

No. 19-710

In the Supreme Court of the United States

CONNECTICUT FINE WINE AND SPIRITS, LLC,
dba Total Wine & More

Petitioner,

v.

MICHELLE H. SEAGULL, COMMISSIONER, CONNECTICUT
DEPARTMENT OF CONSUMER PROTECTION, et al.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

**BRIEF OF SOUTHERN GLAZER'S WINE AND
SPIRITS, LLC AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER**

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INTEREST OF *AMICUS CURIAE*¹

Southern Glazer’s Wine and Spirits, LLC (“Southern”) is the largest distributor of wine and spirits in the United States, with alcoholic beverage wholesale operations in 44 states, the District of Columbia, Canada, and the Caribbean. Southern represents over 3,000 suppliers of wine, spirits, beer, and beverages from around the world, and markets, promotes, merchandises, and distributes over 20,000 brands. The company has approximately 22,000 employees.

Southern has a direct and substantial interest in this case because it operates as a wholesaler in a number of states which regulate the sale of alcoholic beverages in a manner similar to Connecticut, whose laws are challenged here. As the petition explains, this case involves three related aspects of Connecticut’s alcoholic beverage regulations: the so-called “post-and-hold” requirement, pursuant to which wholesalers must publish their prices in advance, competitors have a fixed window to match (but not undercut) those prices before they take effect, and wholesalers are prohibited from changing prices for 30 days; a “minimum bottle-pricing” requirement, pursuant to which wholesalers set and publish the minimum price at which retailers may resell alcoholic beverages to consumers; and a prohibition on wholesalers offering volume discounts. Of these three laws, the post-and-hold requirement is of greatest interest to Southern, because it operates as a wholesaler in (among other states)

¹ All parties were given timely notice and have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae* and its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

New York, Oklahoma, Michigan, and Idaho, all of which have enacted similar or, in some cases, materially indistinguishable post-and-hold requirements as Connecticut, and which impede Southern's ability to compete in those markets.

Southern recognizes that states have authority to regulate the sale of alcoholic beverages under their police powers and the Twenty-First Amendment. However, the scope of the Twenty-First Amendment is not at issue in this case, which is limited to the statutory question of whether certain components of Connecticut's alcoholic beverage scheme are preempted by Section 1 of the Sherman Act, 15 U.S.C. § 1. See Pet. App. 23a n.13 (panel decision, noting that Twenty-First Amendment issue is "not presented here").² The federal antitrust laws provide an important safeguard against state regulations that impede competition. Southern has a strong interest in the proper and uniform interpretation and enforcement of the Sherman Act, and welcomes the opportunity to compete in markets nationwide, including by offering business efficiencies and economies of scale, competitive pricing, and other strategies to be responsive to consumer demand.

This petition presents an important question regarding the Sherman Act's application to state laws that effectively promote private collusion on prices in a manner that suppresses competition and creates

² See also Pet. App. 45a-46a (district court order, noting that "neither the [state] defendants nor the intervenors have suggested at this time that any of the challenged provisions might be saved by the Twenty-first Amendment"); State Defs. C.A. Br. 42 ("only the threshold [Sherman Act] preemption standard," and not the Twenty-First Amendment, "is at issue in this appeal").

barriers to market entry. Without detracting from the petition's focus on several related aspects of Connecticut's alcoholic beverage laws, Southern addresses here the post-and-hold requirements because its experience with such laws as a wholesaler may be useful to the Court. Granting the petition and reversing the judgment below would bring much-needed uniformity to the administration of the Sherman Act nationwide, and would remove a substantial obstacle to competition in wholesale and retail sales of alcoholic beverages in Connecticut and numerous other states.

INTRODUCTION AND SUMMARY OF ARGUMENT

Although numerous alcoholic-beverage wholesalers intervened in this litigation to *defend* Connecticut's alcoholic beverage laws, Southern opposes post-and-hold requirements like Connecticut's and believes they are preempted by the Sherman Act because of their significant anticompetitive effects. Southern files this brief to demonstrate that not all alcoholic-beverage wholesalers support post-and-hold laws—even if such laws might be expected to benefit wholesalers by raising the price at which wholesalers sell products to retailers. In many states nationwide, experience shows that post-and-hold requirements suppress competition in the markets for alcoholic beverages, adversely affecting end-user consumers not only by keeping retail prices artificially high, but also by impeding distributors or wholesalers from competing for business on the basis of price.

