No. 06-480

In The
Supreme Court of the United States

LEEGIN CREATIVE LEATHER PRODUCTS, INC.,

Petitioner,

v.

PSKS, INC. DBA KAY'S KLOSET . . . KAY'S SHOES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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BRIEF OF THE AMERICAN ANTITRUST INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*

The American Antitrust Institute ("AAI") is an independent non-profit education, research, and advocacy organization. Its mission is to advance the role of competition in the economy, protect consumers, and sustain the vitality of the antitrust laws. The Advisory Board of AAI, which serves in a consultative capacity, consists of prominent antitrust lawyers, law professors, economists, and business leaders. *See* http://www.antitrustinstitute.org.[1]

SUMMARY OF ARGUMENT

The issue before the Court is whether petitioner or its *amici* have offered a sufficiently compelling reason for overruling the venerable *Dr. Miles* per se rule against minimum resale price maintenance (RPM) in light of Congress's ratification of the rule. They have not. According to petitioner and its *amici*, the main cost of *Dr. Miles* is that manufacturers that wish to adopt RPM for a legitimate purpose (e.g., promotion of services) are forced to use alternative means to achieve that end (e.g., direct payments). But even assuming *arguendo* that RPM can have procompetitive uses in theory, petitioner and its *amici* have offered no evidence that such uses are common or important or that less restrictive alternatives are in fact more costly or less effective. Nor have they indicated the magnitude of any such costs, and there is no reason to think that such costs are significant.

In contrast to the theoretical case offered by proponents for a radical shift in antitrust policy, the reality is that RPM virtually always raises prices to consumers,

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[1] The written consents of all parties to the filing of this brief have been lodged with the Clerk. No counsel for a party has authored this brief in whole or in part, and no person or entity other than AAI or its counsel has made a monetary contribution to the preparation or submission of this brief. The AAI is managed by its Board of Directors, which has approved of this filing. The individual views of members of the Advisory Board may differ from the positions taken by AAI.

prevents more efficient retailers from passing along the savings from their efficiency to consumers, tends to retard innovation in retailing, and often has been used by retailers and manufacturers for anticompetitive ends. Repealing *Dr. Miles* would increase the incidence of anticompetitive RPM and increase business uncertainty. Thus, the conceptual basis of the per se rule remains sound. The distinction between price and nonprice restraints is also valid because nonprice restraints are less likely to impair interbrand competition at the retailer and manufacturer levels and more likely to have procompetitive benefits. In sum, not only is there no compelling basis for reversing *Dr. Miles*, but consumer welfare is better served by a per se rule than a rule of reason, as most antitrust jurisdictions in the world recognize by treating RPM harshly.

I. PETITIONER AND ITS *AMICI* OFFER NO COMPELLING JUSTIFICATION FOR OVERRULING *DR. MILES*

A. *Dr. Miles* Is Firmly Embedded In This Court's Antitrust Jurisprudence And Has Been Ratified By Congress

For nearly a century since *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), this Court has repeatedly and unequivocally held that minimum RPM is per se illegal. Even as the Court has altered the treatment of nonprice vertical restraints in *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), adjusted the contours of the *Colgate* doctrine in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), clarified the boundary between price and nonprice restraints in *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988), and changed the treatment of maximum RPM in *State Oil Co. v. Khan*, 522 U.S. 3 (1997), it has steadfastly adhered to the core of *Dr. Miles*, significantly in respect of the will of Congress. Since 1975, Congress has repeatedly and unequivocally acted to extend and preserve

Dr. Miles.[2] "With the possible exception of merger policy, there is probably no area of antitrust where Congress has displayed such an explicit and abiding intent to set policy for the courts and enforcement agencies as the area of resale price maintenance ('RPM')." H.R. Rep. No. 237, 102nd Cong., 1st Sess. 4 (1991).

Contrary to the arguments of petitioner and the United States, the Court in *Sylvania* did not err when it read the repeal of the fair trade amendments as approval of *Dr. Miles*.[3] The legislative history of the Consumer Goods Pricing Act of 1975 indicates not merely "Congress's awareness of the reality that by repealing the exemption for fair trade laws [it] was remitting RPM to the *Dr. Miles* regime," Brief for the U.S. as Amicus Curiae (U.S. Br.) 21-22, but that Congress specifically intended to outlaw the practice of RPM by restoring *Dr. Miles* as the governing law nationwide. At the hearings, enforcement agency officials testified that RPM was pernicious and should be banned.[4] The committee reports show that the House and

[2] *See* Consumer Goods Pricing Act of 1975, Pub. L. No. 94-175, 89 Stat. 801. After the Reagan Administration's Justice Department sought to overturn *Dr. Miles* in *Monsanto*, Congress passed appropriations measures in 1983, 1985, 1986, and 1987 preventing the Department from using appropriated funds for this purpose. Such measures were no longer needed when the (first) Bush Administration came to office and promised to enforce *Dr. Miles*. *See Speech by Ass't Attorney General James F. Rill*, 57 Antitrust & Trade Reg. Rep. (BNA) 671, Nov. 9, 1989 (stating that the Antitrust Division would not advocate change to the per se rule and would "not hesitate to bring a resale price maintenance case, contingent only on evidence sufficient to establish a genuine resale price conspiracy and facts showing a significant regional impact").

[3] *See* Herbert Hovenkamp, *Chicago and its Alternatives*, 1986 Duke L.J. 1014, 1020 n.34 ("I am persuaded . . . that Congress has sanctioned the per se rule for resale price maintenance, and that we should feel obliged to comply with it until Congress tells us otherwise.").

[4] *See* Fair Trade Laws: Hearings on S. 408 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess. 170-72 (1975) (Senate Hearings) (FTC Chairman Lewis A. Engman testifying that "fair trade laws are little more than anticompetitive price fixing, unadorned with any redeeming features"); *id.* at 172-77 (Thomas E. Kauper, Ass't Attorney General, making

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Senate Judiciary Committees intended to remove the fair trade obstacle to the per se treatment of RPM.[5] And the chief sponsors of the bill articulated the same understanding.[6] Congress was well aware of the theoretical procompetitive uses of RPM, including the promotion of dealer services, yet rejected any exceptions to the per se rule.[7]

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strong case against "resale price fixing" in any circumstances); Fair Trade: Hearings on H.R. 2384 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, 94th Cong., 1st Sess. 109, 121 (1975) (House Hearings) (similar testimony of Keith Clearwaters, Deputy Ass't Attorney General).

[5] S. Rep. No. 466, 94th Cong., 1st Sess. 1 (1975) (Senate Rep.) ("The purpose of the proposed legislation is to repeal Federal antitrust exemptions which permit States to enact fair trade laws [which are] legalized price-fixing . . . Without these exemptions the agreements they authorize would violate the antitrust laws."); *id.* at 2 (repeal "will prohibit manufacturers from enforcing resale prices."); H.R. Rep. No. 341, 94th Cong., 1st Sess. 2 (1975) (House Rep.) ("An agreement between a manufacturer and a retailer that the retailer will not resell the manufactured product below a specified price is . . . *per se* illegal under section 1 of the Sherman Act").

