

# 17-2003-cv

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## United States Court of Appeals for the Second Circuit

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CONNECTICUT FINE WINE & SPIRITS, LLC,  
d/b/a Total Wine & More

*Plaintiff-Appellant,*

– v. –

COMMISSIONER MICHELLE H. SEAGULL,  
Department of Consumer Protection;  
JOHN SUCHY, Director, Division of Liquor Control,

*Defendants-Appellees,*

WINE & SPIRITS WHOLESALERS OF CONNECTICUT, INC.;  
CONNECTICUT BEER WHOLESALERS ASSOCIATION, INC.;  
CONNECTICUT RESTAURANT ASSOCIATION;  
CONNECTICUT PACKAGE STORES ASSOCIATION, INC.;  
BRESCOME BARTON, INC.,

*Intervenors-Defendants-Appellees*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF CONNECTICUT

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### **PLAINTIFF-APPELLANT CONNECTICUT FINE WINE & SPIRITS, LLC'S PETITION FOR REHEARING AND REHEARING *EN BANC***

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## INTRODUCTION AND RULE 35(B)(1) STATEMENT

Connecticut's liquor pricing regime, under that state's Liquor Control Act, Conn. Gen. Stat. § 30-1, *et seq.* (the "Act"), is among the most anti-competitive in the country, and is largely indistinguishable from a New York regime that the Supreme Court invalidated 31 years ago under Section 1 of the Sherman Act. 15 U.S.C. § 1; *see 324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987).

Plaintiff-Appellant Connecticut Fine Wine & Spirits, LLC, d/b/a Total Wine & More ("Total Wine"), filed a Section 1 challenge to three aspects of the Act which, taken together, authorize and mandate industry-wide horizontal and vertical price fixing among Connecticut wholesalers and retailers: (1) a "post and hold" requirement, under which every wholesaler must publish its "case" and "bottle" prices monthly so competitors can review and match those prices, and then maintain ("hold") those prices for a full month; (2) a minimum bottle retail price scheme, in which wholesalers, through their posted-and-held "bottle" prices, set minimum retail prices and thereby create a fixed, minimum-profit margin for all retailers; and (3) a quantity discount ban, which ensures that the posted-and-held "case" and "bottle" prices are *always* the governing price, even for bulk purchases.

The panel affirmed the district court's order dismissing Total Wine's complaint at the pleadings stage. Three errors warrant panel rehearing or *en banc* review under Rule 35(a) and (b). **First**, the panel's decision entrenches circuit

splits on whether post-and-hold statutes and quantity discount bans like Connecticut's are preempted by the Sherman Act. **Second**, the panel's decision conflicts with at least one decision of the Supreme Court: *324 Liquor Corp.* **Third**, the panel considered itself bound by the majority opinion in *Battipaglia v. New York State Liquor Authority*, 745 F.2d 166 (2d Cir. 1984), which the *en banc* Court should clarify is no longer good law.

## FACTUAL BACKGROUND

### A. The Challenged Provisions

In the United States, prices for goods and services are ordinarily determined by the laws of supply and demand, with businesses setting their own prices and changing them to compete for business. In Connecticut's alcoholic-beverage industry, by contrast, manufacturers and wholesalers operate like cartels with almost exclusive control over the prices retailers can charge customers for their alcoholic beverage products.

The starting point for Connecticut's price-control regime is the "post and hold" provisions codified at Conn. Gen. Stat. § 30-63(c) and Conn. Reg. 30-6-B12(b). Each month every manufacturer and wholesaler "posts" two prices for each product: a bottle (or can) price, and a case price. Conn. Gen. Stat. § 30-63(c). After the posting deadline, any other manufacturer or wholesaler may, within four days, "amend" its own posted prices to "meet a lower price posted by another

manufacturer or wholesaler.” *Id.* That price then becomes “the controlling price” that month. *Id.* Thus, wholesalers are compelled to fix their prices to the posted price for an entire month.

A key aspect of this regime is that wholesalers set not only their own (case) prices for sales to retailers, but also the minimum bottle prices for *retail* sales to consumers. *See* Conn. Gen. Stat. § 30-68m(b) (prohibiting retail sales below “cost”); *id.* § 30-68m(a)(1) (defining “cost” as “the posted bottle price” plus a small charge for “shipping or delivery”); *id.* § 30-68m(a)(3) (defining the “bottle” price as *at least* the posted case price divided by the number of bottles in a case plus a minimum markup).

The final challenged aspect of the Act is its ban on quantity (and other) discounts. Sections 30-68k, 30-63(b) and 30-94(a) require wholesalers to sell every case of liquor or wine at the same price, whether the retailer buys 1 case or 1,000 cases.

**B. The Purpose And Effect Of The Challenged Statutes**

These provisions eliminate any incentive for wholesalers to compete on price. If a wholesaler drops its case or bottle price on a product, competitors know that immediately from the posted price, and have four days to match. The first wholesaler is required to “hold” the lower prices for an entire month – during which competitors charge and post the same case and minimum bottle prices.

Thus, if a wholesaler sells a (12-bottle) case of Acme pinot noir for \$240 and sets the bottle price at \$25, every rational retailer will sell Acme at \$25 per bottle. Retailers cannot seek a lower price from a competing wholesaler, because the wholesale prices have been coordinated through the post-and-hold regime. Retailers *could* sell Acme for more than \$25, but wholesalers have already established an above-market profit margin for retailers (here, \$5 or 25%). Thus the retail market for Acme becomes fixed at \$25 throughout the state. Retailers like Total Wine have no ability to pass on to consumers, in the form of lower prices, cost savings achieved through operational or other efficiencies. Because all retailers are forced by the state to sell at or above the artificial minimum bottle price floor set by wholesalers, price competition does not exist at the wholesale or retail tiers. As a result, Connecticut consumers pay significantly inflated prices.

As reflected in tables attached to the Complaint (JA.24-31), “[c]ompeting wholesalers for the same brands routinely set the same bottle and case prices down to the penny, month after month, with each wholesaler exactly tracking its competitors’ on-post and off-post case prices.” JA.20 (Compl. ¶ 19). The tables show, as to 22 prominent products, each wholesaler’s posted case price offered to retailers (“cost/bottle”) and its posted minimum bottle price to consumers (“Min bottle”), from December 2015 to July 2016. JA.24-25. For each product, each wholesaler set *exactly* the same case and bottle price every month. When one

wholesaler increased its minimum bottle retail price, the competing wholesaler(s) increased their own posted bottle prices by the same amount, and then adhered to them. Total Wine also cited studies showing that Connecticut prices were as much as 24 percent higher than prices for identical products in neighboring states. *Id.* ¶ 18.

The anticompetitive effect of this industry-wide price fixing mandated by statute is illustrated vividly by a practice known as “on-post” and “off-post” pricing. JA.19-20 (Compl. ¶ 17). After several months holding case prices steady (“on-post”), all wholesalers simultaneously reduce (“off-post”) their *case* prices. But they keep minimum *bottle* prices as high, or nearly as high, as they were before the simultaneous drop in case prices. Because retailers purchase cases, not bottles, the wholesalers effectively control not only retailers’ prices, but also their profit margins. *See, e.g.*, JA. 24 (Compl., Table 1).

C. Total Wine’s Claims, and the District Court and Panel Decisions

Total Wine today operates 193 retail liquor stores in 23 states, including four in Connecticut. Total Wine’s business model emphasizes outstanding selection and customer service combined with competitive prices. Total Wine has not been able to provide Connecticut consumers with the full benefit of lower prices, however, because the challenged statutes mandate that wholesalers control retail prices. JA.18-19 (Compl. ¶¶ 11, 16).

Total Wine filed this action because these interrelated aspects of the Liquor Control Act constitute anticompetitive “hybrid” restraints that mandate industry-wide horizontal and vertical price fixing. The Complaint alleges that the challenged statutes are preempted by the Sherman Act because they mandate and/or authorize horizontal price fixing (Count One) and industry-wide vertical price fixing (Count Two). Defendants, along with five intervenors (four industry trade associations and the state’s largest wholesaler) moved to dismiss. JA.32-39.

The District Court granted the motions. It agreed that the challenged statutes, at least in part, constitute hybrid restraints, *i.e.*, they “grant[] private actors a degree of regulatory control over competition.” *Connecticut Fine Wine & Spirits, LLC v. Harris*, 255 F. Supp. 3d 355, 368-69 (D. Conn. 2017), *aff’d*, 2019 WL 692526 (2d Cir. Feb. 20, 2019) (quoting *Freedom Holdings, Inc. v. Cuomo*, 624 F.3d 38, 50 (2d Cir. 2010)). The District Court also concluded that the challenged statutes are not readily distinguishable from the statutes held preempted in *324 Liquor. Id.* But the court concluded that this Court’s decision in *Battipaglia* barred it from analyzing the horizontal price fixing mandated by the Act as a *per se* antitrust violation, and that *324 Liquor* was overruled *sub silentio* by *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877 (2007), which held, in a very different context, that vertical price restraints were no longer *per se* violations of the Sherman Act.

Total Wine appealed, and a panel of this Court affirmed. The panel addressed the challenged statutes individually, rather than as a unified scheme that was intentionally anticompetitive. As to the minimum bottle retail pricing requirement, the panel held it was a purely vertical restraint and *324 Liquor* was effectively overruled by *Leegin*. Slip op. at 24-25. The panel held that quantity discounts and other price-discrimination prohibitions were “purely vertical” unilateral restraints controlled by *Leegin*. *Id.* at 26. And as to post-and-hold, the Court followed the majority opinion in *Battipaglia*, concluding that it had not been undermined by *324 Liquor*. *Id.* at 27-41.

