

No. 19-710

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In The  
**Supreme Court of the United States**

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

*Petitioner,*

v.

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

*Respondents.*

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

*Intervenors-Respondents.*

—◆—  
**On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Second Circuit**

—◆—  
**BRIEF OF INTERVENORS-RESPONDENTS  
IN OPPOSITION TO PETITION  
FOR A WRIT OF CERTIORARI**

—◆—  
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March 3, 2020

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**QUESTION PRESENTED**

The narrow question presented, and the only issue pressed and passed upon below, is whether Connecticut's alcoholic beverage pricing laws—which on their face neither mandate nor authorize any parties to engage in conduct that constitutes a *per se* violation of the antitrust laws—are preempted by Section 1 of the Sherman Act under this Court's facial preemption standard set out in *Rice v. Norman Williams*, 458 U.S. 654 (1982).

## **CORPORATE DISCLOSURE STATEMENT**

Intervenor–Respondent Wine & Spirits Wholesalers of Connecticut, Inc. has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Intervenor–Respondent Connecticut Beer Wholesalers Association, Inc. has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Intervenor–Respondent Connecticut Restaurant Association has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Intervenor–Respondent Connecticut Package Stores Association, Inc. has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Intervenor–Respondent Brescome Barton, Inc. has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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## INTRODUCTION

This case involves the straightforward application of this Court’s standard for evaluating preemption under Section 1 of the Sherman Act, as explained in *Rice v. Norman Williams*, 458 U.S. 654 (1982). Under the well-established *Norman Williams* standard, Section 1 preempts a state statute only if the statute on its face mandates or authorizes conduct that would amount in all cases to a *per se* violation of the antitrust laws. 458 U.S. at 661.<sup>1</sup> This is an appropriately high standard, consistent with the Court’s admonition against “seeking out conflicts between state and federal regulation where none clearly exists.” *Id.* at 664. Although *Norman Williams* is indisputably the controlling standard, Petitioner Connecticut Fine Wine and Spirits, LLC, d/b/a Total Wine & More (“Petitioner” or “Total Wine”), does not even *mention* the case in its Petition, let alone purport to apply it or explain why the Second Circuit’s application of the standard was incorrect.

In its ruling, the Second Circuit faithfully applied *Norman Williams* and affirmed the dismissal of Petitioner’s facial preemption attack over three aspects of Connecticut’s Liquor Control Act: (1) its minimum-retail-price provisions prohibiting alcohol sales below

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<sup>1</sup> *Norman Williams* suggests that preemption may also be appropriate if a statute “places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute.” 458 U.S. at 661. But Petitioner confirmed that it was not pursuing Sherman Act preemption under this “irresistible pressure” prong. Ints.–Resps. App. 83 (May 18, 2017 Hr’g Tr. at 61:11–15).

cost; (2) its price-discrimination-prohibition provisions requiring wholesalers to sell alcohol to all retailers on equal terms; and (3) its post-and-hold provisions requiring wholesalers to post prices and hold them for a month. (The Petition focuses solely on the latter two groups of provisions.)

Petitioner argues that the Second Circuit’s ruling conflicts with Supreme Court authority. It does not. The Second Circuit rigorously applied the *Norman Williams* facial preemption standard. Although preemption under *Norman Williams* is the only issue the parties litigated below, Petitioner does not even cite the case or its preemption standard. Instead, Petitioner focuses on an issue never litigated below, so-called “*Parker*” immunity—the separate legal rule granting states immunity from antitrust preemption when they actively supervise clear policies. *See Parker v. Brown*, 317 U.S. 341 (1943).

This is not an occasion in which Petitioner has addressed the wrong body of law because of any purported confusion in the Court’s decisions. Petitioner recognized below that the application of *Norman Williams* presents “[t]he core preemption question,” Ints.–Resps. App. 58 (Pet. App. Br. at 27), and that *Parker* immunity is irrelevant to that determination, 45a–46a. Perhaps Petitioner believes that a preemption case presenting *Parker* immunity and Twenty-First Amendment issues would be of greater interest to this Court. But those were not the issues litigated in the lower courts, and this Court has long refused to review “questions not pressed or passed upon below.” *Duignan v.*

*United States*, 274 U.S. 195, 200 (1927). The only issue litigated and decided below is the application of this Court’s indisputably pertinent *Norman Williams* preemption standard.