As a practical matter, post-and-hold laws like Connecticut's impede wholesalers' ability to compete on price, either as a mechanism to enter new markets or

to win customers in existing markets. Post-and-hold laws have these anticompetitive effects because they dilute and often effectively eliminate wholesalers' incentive to try to capture new customers by competing on the basis of price. Southern currently operates as a wholesaler in 44 U.S. states and the District of Columbia, and seeks to expand and grow its business operations to include markets (such as Connecticut) where it does not currently operate. As part of such a strategy, Southern might naturally seek to sell alcoholic beverage products to retailers at lower prices than incumbent wholesalers, for instance by taking advantage of its optimized and efficient business operations and economies of scale. But if Southern sought to compete in this manner on the basis of price, Connecticut's post-and-hold law virtually guarantees that any price cuts will be immediately matched (but by law may not be undercut) by competitors before they take effect. Then, all wholesalers' prices must, by law, be held static for 30 days. As a practical matter, this kind of post-and-hold scheme effectively eliminates the incentive for wholesalers to compete on price; price-cutters will not gain new customers or market share from price cuts, but instead will be price-matched by other wholesalers before prices take effect, and then forced to hold the prices fixed for 30 days, regardless of actual market conditions.

As the nation's largest wholesaler of wine and spirits, with coast-to-coast operations, Southern is harmed by the current lack of uniformity in the case law regarding whether state post-and-hold laws are consistent with Section 1 of the Sherman Act. As the petition explains, states in the Fourth and Ninth Circuits—which include significant markets for alcoholic

beverages, such as California, Washington, Virginia, and North Carolina—may not adopt post-and-hold requirements, whereas in the Second Circuit, which includes the major markets of New York and Connecticut, Section 1 of the Sherman Act poses no obstacle to such laws.

As petitioner persuasively demonstrates and the panel below recognized, the circuits are split on the question presented here: whether Section 1 of the Sherman Act preempts state laws that facilitate unsupervised price fixing. The circuit split is particularly pronounced as to post-and-hold requirements, a question on which the Second Circuit explicitly and self-consciously disagreed with the Fourth and Ninth Circuits.

The question presented is of substantial importance and ripe for this Court's review, especially given that at least a dozen states nationwide have adopted post-and-hold laws similar to Connecticut's. The case urgently warrants this Court's intervention.

ARGUMENT

I. Alcoholic-Beverage Post-And-Hold Laws Suppress Competition

Post-and-hold laws like Connecticut's impede the ability of cost-effective wholesalers like Southern to enter new markets or gain market share by offering lower prices and being more responsive to market conditions. Such laws provide an effective mechanism for some wholesalers to collaborate in maintaining supracompetitive prices (and to quash any efforts by competitors to gain new customers by offering lower prices). Post-and-hold laws also ossify pricing structures by requiring wholesalers to keep prices fixed for

a substantial period of time (in Connecticut, a month, and in some other states much longer).

As the four judges who dissented from the denial of rehearing en banc below noted, “post-and-hold laws impose serious and well-recognized harms on consumers and retailers.” Pet. App. 89a. Such laws can play an “obvious role” in “facilitating * * * collusion” by “reducing * * * uncertainty” regarding competitors’ pricing strategies. James C. Cooper & Joshua D. Wright, *Alcohol, Antitrust, and the 21st Amendment: An Empirical Examination of Post and Hold Laws*, 32 Int’l Rev. L. & Econ. 379, 380-381 (2012); accord Christopher T. Conlon & Nirupama S. Rao, *The Price of Liquor Is Too Damn High: Alcohol Taxation and Market Structure* 34 (2015), <http://bit.ly/2Qr5qnR> (post-and-hold legislation “acts as a device to facilitate collusion”); see also John E. Lopatka & William H. Page, *State Action and the Meaning of Agreement Under the Sherman Act: An Approach to Hybrid Restraints*, 20 Yale J. on Reg. 269, 311 (2003) (“[T]he dissemination of information about prices and a credible commitment to maintain those prices reduce a firm’s uncertainty about its rivals’ pricing behavior and thereby predictably foster a non-competitive outcome.”); 1 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 217b2, at 389 (4th ed. 2013) (noting “the great danger that agreements to post and adhere will facilitate horizontal collusion”). And when “firms in a market are able to coordinate their pricing,” they “can increase their collective profits and reduce consumer welfare by raising price and reducing output.” *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874, 896 (9th Cir. 2008).