[6] *See* 121 Cong. Rec. 38,049-50 (1975) (Sen. Brooke, chief Senate sponsor: "Fair trade is legalized price fixing. . . . Without [Miller-Tydings and McGuire Acts], these interstate-price fixing conspiracies would be in violation of . . . the Sherman Antitrust Act"); *id.* at 23,659 (Rep. Jordan, chief House sponsor: without the exemptions RPM agreements "would be per se violations of the antitrust laws"); *see also* Statement by President Gerald R. Ford Upon Signing the Consumer Goods Pricing Act of 1975 (law "will make it illegal for manufacturers to fix the prices of consumer products sold by retailers").

[7] The Senate report rejected the dealer services case for RPM as follows: "Opponents were primarily service-oriented manufacturers who claimed retailers would not give adequate service unless they were guaranteed a good margin of profit. However, the manufacturer could solve this problem by placing a clause in the distributorship contract requiring the retailer to maintain adequate service. Moreover, the manufacturer has the right to select distributors who are likely to emphasize service." Senate Rep. 3; *see also* House Rep. 4 ("[T]o the extent that . . . the retailer charges a higher price because he is providing more services to his customers, consumers should have the freedom to choose between paying more for those services and buying nothing but the unadorned product at a lower price from a competitor."); *id.* at 5

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B. The Court Has Set A Very High Bar For Overruling A Long-Standing Statutory Construction Ratified By Congress

"*[S]tare decisis* is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon 'an arbitrary discretion.'" *Patterson v. McLean Credit Union*, 491 U.S. 164, 171 (1989) (quoting The Federalist, No. 78, A. Hamilton). The Court has long held that "considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of legislation." *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977). As Justice Brandeis observed, and this Court has repeatedly quoted: "*Stare decisis* is usually the wise policy because in most matters, it is more important that the applicable rule of law be settled than that it be settled right. This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (dissenting). Accordingly, as Justice Kennedy explained in a statutory case, this Court "will not depart from the doctrine of *stare decisis* without some compelling justification." *Hilton v. S. Carolina Public Ry. Com'n*, 502 U.S. 197, 202 (1991).

The "strong presumption of continued validity that adheres in the judicial interpretation of a statute" applies to cases interpreting the Sherman Act. *Square D Co. v. Niagra Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424 (1986) (declining to overrule *Keogh* doctrine); *see also Illinois Brick*, 431 U.S. at 736-37 (declining to overrule *Hanover Shoe* rule); *Flood v. Kuhn*, 407 U.S. 258, 282-84 (1972) (refusing to overturn prior decisions exempting baseball from the Sherman Act notwithstanding "any inconsistency or illogic in all this" because the "aberration

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(rejecting "new product" exemption); *see also* House Hearings 32 (quoting Bork's efficiency explanation for RPM).

. . . has been with us now for half a century" and Congress "has clearly evinced a desire not to disapprove them legislatively.").

The case for following precedent here is particularly strong because not only has Congress repeatedly acted in this area, its actions could not more clearly validate *Dr. Miles*. By eliminating the fair trade exceptions to *Dr. Miles* that it had written into Section 1, Congress essentially reenacted the law prior to Miller-Tydings, i.e. the law of *Dr. Miles*.[8] To be sure, in *Khan* the Court stated that "the general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act in light of the accepted view that Congress expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition." 522 U.S. at 20-21 (internal quotes omitted). But even if this is correct,[9] the

[8] *See United States v. Board of Comm'rs*, 435 U.S. 110, 134-35 (1978) ("When a Congress that re-enacts a statute voices its approval of an administrative or other interpretation thereof, Congress is treated as having adopted that interpretation, and this Court is bound thereby."); *see also Hubbard v. United States*, 514 U.S. 695, 714 (1995) ("*Stare decisis* has special force when legislators or citizens have acted in reliance on a previous decision") (internal quotes omitted).

[9] Scholars have questioned the extent to which the Court operates as a "free agent" in interpreting the Sherman Act. For a recent critique, *see* Daniel A. Farber & Brett H. McDonnell, *"Is There a Text in this Class?" The Conflict Between Textualism and Antitrust*, 14 J. Contemp. Leg. Issues 619 (2005). In any event, Justice O'Connor's statement that the presumption of validity of statutory precedent is weaker in Sherman Act cases was unsupported and in fact a departure from the Court's decisions in *Square D, Illinois Brick,* and *Flood*. *But see Guardians Ass'n v. Civ. Serv. Com'n*, 463 U.S. 582, 642 n.12 (1983) (Stevens, J., dissenting). Indeed *Illinois Brick* is a leading cite for the "super-strong" presumption of the correctness of statutory precedents. *See* William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 Geo. L. J. 1361, 1368 n.34 (1988). Nor does it follow that the "common law" nature of Sherman Act interpretation should give the Court more leeway to reverse a long-standing precedent. Indeed, the Court in *Maricopa* thought the opposite:

> Our adherence to the *per se* rule [for maximum horizontal price fixing] is grounded not only on economic prediction,

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Court has never suggested that the "strong presumption" of continued statutory validity has any less force with respect to the Sherman Act than other statutes when Congress has legislated in the area in reliance on the Sherman Act precedent and made its intent absolutely clear. *See Square D*, 476 U.S. at 424 ("We are especially reluctant to reject this presumption in an area that has seen careful, intense, and sustained congressional attention.").

C. Congressional Reliance Distinguishes This Case From Other Sherman Act Cases In Which *Stare Decisis* Was Not Decisive

None of the Sherman Act cases in which the Court has overruled one of its precedents has involved any congressional reliance on the precedent. In *Sylvania*, the Court expressly noted that while "Congress recently has expressed its approval of a *per se* analysis of vertical price restrictions by repealing those provisions of the Miller-Tydings and McGuire Acts allowing fair trade pricing at the option of the individual States," "[n]o similar expression of congressional intent exists for nonprice restrictions." 433 U.S. at 51 n.18 (1977). In *Khan*, the Court could "infer little meaning from the fact that Congress has not reacted legislatively to *Albrecht*," and "[i]n any event, the history of various legislative proposals regarding price

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> judicial convenience, and business certainty, but also on a recognition of the respective roles of the Judiciary and the Congress in regulating the economy. . . . Given its generality, our enforcement of the Sherman Act has required the Court to provide much of its substantive content. By articulating the rules of law with some clarity and by adhering to rules that are justified in their general application, however, we enhance the legislative prerogative to amend the law. . . .

Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 354-55 (1982). *See also* Lawrence C. Marshall, "*Let Congress Do It": The Case for an Absolute Rule of Statutory Stare Decisis,* 88 Mich. L. Rev. 177, 223 (1989) (arguing that case for statutory *stare decisis* for common law-like statutes is *stronger* than for other statutes because "the lawmaking role of the court is at its pinnacle").

fixing seems neither clearly to support or denounce the *per se* rule of *Albrecht*." 522 U.S. at 19.[10]

In *Copperweld Corp. v. Ind. Tube Corp.*, 467 U.S. 752 (1984), there was no suggestion that Congress (or anyone else) had acted in reliance on the intra-enterprise conspiracy doctrine, nor any hint that Congress approved the doctrine. And in *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 126 S. Ct. 1281 (2006), the Court reversed the presumption of market power in patent tying antitrust cases precisely because Congress had made such a change in patent misuse cases. Thus, the Court was acting in deference to congressional will, not against it. *See id.* at 1290-91 ("While the 1988 amendment does not expressly refer to the antitrust laws, it certainly invites reappraisal of the *per se* rule announced in *International Salt*.").

In contrast, in *Square D*, where congressional reliance was strong, the Court declined to overrule *Keogh v. Chicago & N.W. Ry. Co.*, 260 U.S. 156 (1922), which barred treble damage actions to remedy price fixing conspiracies in connection with filed rates. As here, the United States as *amicus curiae* urged that *Keogh* be overruled because the rationales of the decision had been undermined by subsequent developments and rendered the "decision obsolete and its continued application anomalous."[11] Judge

[10] The Consumer Goods Pricing Act of 1975 repealing the fair trade exemptions was not directed at maximum RPM. *See* Brief for the U.S. and F.T.C. as Amici Curiae Supporting Reversal, *State Oil Co. v. Kahn*, 1997 WL 163852 *18 n.7 (U.S. *Khan* Br.) (noting that the "congressional approval of per se analysis inferred by the Court [in *Sylvania*] from repeal of the federal antitrust exemptions for state 'fair trade' laws would not extend to maximum price restraints, because the sort of 'fair-trade pricing' . . . covered by those laws . . . typically involved only the setting of minimum prices.").

[11] Brief for the U.S. as Amicus Curiae Supporting Petitioners, 1985 WL 670055 (U.S.) *7. And, as here, the United States argued that congressional action in the area did not indicate that Congress "intended to fix by legislative fiat the balance this Court struck in 1922" particularly in light of the "long tradition of dialogue between the judicial and legislative branches that has served to perfect and preserve the vitality of the antitrust laws." *Id.* at *16 & n.21. The United States

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Friendly, writing for the Second Circuit also thought that the reasoning of *Keogh* "outdated" and that "[t]he case for reaching a conclusion contrary . . . is particularly strong in the light of recent statutes which rely increasingly on competition rather than regulation to insure the reasonableness of rail and motor carrier rates." 760 F.2d 1347, 1349, 1354 (2d Cir. 1985). The Supreme Court essentially agreed, but nonetheless declined to overrule *Keogh*, stating:

> Even if it is true that these developments cast Justice Brandeis' reasons in a different light, however, it is also true that the *Keogh* rule has been an established guidepost at the intersection of the antitrust and interstate commerce statutory regimes for some 6 1/2 decades. *The emergence of subsequent procedural and judicial developments does not minimize* Keogh'*s role as an essential element of the settled legal context in which Congress has repeatedly acted in this area.*

476 U.S. at 423 (emphasis added). The Court concluded, "If there is to be an overruling of the *Keogh* rule, it must come from Congress, rather than this Court." *Id.* at 424.

* * * *

Petitioner and its *amici* fail to come to grips with the implications of congressional action on the *stare decisis* question, treating them as independent issues. Thus, having established that congressional action does not *mandate* the per se rule, the United States goes on to suggest that *stare decisis* does not justify retention of *Dr. Miles* because it is bad policy and does not comport with *Sylvania's* treatment of nonprice restraints (even though the Court in *Sylvania* thought different treatment was appropriate). But the point is that congressional approval bolsters the case for *stare decisis* such that only the most compelling reasons can justify reversal. The United States asserts, "Congress could have buttressed the *Dr. Miles* rule

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also emphasized the fact that the *Keogh* rule was a "judicially-crafted immunity," *id.*, thus suggesting that the Court had ample leeway to reverse course.

directly, and more to the point, retains the full ability to address RPM legislatively. If *Dr. Miles* cannot survive as a matter of *stare decisis* . . . it should no longer skew any congressional debate concerning RPM." Br. 22. This is exactly backwards. The doctrine of *stare decisis* in statutory cases ensures that congressional authority to amend the law is preserved. *See Maricopa*, 457 U.S. at 354; *see also Neal v. U.S.*, 516 U.S. 284, 295-96 (1996) ("Were we to alter our statutory interpretations from case to case, Congress would have less reason to exercise its responsibility to correct statutes that are thought unwise or unfair.").

D. Federal And State Enforcers Continue to Rely On The Per Se Rule To Bring Cases Against Vertical Price Fixing And Related Conduct

In reversing *Albrecht*, the Court in *Khan* relied in part on the fact that "*Albrecht* has little or no relevance to ongoing enforcement of the Sherman Act." 522 U.S. at 18; *see also Copperweld*, 476 U.S. at 777 & n.25; *Hubbard*, 514 U.S. at 713. In contrast, the Justice Department, FTC, and the States continue to rely on *Dr. Miles* to bring cases against RPM and related conduct.[12] Moreover, the federal

[12] Recent FTC cases include: *In re Nintendo of America Inc.*, 114 F.T.C. 702 (1991), *In re Kreepy Krauly USA, Inc.*, 114 F.T.C. 777 (1991), *In re The Keds Corp.*, 117 F.T.C. 389 (1994), *In re Reebok International, Ltd.,* 120 F.T.C. 20 (1995), *FTC v. Onkyo U.S.A. Corp.*, 1995-2 Trade Cas. (CCH) ¶71,111 (D.D.C. 1995), *In re New Balance Athletic Shoe, Inc.*, 122 F.T.C. 137 (1996), *In re American Cyanamid Corp.*, 123 F.T.C. 1257 (1997), *In re Nine West Group, Inc.*, 2000 FTC LEXIS 48 (2000), and *In re Time Warner, Inc.*, 2000 FTC LEXIS 40 (2000) (minimum advertised price agreement). DOJ cases include: *U.S. v. Canstar Sports USA, Inc.*, 1993-2 Trade Cas. (CCH) ¶70,372 (D. Vt. 1993), *U.S. v. California SunCare, Inc.*, 1994-2 Trade Cas. (CCH) ¶70,843 (C.D. Cal. 1994), *U.S. v. Playmobil USA, Inc.*, 1995-1 Trade Cas. (CCH) ¶71,000 (D. D.C. 1995), *U.S. v. Anchorshade, Inc.*, 1996-2 Trade Cas. (CCH) ¶71,640 (S.D. Fla. 1996), and *U.S. v. Brush Fibers, Inc.*, 1997-2 Trade Cas. (CCH) ¶71,915 (E.D. Pa. 1997). The numerous cases brought by the States are identified in their *amicus* brief.

and state enforcement agencies, on a bipartisan basis, have invoked the per se rule in their guidelines and enforcement agendas.[13]