## ARGUMENT

### **I. The Panel Decision Entrenches a Circuit Split on Post-and-Hold Laws and Quantity Discount Bans.**

#### **A. This Is The Sole Circuit To Hold That Post-and-Hold Statutes Like Connecticut’s Are Not Preempted By The Sherman Act.**

As explained above, the core of Connecticut’s anticompetitive regime is wholesalers’ unilateral control over not only the prices they charge retailers, but also the minimum prices retailers charge customers. The Sherman Act preempts any statute that “mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute.” *Rice v. Norman Williams Co.*, 458 U.S. 654, 661 (1982). The circuits are split two (Ninth and Fourth) to one (Second) on whether statutes like these are preempted.

As discussed below, the forerunner of this Circuit’s position, the 1984 divided *Battipaglia* decision, was invalidated by the Supreme Court’s 1987 *324 Liquor* decision. *See* § III, *infra*. Even without reaching that issue, the Court should grant *en banc* review because *Battipaglia* is an outlier; this Court should eliminate the circuit split and join the Ninth and Fourth Circuits in holding that statutory regimes like Connecticut’s are subject to *per se* antitrust scrutiny and are preempted by the Sherman Act.

In *Battipaglia*, the majority acknowledged that New York’s post-and-hold law “force[d] each wholesaler to inform other wholesaler[s] of its prices and then to adhere for a month to them . . . and that if this had been done pursuant to an agreement, the agreement would have constituted a violation of § 1.” 745 F.2d at 172. But because the majority believed, despite “some doubt,” that “Section 1 requires an agreement” – a premise the Supreme Court later rejected in *324 Liquor* – the majority concluded the statute “does not place ‘irresistible pressure on a private party to violate the antitrust laws in order to comply’ with it.” *Id.* (quoting *Rice*, 458 U.S. at 661). In dissent, Judge Winter correctly predicted that the Supreme Court would eliminate the requirement of a private agreement in the context of statutory hybrid restraints; he would have held that the “requirement of adherence to announced prices,” including among competitors at the same horizontal tier, was subject to *per se* scrutiny and violated the Sherman Act

because it “brings about the very anti-competitive arrangements the Sherman Act was designed to avoid.” *Id.* at 179.

Since then, two other Circuits have held post-and-hold statutes are preempted by the Sherman Act. *TFWS, Inc. v. Schaefer*, 242 F.3d 198, 209 (4th Cir. 2001) (“The Maryland system . . . mandates activity that is essentially a form of horizontal price fixing, which has been called ‘the paradigm of an unreasonable restraint of trade.’”) (citation omitted); *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874, 895-96 (9th Cir. 2008) (“[A]n agreement to adhere to posted prices is a per se violation without regard to reasonableness. . . . Such agreements . . . are anticompetitive because they are highly likely to facilitate horizontal collusion among market participants. . . .”).

Both circuits expressly rejected the *Battipaglia* majority’s analysis and instead followed Judge Winter’s dissent. *See TFWS*, 242 F.3d at 210 (“*Battipaglia* has not been followed elsewhere, and a leading commentator on antitrust law has sided with the dissent.”) (citing 1 Phillip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW ¶ 217, at 308-09 (2d ed. 2000)); *Costco*, 522 F.3d at 894 (“[T]he dissent’s position is more consistent with [*California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105-06 (1980)].”) (quoting Areeda & Hovenkamp ¶ 217b).

Connecticut's statute is indistinguishable from the post-and-hold provisions invalidated in *TFWS* and *Costco*. See also, e.g., *TFWS, Inc. v. Franchot*, 572 F.3d 186, 188 (4th Cir. 2009) (earlier Fourth Circuit opinion, concluding that the statutes were preempted); *Miller v. Hedlund*, 813 F.2d 1344 (9th Cir. 1987) (holding that Oregon's post-and-hold statute was preempted).

Total Wine argued before the panel that *Battipaglia* is no longer good law, and thus there should be *no* circuit split on whether post-and-hold statutes are preempted. The panel disagreed, concluding that *Battipaglia* remains controlling and that only the full Court can overrule it. This Court should grant *en banc* review to eliminate the circuit split, and overrule *Battipaglia*.

B. The Panel's Decision Also Entrenches a Circuit Split On Quantity Discount Bans.

The panel opinion also entrenches a circuit split with respect to quantity discount bans. The Fourth Circuit in *TFWS* squarely held that the Sherman Act preempts Maryland's quantity discount ban, which also is indistinguishable from Connecticut's. That volume discount ban "reinforce[d] the post-and-hold system by making it even more inflexible." 242 F.3d at 209. "Wholesalers post their prices as required, and discounts of any nature are prohibited by regulation." *Id.* Unlike with respect to post-and-hold, one other Circuit has reached the same conclusion as the panel here: that quantity discount bans are "unilateral" restraints. See *Costco*,

252 F.3d at 898. But the fact that the panel opinion fortified the circuit split with respect to quantity discount bans further supports *en banc* review.

## **II. The Panel Improperly Disregarded Controlling Supreme Court Precedent.**

In *324 Liquor*, the Supreme Court struck down a minimum-pricing and post-and-hold regime that was materially indistinguishable from Connecticut's.

Contrary to the panel's conclusion, *324 Liquor* controls this case in two ways.

**First**, *324 Liquor*'s footnote 8 establishes that post-and-hold statutes like Connecticut's satisfy the "concerted action" requirement of Sherman Act § 1, which by its terms prohibits "contract[s], combination[s] ... or conspirac[ies], in restraint of trade." *See* 479 U.S. at 345 n.8. That footnote in the Supreme Court's opinion is not ambiguous, is not dicta, and is not distinguishable. It must be followed by this Court unless that aspect of *324 Liquor* has been overruled.

The panel found that *324 Liquor* was not controlling because Connecticut's regime did not "call for any private action, let alone concerted action," and that "*Fisher*'s emphasis on the need for concerted action reinforces" that *Battipaglia* – decided before *324 Liquor* – was correct. Slip op. at 38 (citing *Fisher v. City of Berkeley*, 475 U.S. 260 (1986)). But the Supreme Court in *324 Liquor* reached exactly the opposite conclusion – and cited *Fisher* in support. In *TFWS*, Judge Luttig was also skeptical that footnote 8 of *324 Liquor* reflected a proper understanding of prior Supreme Court precedent, including *Fisher*. 242 F.3d at

214-15. The Ninth Circuit shared Judge Luttig’s concern. *Costco*, 522 F.3d at 895 n.17. But both Judge Luttig and *Costco* (as well as the majority in *TFWS*) properly concluded that footnote 8 was controlling because, as Judge Luttig put it, “the Maryland regulations before us are not materially different from the regulations in *324 Liquor*.” 242 F.3d at 214.<sup>1</sup>

The Connecticut regulations at issue here are even more closely analogous to the New York regulations at issue in *324 Liquor* than the Maryland regulations in *TFWS*. Footnote 8 is as binding on this Court as it was on the courts in *TFWS* and *Costco*. At best, therefore, the panel decision splits with the other two federal Courts of Appeals to have considered the issue after *324 Liquor*. At worst, it openly disregards binding Supreme Court precedent. Either way, this Court should revisit the matter *en banc*.<sup>2</sup>

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<sup>1</sup> There also was no evidence of an “agreement” in *Midcal*, yet there as well the Supreme Court held that the state laws were hybrid restraints that were preempted. *Midcal*, 445 U.S. at 103. *See also Miller*, 813 F.2d at 1349 (“While it is true that there is no agreement or concerted activity among the wholesalers . . . the state compels activity that would otherwise be a per se violation of the Sherman Act.”); *Costco*, 522 F.3d at 893 (same); *TFWS*, 242 F.3d at 214 (Luttig, J., concurring).

<sup>2</sup> The panel also observed that *Freedom Holdings* treated *Battipaglia* as good law, a highly questionable reading of *Freedom Holdings* that is entirely inconsistent with the Ninth Circuit’s reading. *Costco*, 522 F.3d at 894 n.16 (“[I]t appears that Judge Winter’s view in *Battipaglia* has prevailed in the Second Circuit.”) (citing *Freedom Holdings*, 357 F.3d at 223-24 n.17). The panel here, however, did not feel itself free to deviate from *Battipaglia*. The panel also relied on *Bell Atlantic Group v. Twombly*, 550 U.S. 544 (2007), which neither discusses *324 Liquor* nor comes close to overruling it.

**Second**, Total Wine argued that *324 Liquor* established that New York’s minimum-pricing and post-and-hold requirements caused *industry-wide* resale price fixing, which the Supreme Court held to be a *per se* Section 1 violation. *See* 479 U.S. at 342. Again, this holding must be followed unless and until it has been overruled. The panel acknowledged that the minimum pricing components of the New York and Connecticut statutes, like the post-and-hold components, were “substantively identical,” Slip op. at 24, but held that *Leegin* displaced the holding in *324 Liquor* that New York’s minimum pricing law was a *per se* violation of § 1. According to the panel, *324 Liquor* was a straightforward case about a vertical restraint, and after *Leegin* vertical restraints could never be considered *per se* violations of Section 1.