The risk of anticompetitive conduct is particularly pronounced in states such as Connecticut and New

York that have a two-stage post-and-hold system in which wholesalers can adjust their initially posted prices to match any lower prices offered by competitors, before those prices go into effect. See Conn. Gen. Stat. § 30-63(c); N.Y. Alco. Bev. Cont. Law § 101-b(4); Pet. App. 28a (“Connecticut’s post-and-hold provisions are substantially identical to * * * New York[’s].”); see also pp. 11-12, *infra* (discussing New York’s post-and-hold requirements). Wholesalers naturally have “less incentive” to reduce their prices “when their competitors can match [the reductions] instantaneously,” before the price reductions take effect. Cooper & Wright, 32 Int’l Rev. L. & Econ. at 381 n.14. Wholesalers only profit from reducing their prices if the lower prices result in increased sales. *Ibid.* But “[w]hen discounts are made public, and are announced to all rivals before going into effect, competing wholesalers can offer the same discount,” diluting or eliminating any “market share gains from price cuts.” *Ibid.*; accord Pet. 3.

Basic economic theory indicates that post-and-hold laws can result in prices “at least [as] high as a single product monopolist would charge.” Conlon & Rao 3. In a two-stage post-and-hold system, there is no penalty for wholesalers that initially post “monopoly prices” (i.e., prices that would maximize the individual wholesaler’s profits in a hypothetical market where it was acting as a monopolist, without competition from other wholesalers). If other wholesalers post lower prices for competing products, the higher-priced wholesaler can reduce its posted prices to avoid being undercut. But if other wholesalers do not post lower prices, all wholesalers will be able to charge their supracompetitive prices, and will thus benefit from the increased profits resulting from those prices. Knowing

that stage-one price reductions are unlikely to result in increased sales because those reductions can be matched by competing wholesalers at stage two, incumbent wholesalers may rationally conclude that efforts at price competition would be futile, and thus all post supracompetitive prices at stage one, resulting in higher prices for retailers and consumers. See *id.* at 9-14. Similarly, prospective competitors may refrain from attempting to enter a new market, reasonably concluding that it would be difficult or impossible to gain market share by competing on price if incumbent wholesalers can simply match their prices before they take effect.

Connecticut's experience appears to align with what theory predicts. Because any stage-one price reductions will be routinely matched by competing wholesalers at stage two, Connecticut wholesalers lack an incentive to compete based on price. The net result (the complaint here alleges) is that competing wholesalers routinely set the same bottle and case prices, "with each wholesaler exactly tracking its competitors' * * * case prices" month after month. Pet. App. 102a; see also *id.* at 107a (reporting data on posted prices).

In sum, post-and-hold laws tend to "insulate wholesalers from the downward pricing pressure that comes with competition," Cooper & Wright, 32 Int'l Rev. L. & Econ. at 390, both among existing participants in a market and as to prospective new entrants. In fact, as the opinion below acknowledged, the Connecticut laws at issue here are self-consciously aimed at suppressing competition by providing a "means of guarding against escalating price wars" in the market for alcoholic beverages. Pet. App. 7a; accord *id.* at 34a (Connecticut's

“framework [is] aimed at avoiding price wars”); Pet. 3, 5, 10-11 (similar). Similarly, New York’s post-and-hold laws were enacted to put an end to “a series of price wars in New York City in the late 1930s and early 1940s.” N.Y. State Law Revision Comm’n, *Report on the Alcoholic Beverage Control Law and Its Administration* 201-209 (Dec. 15, 2009), <https://bit.ly/37n1QSE> (detailing history). Until New York adopted anticompetitive legislation, those price wars often generated substantially lower prices for consumers. *Id.* at 201-202 (noting one-day price war in May 1936 that led to 5-20% retail discounts on champagne, domestic whisky, scotch, and imported cognac and vermouth).