II. THE CONCEPTUAL UNDERPINNINGS OF THE PER SE RULE REMAIN SOUND

Petitioner and its *amici* assert that the per se rule is not appropriate for minimum RPM because there is a consensus among economists that RPM can sometimes be procompetitive, and the per se rule is reserved for conduct that is "always" or "almost always" anticompetitive. However, that is not the test that the Court applied in either *Sylvania* or *Khan*. Indeed, the Court in *Sylvania* suggested – and modern decision theory dictates – that the proper focus is not simply on the frequency with which RPM is anticompetitive or procompetitive, but also on the magnitude of the harms or benefits and, given error costs, whether an alternative rule would generally improve consumer welfare and the administration of the antitrust laws. In *Sylvania*, Justice Powell stated:

> *Per se* rules . . . require the Court to make broad generalizations about the social utility of particular commercial practices. The probability that anticompetitive consequences will result from a practice *and the severity of those consequences*

[13] *See* Dept. of Justice and F.T.C., *Antitrust Guidelines for the Licensing of Intellectual Property* §5.2 (April 6, 1995) ("the Agencies will enforce the per se rule against resale price maintenance in the intellectual property context"); *cf. Illinois Tool Works*, 126 S. Ct. at 1292-93 (finding it significant that Guidelines did not follow presumption of market power in tying cases). It is noteworthy that two of the current FTC commissioners dissented from the FTC's decision to join the *amicus* brief of the United States. *See* An Open Letter to the Supreme Court of the United States from Commissioner Pamela Jones Harbour (Feb. 26, 2007), at http://www.ftc.gov/speeches/harbour.htm. Moreover, prior agency support for *Dr. Miles* has been bipartisan. *See, e.g., Interview With Former Assistant Attorney General James F. Rill*, 63 Antitrust & Trade Reg. Rep. (BNA) 254 (Aug. 27, 1992) (favoring "a per se illegality principle applied to resale price maintenance").

> must be balanced against its procompetitive consequences. Cases that do not fit the generalization may arise, but a per se rule reflects the judgment that such cases are not sufficiently *common or important* to justify the time and expense necessary to identify them.

433 U.S. at 50 n.16 (emphasis added).

"It is thus not enough to suggest that a class of restraints is sometimes or even often beneficial or harmful. The critical questions are always ones of frequency and magnitude relative to the business and legal alternatives." 8 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶1628b, at 292 (2d ed. 2004).[14] As documented below, there is strong evidence that RPM can have, and often has had, significant anticompetitive effects. Abandoning the per se rule will inevitably mean an increased incidence of anticompetitive RPM, as well increased uncertainty for business and greater litigation expenses, particularly if the Court adopts an unstructured rule of reason in place of the per se rule. At the same time, there is no evidence that the *Dr. Miles* rule harms consumer welfare. Petitioner has not shown that procompetitive uses of RPM are common or important nor that less restrictive alternatives are more costly or less effective. In short, even if the Court were approaching the issue *de novo*, there is ample reason for having a per se rule against minimum RPM, as most countries do.[15]

[14] *See also* Arndt Christiansen & Wolfgang Kerber, *Competition Policy With Optimally Differentiated Rules Instead of "Per Se Rules vs Rule of Reason"*, 2 J. Comp. L. & Econ. 215, 238 (2006) (explaining "error cost approach" in law and economics, and observing that to justify abandoning prohibition of RPM, "it is not sufficient to show that that there are cases in which resale price maintenance can lead to positive welfare effects").

[15] Many scholars concur. *See, e.g.*, Robert Pitofsky, *In Defense of Discounters: The No-Frills Case for a Per Se Rule Against Vertical Price Fixing*, 71 Geo. L. J. 1487, 1495 (1983) (Pitofsky); Robert Pitofsky, *Are Retailers Who Offer Discounts Really "Knaves"?: The Coming Challenge to the* Dr. Miles *Rule,* Antitrust, Spring 2007 (forthcoming); Jean Wegman Burns, *Vertical Restraints, Efficiency and the Real World*, 62

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A. The Anticompetitive Effects Of RPM Are Significant

1. **Higher prices.** The function of RPM is to raise resale prices to consumers and there is no dispute that RPM generally has that effect. *See* 8 Areeda & Hovenkamp ¶1604b, at 40 (RPM "tends to produce higher consumer prices than would otherwise be the case. The evidence is persuasive on this point."). This is enough to make it competitively suspect, *see National Soc'y of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978) ("[p]rice is the 'central nervous system of the economy'") (quoting *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 n.59 (1940)), and was the main reason Congress repealed the fair trade laws.[16] Studies of the fair trade era

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Ford. L. Rev. 597 (1993) (advocating retention of *Dr. Miles* rule); David F. Shores, *Vertical Price-Fixing and the Contract Conundrum: Beyond* Monsanto, 54 Ford. L. Rev. 377 (1985) (same); *see also* Edward Iacobucci, *The Case for Prohibiting Resale Price Maintenance*, 19 World Comp. L. & Econ. Rev., Dec. 1995, at 71, 101 (Iacobucci) (advocating per se rule because "the number of cases where RPM is efficient will probably be rather small," "suitable alternatives exist that do not involve price setting," and "the cost of a rule-of-reason review is likely to be significant"). This is in contrast to the scholarly commentary on *Albrecht* and *Schwinn*, the overwhelming consensus of which was critical.

[16] The 1975 Act itself is titled, "An act to Amend the Sherman Antitrust Act to provide lower prices for consumers." The significance of low prices to the Court's vertical restraints jurisprudence was confirmed by *Khan*, where the Court reiterated that "[l]ow prices . . . benefit consumers regardless of how those prices are set," and "condemnation of practices resulting in lower prices to consumers is especially costly because cutting prices to increase business often is the very essence of competition." 522 U.S. at 15 (internal quotes omitted). Thus, the Court found that the per se rule against maximum RPM could not be sustained because maximum RPM was used to keep consumer prices low, notwithstanding that in some cases the prices might be set too low for dealers to offer consumers essential or desired services. As one member of the Court noted at the *Khan* oral argument, the distinction between maximum RPM and minimum RPM is that "the one, means the consumer pays low prices; in the other, high prices. Where the consumer pays high prices, that's likely to be bad. Where the consumer pays lower prices, that's likely to be good." Trans. of Oral Argument, *State Oil Co. v. Kahn*, 1997 U.S. Trans. LEXIS 81 (Oct. 7,

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show that prices of items subjected to fair trade were significantly higher in states where fair trade was permitted than in states where RPM was illegal, and that fair trade cost consumers several *billion* dollars a year. *See* House Rep. 3; *see also* F.M. Scherer, *Comment on Cooper et al.'s "Vertical Restrictions and Antitrust Policy"*, 1 Comp. Policy Int'l, Autumn 2005, 65, 72-74 (reviewing studies showing substantial consumer savings from termination of RPM in light bulb, retail drug, blue jeans, and other sectors). More recently, music companies' efforts to restrain resale prices of CDs was estimated by the FTC to have cost consumers as much as $480 million. *See* F.T.C., *Record Companies Settle FTC Charges of Restraining Competition in CD Music Market*, May 10, 2000.[17]