The panel overlooked Total Wine’s argument that *Leegin* addressed purely private vertical resale price maintenance arrangements. It did not address statutory regimes that caused industry-wide resale price fixing. *E.g.*, App’t Br. at 49-55; App’t Repl. Br. at 16-20. The animating principle of *Leegin* is that economists had come to recognize *pro-competitive* justifications for a particular manufacturer’s use of resale price maintenance. 551 U.S. at 889. A leather goods manufacturer, for instance, might set high retail prices to promote *intra-brand* competition among retailers based on exceptional service. Those set prices, in turn, could promote *inter-brand* competition with other manufacturers on price.

But the New York and Connecticut statutory regimes effectively eliminate all price competition among retailers. Wholesale prices must be shared and competing wholesalers given an opportunity to amend their prices, thereby eliminating price competition among wholesalers. *All* wholesalers are then required to set retail prices through the minimum bottle price provisions. The result is not the promotion of interbrand competition, as in *Leegin*, but rather the opposite. *See 324 Liquor*, 479 U.S. at 342 (“Mandatory industrywide resale price fixing is virtually certain to *reduce* interbrand competition as well as intrabrand competition.”) (emphasis added). The result is an entire industry of stabilized (i.e., fixed) prices at both the wholesale and retail levels. *324 Liquor* struck down that statutory regime *in toto*, and the Court in *Leegin* did not begin to contemplate whether its holding that private agreements for resale price maintenance should be judged according to a rule of reason analysis affected *324 Liquor*’s holding that a statutory regime that caused industry-wide price fixing was illegal *per se*.

Moreover, as Total Wine argued before the panel, “[i]t is [the Supreme] Court’s prerogative alone to overrule one of its precedents.” *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). Nowhere in *Leegin* did the Supreme Court suggest it was overruling *324 Liquor*; *Leegin* does not even cite *324 Liquor*. Where “a precedent of [the Supreme] Court has direct application in a case,” as *324 Liquor* does here, “the Court of Appeals should follow the case which directly controls” – even if the

case “appears to rest on reasons rejected in some line of decisions.” *Agostini v. Felton*, 521 U.S. 203, 237 (1997).

### **III. The *En Banc* Court Should Conclude That *Battipaglia* Does Not Control.**

The panel expressly concluded that *Battipaglia* remains controlling, and that “[a]ny application to revisit *Battipaglia* is beyond this panel’s authority.” Slip op. at 41. Even if the panel’s decision had neither entrenched circuit splits nor disregarded controlling Supreme Court precedent, this Court should grant *en banc* review to overrule the wrongly decided and widely criticized *Battipaglia* opinion.

**First**, as set forth above, *Battipaglia* was abrogated by *324 Liquor*. A central premise of *Battipaglia* was that a statute is preempted only where it “compel[s] an[] agreement.” 745 F. 2d at 170. The *Battipaglia* majority also suggested that it saw the preemption analysis as a balancing test, weighing New York’s interest in “deal[ing] with the subject of intoxicating liquor” against “the federal commerce power.” *Id.* at 169. There is no way to reconcile either *Battipaglia*’s “agreement” requirement or its interest-balancing test with *324 Liquor*.

**Second**, not only is *Battipaglia* an anachronistic outlier; it has been heavily criticized. The overwhelming opinion of courts and commentators is that *Battipaglia* reached the wrong outcome based on faulty reasoning. As the District Court noted, the *Battipaglia* court “[c]uriously . . . relied on cases that applied rule of reason scrutiny to arrangements by which competitors only *shared* price

information, rather than grappling with the additional complexity stemming from the state's requirement that wholesalers *hold* their posted prices.” 255 F. Supp. 3d at 371. As discussed above, “posting” alone is not necessarily fatal from an antitrust perspective; many retailers and wholesalers publish their prices. It is the posting *and holding* that is pernicious, and that violates the Sherman Act.

Judge Winter, in his *Battipaglia* dissent, explained that New York's mandatory “hold” moved the challenged regime from rule of reason to *per se* analysis, because agreements to adhere to announced prices have long “been uniformly held illegal without regard to [their] reasonableness.” 745 F.2d at 179 (Winter, J., dissenting) (citing *Sugar Inst., Inc. v. United States*, 297 U.S. 553, 601 (1936)). As noted above, the leading antitrust treatise also criticized *Battipaglia* for the same reasons. “Given the great danger that agreements to post and adhere will facilitate horizontal collusion, the dissent's position [in *Battipaglia*] is more consistent with *Midcal*.” Areeda & Hovenkamp ¶ 217b2.

*Battipaglia* is no longer good law. That the panel felt constrained to follow it is further reason for the full Court to grant *en banc* review.

## CONCLUSION

For the foregoing reasons, this Court should grant rehearing or rehearing *en banc* and thereafter reverse the judgment of the district court.

Dated: March 5, 2019

Respectfully submitted,

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### **CERTIFICATE OF COMPLIANCE**

In conformance with Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the foregoing petition is in 14-point Times New Roman proportional font and contains 3,806 words. Accordingly, the petition complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure.

Dated: March 5, 2019

/s/ William J. Murphy  
William J. Murphy

*Attorney for Plaintiff-Appellant*

### **CERTIFICATE OF SERVICE**

In conformance with Rule 25(d) of the Federal Rules of Appellate Procedure, I hereby certify on this 5th day of March, 2019, that I electronically filed Plaintiff-Appellant Connecticut Fine Wine & Spirits, LLC's Petition For Rehearing And Rehearing *En Banc* and thereby served it on all counsel of record.

/s/ William J. Murphy  
William J. Murphy

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17-2003

*Connecticut Fine Wine and Spirits LLC v. Seagull*

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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August Term, 2017

(Argued: February 1, 2018    Decided: February 20, 2019)

Docket No. 17-2003-cv

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CONNECTICUT FINE WINE AND SPIRITS, LLC, d/b/a, TOTAL WINE & MORE,

*Plaintiff-Appellant,*

— v. —

COMMISSIONER MICHELLE H. SEAGULL, DEPARTMENT OF CONSUMER  
PROTECTION, JOHN SUCHY, DIRECTOR, DIVISION OF LIQUOR CONTROL,

*Defendants-Appellees,*

WINE & SPIRITS WHOLESALERS OF CONNECTICUT, INC., CONNECTICUT  
BEER WHOLESALERS ASSOCIATION, INC., CONNECTICUT RESTAURANT  
ASSOCIATION, CONNECTICUT PACKAGE STORES ASSOCIATION, INC.,  
BRESCOME BARTON, INC.,

*Intervenors-Defendants-  
Appellees.\**

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\* The Clerk of Court is respectfully directed to amend the official caption in this case as set forth above.

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B e f o r e:

POOLER, SACK, *Circuit Judges*, and ENGELMAYER, *\*\* District Judge*.

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Connecticut Fine Wine and Spirits, d/b/a Total Wine & More (“Total Wine”), challenged certain provisions of Connecticut’s Liquor Control Act and related regulations. Total Wine alleged that these provisions were preempted by the Sherman Act, 15 U.S.C. § 1. The United States District Court for the District of Connecticut, Janet Hall, J., granted the defendants’ motion to dismiss the complaint, holding, *inter alia*, that the post-and-hold provisions and the minimum-retail-price provisions of the Connecticut Liquor Control Act were hybrid restraints on trade, but that Total Wine failed to plead facts that plausibly support the conclusion that those provisions constitute *per se* violations of, and therefore were preempted by, the Sherman Act. The District Court also held that Total Wine did not plausibly allege that the price discrimination provision was a hybrid restraint on trade; therefore, that provision imposes a unilateral restraint

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*\*\** Judge Paul A. Engelmayer, of the United States District Court for the Southern District of New York, sitting by designation.

on trade that falls outside the scope of the Sherman Act. We agree with the District Court that the post-and-hold, minimum-retail-price, and price-discrimination provisions are not preempted by the Sherman Act. We therefore AFFIRM.

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PAUL A. ENGELMAYER, *District Judge*:

Connecticut Fine Wine and Spirits, d/b/a Total Wine & More (“Total Wine”) appeals from a judgment of the United States District Court for the District of Connecticut (Janet C. Hall, District Judge) dismissing its complaint against the Connecticut Department of Consumer Protection (“DCP”) and the Director of the Connecticut Division of Liquor Control (“DLC”). Total Wine claimed that certain statutory and regulatory provisions that govern the distribution and sale of alcoholic beverages in Connecticut, and which often result in common retail-level pricing across the state for particular such beverages, are preempted by federal antitrust law. For the reasons that follow, we hold that these laws are not preempted. We therefore affirm.

## **BACKGROUND**

### **A. Connecticut’s Laws Regarding Alcohol Distribution and Sale**

Like many other states, Connecticut heavily regulates the distribution and sale of alcoholic beverages within its borders. The state’s Liquor Control Act

prohibits the sale of alcoholic beverages in a manner that fails to comply with that statute. *See* Conn. Gen. Stat. § 30-74(a).

At issue here are three sets of provisions under Connecticut statutes and regulations that bear on the price at which alcoholic beverages may lawfully be sold: “post-and-hold” provisions; minimum retail pricing provisions; and provisions prohibiting price discrimination and volume discounts.<sup>1</sup> These, in tandem, establish the method by which alcoholic beverage prices are set by the manufacturer, the wholesaler, and the retailer.

The three sets of provisions at issue are as follows:

*Post-and-hold provisions:* Connecticut’s “post and hold” provisions require state-licensed manufacturers, wholesalers, and “out-of-state permittees” (together, “wholesalers”) to post a “bottle price” and a “case price” each month with the DCP for each alcoholic product that the wholesaler intends to sell during the following month. (For beer, the wholesaler must post a “can price.”)