Petitioner also asserts that purported circuit splits over treatment of price-discrimination-prohibition provisions and post-and-hold provisions warrant granting the Petition. They do not. The Second Circuit’s ruling on Connecticut’s price-discrimination-prohibition provisions was correct and consistent with the Ninth Circuit, the only other circuit to have substantively addressed the issue. Its ruling on Connecticut’s post-and-hold provisions was also correct. In finding those provisions not preempted, the Second Circuit reaffirmed its 1984 decision in *Battipaglia v. New York State Liquor Authority*, 745 F.2d 166 (2d Cir. 1984). While it is true that two other circuit courts have disagreed with *Battipaglia* in invalidating different states’ post-and-hold provisions, any supposed “circuit split” has existed tolerably for over three decades. Citing change in the law over the years, Petitioner itself disagreed below that Connecticut’s post-and-hold provisions are “similar” to those of other states. Ints.–Resps. App. 52 (Pet. App. Br. at 21 n.11). Thus, any split of authority on this question is of at most academic interest and even less worthy of this Court’s review now than it was when the “split” lamented by Petitioner originated in 1987. *See Rice v. Sioux City Mem’l Park Cemetery*, 349 U.S. 70, 74 (1955) (“academic” or “episodic” issues do not meet standard for granting petition). The Petition therefore does not meet this Court’s high

standard for granting certiorari. *Id.* at 79 (certiorari should not be granted “except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals” (internal citation omitted)).

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## STATEMENT OF THE CASE

### A. Statutory Background

First passed in 1933 following the repeal of Prohibition, Connecticut’s Liquor Control Act creates a three-tier system for the sale and distribution of alcohol consisting of manufacturer/suppliers, wholesalers, and retailers. Although the Liquor Control Act contains over 100 separate statutory provisions, Total Wine challenged only the three groups of pricing provisions described below (and focuses on only the second and third groups in its Petition).

First, under the Liquor Control Act, retailers are not permitted to sell to consumers below their “cost.” Conn. Gen. Stat. § 30-68m(b).<sup>2</sup> Retailers retain

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<sup>2</sup> For wine and spirits, the retailer’s “cost” is defined as the “posted bottle price from the wholesaler plus any charge for shipping or delivery to the retail permittee’s place of business.” Conn. Gen. Stat. § 30-68m(a)(1)(A). For beer, the retailer’s “cost” is defined as “the lowest posted price” during the month in which the retailer is selling “plus any charge for shipping or delivery to the retail permittee’s place of business.” Conn. Gen. Stat. § 30-68m(a)(1)(B).

complete control over pricing decisions (so long as prices are set above cost). Conn. Gen. Stat. § 30-68m. Even the “cost” floor is subject to a statutory exception that allows retailers to sell designated products each month below the minimum. Conn. Gen. Stat. §§ 30-68m(c) (collectively, with Conn. Gen. Stat. §§ 30-68m(a) and (b), the “Minimum Retail Price Provisions”).

Second, each wholesaler must sell a specific product (i.e., brand and bottle/case size) at the same price to all retail customers in the state, and thus cannot discriminate on price among different purchasers. Conn. Gen. Stat. §§ 30-68k, 30-94(a); see *Slimp v. Dep’t of Liquor Control*, 239 Conn. 599, 611–13 (1996) (“[T]he legislature was concerned that there be no favoritism, i.e., no discrimination, in the liquor industry in Connecticut.”). These antidiscrimination provisions include a prohibition on volume or quantity discounts. Conn. Gen. Stat. § 30-63(b); Regs. Conn. State Agencies § 30-6-A29(a) (collectively, with Conn. Gen. Stat. §§ 30-68k, 30-94(a), and 30-63(b), the “Price Discrimination Prohibition Provisions”). These prohibitions mirror similar price-discrimination provisions in Federal antitrust law under 15 U.S.C. § 13 (the “Robinson-Patman Act”) and Connecticut’s state-law equivalent, Conn. Gen. Stat. § 35-45(a).

Third, every month each wholesaler must post a pricing schedule with the Connecticut Department of Consumer Protection stating the bottle, can, and case price that the wholesaler has set for every item offered for sale. Conn. Gen. Stat. § 30-63(c); Regs. Conn. State Agencies § 30-6-B12(a). The wholesaler must sell only

at its posted prices during the following month. Conn. Gen. Stat. § 30-63(c).<sup>3</sup> A wholesaler may, however, amend a posting within four business days to meet a *lower* price posted by another wholesaler. *Id.* Critically (though absent from Petitioner’s summary of the statute), a wholesaler may match a lower price *only* for “the same brand or trade name and of like age, vintage, quality and unit container size.” *Id.* In other words, the statute permits only *intra*-brand price matching, where two or more wholesalers are selling *exactly* the same product in *exactly* the same territory. No *inter*-brand price matching is authorized, leaving vigorous interbrand price competition unimpacted.

## **B. Proceedings Below**

In August 2017, Total Wine filed its Sherman Act preemption complaint against the Challenged Provisions. As Petitioner represented to the district court several times it brought solely a “*facial* challenge to the statute.” Ints.–Resps. App. 78 (May 18, 2017 Hr’g Tr. at 57:8-19 (emphasis added)). The Intervenors–Respondents intervened as defendants in the action. The State and Intervenors–Respondents filed separate motions to dismiss arguing that the Challenged

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<sup>3</sup> Connecticut General Statutes § 30-63(c), together with Regulations of Connecticut State Agencies § 30-6-B12, are hereinafter referred to as the “Post and Hold Provisions.” The Post-and-Hold Provisions, together with the Price Discrimination Prohibition and Minimum Retail Price Provisions, are hereinafter referred to as the “Challenged Provisions.”