2. **Reduced innovation and efficiency in retailing.** In addition to raising prices, RPM has a tendency to retard innovation and efficiency in retailing. *See* Robert L. Steiner, *How Manufacturers Deal With the Price-Cutting Retailer: When are Vertical Restraints Efficient?*, 65 Antitrust L.J. 407, 424 & n.47 (1997) (Steiner) ("growth of . . . more efficient new retailing forms often has been seriously

1997). To be sure, this Court in *Business Elecs.* noted that "all vertical restraints . . . have the potential to allow dealers to increase 'prices' and can be characterized as intended to achieve just that," 485 U.S. at 728, but in fact nonprice restraints often are *not* intended to increase price and always permit the retailer to engage in price competition with competing brands. *See infra.*

[17] Petitioner and its *amici* argue that preserving "dealer freedom" cannot justify the *Dr. Miles* rule. Plainly, the principal concern of Congress in repealing the fair trade laws was to protect consumers, and *Khan* recognized that dealer freedom to set high prices could not trump consumers' interests in low prices. But dealer freedom to compete with lower prices is another matter, and was recognized by Congress as an interest deserving protection. *See* House Rep. 3 ("Some retailers prefer to try to enlarge their share of the market by competing vigorously in price – precisely the sort of behavior encouraged by our antitrust laws."); *see also* Thomas B. Leary, *Freedom as the Core Value of Antitrust in the New Millennium*, 68 Antitrust L. J. 545, 552 (2000) ("dealer freedom is a protected value, but only along with the freedom of other actors").

retarded by their inability to obtain well-known manufacturers' brands, free of RPM"); 8 Areeda & Hovenkamp ¶1632c4, at 320 ("When resale prices are not fixed, price competition among dealers favors the expansion of those with efficient scale and methods, thus lowering the cost of distribution."); Lawrence A. Sullivan & Warren S. Grimes, *The Law of Antitrust: An Integrated Handbook* §6.3a2, at 335 (2d ed. 2006) ("Preserving entry opportunities for new retailers and new retailing approaches is a critical component to the dynamic growth of our economy. Intrabrand competition serves this goal by preserving one of the new entrant's most competitive tools: the ability to discount popular branded items that draw customers."). *See also* Brief of *Amicus Curiae* Consumer Federation of America 5-11.

3. **Protection of retailer interests.** Petitioner and its *amici* suggest that the obvious anticompetitive effects of RPM should be ignored because a manufacturer ordinarily benefits from low resale prices; hence if the manufacturer adopts RPM, it must believe it is necessary to achieve distribution efficiencies. That is not the case. If a manufacturer adopts RPM at the behest of its retailers, then this presumption evaporates. *See* Brief for William S. Comanor & Frederic M. Scherer as *Amici Curiae* 8 ("[T]here are no arguments in economic analysis supporting restraints arising from distributor actions or pressures. In such circumstances, RPM and similar restraints lead to higher consumer prices with no demonstrated redeeming values. . . . "); *Toys "R" Us, Inc. v. F.T.C.*, 221 F.3d 928, 938 (7th Cir. 2000) ("the rationale for permitting restricted distribution policies depends on the alignment of interests between consumers and manufacturers. Destroy that alignment and you destroy the power of the argument.") (internal quotes omitted). The United States insists that "RPM generally emanates from the *manufacturer*," U.S. Br. 18, but that assertion is belied by the historical record. As Professors Areeda and Hovenkamp conclude, "the Court's perception [in *Dr. Miles*] that dealer power may be the predominant explanation for much resale price maintenance may have been accurate."

8 Areeda & Hovenkamp ¶1620c4, at 217; *see also id.* ¶1604a, at 35 ("[M]anufacturers have often restrained intrabrand competition – especially through resale price maintenance – not to achieve more effective distribution but rather to appease dealer interests in excess profits or the quiet life.").

The retailer power explanation for RPM does not rely on the existence of a retailer cartel, or even tacit retailer collusion.[18] Rather, "[a] manufacturer might be forced to restrain distribution in order to appease one or more individually powerful dealers," 8 Areeda & Hovenkamp ¶1604d2, at 47, or may adopt RPM based on the calculation that it has more to lose from its incumbent high-cost retailers than to gain from emerging lower cost retailers.[19]

[18] Thus the contention by petitioner and its *amici* that the empirical evidence (essentially three reviews of litigated cases) does not suggest that minimum RPM often facilitates dealer cartels is beside the point. Further, the contention simply ignores that "[a] wealth of history shows that dealers have attempted to use RPM imposed by suppliers to facilitate horizontal dealer collusion." Herbert Hovenkamp, *Federal Antitrust Policy* 451 (3rd ed. 2005); *see* Thomas R. Overstreet Jr., *Resale Price Maintenance* 15 n.1 (FTC 1983) (explaining that "the literature contains numerous examples where analysts have attributed the existence of RPM to pressures from organized trade groups, rather than to manufacturers' attempts to deal with 'free-rider' problems," citing Palamountain, Bowman, Yamey, and Hollander). Professor Hovenkamp criticizes the conclusions about collusion drawn from studies of litigated RPM cases because, in addition to the fact that the studies do not consider tacit collusion, "litigated cases probably represent a skewed sample" (i.e., are more marginal than the overall pool of cases) and plaintiffs had no need to allege collusion "since RPM is independently illegal." Hovenkamp, *supra*, 464 & n.19; *see also* Iacobucci 96 (similar criticism).

[19] *See* Steiner 426; *see also* 8 Areeda & Hovenkamp ¶1604d3, at 48, 49 ("Multibrand dealers' ability to substitute other brands gives the dealers considerable leverage."); William S. Comanor, *The Two Economics of Vertical Restraints*, 21 Sw. U. L. Rev. 1265, 1276-81 (1992) (monopsony power arises from pervasive economies of scope in distribution sector); *cf. Toys "R" Us*, 221 F.3d at 930 (large toy manufacturers acceded to demands of Toys "R" Us to restrict distribution to lower margin warehouse clubs because manufacturers felt they could not find other retailers to replace it).

The increasing concentration of retail markets in recent years and rise of buyer power suggests that the risks of retailer-induced RPM have only increased since fair trade was repealed.[20]

4. **Restricted interbrand competition.** The assumption that manufacturers have the same interest as consumers in low reseller prices is also belied by manufacturers' incentive to adopt RPM in order to protect their own wholesale margins. Retail discounting is often harmful to the manufacturer because it puts pressure on the manufacturer to reduce its wholesale prices. *See* 8 Areeda & Hovenkamp ¶1606c, at 85-86.[21] Even without dealer pressure, it is widely recognized that RPM may be used to restrict interbrand competition by facilitating coordinated pricing by manufacturers. Petitioner and its *amici* acknowledge that RPM might be used to facilitate a cartel at the manufacturer level, *see* Brief of *Amici Curiae* Economists 13 (Econ. Br.) (objection "had some traction historically"), but claim that this is not likely to be common and

[20] To be sure, the Court in *Business Elecs.* stated that "[r]etail market power is rare, because of the usual presence of interbrand competition and other dealers," 485 U.S. at 727 n.2, but this is difficult to square with current realities. *See, e.g.*, Deloitte, *2007 Global Powers of Retailing*, Stores, Jan. 2007, at 2-G8 (combined sales of ten largest retailers worldwide has grown to nearly 30% of total retail sales of top 250 retailers); OECD, *Buying Power of Multiproduct Retailers* 7 (1999) ("last twenty years have seen momentous changes in retail distribution including significant increases in concentration").