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<sup>1</sup> Total Wine challenges the following provisions: (1) section 30-63 of the Connecticut General Statutes and section 30-6-B12 of the Regulations of Connecticut State Agencies (referred to here as the “post-and-hold” provisions); (2) sections 30-68m(a)(1) and 30-68m(b) of the Connecticut General Statutes (the “minimum retail price” provisions); and (3) sections 30-63(b), 30-68(k), and 30-94(b) of the Connecticut General Statutes and section 30-6-A29(a) of the Regulation of Connecticut State Agencies (the “price discrimination prohibition” provisions). In the ensuing discussion, the Court reproduces the central provisions.

Posted prices are then made available to industry participants. During the four days after the posting of the prices, wholesalers may “amend” their posted prices to “match” competitors’ lower prices—specifically, “to meet a lower price posted by another wholesaler with respect to alcoholic liquor bearing the same brand or trade name.” Those amended prices, however, may not be “lower than those [prices] being met.” Wholesalers are obligated to “hold” their prices at the posted price (amended or not) for a month. These post-and-hold provisions—variations of which are found in many states—are the heart of the Connecticut regulatory regime that Total Wine challenges.<sup>2</sup>

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<sup>2</sup> Section 30-63(c) of the Connecticut General Statutes provides:

For alcoholic liquor other than beer, each manufacturer, wholesaler and out-of-state shipper permittee shall post with the department, on a monthly basis, the bottle, can and case price of any brand of goods offered for sale in Connecticut, which price when so posted shall be the controlling price for such manufacturer, wholesaler or out-of-state permittee for the month following such posting. On and after July 1, 2005, for beer, each manufacturer, wholesaler and out-of-state shipper permittee shall post with the department, on a monthly basis, the bottle, can and case price, and the price per keg or barrel or fractional unit thereof for any brand of goods offered for sale in Connecticut which price when so posted shall be the controlling price for such brand of goods offered for sale in this state for the month following such posting. Such manufacturer, wholesaler and out-of-state shipper permittee may also post additional prices for such bottle, can, case, keg or barrel or fractional unit thereof for a specified portion of the following month which prices when so posted shall be the controlling prices for such bottle, can, case, keg or barrel or fractional unit thereof

*Minimum-retail-price provisions:* Connecticut's minimum-retail-price provisions require that retailers sell to customers at or above a statutorily defined "[c]ost." "Cost," however, is not defined as the retailer's actual cost. Instead, generally, a retailer's "[c]ost" for a given alcoholic beverage, is determined by adding the posted bottle price—as set by the wholesaler—and a markup for

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for such specified portion of the following month. Notice of all manufacturer, wholesaler and out-of-state shipper permittee prices shall be given to permittee purchasers by direct mail, Internet web site or advertising in a trade publication having circulation among the retail permittees except a wholesaler permittee may give such notice by hand delivery. Price postings with the department setting forth wholesale prices to retailers shall be available for inspection during regular business hours at the offices of the department by manufacturers and wholesalers until three o'clock p.m. of the first business day after the last day for posting prices. A manufacturer or wholesaler may amend such manufacturer's or wholesaler's posted price for any month to meet a lower price posted by another manufacturer or wholesaler with respect to alcoholic liquor bearing the same brand or trade name and of like age, vintage, quality and unit container size; provided that any such amended price posting shall be filed before three o'clock p.m. of the fourth business day after the last day for posting prices; and provided further such amended posting shall not set forth prices lower than those being met. Any manufacturer or wholesaler posting an amended price shall, at the time of posting, identify in writing the specific posting being met. On and after July 1, 2005, all wholesaler postings, other than for beer, for the following month shall be provided to retail permittees not later than the twenty-seventh day of the month prior to such posting. All wholesaler postings for beer shall be provided to retail permittees not later than the twentieth day of the month prior to such posting.

shipping and delivery. The post-and-hold provision, because it supplies the central component of the “[c]ost” at which the retailer may sell its product, thus largely dictates the price at which Connecticut retailers must sell their alcoholic products.<sup>3</sup>

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<sup>3</sup> Section 30-68m of the Connecticut General Statutes provides, in pertinent part:

(a) For the purposes of this section:

(1) “Cost” for a retail permittee means (A) for alcoholic liquor other than beer, the posted bottle price from the wholesaler plus any charge for shipping or delivery to the retail permittee's place of business paid by the retail permittee in addition to the posted price, and (B) for beer, the lowest posted price during the month in which the retail permittee is selling plus any charge for shipping or delivery to the retail permittee's place of business paid by the retail permittee in addition to the price originally paid by the retail permittee;

(b) No retail permittee shall sell alcoholic liquor at a price below his or her cost.

Relatedly, Section 30-68m(a)(C) defines “bottle price” as:

[the] price per unit of the contents of any case of alcoholic liquor, other than beer [which] shall be arrived at by dividing the case price by the number of units or bottles making up such case price and adding to the quotient an amount that is not less than the following: A unit or bottle one-half pint or two hundred milliliters or less, two cents; a unit or bottle more than one-half pint or two hundred milliliters but not more than one pint or five hundred milliliters, four cents; and a unit or bottle greater than one pint or five hundred milliliters, eight cents.

Plaintiffs allege that wholesalers will occasionally lower their posted case prices for a given month, without lowering posted bottle prices, during what are called “off-post” months. Although retailers buy almost exclusively by the case, their prices remain fixed by the minimum-retail-price provisions, which are keyed to bottle prices.

*Price discrimination/volume discounts:* Finally, Connecticut bans volume discounts and other forms of price discrimination. Wholesalers must sell a given product to all retailers at the same price. Wholesalers may not offer discounts to retailers who are high-volume purchasers.<sup>4</sup>

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<sup>4</sup> Section 30-68k of the Connecticut General Statutes provides:

No holder of any wholesaler's permit shall ship, transport or deliver within this state or any territory therein or sell or offer for sale, to a purchaser holding a permit for the sale of alcoholic liquor for on or off premises consumption, any brand of alcoholic liquor, including cordials, as defined in section 30-1, at a bottle, can or case price higher than the lowest price at which such item is then being sold or offered for sale or shipped, transported or delivered by such wholesaler to any other such purchaser to which the wholesaler sells, offers for sale, ships, transports or delivers that brand of alcoholic liquor within this state.

Similarly, Section 30-63(b) of the Connecticut General Statutes provides:

No manufacturer, wholesaler or out-of-state shipper permittee shall discriminate in any manner in price discounts between one permittee and another on sales or purchases of alcoholic liquors bearing the same brand or trade name and of like age, size and quality, nor shall such

While multiple policy interests have been asserted in support of these provisions, they (particularly the post-and-hold and minimum-retail-price provisions) commonly have been justified as means of guarding against escalating price wars among alcohol retailers that may lead to excessive consumption. See *Slimp v. Dep't of Liquor Control*, 687 A.2d 123, 129 (Conn. 1996) (noting “legislature’s concern that artificial inducements to purchase liquor will result in increased consumption”); *Eder Bros. v. Wine Merchants of Conn., Inc.*, 800 A.2d 138, 147 (Conn. 2005) (noting that “price wars among retail dealers” for liquor “may induce persons to purchase, and therefore consume, more liquor than they would if higher prices were maintained”); *Eder Bros.*, 800 A.2d at 147–48 (noting that “the cutthroat competition” characteristic of price wars “is apt to induce the retailers to commit such infractions of the law as selling to minors and keeping open after hours in order to withstand the economic pressure”). These provisions (particularly the price-discrimination provision) have also been justified as guarding against favoritism within the liquor industry

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manufacturer, wholesaler or out-of-state shipper permittee allow in any form any discount, rebate, free goods, allowance or other inducement for the purpose of making sales or purchases. Nothing in this subsection shall be construed to prohibit beer manufacturers, beer wholesalers or beer out-of-state shipper permittees from differentiating in the manner in which their products are packaged on the basis of on-site or off-site consumption.

and protecting smaller retailers. *See Slimp*, 687 A.2d at 129. Unsurprisingly, countervailing arguments have also been made, including ones noting the anti-competitive nature of these price restraints.

### **B. Total Wine's Complaint**

Total Wine is the largest retailer of wine and spirits in the United States. Headquartered in Bethesda, Maryland, Total Wine, with its affiliates, owns and operates wine and liquor stores in 21 states.

In December 2012, Total Wine opened a retail beverage store in Norwalk, Connecticut, its first such store in the state. Since then, Total Wine has opened additional stores, in Milford, Manchester, and West Hartford, Connecticut.

On August 23, 2016, Total Wine filed suit against Jonathan Harris, the Commissioner of the DCP, and John Suchy, Director of the DLC, in their official capacities.<sup>5</sup> Seeking injunctive and declaratory relief, it brought a facial challenge to the three sets of statutory and regulatory provisions reviewed above governing the distribution and sale of alcoholic beverages in Connecticut: (1) the post-and-hold provisions, (2) the minimum-retail-price provisions, and (3) the price-discrimination and volume-discount-prohibition provisions. Total Wine

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<sup>5</sup> Michelle H. Seagull replaced Jonathan Harris as Commissioner of the DCP on May 1, 2017.

alleged that these provisions bring about *per se* violations of § 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, and so are preempted by that statute.