Provisions did not meet the standard for facial preemption set forth by this Court in *Norman Williams*.

Following argument, the district court held that none of the Challenged Provisions is preempted by the Sherman Act and dismissed all claims on that basis. Pet. App. B. Applying the facial preemption standard from *Norman Williams*, the court held that Connecticut's Post and Hold and Minimum Retail Price Provisions do not "constitute *per se* violations of the Sherman Act" and thus are not preempted. Pet. App. 52a, 64a. The court also held that the Price-Discrimination-Prohibition Provisions are "unilateral restraint[s] outside the scope of the Sherman Act" and thus not subject to preemption review. Pet. App. 75a. The court rejected as outside the scope of a facial preemption challenge allegations about the provisions' alleged anticompetitive impact that Total Wine sought to inject into the analysis. Pet. App. 43a n.6, 45a.

Following appeal and argument, a three-judge panel of the Second Circuit issued a unanimous decision affirming the dismissal of Total Wine's preemption challenge. Pet. App. A. The Second Circuit articulated the preemption standard from *Norman Williams*, including its key command that "[a] party may successfully enjoin the enforcement of a state statute only if the statute on its face irreconcilably conflicts with antitrust policy." Pet. App. 15a (quoting *Norman Williams*, 458 U.S. at 659). 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.” *Id.* The Second Circuit observed that even if an ordinance required “action [that] would have been a *per se* violation of the Sherman Act” under *Norman Williams*, preemption review is inappropriate if the action is taken “unilaterally” in response to a regulatory command rather than through “concerted action.” Pet. App. 17a (citing *Fisher v. City of Berkeley*, 475 U.S. 260, 267 (1986)).

The Second Circuit reviewed each of the Challenged Provisions under these standards. As to the Minimum Retail Price Provisions, the court observed that they are vertical restraints. Pet. App. 20a–21a. Under *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 882 (2007), vertical restraints implicate the rule of reason, not a *per se* analysis. *Id.* The Second Circuit held that “[t]he 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.” Pet. App. 21a (citing *Norman Williams*, 458 U.S. at 658). As to the Price Discrimination Prohibition Provisions, the Second Circuit held that they likewise are vertical restraints and thus under *Leegin* do not implicate *per se* illegal conduct. Pet. App. 22a. The court also held that they are “unilateral restraint[s]” under *Fisher*. Pet. App. 21a–22a. Thus, the provisions are not subject to preemption. *Id.*

As to the Post and Hold Provisions, the Second Circuit reviewed its decision in *Battipaglia v. New York State Liquor Authority*, 745 F.2d 166, 174–75 (2d Cir. 1984), upholding New York’s “substantially identical”

post-and-hold statute. Pet. App. 23a–28a. The Second Circuit’s decision noted that, in *Battipaglia*, “[t]he 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.’” Pet. App. 28a (quoting *Battipaglia*, 745 F.2d at 175 (quotation marks omitted)). The Second Circuit reaffirmed *Battipaglia*’s prior application of *Norman Williams*, concluding that the precedent had become stronger over time given later decisions of this Court. Pet. App. 34a. It held that the limited disclosure of price information under Connecticut’s Post and Hold Provisions does not “constitute a violation of the antitrust laws *in all cases*.” Pet. App. 26a. Likewise, the requirement to hold prices is on its face just a negative restraint that calls for no action at all, let alone concerted action. Pet. App. 31a–32a. The Second Circuit concluded that this Court’s later decision in *Fisher* offered even more support. In *Fisher*, this Court held that even if a restraint requires conduct that would be *per se* unlawful if taken voluntarily, it cannot be preempted without “concerted action”—i.e., a “contract, combination, or conspiracy” between separate entities. Pet. App. 30a–32a (quoting, respectively, *Fisher*, 475 U.S. at 267, and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553 (2007)).

After the Second Circuit panel unanimously affirmed dismissal of Petitioner’s preemption challenge, Petitioner sought rehearing en banc. By a vote of 7 to 4, the full Second Circuit denied the petition for rehearing en banc. Pet. App. C. Petitioner then filed its Petition to this Court. In it, Petitioner focuses solely on

the Second Circuit’s decision on Connecticut’s Price Discrimination Prohibition Provisions and its Post and Hold Provisions.