[21] *See also* Steiner 441-42 (RPM may be used to tame the exercise of countervailing retail power); David Gilo, *Retail Competition Percolating Through to Suppliers and the Use of Vertical Integration, Tying, and Vertical Restraints To Stop It*, 20 Yale J. Reg. 25 (2003) (explaining how RPM offsets manufacturer's incentive to offer selective price cuts to distributors); *e.g.*, *In re Time Warner, Inc.*, 2000 FTC LEXIS 40 (2000) (music companies' restriction on resale prices designed to shore up wholesale prices); *accord* S. Robson Walton, *Antitrust, RPM, and the Big Brands: Discounting in Small-Town America (II)*, 15 Antitrust L. & Econ. Rev. No. 2, at 11, 16 (1983) (Wal-Mart senior executive stating "I don't have any question but that competitive pricing at the retail level creates more pressure on manufacturers' factory prices than is present when they're able to set retail prices").

in any event may be controlled by the per se rule against horizontal price fixing. However, RPM can be used as a facilitating device not only to enforce an unlawful cartel, but to dampen price competition among oligopolistic manufacturers. *See* 8 Areeda & Hovenkamp ¶1606d-f, at 86-92 (RPM reinforces manufacturer coordination, whether express or tacit, by reducing utility of wholesale price cuts and increasing visibility of prices; "danger is more than theoretical").[22]

Petitioner and its *amici* contend that the existence of interbrand competition will prevent the exercise of intrabrand market power by retailers, quoting *Sylvania* to that effect. *See* 433 U.S. at 52 n.19. Of course, *Sylvania* nonetheless upheld the per se rule for RPM. In any event, the existence of interbrand competition obviously does not check intrabrand market power when RPM is itself used to restrict interbrand competition. Moreover, it is commonly understood by economists that neither retailers nor manufacturers will engage in RPM without some interbrand market power.[23]

[22] Again, the reliance by petitioner and its *amici* on three empirical studies of litigated cases that conclude that RPM has not been frequently used to support a manufacturer's *cartel* is beside the point. None of the studies addresses whether RPM may have been used to facilitate oligopoly pricing. And even as to cartel facilitation, the studies are flawed. *See supra* note 18; *see also* 8 Areeda & Hovenkamp ¶1606f, at 91 (criticizing Ornstein study). Moreover, petitioner and its *amici* ignore other evidence that RPM has often been used in conjunction with manufacturer cartels. *See* Overstreet, *supra*, at 22 ("The economics literature contains several examples of possible collusion among manufacturers which may have been facilitated by RPM."). For a recent example, *see* Dept. of Justice, *Massachusetts Tampico Fiber Distributor Charged in Price Fixing Conspiracy*, Aug. 29, 1996 ("textbook example of a cartel among producers enhanced and strengthened by a resale price agreement").

[23] *See* Ward Bowman, Jr., *The Prerequisites and Effects of Resale Price Maintenance*, 22 U. Chi. L. Rev. 825, 849 (1955) ("Price maintenance appears to be incompatible with an assumption of pure competition among both sellers and resellers."); 8 Areeda & Hovenkamp ¶1632e2, at 324-25 ("most products subject to RPM are sufficiently differentiated to enjoy greater pricing discretion than is possible for perfectly competitive products"); *see also* Sullivan & Grimes §7.2b, at

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B. The Procompetitive Uses Of RPM Are Not Common Or Important

Against the history of the use of RPM for anticompetitive purposes, petitioner and its *amici* offer theories under which RPM *could* be procompetitive. Particularly in the context of overturning a keystone antitrust precedent, the Court should insist on evidence that petitioner's theories are common explanations for real world events. However, the few empirical studies cited provide minimal support for procompetitive explanations, as the States' amicus brief demonstrates, and no evidence that less restrictive alternatives would not serve equally as well in the limited instances where procompetitive explanations are likely.

1. **Free-rider argument.** Petitioner and its *amici* focus primarily on the "free rider" theory, contending that RPM can benefit consumers because the higher prices may induce retailers to provide pre-sale services that promote interbrand competition. This "modern" economic theory (dating back to Telser in 1960) was well known to Congress in 1975 and the Court in *Sylvania*, but nonetheless was rejected as a basis for permitting RPM.[24] As Professors Comanor and Scherer point out, "there is skepticism in the economic literature about how often [free riding] occurs."[25] Moreover, as *amici* economists

379 (the more effective a vertical restraint is in differentiating a brand, the greater the *reduction* in interbrand competition).

[24] *See supra* note 7. The suggestion by the United States and CTIA that the free-rider problem has been exacerbated by the growth of Internet commerce, *see, e.g.,* U.S. Br. 13, illustrates the weakness of the free rider argument, as the growth of Internet commerce has only increased the efficiency of retail markets and increased sales of "bricks and mortar" retailers. *See, e.g.,* Kortney Stringer, *Style & Substance: Shoppers Who Blend Store, Catalog and Web Spend More*, Wall St. J., Sept. 3, 2004, at A7 ("After initial worries that the Internet would steal sales from stores, retailers now are realizing that just the opposite is happening.").

[25] Comanor & Scherer Br. 6; *see also* F. M. Scherer & David Ross, *Industrial Market Structure and Economic Performance* 552 (3rd ed. 1990) ("relatively few products qualify . . . under Telser's free-rider theory"); 8 Areeda & Hovenkamp ¶1601e, at 13 ("[U]nrestrained intrabrand competition does not lead to substantially detrimental free

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Klein and Murphy have noted elsewhere, the standard free-rider theory for RPM is "fundamentally flawed" because it is based on "the unrealistic assumption that sole avenue of nonprice competition available to retailers is the supply of the particular services desired by the manufacturer."[26] The "quality certification" version of the free-rider theory, which has limited applicability on its own terms, is similarly flawed.[27] Furthermore, even if RPM is used to prevent free riding and increase output, while it may be profit-maximizing for the manufacturer, there is no *a priori* reason to believe that consumers as a whole benefit because most consumers may prefer the lower-priced product without the services. Comanor & Scherer Br. 4-5; *see also* Econ. Br. 10 (noting that Scherer & Ross have shown "that RPM may reduce both consumer and social welfare under a plausible hypothesis regarding the impact on demand for the product").