Total Wine's claim was that the Connecticut regulatory scheme eliminates incentives for alcoholic beverage wholesalers to compete on the basis of price and invites wholesalers to maintain prices "substantially above what fair and ordinary market forces would dictate." App. at 19, Compl. ¶ 16. Total Wine further claimed that Connecticut's regulations inhibit meaningful price competition at the retail level.

Specifically, Total Wine claimed, the regulations, in two ways, bring about prices that exceed those that a competitive market would produce.

First, it argued, the post-and-hold provisions—and the opportunity they give wholesalers to match a lower price during the forthcoming month for a given product with no risk of sparking a price war—reduce any wholesaler's incentive to be the first to reduce price. The post-and-hold provisions, Total Wine argued, effectively bring about horizontal price fixing. As it put the point on appeal: "If a wholesaler were to drop its price on a particular product, its competitors would know immediately (from having seen the posted price), and would have four days to match the posted price." Appellant Br. at 8–9. Even if the wholesaler who had been the first to reduce its price still wished to set a price

beneath its competitors, Total Wine noted, it would then be required to “hold the lower price for an entire month—during which it would have no competitive advantage because its competitors would be charging the same price.”<sup>6</sup> *Id.* at 9.

Second, Total Wine argued, Connecticut’s system precludes retailers from competing on the basis of cost. Fundamentally, Total Wine noted, the minimum-retail-price provision is keyed to a definition of “[c]ost” that turns not on the retailer’s actual cost but on the price charged to the retailer by the wholesaler. This, Total Wine argued, prevents a high-volume, lower-average-cost retailer such as itself from attracting customers by offering discounts enabled by its lower-cost structure. This result is exacerbated, Total Wine alleged, by a practice in which wholesalers often engage: They set high minimum bottle prices, and then lower the case prices for the product without making corresponding reductions to the bottle price. While retailers (who buy almost exclusively by the case) take advantage of the reduced case price and buy larger quantities during months where the case price is lower, this, Total Wine alleged, does not benefit the consumer because retailers are required to sell the product at a margin fixed

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<sup>6</sup> Total Wine’s claim that the Connecticut regulations promote horizontal price fixing was substantially developed in its briefs on the motion to dismiss and further refined on appeal. Its Complaint overwhelmingly focused instead on its claims as to vertical price fixing. We conclude, however, that the Complaint satisfactorily pled both theories.

by the higher minimum bottle price, which has effectively been set by the wholesaler. In this manner, Total Wine alleged, “wholesalers effectively control both retail price and retailers’ profit margins,” and retailers like Total Wine that wish to use their business efficiencies to reduce the prices offered to consumers are blocked from doing so. App. at 20, Compl. ¶ 17.

The end result, Total Wine alleged, is a market without meaningful price competition: “Competing wholesalers for the same brands routinely set the same bottle and case prices down to the penny, month after month, with each wholesaler exactly tracking its competitors’ . . . case prices.” *Id.*, Compl. ¶ 19. In other words, Total Wine argued, the regulatory scheme promotes vertical price fixing. Total Wine’s complaint attached data tables reflecting that, over long periods, leading wholesalers often have charged the same amount for each alcoholic beverage product—*e.g.*, Bombay Sapphire, Grey Goose, Jose Cuervo Gold—and have adjusted prices in lockstep. These prices, Total Wine claimed, exceed those which a competitive market would produce: Citing a study, Total Wine alleged that Connecticut’s regulatory scheme “result[s] in retail prices for wine and spirits in Connecticut that are as much as 24% higher than prices offered for identical products in the surrounding states.” *Id.*, Compl. ¶ 18.

Finally, Total Wine alleged, the Connecticut regulatory scheme does not entail active supervision by any state agency or instrumentality. Wholesalers post and retailers charge the prices they see fit, it alleged, without any review or intervention by regulators, save where a lawsuit has been brought claiming noncompliance with the state's regulations.

### C. The Motion to Dismiss

On October 14, 2016, the defendants moved to dismiss. They were supported in this motion by five intervenors, four of which were trade associations and the fifth of which was a liquor distributor.<sup>7</sup>

On June 6, 2017, the district court, following argument, granted the motion to dismiss. *See Conn. Fine Wine & Spirits v. Harris, LLC*, 255 F. Supp. 3d 355 (D. Conn 2017). Analyzing the challenged provisions separately,<sup>8</sup> the district court

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<sup>7</sup> These were: the Wine & Spirit Wholesalers of Connecticut ("WSWC"), the Connecticut Beer Wholesalers Association ("CBWA"), the Connecticut Restaurant Association ("CRA") and the Connecticut Package Stores Association ("CPSA") (collectively, "the trade associations"), as well as Brescome Barton, Inc. ("Brescome" and, with the trade associations, "intervenors").

<sup>8</sup> The district court stated that separate consideration of each challenged provision was required (1) under principles of federalism, (2) because each provision presented distinct analytic issues under principles of antitrust preemption, and (3) because Connecticut's general rule of statutory construction provides that the invalidity of some sections of a statute should not invalidate the statute as a whole. *See Conn. Fine Wine & Spirits*, 255 F. Supp. 3d at 366–67; Conn. Gen. Stat. § 1-3.

applied as to each the first step in the two-step framework used to assess claims of preemption by § 1 of the Sherman Act in this Circuit.<sup>9</sup> As a threshold matter, the court inquired whether the restraints are unilateral (“imposed by the government . . . to the exclusion of private control”) and hence immune from preemption by § 1, or hybrid (imposed by both the government and by granting “private actors a degree of regulatory control over competition” and hence capable of preemption. *Id.* at 364. Then, the court inquired whether the challenged provision brought about facially, or *per se*, unlawful restraints on trade, in which case they are preempted, or restraints that are subject to rule of reason scrutiny, in which case they are not. *Id.*

As to the post and hold restraint, the district court held that it is a hybrid restraint, but that the conduct it brings about is not *per se* unlawful, and so is subject to rule of reason analysis. *Id.* at 371. Therefore, it is not preempted. *Id.* The district court relied on *Battipaglia v. New York State Liquor Authority*, 745 F.2d 166 (2d Cir. 1984), in which we upheld New York State’s post-and-hold provision as similarly not preempted.

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<sup>9</sup> The district court dismissed Total Wine’s claims at the first step of the preemption analysis and neither the defendants nor any of the intervenors have argued that Total Wine’s claims should be dismissed at the second step.

As to the minimum resale price restraint, the district court held that it too was hybrid, but that it also implicated only the rule of reason, not condemnation *per se*. *Id.* at 373. The district court held that this provision imposed a vertical restraint. And, it noted, recent Supreme Court cases, in particular *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007), have held that courts are to apply rule of reason, not *per se*, analysis to vertical restraints, meaning that this provision is not facially preempted. *Id.* at 378.

Finally, the district court held that Connecticut's provisions forbidding price discrimination amounted to a unilateral restraint on trade, imposed solely by the state and not involving private conduct. *Id.* That was because these provisions "simply prohibit[] liquor wholesalers from charging different prices to different retailers," and do not "grant[] private actors a degree of regulatory authority over competition." *Id.* at 379. Thus, it held that these provisions, too, are not preempted. *Id.* at 380.

Accordingly, the district court upheld all challenged aspects of Connecticut's alcoholic beverage regulatory regime.

On June 26, 2017, Connecticut Fine Wine appealed.

## DISCUSSION

This case presents questions of preemption: Does § 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, which makes illegal “[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce,” preempt the challenged provisions of Connecticut’s Liquor Control Act?

We begin by reviewing the two key precedents that frame the § 1 preemption inquiry: *Rice v. Norman Williams Co.*, 458 U.S. 654 (1982), and *Fisher v. City of Berkeley, California*, 475 U.S. 260 (1986). Then, because the analysis differs by provision, we review serially the three sets of challenged provisions. We first address the minimum-resale-price restraint and then the prohibition on price discrimination. We last address the post-and-hold provisions, which are the primary focus of plaintiffs’ challenge. None of the provisions, we hold, are preempted.<sup>10</sup>

### A. Principles of Preemption Under § 1: *Rice* and *Fisher*

The Supreme Court’s decisions in *Rice* and *Fisher* frame the § 1 preemption inquiry.

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<sup>10</sup> While we address the three areas separately here, we have also considered them in tandem. The outcome is the same: considered separately or as a whole, the provisions are not preempted. We therefore do not reach the question of which analysis would have been the right one had the difference been determinative.

**1. *Rice*: The Requirement That the State Law “Mandate or Authorize,” or “Place Irresistible Pressure” on Private Parties to Bring About, a *Per Se* Violation of § 1**

In *Rice*, the Court held that the preemption inquiry under § 1 requires courts to

apply principles similar to those which we employ in considering whether any state statute is pre-empted by a federal statute pursuant to the Supremacy Clause. As in the typical pre-emption case, the inquiry is whether there exists an irreconcilable conflict between the federal and state regulatory schemes. The existence of hypothetical or potential conflict is insufficient to warrant the pre-emption of the state statute. A state regulatory scheme is not pre-empted by the federal antitrust laws simply because in a hypothetical situation a private party’s compliance with the statute might cause him to violate the antitrust laws. A state statute is not preempted by the federal antitrust laws simply because the state scheme might have an anticompetitive effect.