## **REASONS FOR DENYING THE PETITION**

### **I. The Second Circuit’s decision did not create or entrench a circuit split.**

Petitioner argues that the Second Circuit’s decision entrenches a circuit split in two regards: First, Petitioner asserts that the Second Circuit’s decision entrenches a “circuit split concerning the validity of” price-discrimination-prohibition provisions. Pet. at 9. Second, Petitioner asserts that the Second Circuit’s decision entrenches a circuit split over preemption of post-and-hold provisions. Pet. at 8–9. In fact, the Second Circuit’s decision did not create a split on either issue and has exacerbated no existing circuit split beyond what this Court has found tolerable for over thirty years.

1. The Second Circuit did not create or entrench a circuit split over the validity of price-discrimination-prohibition provisions. Indeed, there is no circuit split on this question. The Second Circuit and Ninth Circuit have both affirmed that price-discrimination-prohibition provisions are unilateral restrictions that cannot be preempted. Pet. App. 21a–22a; *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874, 898–99 (9th Cir. 2008). Though the Fourth Circuit in *TFWS, Inc. v. Franchot*, 572 F.3d 186, 193 (4th Cir. 2009) (the fourth and final appeal in that case, “*TFWS IV*”) affirmed

the invalidation of Maryland’s price-discrimination-prohibition provision, it did so on procedural grounds, as the state had failed to argue in earlier proceedings that the provision could be severed from the rest of the “bundled” statutory regime that was struck down. *Id.* at 193–95. That procedural ruling was unique to the Fourth Circuit’s decision<sup>4</sup> and presents no genuine split from the Second and Ninth Circuits on the substantive issue of the treatment of price-discrimination-prohibition provisions.

2. The Second Circuit also did not create or entrench a circuit split over the validity of post-and-hold provisions. The chronology of the rulings from the three circuits with post-and-hold decisions confirms this. The Second Circuit was the first circuit to address the issue substantively in its *Battipaglia* decision over 35 years ago, in which it held that New York’s post-and-hold provisions are not preempted by the Sherman Act. 745 F.2d at 175. The Second Circuit has continued to cite *Battipaglia* as good law over the years, most recently in 2010. *E.g.*, *Freedom Holdings, Inc. v. Cuomo*, 624 F.3d 38, 62 (2d Cir. 2010) (citing *Battipaglia* as good law); *Todd v. Exxon Corp.*, 275 F.3d 191, 198 (2d Cir. 2001) (same). In upholding Connecticut’s Post and Hold Provisions here, the Second Circuit simply reached

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<sup>4</sup> By contrast, Petitioner has made clear here that the three statutes need *not* be analyzed collectively. Ints.–Resps. App. 70–71 (May 18, 2017 Hr’g Tr. at 48:14–49:2 (contending that reviewing the provisions “collectively” was not “essential,” but merely a “preferred” framework)).

the same outcome as, and reaffirmed, *Battipaglia*. Pet. App. 28a–34a.

Although the Fourth and Ninth Circuits have reached different outcomes when presented with different post-and-hold statutes, these varying approaches have tolerably coexisted for decades. The Ninth Circuit weighed in with its approach 33 years ago in *Miller v. Hedlund*, 813 F.2d 1344 (9th Cir. 1987), which held that Oregon’s post-and-hold provisions (among others) were preempted by Section 1. After *Miller* was decided, Oregon sought certiorari on the ground that the Ninth Circuit’s decision was purportedly “inconsistent with decisions of other federal courts of appeals”—namely, *Battipaglia* from the Second Circuit. Ints.–Resps. App. 34 (*Miller* Cert. Pet. at 21). This Court denied the petition. Ints.–Resps. App. 41 (Feb. 22, 1988, Order). The Fourth Circuit weighed in next in 2001 in a case that Petitioner’s affiliate brought on a “bundling” theory. See *TFWS, Inc. v. Schaefer*, 242 F.3d 198 (4th Cir. 2001) (“*TFWS I*”). Since that initial Fourth Circuit decision in *TFWS I* almost two decades ago, the circuits’ respective treatment of post and hold has remained the same.<sup>5</sup> Throughout this time, Petitioner and other large retailers and wholesalers have managed to operate, and indeed thrive, nationwide, including in states with extant post-and-hold statutes.

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<sup>5</sup> The Ninth and Fourth Circuits have revisited post-and-hold provisions in later decisions that reaffirmed their prior rulings. *Costco*, 522 F.3d at 885–86; *TFWS IV*, 572 F.3d at 193–95.