Experience shows that hold requirements also deter wholesalers from “experiment[ing] with price reductions or offer[ing] socially desirable short-term discounts”—whether they are competing as an incumbent or seeking to enter a new market—for an additional reason: the wholesalers cannot reverse the price reductions during the hold period to account for changes in supply or demand. Cooper & Wright, 32 Int’l Rev. L. & Econ. at 381 n.14. By making price cuts “temporarily irreversible,” even if they turn out to be unprofitable, hold requirements make price reductions riskier and “more expensive,” and thus “much less likely.” *Costco Wholesale*, 522 F.3d at 896; accord 1 Areeda & Hovenkamp, ¶ 217b2, at 390 n.52; cf. Tenn. Code Ann. § 57-6-104(c) (any reduction in the wholesale price of beer “must remain in effect for at least three hundred sixty (360) days”). This additional deterrent to price cutting amplifies the harms that post-and-hold laws impose on consumers.

II. The Question Is Ripe And Urgently Warrants This Court's Review, Especially Given The Prevalence Of Post-And-Hold Laws Nationwide

The question presented is ripe and urgently warrants this Court's review, especially considering that post-and-hold laws—and their negative effect on competition—are prevalent nationwide. As the Second Circuit panel and en banc dissenters all recognized, “variations” of Connecticut's post-and-hold provisions “are found in many states.” Pet. App. 4a, 90a. At least a dozen states have adopted post-and-hold laws applicable to alcoholic-beverage wholesalers. Those with laws most similar to Connecticut's include Georgia, Michigan, New Jersey, New York, Oklahoma, and Vermont. See *Wholesale Pricing Practices and Restrictions*, APIS, <https://bit.ly/2SEnZ1c> (last visited Jan. 3, 2020).³ Several of these states are among the largest and most important markets for alcoholic beverage sales nationwide. See *U.S. Alcoholic Beverage Market – Overview*, Park Street, <https://bit.ly/2spCSmZ> (last visited Jan. 3, 2020).

Most states' post-and-hold laws require wholesalers to publicly “post” a list of prices for their alcohol products and “hold” those prices for a set period of

³ See also *Wholesale Pricing Practices*, *supra* (identifying Idaho, Indiana, Iowa, Maine, Massachusetts, Ohio, Oregon, Tennessee, and West Virginia as also having post-and-hold laws); cf. Mo. Rev. Stat. § 311.333(2) (Missouri law requiring liquor and wine wholesalers to provide price lists to retailers five days before the start of each month, and to hold prices fixed during that month).

time.⁴ Some states, like Connecticut, have adopted a two-stage system, in which wholesalers initially post prices, and then have a short period of time to amend their prices downward to match competitors' prices (but not go any lower), before those prices take effect. See Conn. Gen. Stat. § 30-63(c); Pet. App. 87a. As discussed above, these two-stage schemes exacerbate the general anticompetitive effects of post-and-hold laws, by allowing wholesalers to review and match competitors' prices beforehand, thereby "facilitat[ing] collusion and discourag[ing] price cuts." *Costco Wholesale*, 522 F.3d at 895.

For example, in New York (where Southern operates), wine and liquor wholesalers must post their price and discount lists on the fifth day of each month, which are then held for the following calendar month beginning on the first day of that month. See N.Y. Alco. Bev. Cont. Law § 101-b(3)(b), (4). Ten days after the initial price posting, wholesalers are given several days to "review retail prices posted by other wholesalers * * * [and] lower [their] prices and discounts to match the prices and discounts of another wholesaler" before those prices go into effect. N.Y. State Liquor Authority, Price Posting (last visited Jan. 3, 2020), <https://sla.ny.gov/price-posting>; see N.Y. Alco. Bev. Cont. Law § 101-b(4). As the Second Circuit panel recognized, New York's post-and-hold law is "substantially identical" to Connecticut's, Pet. App. 28a, in part because wholesalers may amend their prices during stage two "provided such amended prices are not