2. **Other "procompetitive" theories.** Petitioner and its *amici* maintain that RPM can enhance interbrand competition even without free riding because "RPM provides retailers with an incentive to make non-price sales efforts that attract customers away from other

riding when dealers provide no significant services (such as drugstores selling toothpaste), the services they do provide cannot be utilized by customers who patronize other dealers (luxurious ambience), the services are paid for separately (post-sale repair), the services provided are not brand specific and are fully supported by a wide range of products (high-quality department store), the services can be provided efficiently by the manufacturer (advertising), or a sufficient number of consumers patronize the dealers from whom they receive the service."); *id.* ¶1611f, at 134 ("for most products, low-service discounting dealers do not impair the viability of full-service dealers; both exist side by side").

[26] Benjamin Klein & Kevin Murphy, *Vertical Restraints as Contract Enforcement Mechanisms*, 31 J. Law & Econ. 265, 266 (1988) ("No matter how large a margin is created by resale price maintenance, there appears to be no incentive for competitive free-riding retailers to supply the desired . . . services.").

[27] *See* Iacobucci 80-82; *see also* 8 Areeda & Hovenkamp ¶1613g, 156-65 (quality certification theory is "relatively weak" largely because elite dealers' services are usually not brand specific and RPM in this context may well reflect dealer power).

brands." U.S. Br. 15. The logic of the non-free-rider theories is not obvious because, absent free riding, the retailer has every incentive to offer services that consumers prefer.[28] Furthermore, insofar as higher retailer margins induce multibrand retailers to undertake nonprice sales efforts to favor one brand over another, the result is generally *anticompetitive*, not procompetitive. *See* 8 Areeda & Hovenkamp ¶1614, at 165-71 (rejecting dealer "goodwill" as justification for RPM; providing multibrand retailers with higher margin to push particular brand leads to deception of consumers and reflects retailer power); Sullivan & Grimes §6.3c2, at 343.

3. **Less restrictive alternatives.** Any procompetitive effects of RPM can be achieved by less restrictive means that do not prevent efficient retailers from passing on the benefits of their efficiency to consumers. *Amici* economists recognize that manufacturers may curtail free riding by other means, and that where such means are available, "RPM may not offer an incremental benefit to interbrand competition that would offset the diminution of intrabrand competition." Econ. Br. 9. The United States apparently agrees.[29] The most obvious way to ensure desired retailer services is to pay retailers for performing those services. *See Toys "R" Us*, 221 F.3d at 933, 938

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[28] Also, Klein and Murphy's "contractual fidelity" theory, Winter's "inter-retailer v. product margin" theory, and Deneckere et al.'s "demand uncertainty" theory suffer from the limitation that the theories have neither been shown to be of significance in the real world nor that the concerns they address could not be resolved equally as well by techniques other than RPM. *See* Iacobucci 84-89; *see also* Ittai Paldor, *Rethinking RPM: Did the Courts Have it Right All Along?* 52-72, 206-15 (Working Paper 2007) (Paldor), at http://papers.ssrn.com.

[29] *See* U.S. Br. 23 ("the per se prohibition against RPM does not prevent manufacturers from engaging in other conduct that achieves similar results"); *see also* U.S. *Khan* Br. *18 n.8 ("in the case of vertical minimum price fixing, suppliers' stated concerns (such as inducing dealers to provide adequate point-of-sale services) could often be addressed directly in a distribution agreement without reference to price (by, for example, requiring the distributor to provide a certain level of facilities or services to its customers)").

(rejecting free-rider argument because services performed by retailer, such as advertising, warehousing and full-line stocking, were compensated by manufacturer). Petitioner has failed to demonstrate that these alternatives have proven to be inadequate or costly.[30]

C. Having Different Rules For Price And Nonprice Restraints Makes Sense

"It is . . . entirely reasonable to regard resale price maintenance as a more pervasive threat to competition than nonprice restraints." 8 Areeda & Hovenkamp ¶1630b, at 303. "Nonprice restraints fulfill a wider range of potentially legitimate objectives and threaten fewer harms to competitive interests" than RPM. *Id.* 302. The Court in *Sylvania* distinguished price and nonprice vertical restraints on the ground that RPM "almost invariably" reduces interbrand competition. 433 U.S. at 51 n.18 (quoting Justice Brennan's concurring opinion in *White Motor*). Indeed, RPM *is* more likely than nonprice restraints to restrict interbrand competition at both the

[30] *See* Steiner 427-29. The Robinson Patman Act is no impediment to reimbursing retailers for services that benefit the supplier. *See* Richard M. Steuer, *Dysfunctional Discounts,* Antitrust, Spring 2005, at 75, 79. *Amici* economists maintain that paying dealers for services may not be as efficient as RPM "*under some circumstances*" because "it may be difficult to specify completely all of the services that the retailer must perform and the level that the retailer must perform them," or because it is "possible that the retailer, rather than the manufacturer, knows which retail-level services will be the most effective in maximizing the competitiveness of the product, or that the most effective services will be discovered only through experience with the market and will be more apparent to the retailer than to the manufacturer." Econ. Br. 9 (emphasis added). However, no evidence is offered as to empirical relevance of these possibilities. Moreover, merely raising retailer margins through RPM – without contractual service requirements – is generally ineffective in curtailing free riding. *See supra* note 26. It is not apparent why a retailer would choose to provide services that the manufacturer does not even ask for when other retailers are not also required to provide such services, unless the services themselves are profitable for a retailer, which means that RPM is not necessary in the first place.

retailer and manufacturer levels. At the retailer level, only RPM restricts dealers from competing on price against other brands.[31] And RPM, unlike nonprice restraints, prevents more efficient retailers from passing on the benefits of that efficiency to consumers.[32] Furthermore, RPM stultifies competition among multibrand retailers, which are generally not susceptible to territorial or customer restraints. *See* 8 Areeda & Hovenkamp ¶1604g6, at 65. As a general matter, "[t]he form of restraint most likely to reflect dealer power is resale price maintenance." *Id.*; *see also id.* ¶1630b, at 303 ("Historically . . . price rather than nonprice restraints have been the vehicle chosen by dealer organizations to limit competition among their members.").

The Court in *Sylvania* also distinguished price and nonprice vertical restraints on the ground that price restraints can facilitate a cartel. 433 U.S. at 51 n.18; *see also Business Elecs.*, 485 U.S. at 725-26 (noting that authorities cited by *Sylvania* suggested RPM may assist cartelization, but "[s]imilar support for the cartel-facilitating effect of vertical nonprice restraints was and remains lacking"); 8 Areeda & Hovenkamp ¶1606, at 99 ("[M]ost nonprice restraints lack the characteristics that enable [RPM] to support price coordination among manufacturers."). Petitioner and its *amici* do not challenge this distinction, but rather argue that cartelization is still not a common use for RPM. However, as pointed out above, the evidence on this score is contested, and petitioner and its

[31] Even airtight territorial exclusives allow restricted dealers to fully compete in their territories against dealers of other brands, but RPM prevents dealers "from engaging resellers of other brands in price competition." 8 Areeda & Hovenkamp ¶1630b, at 303.