This long period of stasis has coincided with robust interbrand competition and a thriving industry. For example, Total Wine opened its first store in 1991, after the Second and Ninth Circuits already weighed in on post and hold. Ints.–Resps. App. 48–49 (Pet. App. Br. at 12–13). Since then, Total Wine asserts that its company has reached national scale, with “more than 100 retail” stores across “approximately 20 states,” including Connecticut. *Id.* Similarly, amicus Southern Glazer’s Wine and Spirits (“Southern Glazer’s”) boasts of doing business “in 44 states” and employing over 20,000 people. Am. Br. at 1. Although the competitive impact of Connecticut’s Post and Hold Provisions is irrelevant for reasons discussed below, *see infra* p. 19–20, there is no basis in fact or law to believe that the Challenged Provisions have interfered with the success of the industry by purportedly decreasing competition in intrabrand pricing among retailers or wholesalers. To the contrary, as this Court recognized in *Leegin*, “the antitrust laws are designed primarily to protect interbrand competition,” 551 U.S. at 895, and “reducing intrabrand competition” “can stimulate interbrand competition,” *id.* at 890.

The Second Circuit’s decision is likely to have a particularly muted impact because of the distinct features of Connecticut’s Post and Hold Provisions. Total Wine has claimed that “Connecticut’s alcohol pricing statute” is distinguishable from other post-and-hold statutes across the country. Ints.–Resps. App. 52 (Pet. App. Br. at 21). Among five statutes posited as potentially similar to Connecticut’s, in prior briefing, Total

Wine distinguished each (including by noting the repeal of the Delaware statute). *Id.* & n.11.

Not bound by Total Wine’s representations in its briefing, amicus Southern Glazer’s now asserts that the Second Circuit’s decision has national importance because other states have similar post-and-hold statutes. These assertions are undercut by its own brief (not to mention Total Wine’s prior representations). Southern Glazer’s identifies only four states outside the Second Circuit that it characterizes as having post-and-hold laws closely analogous to those in Connecticut: Georgia, Michigan, New Jersey, and Oklahoma. Am. Br. at 10. Among those four, Southern Glazer’s identifies only two, Michigan and Oklahoma, that it claims contain the “price matching” features, *id.* at 11–13, that Total Wine (incorrectly) portrays as the source of anticompetitive harm.<sup>6</sup> *See* Pet. at (i) (framing the “question presented” as involving conduct that “mimics the results” of a conspiracy because “wholesalers can match” the posted prices). But Southern Glazer’s errs in its “price matching” assessment for Michigan and Oklahoma.<sup>7</sup> In any event, the fact that Southern

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<sup>6</sup> In prior briefing, Total Wine *distinguished* the Michigan and Oklahoma statutes from Connecticut’s. As to Michigan, Total Wine represented that its statute is different because “that state’s law applies only to wholesale prices; wholesalers neither set nor hold retail prices.” Ints.–Resps. App. 52 (Pet. App. Br. at 21 n.11). As to Oklahoma, Total Wine represented that its regulations “involve only price posting; they neither grant wholesalers control over retail prices nor forbid quantity discounts.” *Id.*

<sup>7</sup> The Michigan regulation that Southern Glazer’s cites on beer (Mich. Admin. Code R. 436.1625) was superseded by statute (Mich. Comp. Laws § 436.1609a) under which beer wholesaler

Glazer’s can identify only two states outside the Second Circuit that it says have post-and-hold statutes with similar features to Connecticut’s (incorrect as that assertion may be), confirms that this is not an issue of national importance.

Southern Glazer’s attempts to buttress its faulty claim of national importance by warning that “the decision is . . . likely to encourage states in other circuits to adopt their own post-and-hold systems.” Am. Br. at 14. Given that the Second Circuit was the first to rule on post and hold and its law has remained the same for over 35 years, it seems unlikely that its latest decision will spark a post-and-hold renaissance. Nor does Southern Glazer’s offer any reason why a circuit’s choice to follow its own well-established precedent would suddenly spur this hypothesized trend. Simply put, Petitioner (and its Amicus) have failed to show that the question of the validity of Connecticut’s unique Post and Hold Provisions “reach[es] to a

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price filings are not publicly available (including to other wholesalers) for a period of one year of the filing. And although the Michigan regulation on the wholesaler price filings for wine is still in effect (Mich. Admin. Code R. 436.1726), the prices filed cannot be changed during a quarterly period except by written order of the Michigan Liquor Control Commission. Likewise, the Oklahoma post-and-hold provision does not provide wholesalers with a universal “price matching” right for each product. Okla. Admin. Code § 45:30-3-7. Rather, wholesalers file a proposed *category* percentage markup by category, such as spirits, with the Commission. Okla. Admin. Code §§ 45:30-3-7(a), (b). In response to the Commission’s summation of proposed category percentage markups, the wholesalers may post an “adjusted price” for a particular product based on the lowest category percentage for that product’s applicable category. *Id.* at § 45:30-3-7(e), (f), (g).

problem beyond the academic or the episodic,” thus rendering review by this Court improvident. *Rice v. Sioux*, 349 U.S. at 74.

## **II. The Second Circuit’s decision adheres to Supreme Court authority.**

Petitioner offers as a second purported basis for granting certiorari that the Second Circuit’s decision conflicts with Supreme Court precedent. That is incorrect. Petitioner presents no argument at all that the Second Circuit’s decision conflicts with the applicable preemption standard from *Norman Williams*. Indeed, the Petition does not even *mention* that governing case.