⁴ See, e.g., Ga. Comp. R. & Regs. 560-2-4-.07 (Georgia's liquor and beer post-and-hold law); N.J. Admin. Code. § 13:2-24.6 (New Jersey's liquor, beer, and wine post-and-hold law); Vt. Admin. Code § 14-1-8 (West 2019) (Vermont's beer post-and-hold law).

lower * * * than those to be met.” N.Y. Alco. Bev. Cont. Law § 101-b(4); cf. Conn. Gen. Stat. § 30-63(c) (“such amended posting shall not set forth prices lower than those being met”); see also Pet. App. 28a (circuit precedent analyzing whether Sherman Act preempts New York’s post-and-hold law was “controlling” on same question for Connecticut’s post-and-hold law).

Oklahoma has a similar two-stage post-and-hold scheme for wholesalers not designated by a manufacturer as the exclusive wholesaler for a particular product. Every other month, non-exclusive wholesalers must file wine and spirits prices (specifying percentage markups, handling, and delivery charges), and then hold those prices for two months. See Okla. Admin. Code §§ 45:30-3-7, 45:30-3-8. In particular, before prices go into effect, non-exclusive wholesalers must file their prices by the 15th day of each “posting month,” and then, in response to prices posted by competitors, may file by the 25th day of that month *amended* prices that are “no lower than” the prices posted “by any [other] Wine and Spirits Wholesaler.” Okla. Admin. Code §§ 45:30-3-7, 45:30-3-8. Likewise, in Michigan, wholesalers must hold beer prices for a period of 180 days, but can lower prices to match a competitor’s at any time during the hold period, provided “the price reduction is not greater” than that of the competitor whose prices are being matched. Mich. Admin. Code R. 436.1625. In each of these states, as in Connecticut, the post-and-hold regime impedes price competition among wholesalers because wholesalers can easily adjust their prices downward to match—but not undercut—those of their competitors. Such post-and-hold laws impede price competition

among incumbent wholesalers, and also create a barrier to market entry by new prospective competitors. See, *e.g.*, Michael D. LaFaive & Derk Wilcox, Mackinac Center for Public Policy, *State 'Post and Hold' Rules Economically Unsound* (Aug. 10, 2016), <https://www.mackinac.org/22683> (arguing that Michigan's post-and-hold law “allows all wholesalers to see what the competition is charging” and “inhibits price competition by limiting the speed with which prices can change”).

Even post-and-hold laws that do not employ a two-stage system inviting wholesalers to match each others' price discounts—like those in Vermont, Georgia, and New Jersey—have substantial “anticompetitive” effect. Pet. App. 90a. As the court in *Costco Wholesale* explained, “[t]hat firms are not empowered immediately to alter their prices to meet a lower price or to adjust to a higher price does not alter the conclusion that in the long run, prices for beer and wine” subject to post-and-hold laws “are more likely to be uniform and stable because of tacit collusion.” *Costco Wholesale*, 522 F.3d at 896 n.18 (noting the absence of an “adjust” provision “will not save the [post-and-hold] scheme from per se condemnation”). In sum, in more than a dozen states across the country, post-and-hold laws, like the one challenged here, suppress competition and create barriers to market entry by new competitors, by impeding wholesalers from competing on price and responding to market conditions.

This case presents an attractive vehicle for the Court to address the Section 1 preemption issue, which was squarely raised and decided below. As the petition demonstrates, the question presented is ripe

for this Court’s review, having generated an intractable circuit split that the en banc Second Circuit has now declined to resolve. The circuits in the split include important markets for alcoholic beverage sales, including California, New York, Virginia, and North Carolina. Moreover, the Second Circuit’s decision and denial of en banc rehearing may embolden states in that circuit to make their post-and-hold restrictions more severe in ways that further impede competition; the decision is also likely to encourage states in other circuits to adopt their own post-and-hold systems. The ongoing anticompetitive effects of post-and-hold laws in Connecticut and other important markets nationwide underscore the urgent need for this Court’s prompt intervention.

CONCLUSION

For the foregoing reasons and those in the petition, the petition for a writ of *certiorari* should be granted.

Respectfully submitted.

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