458 U.S. at 659 (citations omitted). Rather, the Court held, “[a] party may successfully enjoin the enforcement of a state statute only if the statute on its face irreconcilably conflicts with federal antitrust policy.” *Id.* In other words, for a state statute to be preempted by § 1, the statute must bring about conduct that would require *per se* condemnation under § 1:

Our decisions in this area instruct us, therefore, that a state statute, when considered in the abstract, may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute. Such

condemnation will follow under § 1 of the Sherman Act when the conduct contemplated by the statute is in all cases a *per se* violation. If the activity addressed by the statute does not fall into that category, and therefore must be analyzed under the rule of reason, the statute cannot be condemned in the abstract. Analysis under the rule of reason requires an examination of the circumstances underlying a particular economic practice, and therefore does not lend itself to a conclusion that a statute is facially inconsistent with federal antitrust laws.

*Id.* at 661.

Applying these principles, the *Rice* Court upheld the codes at issue: California Alcoholic Beverage Control provisions which prohibited a licensed importer from importing any brand of distilled spirits for which it was not a designated importer. These, the Court explained, would not give rise in all instances to *per se* illegal conduct. *Id.* at 661–62.

## **2. *Fisher*: The Requirement of Concerted Action**

In *Fisher*, the Court identified a related hurdle that a claim of preemption by § 1 must clear. At issue was a rent stabilization law enacted by the City of Berkeley, California, that placed strict controls on certain classes of real property rented for residential use. The ordinance required landlords to adhere to the prescribed rent ceilings; violators were subject to civil and criminal penalties. 475 U.S. at 262–63. A group of landlords sued the city, arguing that the ordinance was a traditional—and *per se* invalid—form of fixing prices.

The Supreme Court rejected that argument. Sherman Act § 1, it noted, can be violated only by collective action: “unreasonable restraints of trade effected by a ‘contract, combination . . . , or conspiracy’ between *separate* entities.” *Id.* at 266 (quoting *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984)). But, the Court held, Berkeley’s unilateral imposition of rent control did not amount to agreement or “concerted action.” *Id.* The Court acknowledged that, had the Berkeley landlords banded together to fix rental prices in the absence of an ordinance, their action would have been a *per se* violation of the Sherman Act. *Id.* But the fact that the price-fixing ordinance resulted from the city acting unilaterally, not the landlords acting concertedly, saved it from preemption:

A restraint imposed unilaterally by government does not become concerted-action within the meaning of the [Sherman Act] simply because it has a coercive effect upon parties who must obey the law. The ordinary relationship between the government and those who must obey its regulatory commands whether they wish to or not is not enough to establish a conspiracy. Similarly, the mere fact that all competing property owners must comply with the same provisions of the Ordinance is not enough to establish a conspiracy among landlords. Under Berkeley’s Ordinance, control over the maximum rent levels of every affected residential unit has been unilaterally removed from the owners of these properties and given to the Rent Stabilization Board.

*Id.* at 267. In sum, the challenged rent control laws could exist, alongside § 1, because “the rent ceilings imposed by the Ordinance and maintained by the Rent

Stabilization Board have been unilaterally imposed by government upon landlords to the exclusion of private control.” *Id.* at 266. As the Court put the point: “There is no meeting of the minds here.” *Id.* at 267.

The Supreme Court in *Fisher* was careful to limit its holding to unilateral action by a government entity. It recognized that a governmentally imposed restraint on trade that enforces private pricing decisions would be a “hybrid restraint” that fulfills the Sherman Act’s “concerted action” requirement. The Court explained:

Not all restraints imposed upon private actors by government units necessarily constitute unilateral action outside the purview of § 1. Certain restraints may be characterized as ‘hybrid,’ in that nonmarket mechanisms merely enforce private marketing decisions. *See Rice*, 458 U.S. at 665 (Stevens, J., concurring in the judgment). Where private actors are thus granted “a degree of private regulatory power,” *id.* at 66 n.1, the regulatory scheme may be attacked under § 1.”

*Id.* at 267–68.

We have previously read *Rice* and *Fisher* to constitute the first step in a two-step inquiry to decide whether a statute is preempted by § 1. *See, e.g., Freedom Holdings Inc. v. Spitzer*, 357 F.3d 205, 223 (2d Cir. 2004).<sup>11</sup>

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<sup>11</sup> In cases in which alcoholic-beverage laws are claimed to be preempted by § 1, states have sometimes additionally defended by asserting state action immunity, which is the second step in our Circuit’s two-step preemption inquiry, and immunity derived from the Twenty First Amendment to the U.S. Constitution.

## B. Connecticut's Minimum-Retail-Price Provisions

The Court applies these principles, first, to the minimum-retail-price provisions. As noted, these provisions (*e.g.*, Conn. Gen. Stat. § 30-68m) dictate the relationship between the liquor prices set by wholesalers and those set by retailers.

In *324 Liquor v. Duffy Corp.*, 479 U.S. 335 (1987), the Supreme Court considered a similar New York statute, which “impose[d] a regime of resale price maintenance on all New York liquor retailers” and required them to charge at least 112% of the wholesaler’s posted bottle price. *Id.* at 337, 341. The Supreme Court classified the New York statute, under *Fisher*, as a hybrid restraint. *Id.* at 345 n.8 (describing provisions as having granted “private actors . . . a degree of private regulatory power”) (quoting *Fisher*, 475 U.S. at 268). Then, applying the *Rice* framework, the Court found the statute was “inconsistent with § 1” because it authorized *per se* violations of § 1 under precedents that, “since the early years of national antitrust enforcement,” had so treated resale price maintenance agreements. *Id.* at 341 (quoting *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761 (1984)). Hence, the New York statute was preempted. *Id.* at 343.

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Connecticut has not raised such defenses in connection with this appeal.

The Supreme Court's classification in *324 Liquor* of the minimum-retail-price restraints as hybrid, and hence capable of preemption by § 1, binds the Court here. The New York statute there is substantively identical to the Connecticut statute here. And the hybrid classification in *324 Liquor* remains good law. See *Freedom Holdings*, 357 F.3d at 223–24 (noting that *324 Liquor* found a hybrid arrangement based on limited private acts: “the individual determinations of each wholesaler as to what bottle price to post”).

The same, however, cannot be said for the Supreme Court's application of *Rice* in *324 Liquor*. The Court's premise, that the New York statute mandated *per se* violations of § 1, has been overtaken by a change in antitrust law. In 2007, the Supreme Court, culminating a line of decisions, held that rule of reason—and not *per se*—analysis applies to all vertical restraints. See *Leegin*, 551 U.S. at 882. *Leegin* overruled *Dr. Miles Medical. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), the precedent cited by *324 Liquor* as the fount of the doctrine that vertical price fixing arrangements are *per se* illegal. See *324 Liquor*, 479 U.S. at 341. Henceforth, the Supreme Court stated, “vertical price restraints are to be judged by the rule of reason.” *Leegin*, 551 U.S. at 882. Justifying the doctrinal change, the Court explained that “it cannot be stated with any degree of confidence that resale price maintenance ‘always or almost always tend[s] to restrict competition

and decrease output,” *id.* at 894 (quoting *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988)), noting that *Leegin* capped a gradual doctrinal move “away from *Dr. Miles*’ strict approach,” *id.* at 900.

In light of *Leegin*, 324 *Liquor*’s holding that minimum-retail-price provisions constitute a *per se* violation of antitrust laws in all cases, 479 U.S. at 343, is, necessarily, no longer good law. The need to analyze vertical pricing arrangements under the rule of reason means that § 1 cannot preempt as *per se* unlawful even a statute that overtly mandates such arrangements. *See Rice*, 458 U.S. at 658 (“If the activity addressed by the statute . . . must be analyzed under the rule of reason, the statute cannot be condemned in the abstract. Analysis under the rule of reason requires an examination of the circumstances underlying a particular economic practice, and therefore does not lend itself to a conclusion that a statute is facially inconsistent with the federal antitrust laws.”).

We therefore hold that Connecticut’s minimum-retail-price provisions, compelling as they do only vertical pricing arrangements among private actors, are not preempted under § 1.<sup>12</sup>

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<sup>12</sup> Total Wine alternatively attempts to characterize minimum-retail-price provisions such as Connecticut’s as impelling horizontal price-fixing. For the reasons given by the district court, this characterization is wrong. *Conn. Fine Wine & Spirits*, 255 F. Supp. 3d at 375.

### C. Connecticut's Provisions Prohibiting Price Discrimination

The Court next considers Connecticut's provisions prohibiting price discrimination. These provisions, as noted, require that wholesalers sell a given alcoholic product to all retailers at the same price.

For two reasons, we hold that these provisions are not preempted.

First, as the district court recognized, these provisions impose a unilateral restraint. They leave each wholesaler at liberty to choose the price it will charge all retailers for a product while prohibiting each from charging different prices to different retailers. Although limiting a wholesaler's range of motion, this provision does not grant any private actor "a degree of regulatory control over competition." *Freedom Holdings Inc. v. Cuomo*, 624 F.3d 38, 50 (2d Cir. 2010). Rather, like the rent cap set by the Berkeley municipality in *Fisher*, it is a restraint "imposed by government . . . to the exclusion of private control." *Id.* (citing *Fisher*, 475 U.S. at 266). Such a restraint does not implicate the concerns of concerted activity animating § 1.

Second, the price restraint worked by § 30-68k is purely vertical in operation. It limits the ability of a wholesaler that has already charged one retailer a given price to charge another retailer a different price. Therefore, even if this provision could be viewed as a hybrid, rather than a unilateral, price-fixing

provision, after *Leegin*, it would no longer implicate a category of conduct that remains *per se* unlawful. While its impact may be to harmonize prices at a retail level of beverages sold by a common wholesaler, the provision does not mandate—or even incent—collaboration among horizontal competitors. For this separate reason, under *Rice*, it is not preempted by § 1.