1. As discussed above, Petitioner’s claims are based exclusively on Connecticut’s laws being *facially* invalid under the Sherman Act. (*See supra* p. 6.) The legal standard for facial review of statutes for preemption by the Sherman Act is set forth in this Court’s decision in *Norman Williams*:

[W]e 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. . . .

A party may successfully enjoin the enforcement of a state statute only if the statute on its face irreconcilably conflicts with federal antitrust policy. . . .

. . . .

[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***. . . . 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.

458 U.S. at 659–61 (citations omitted and emphasis added).

As Petitioner recognized before, this standard from *Norman Williams* presents “[t]he core preemption question.” Ints.–Resps. App. 58 (Pet. App. Br. at 27). All of the preemption cases that Petitioner cites agree on this point. *Fisher*, 475 U.S. at 264–65 (quoting preemption standard from *Norman Williams*); *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 342–43 (1987) (same); *Battipaglia*, 745 F.2d at 173–75 (same); *Costco*, 522 F.3d at 885–86 (same); *TFWS I*, 242 F.3d at 206–07 (same); *Miller*, 813 F.2d at 1348 (same, and stating that “[t]he analytical framework that structures the approach to the antitrust [preemption] issue is set forth in *Rice v. Norman Williams Co.*”); *Canterbury Liquors & Pantry v. Sullivan*, 16 F. Supp. 2d 41, 45 (D. Mass. 1998) (same, and stating that “[t]he standard for determining whether the statute and regulations now at issue are preempted by § 1 of the Sherman Act is set forth in the Supreme Court’s decision in *Rice v. Norman Williams Co.*”); and *Beer & Pop Warehouse v. Jones*, 41 F. Supp. 2d 552, 560 (M.D. Penn. 1999) (same, and including same quote as *Canterbury*).

The Second Circuit’s decision, as discussed above, identified and applied the “core preemption” standard from *Norman Williams*. And its application was correct and consistent with its decision in *Battipaglia*, rendered over 35 years ago. As the Second Circuit held, neither the New York post-and-hold provisions reviewed in *Battipaglia* nor the Connecticut provisions it reviewed here “mandate[] or authorize[] conduct that necessarily constitutes a violation of the antitrust laws in all cases.” Pet. App. 26a (quoting *Battipaglia*, 745

F.2d at 175 (in turn quoting *Norman Williams*, 458 U.S. at 661)). As the court correctly held, price posting involves no more than limited disclosure of price information, conduct not subject to *per se* treatment. Pet. App. 26a. And the requirement to adhere to posted prices is a *negative* restraint that does not compel any individual action, much less concerted action by wholesalers. Pet. App. 31a–32a.

The Petition does not even mention the “core preemption” standard from *Norman Williams*. To state the obvious, Petitioner cannot credibly maintain that the Second Circuit’s preemption decision is inconsistent with this Court’s applicable preemption standard, when it does not even mention that standard. Unchallenged by Petitioner, the Second Circuit’s decision correctly answered “the core preemption question” posed by *Norman Williams*.

**2.** Rather than address the *Norman Williams* preemption question that was actually litigated and decided, Petitioner focuses on factual and legal issues not germane to this case. For example, Petitioner repeatedly asserts that preemption is warranted because of purported “anticompetitive effects” in the form of alleged instances of uniform intrabrand wholesale pricing. Pet. at 7, 9, 10, 14. But whether Connecticut’s Post and Hold Provisions yield any anticompetitive effects, and what those might be, have no role in the applicable preemption standard, and are thus not part of the record. As this Court has stated, “[a] state statute is not preempted by the federal antitrust laws simply because the state scheme might have an anticompetitive

effect.” *Norman Williams*, 458 U.S. at 659 (citations omitted).<sup>8</sup> Rather, the basis of a preemption analysis is the face of the statute, “in the abstract.” *Id.* at 661.

Petitioner’s focus on purported competitive impacts of Connecticut’s liquor laws underscores that the Petition bears no relation to the Second Circuit’s narrow decision applying *Norman Williams*. Moreover, even though alleged anticompetitive effects are irrelevant to the *Norman Williams* analysis, *see supra* p. 17, the purported decrease in intrabrand competition that Petitioner relies on in asserting anticompetitive harm ought, if anything, to have *encouraged* competition by “stimulat[ing] interbrand competition.” *Leegin*, 551 U.S. at 890.

Similarly irrelevant to the applicable *Norman Williams* analysis is Petitioner’s argument that Sherman Act preemption is required for “state laws facilitating unsupervised price-fixing.” Pet. at (i). Whether or not Connecticut’s Post and Hold Provisions facilitate conduct that could violate the Sherman Act is irrelevant. “Facilitation” of anticompetitive conduct is not part of the *Norman Williams* standard, which instead abides preemption only when, judged in the abstract, “the conduct contemplated by the statute is in all cases a *per se* violation.” 458 U.S. at 659; *accord* Ints.–Resps. App. 82 (May 18, 2017 Hr’g Tr. at 61:4–8 (court noting that

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<sup>8</sup> Judge Sullivan’s opinion dissenting from denial of rehearing en banc makes the same mistake, focusing largely on the purported “anticompetitive effects” and “economic realities of a post-and-hold pricing” regime rather than a facial analysis of the statute under the *Norman Williams* standard. Pet. App. 87a–88a.

“facilitat[ion] . . . isn’t in the [*Norman Williams* test”).

3. Petitioner’s reference to purportedly “unsupervised” antitrust violations, Pet. at (i), is inapt. Supervision by a state—or lack thereof—relates solely to the separate legal question of *Parker* immunity, which has never been the issue here. In *Parker v. Brown*, 317 U.S. 341 (1943), this Court, relying on principles of federalism and state sovereignty, held that Sherman Act preemption does not apply to state action even if that action is anticompetitive and violates the Sherman Act. *Id.* at 350–52. Thus, when a state “actively supervise[s]” its clearly articulated policy, it is immune from Sherman Act preemption. *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum*, 445 U.S. 97, 105 (1980) (quotation marks omitted).

4. *Parker* immunity was never litigated below, and for good reason. As reflected in the district court’s summary of the parties’ briefing, and as Petitioner itself recognized, the distinct legal issue of *Parker* immunity is reached only if state statutes irreconcilably conflict with the Sherman Act under *Norman Williams* because they mandate or authorize a *per se* antitrust violation:

Neither the defendants nor any of the intervenors have suggested at this time that Total Wine’s claims should be dismissed at the second step of this analysis. See Opp’n [Petitioner’s Brief] at 12 n.4 (discussing the second step—so-called *Parker* immunity—and defendants’ failure to raise it as grounds for

dismissal). . . . Therefore, the court’s analysis in this Ruling focuses solely on the first step of the above inquiry: determining whether the state statutes mandate or authorize a *per se* antitrust violation.

Pet. App. 45a–46a (quotation marks and citation omitted). Because the motion to dismiss was narrowly addressed to facial preemption under *Norman Williams*, *Parker* immunity was, as stated in the Second Circuit’s decision, “not presented here.” Pet. App. 23a n.13. The absence of *Parker* immunity from the litigation below was no accident. Connecticut’s role in and its supervision of its liquor laws (as well as any Twenty-First Amendment defense that the State may have to preemption) could not be addressed at the motion to dismiss stage without the benefit of a factual record on those issues.

This Court has often stated that, absent exceptional circumstances, it “will not decide questions not raised or litigated in the lower courts.” *City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987) (citing *California v. Taylor*, 353 U.S. 553, 556 n.2 (1957)); *see also Illinois v. Gates*, 462 U.S. 213, 222 (1983) (same); *United States v. Lavasco*, 431 U.S. 783, 788 n.7 (1977) (same); *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 330 (1967) (same). It has long been true that “only in exceptional cases” will this Court review “questions not pressed or passed upon below.” *Duignan v. United*

*States*, 274 U.S. 195, 200 (1927). This is not such an “exceptional case.”<sup>9</sup>

5. Petitioner’s misplaced focus on *Parker* immunity distorts its characterization of the preemption standard in other ways. Significantly, Petitioner’s argument that the Second Circuit’s decision is inconsistent with *324 Liquor* rests solely on a footnote that Petitioner plucks from its discussion of *Parker* immunity. Pet. at 12 (citing *324 Liquor*, 479 U.S. at 345 n.8). But because the Second Circuit’s decision involved no *Parker* immunity issue, it cannot be inconsistent with *Parker* or this Court’s application of *Parker* in cases like *324 Liquor*.

*324 Liquor* is also not instructive because it is inapt and abrogated. *324 Liquor* involved preemption of

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<sup>9</sup> In the rare case when this Court has elected to review an issue not pressed and passed upon below, the unpreserved issue was either not objected to by the respondent in its brief in opposition to certiorari or had been addressed by the court of appeals. See *Kibbe*, 480 U.S. at 260 (discussing *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985)); see also, e.g., *City of St. Louis v. Praprotnik*, 485 U.S. 112, 120 (1988) (declining to dismiss writ where petitioner advanced the same position in district court and where the question “was very clearly considered, and decided, by the Court of Appeals”); *City of Canton v. Harris*, 489 U.S. 378, 383–85 (1989) (declining to dismiss writ where “respondent did not oppose our grant of review . . . based on her contention that these claims were not pressed below” and presentation of issues below was “at least adequate to yield a decision by the Sixth Circuit on the questions presented”). Here, the fact that the Second Circuit did not address *Parker* immunity (noting that the issue was “not presented here,” Pet. App. 23a n.13) is the very reason it is inappropriate to grant certiorari on that question, and the Intervenor–Respondents do object to review of that issue.