#### **D. Connecticut’s Post-and-Hold Provisions**

The Court finally considers the post-and-hold provisions, described above. On the question whether § 1 preempts these provisions, the parties primarily dispute whether, as the district court held, *Battipaglia*, 745 F.2d 166, which rejected a claim that § 1 preempted a New York liquor-pricing statute, is controlling here.

##### **1. Review of *Battipaglia***

In *Battipaglia*, decided after *Rice* and before *Fisher*, a divided panel of this Court, per Judge Friendly, upheld a New York statute whose price restraint components governing the sale of liquor were strikingly similar to those at issue here. The New York law contained post-and-hold provisions that obliged wholesalers to file monthly price schedules with the state liquor authority by the fifth day of the preceding month, *Id.* at 168 (citing N.Y. Alco. Bev. Cont. § 101-b(3)(b)), and authorized wholesalers to amend their filed schedules “to meet

lower competing prices and discounts ‘provided such amended prices and discounts are not lower and discounts are not greater than those to be met,’” *id.* (quoting N.Y. Alco. Bev. Cont. Law § 101-b(4)). The New York law also contained price-discrimination and minimum-retail-price provisions that constrained sales prices at the retail level. *See id.* (citing N.Y. Alco. Bev. Cont. § 101-b(2)).

In the relevant portion of its analysis,<sup>13</sup> *Battipaglia* held that the challenged post-and-hold provisions were not preempted because they “do not compel any agreement” among wholesalers, but only individual action. *Id.* at 170. The Court stated: “The schedules required to be filed by the wholesalers are their individual acts.” *Id.* And the *Battipaglia* plaintiffs (a liquor store owner and a wholesaler) had not alleged that “any agreement among the wholesalers” arose as a result of these laws. *Id.*

*Battipaglia* addressed and rejected two arguments the plaintiffs had made for preemption.

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<sup>13</sup> *Battipaglia* addressed two other issues not presented here. It discussed—but did not resolve—whether, if the New York law were in conflict with § 1, it was nonetheless insulated from attack by the “state action” doctrine of *Parker v. Brown*, 317 U.S. 341 (1943). *See Battipaglia*, 745 F.2d at 176–77. And it addressed whether, if the New York law were in conflict with § 1, the state’s important policy interests warranted deference under § 2 of the Twenty-First Amendment. *Id.* at 177–79 (holding that, on the case record, such deference was warranted).

First, the Court distinguished *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97 (1980), which, like *324 Liquor*, had held preempted a state statute that “created a resale price maintenance system for wine.” *Battipaglia*, 745 F.2d at 170; *see also id.* at 171 (describing California statute as having forced “all persons at various levels of the chain of distribution . . . to establish identical prices fixed by the brand owner for each brand of wine” and stating that this type of “vertical control” was impermissible under § 1). In contrast, the Court stated, New York’s post-and-hold provisions “plainly are not a resale price maintenance scheme.” *Id.* at 172. And, the Court again noted, the New York law did not constrain wholesalers, each of which “is completely free to file whatever price schedule he desires.” *Id.* As Judge Friendly put the point: “*Midcal* simply did not deal with a statute like New York’s which merely requires wholesalers to post and adhere to their own unilaterally determined prices and nothing more.” *Id.*

Second, the Court addressed the argument that the post-and-hold law gave rise to a *per se* violation of § 1 because (1) it “forces each wholesaler to inform other wholesaler[s] of its prices and then to adhere for a month to them (or a lowered price meeting that of a competitor filed within three days)” and (2) “if this had been done pursuant to an agreement [among wholesalers], the

agreement would have constituted a violation of § 1.” *Id.* Rejecting this argument, the Court reiterated that § 1 “is directed only at joint action and does not prohibit independent business actions and decisions.” *Id.* (internal citations omitted).

The Court then paused on the conceptual issue of whether, to be preempted by § 1, a state law must compel an actual agreement among competitors. The Court described as “appealing” the reasoning that:

Section 1 requires an agreement, state compulsion of individual action is the very antithesis of an agreement, and the argument that an agreement could have been inferred if the wholesalers had voluntarily done what they been compelled to do is simply too ‘iffy.’

*Id.* at 173.<sup>14</sup> At the same time, the Court acknowledged “some force” to the counterargument: that “a statute compelling conduct which, in its absence, would permit the inference of an agreement unlawful under § 1 is inconsistent with that section.” *Id.* In the end, the Court stated, there was no need to resolve this conceptual issue. That was because the New York law did not meet the *Rice* standard for preemption. *Id.*

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<sup>14</sup> As support for this view, the Court cited a district court decision finding against preemption and rejecting the argument that “simply because the statute compelled individual actions which, if taken pursuant to an agreement, might have constituted a violation,” the statute was preempted. *Id.* at 173 (quoting *U.S. Brewers Ass’n, Inc. v. Healy*, 532 F. Supp. 1312, 1329–30 (D. Conn.), *rev’d on other grounds*, 692 F.2d 275 (2d Cir. 1982), *aff’d*, 464 U.S. 909 (1983)).

*Rice*, the Court emphasized, had held that “[a] state regulatory scheme is not pre-empted by the federal antitrust laws simply because in a hypothetical situation a private party’s compliance with the statute might cause him to violate the antitrust laws.” *Id.* at 174 (quoting *Rice*, 458 U.S. at 659). Rather, under *Rice*, a state law could be “condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute.” *Id.* (quoting *Rice*, 458 U.S. at 661). New York’s statute did not do that, the Court stated, because the only conduct that it compelled—“the exchange of price information” among competitors—does not “constitute a violation of the antitrust laws in all cases.” *Id.* at 174. Such an exchange might or might not signify an agreement among them. *See id.* at 175 (“[T]he dissemination of price information is not a per se violation of the Sherman Act.” (quoting *United States v. Citizens & S. Nat’l Bank*, 422 U.S. 86, 113 (1975) (internal citations omitted))). That the post-and-hold law might result in common wholesaler pricing did not support inferring an agreement either, the Court stated. Absent “plus factors” signifying an agreement, “conscious parallelism” among competitors did not equate to an agreement. *Id.* (citations omitted).

The *Battipaglia* Court concluded:

Section 101-b thus does not mandate or authorize conduct that necessarily constitutes a violation of the antitrust laws in all cases. New York wholesalers can fulfill their obligations under the statute without either conspiring to fix prices or engaging in consciously parallel pricing. So, even more clearly, the New York law does not place irresistible pressure on a private party to violate the antitrust laws in order to comply with it. It requires only that, having announced a price independently chosen by him, the wholesaler shall stay with it for a month.

*Id.* (internal quotation marks omitted).

In dissent, Judge Winter faulted Judge Friendly's majority opinion for dwelling on the "post" component of New York's law and paying too little heed to the law's "hold" component. Were competitors to enter into an agreement to hold their prices in place for 30 days, he observed, such a private agreement would be horizontal price fixing and *per se* illegal. See 745 F.2d at 179–80 (Winter, J., dissenting). The Fourth and Ninth Circuits, the only two circuit courts to address similar laws, have sided with Judge Winter. Each has emphasized that the statutory requirement of adherence to posted prices, were it adopted by private agreement, would be *per se* illegal price fixing. See *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874 (9th Cir. 2008) (holding Washington provisions preempted by § 1); *Miller v. Hedlund*, 813 F.2d 1344 (9th Cir. 1987) (holding Oregon provisions not exempt from § 1 and remanding the case to the district

court for a determination whether the Twenty First Amendment shielded the challenged regulations); *TFWS, Inc. v. Schaefer*, 242 F.3d 198, 210 (4th Cir. 2001) (holding Maryland provisions preempted by § 1, while reserving on whether, under the Twenty First Amendment, Maryland's regulatory interests with respect to alcohol trumped federal interest under the Sherman Act); *see also* 1 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 217, at 388–89 & nn.45–53 (4th ed. 2013) (reviewing reported decisions, including lower court decisions in each direction).

## 2. *Battipaglia* Controls Here

We find *Battipaglia* controlling authority here.

Connecticut's post-and-hold provisions are substantially identical to the New York post-and-hold provisions upheld in that case. Total Wine does not contend otherwise. Both sets of provisions required the wholesaler to set and publicly file a price that it is going to charge the retailer; both provided a brief time window in which wholesalers may match a lower price set by a competitor; and both required the wholesaler to hold that price for one month.

Further, as the above discussion reflects, the Court in *Battipaglia* considered at length the § 1 preemption question in the face of similar arguments to those Total Wine makes here. The Court applied the controlling standards, from *Rice*,

to these provisions. The Court held that the post-and-hold provisions did not “mandate or authorize conduct ‘that necessarily constitutes a violation of the antitrust laws in all cases’” or “place[ ] irresistible pressure on a private party to violate the antitrust laws in order to comply” with it. *Id.* at 175 (quoting *Rice*, 458 U.S. at 661). Those are the questions presented here.

Finally, Total Wine has not identified any later precedent of the Supreme Court or this Court that fairly calls *Battipaglia*’s vitality into question.