vertical pricing arrangements; it had nothing to do with post-and-hold provisions, as Petitioner conceded below. *324 Liquor*, 479 U.S. at 340–50; *accord* Ints.–Resps. App. 89 (May 18, 2017 Hr’g Tr. at 68:1–2 (conceding that “324 [*Liquor*] did not involve a post-and-hold statute”). Moreover, as referenced above, like all of the Court’s decisions preempting alcohol restraints, *324 Liquor* is an abrogated pre-*Leegin* case challenging resale-price maintenance. In *Leegin*, this Court held that resale-price-maintenance restraints, like all vertical restraints, are no longer *per se* illegal and are judged under the rule of reason. *Leegin*, 551 U.S. at 882. Post-*Leegin*, these sorts of resale-price-maintenance schemes are not subject to facial preemption. *Norman Williams*, 458 U.S. at 661 (statutes that “must be analyzed under the rule of reason” are not subject to preemption).<sup>10</sup> The Court’s prior rulings preempting vertical alcohol restraints are thus all abrogated. *See* Pet. App. 30a (Second Circuit making same observation).<sup>11</sup> The Second Circuit’s decision follows the

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<sup>10</sup> Petitioner claims that the Second Circuit’s decision provides for more lenient treatment of horizontal restraints than vertical restraints. Pet. at 16. This is not true. *No* vertical restraints, post-*Leegin*, can be preempted under the *Norman Williams* standard, because they are now all judged under the rule of reason. By contrast, *per se* horizontal restraints are subject to preemption under the *Norman Williams* standard as long as they satisfy that test for irreconcilable conflict.

<sup>11</sup> Petitioner purports to support its radical attempt to erase the concerted-action requirement by citing other pre-*Leegin* preemption cases involving resale-price-maintenance schemes, contending that *Midcal* and *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951) are examples of preemption without concerted action. They are not. As the Second Circuit correctly

Court’s significant narrowing of the scope of Sherman Act preemption through *Leegin*. By contrast, Petitioner’s suggested course of action would represent a radical expansion of the scope of Sherman Act preemption that simply cannot be squared with *Leegin* or this Court’s other decisions.



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held, each of those cases involved preemption of a resale-price-maintenance scheme featuring *agreements* (either express or implied). Pet. App. 30a. Petitioner’s interpretation of footnote 8 in *324 Liquor* as eliminating the concerted-action requirement is implausible because the Court in that case *rejected* the state’s argument that New York’s resale-price-maintenance scheme involved “no contract, combination, or conspiracy, in restraint of trade.” *324 Liquor*, 479 U.S. at 345 n.8 (ellipses and quotation marks omitted). As Petitioner conceded below, judges from both the Fourth Circuit and Ninth Circuit have joined the Second Circuit in being “skeptical” that this interpretation of the footnote “reflect[s] a proper understanding of prior Supreme Court precedent, including *Fisher*.” Ints.–Resps. App. 100 (PFR Brief at 11–12) (citing *TFWS I*, 242 F.3d at 214–15 (Luttig, J., concurring); *Costco*, 522 F.3d at 895 n.17). Despite this well-founded skepticism, the Fourth and Ninth Circuits nevertheless incorrectly felt compelled to follow *324 Liquor* because of perceived material similarity between the challenged statutes in those cases and those at issue in *324 Liquor*. See Ints.–Resp. App. 100 (PFR Brief at 12). In doing so, they reached results fundamentally inconsistent with authority of this Court—both before and after *324 Liquor*—that concerted action is indispensable to Sherman Act liability. *Fisher*, 475 U.S. at 266–67 (emphasizing requirement of concerted action); *Twombly*, 550 U.S. at 553–54 (holding that the Sherman Act prohibits “only restraints effected by a contract, combination, or conspiracy”—i.e., by an unlawful *agreement*—not mere “conscious parallelism” which “is not in itself unlawful” (quotation mark omitted)).

**CONCLUSION**

The lower courts were asked to and did resolve only the narrow issue of applying the *Norman Williams* facial preemption standard to certain aspects of Connecticut's distinct Liquor Control Act. Petitioner does not argue otherwise. This case is emphatically *not* a proper vehicle for addressing broader issues of *Parker* immunity or states' authority under the Twenty-First Amendment, as those matters were not pressed or passed upon below. On the facial preemption issues that *are* properly at issue, the Second Circuit's decision faithfully applied this Court's authority, including *Norman Williams* and *Fisher*, and plowed no new ground. The decision neither creates nor entrenches a circuit split on any issue that hasn't existed tolerably for over thirty years. For these reasons, Intervenor-Respondents request that the Court deny the Petition.

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