Total Wine argues that 324 *Liquor* and our decision in *Freedom Holdings*, 357 F.3d at 223 (Winter, J.) are such precedent. A footnote in 324 *Liquor* suggested that a statute need not bring about an actual agreement between private parties to be preempted by § 1. *See* 324 *Liquor*, 479 U.S. at 345–46 n.8 (rejecting New York’s defense that provisions at issue had not yielded a “contract, combination, or conspiracy in restraint of trade”). *Freedom Holdings* picked up on that footnote to suggest, in a footnote of its own, that “an actual ‘contract, combination, or conspiracy’ need not be shown for a state statute to be preempted by the Sherman Act.” *See* 357 F.3d at 223 n.17 (Winter, J.) (citing 324 *Liquor*, 479 U.S. at 345–46 n.8). Total Wine argues, on account of these statements, that these decisions vitiate *Battipaglia*.

For three reasons, they do not.

First, *Freedom Holdings* itself distinguished *Battipaglia* and treated it as good law. *Freedom Holdings* recognized that, although the *Battipaglia* majority had discussed whether a state law must give rise to an actual agreement for § 1 to preempt it, *Battipaglia* ultimately did not resolve nor rule on the basis of that conceptual issue. Rather, *Battipaglia* had relied on its application of the *Rice* standard to New York's post-and-hold provision. *See id.* (recognizing that *Battipaglia* "did not reach the question" whether "a private contract, combination, or conspiracy" must be shown for Sherman Act preemption to occur (internal citation omitted)).

Second, to the extent that *Freedom Holdings* and *324 Liquor* opine on whether the state law at issue must give rise to an actual private agreement for there to be preemption, these cases are readily distinguished factually because they involved express or readily implied agreements. *Freedom Holdings* involved an express contract among horizontal competitors—a "Master Settlement Agreement" among major tobacco manufacturers pursuant to which the challenged New York legislation had been enacted. *Freedom Holdings*, 357 F.3d at 208. Its discussion of whether the state law must give rise to such an agreement was, therefore, *dicta*. *See id.* at 224 ("Even if a 'contract' among private parties is required in the first step of preemption analysis, therefore, it exists in the present

matter.”). As for *324 Liquor*, it addressed vertical restraints affecting a wholesaler-retailer relationship. In that context, the wholesaler and each of its retailers were in privity and necessarily had an agreement to buy from and/or sell to each another. They entered into these agreements against the backdrop (and presumably with the knowledge) of the price-fixing term that state law would supply. In fact, every Supreme Court case to hold state liquor laws preempted by § 1, has done so on the ground that these laws either mandated or authorized forms of then *per se* unlawful vertical price-fixing arrangements between wholesalers and retailers. *See, e.g., Midcal*, 445 U.S. 97 (California law mandated resale price maintenance among wholesaler and its retailers); *324 Liquor*, 479 U.S. 335 (same as to New York law); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951) (same as to Louisiana law per an interpretation of § 1 as amended by the now-repealed Miller-Tydings Act). Of course, as noted earlier, the application of preemption doctrine to vertical price fixing arrangements has been overtaken by *Leegin*’s removal of vertical restraints from *per se* condemnation.

Third, and finally, two post-*Battipaglia* decisions of the Supreme Court, each involving claims of horizontal price-fixing, lend support to Judge Friendly’s reasoning in finding against preemption. One, *Fisher*, discussed earlier, does so

by narrowing the scope of state action within § 1's preemptive reach. The other, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), does so by underscoring the limited scope of private conduct capable of *per se* violating § 1.

*Fisher*, as noted, upheld Berkeley's rental-cap ordinance in the face of a § 1 preemption claim that it brought about horizontal price fixing. The Supreme Court recognized that "[h]ad the owners of residential rental property in Berkeley voluntarily banded together to stabilize rents in the city," that concerted activity would have worked a *per se* violation of § 1. *Fisher*, 475 U.S. at 266. But, the Court emphasized, more was required. There needed to be concerted action. "A restraint imposed unilaterally by government does not become concerted-action within the meaning of the statute simply because it has a coercive effect upon parties who must obey the law." *Id.* at 267. "[T]he mere fact that all competing property owners must comply with the same provisions of the Ordinance is not enough to establish a conspiracy among landlords." *Id.*

This requirement is significant here. We do not take issue with the holding of the district court here that, given the participation that a post-and-hold law requires of each wholesaler in connection with the posting component,

Connecticut's law, viewed as a whole, qualifies as hybrid under *Fisher*.<sup>15</sup> But we doubt that such a law mandates or authorizes "concerted action" among the wholesalers subject to it. Particularly as to the "hold" component of the law that was the basis of the *Battipaglia* dissent, Connecticut's prohibition on altering prices for a 30-day period is a purely negative restraint. It does not call for any private action, let alone concerted action. See *Hertz Corp. v. City of New York*, 1 F.3d 121, 127 (2d Cir. 1993) (finding hybrid, but upholding, city statute that "eliminate[d] an element of price competition" among rental-car industry competitors); cf. *Flying J, Inc. v. van Hollen*, 621 F.3d 658, 662--63 (7th Cir. 2010) ("[I]t is only when a state law *mandates* or *authorizes* collusive conduct that it is preempted by federal antitrust law." (citing *Fisher*, 475 U.S. at 265)). *Fisher*'s emphasis on the need for concerted action reinforces that Judge Friendly was right both to focus on the posting, rather than the holding, component of New York's post-and-hold law, and to find the law non-preempted.

As to *Twombly*, although it is more commonly cited for its articulation of pleading standards, the Court in its substantive discussion homed in on the

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<sup>15</sup> In finding that the statute grants private actors "a degree of private regulatory power" so as to qualify as hybrid, *Fisher*, 475 U.S. at 268, the district court relied on *324 Liquor*, which had held hybrid a resale-price maintenance law with similar price-posting features. See *Conn. Fine Wines & Spirits*, 255 F. Supp. 3d at 369.

discrete evil prohibited by § 1. “§ 1 of the Sherman Act does not prohibit [all] unreasonable restraints of trade.” *Twombly*, 550 U.S. at 553. It prohibits “only restraints *effected by a contract, combination, or conspiracy.*” *Id.* (emphasis added). The Court explained, therefore, that in § 1 cases, “[t]he crucial question is whether the challenged anticompetitive conduct stem[s] from independent decision or from an agreement.” *Id.* (internal citations omitted). Even conscious parallel acts based on competitors’ mutual recognition of “shared economic interests” are not “in [themselves] unlawful.” *Id.* at 553--54 (quoting *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U. S. 209, 227 (1993)); see also *United States v. Apple, Inc.*, 791 F.3d 290, 315 (2d Cir. 2015) (“[P]arallel behavior that does not result from an agreement is not unlawful even if it is anticompetitive.”). In other words, under § 1, that conscious parallel conduct can create an equally uncompetitive market to parallel conduct achieved by agreement is of no moment. The gravamen of § 1 is an agreement among competitors.

On this basis, *Twombly* upheld the dismissal of a complaint that alleged consciously parallel decisions among recently deregulated telecommunications carriers not to compete in one another’s (horizontal) regional markets. The complaint had not alleged actual agreement among the carriers, and its allegations were consistent with “natural” and “unilateral” behavior by each

carrier, as each had good reason to appreciate that its self-interest lay in forbearing from initiating competition. *See* 550 U.S. at 564, 566; *see also id.* at 568 (“[The carriers] doubtless liked the world the way it was, and surely knew the adage about him who lives by the sword. Hence, a natural explanation for the noncompetition alleged is that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing.”)

*Twombly*’s reasoning resonates here because, under a post-and-hold law, there is a “natural” explanation—independent of any agreement or coordination among liquor wholesalers—for these competitors to arrive at common monthly product prices. Such a law authorizes a wholesaler, during the four days after initial posting, to match a competitor’s lower price, with such prices then held for a month. Under these circumstances, the law itself invites and facilitates conscious parallelism in pricing. It puts in public view each competing wholesaler’s price quotes. And it authorizes, but it does not oblige, wholesalers during a defined window unilaterally to match (or parallel) a competitor’s lower price as the “held” price for the coming month. Nothing about this arrangement requires, anticipates, or incents communication or collaboration among the competing wholesalers. Quite the contrary: A post-and-hold law like Connecticut’s leaves a wholesaler little reason to make contact with a competitor.

The separate, unilateral acts by each wholesaler of posting and matching instead are what gives rise to any synchronicity of pricing. To mirror *Twombly*: “[A] natural explanation for the noncompetition alleged,” *id.* at 568, is that the state-regulated wholesalers are independently making pricing decisions within a framework aimed at avoiding price wars that invites them, before being held to a price for a month, to match that of their competitors. A post-and-hold law, therefore, does not implicate the evil against which § 1 guards: an agreement to unreasonably restrain trade. It would make little sense to preempt a state statute which facilitates parallel conduct that parties can legally undertake on their own under § 1.

Under these circumstances, we do not find reason to conclude that *Battipaglia* has been, *sub silentio*, overruled. If anything, its reasoning has been fortified by intervening decisions like *Fisher* and *Twombly*. *Battipaglia* therefore controls Total Wine’s challenge to Connecticut’s post-and-hold provisions. See *United States v. Moore*, 949 F.2d 68, 71 (2d Cir. 1991) (prior opinions of a Second Circuit panel bind future panels “in the absence of a change in the law by higher authority” or a ruling by the en banc Court). Any application to revisit *Battipaglia* is beyond this panel’s authority. *Battipaglia* remains good—and persuasive—law.

## CONCLUSION

For the reasons above, we affirm the decision below. We hold that the challenged provisions of Connecticut law governing liquor pricing are not preempted by § 1 of the Sherman Act.