[32] *See* Arthur H. Travers, Jr. & Thomas D. Wright, *Restricted Channels of Distribution Under the Sherman Act*, 75 Harv. L. Rev. 795, 801 (1962) (noting territorial and customer restraints do not have "settled propensity of resale price maintenance to prevent dealers or distributors from passing the benefits of efficient distribution on to consumers by adopting a high-volume, low-markup policy") (cited by Justice Brennan in *White Motor Co. v. U.S.*, 372 U.S. 253, 268 n.7 (1963)).

amici ignore the fact that RPM may facilitate coordinated pricing as well as an actual cartel. *See supra*.

Besides doing less harm, nonprice vertical restraints are more likely to have procompetitive benefits than RPM. Nonprice vertical restraints have a wider range of legitimate justifications, including ensuring efficient dealer scale, focusing dealer effort on developing classes of customers or territories, and promoting product quality and safety. *See* 8 Areeda & Hovenkamp ¶1647; *Sylvania*, 433 U.S. at 55 n.23. Moreover, to the extent that territorial or customer restraints entirely eliminate intrabrand competition, they are more likely than RPM to solve free-rider problems because a service-providing dealer under RPM may lose business to free-riding dealers that maintain the same prices but offer other inducements to customers. *See* Sullivan & Grimes §6.3b, at 338; Paldor 293.

D. Foreign Jurisdictions, Including The EU And Canada, Generally Ban Minimum RPM

Antitrust authorities around the world generally ban minimum RPM and treat it more harshly than nonprice vertical restraints.[33] For example, the European Union, which recently liberalized its treatment of most nonprice restraints, continues to treat minimum RPM as a "hard-core" restraint, equivalent to per se illegal.[34] Member States, many of which led the U.S. in abolishing fair trade,

[33] *See* OECD, *Resale Price Maintenance* 10 (1998) (OECD *RPM*) (reporting that "RPM is generally prohibited in almost all OECD countries, subject to a few exemptions, mostly for books, newspapers and medicaments."), at http://www.oecd.org/dataoecd/35/7/1920261.pdf.

[34] Commission Regulation (EC) 2790/1999, 1999 O.J. (L336) 21. Most vertical nonprice restraints, as well as maximum RPM, are presumptively lawful if undertaken by a supplier with a market share of less than 30%. *See id.*; Joseph F. Winterscheid & Margaret A. Ward, *Two Part Harmony: New Rules for Vertical Agreements Under European Union Competition Policy*, Antitrust, Summer, 2000, at 52.

follow suit.[35] Canada treats RPM as a criminal offense.[36] The rest of the advanced industrialized world, like Congress, recognizes the wisdom of the *Dr. Miles* rule.[37]

E. Difficulty Distinguishing "Unilateral" Conduct Under *Colgate* and Unlawful RPM Does Not Justify Abandoning the Per Se Rule

Petitioner and several *amici* suggest that confusion in the *Colgate* doctrine, which permits manufacturers "unilaterally" to impose RPM, militates in favor of repealing *Dr. Miles*. There are several responses. As an initial matter, the tension between *Dr. Miles* and *Colgate* has existed since *Colgate* was decided in 1918. The fact that manufacturers may coerce compliance with suggested resale prices by threatening to refuse to deal with discounters has never been thought to justify abandoning *Dr. Miles*, but rather has been accepted as essentially an exception justified by the need to protect a certain degree of manufacturer freedom.[38] Second, any confusion arising from the *Colgate* doctrine will persist regardless of whether RPM is treated as per se illegal or analyzed under the rule of reason (unless of course RPM is made *de facto* legal, *see infra*). Indeed, to the extent business certainty

[35] *See, e.g.,* II ABA Section of Antitrust Law, *Competition Laws Outside the United States* France-42, Germany-33, United Kingdom-56 (2001); *see also* Paldor 53-54; Scherer & Ross, *supra*, at 549-50.

[36] *See Record Canadian Fine is Levied in Resale Price Maintenance Case*, 83 Antitrust & Trade Reg. Rep. (BNA) 410 (Oct. 25, 2002).

[37] *See* OECD *RPM* 130 (EC official explaining anticompetitive effects of RPM and that "if one supposes that RPM can improve efficiency, this economic efficiency could be achieved by less costly means in terms of competition").

[38] *See U.S. v. Parke, Davis & Co.*, 362 U.S. 29, 44 (1960). It has also been suggested that insofar as the determination of "unilateral" conduct under *Colgate/Monsanto* focuses on whether the conduct is in the independent best interest of the manufacturer, then the doctrine screens out instances of RPM that are less likely to be anticompetitive. *See* Hovenkamp, *supra*, at 471.

about the rules of the game is problematic now, it would only be worsened by abandoning *Dr. Miles* in favor of an unstructured rule of reason. *See* 8 Areeda & Hovenkamp ¶1633b, at 330 (an "open [ended] approach to resale price maintenance would obviously create great uncertainty."). Third, if there is confusion in the application of the *Colgate* doctrine, then the logical solution is to attack the problem directly rather than indirectly by modifying *Dr. Miles*. The academic critique of the *Colgate* doctrine has been far more severe and universal than the criticism of *Dr. Miles*. *See* Sullivan & Grimes §7.2c, at 382 n.50. Fourth, the claim of business uncertainty is overstated and arises in many contexts requiring antitrust counsel. *See* 8 Areeda & Hovenkamp ¶1630d, at 305-06.

III. OVERRULING *DR. MILES* IN FAVOR OF THE *SYLVANIA* RULE OF REASON WOULD BE COSTLY

Petitioner and the United States urge that RPM be analyzed under the same rule of reason applicable to nonprice restraints under *Sylvania*.[39] Pet. Br. 36-39; U.S. Br. 28. Adopting the *Sylvania* rule of reason would inevitably increase the incidence of anticompetitive RPM, as few cases would be brought either by private parties or the government under the Sherman Act.[40] As Professor (and former FTC chair) Pitofsky notes, "rule of reason cases often take years to litigate and are extremely expensive" and "it is very difficult for a plaintiff (either

[39] In *Sylvania* the Court did not specify how the rule of reason should be implemented, but rather merely stated that the "factfinder weighs all of the circumstances of a case," and referred to the open-ended test of *Chicago Board of Trade*. *See* 433 U.S. at 49 & n.15.

[40] A rule of reason would also increase the incidence of anticompetitive RPM because it denies the manufacturer an important tool in combating retailer pressure to adopt RPM. *See* 8 Areeda & Hovenkamp ¶1632b, at 319 ("There is little doubt that per se illegality strengthens the hands of manufacturers in resisting dealer demands for price protection.").

the government or a private party) to win a rule of reason case." Pitofsky 1489. Indeed, most commentators agree that the *Sylvania* rule of reason, as applied by the lower courts, has resulted in a rule of *de facto* per se legality for nonprice vertical restraints.[41] To be sure, the government occasionally brings a successful nonprice vertical restraint case, but such cases have often involved per se elements.[42]

Another cost of abandoning *Dr. Miles* is the uncertainty for businesses that would likely result from the fact that many states ban RPM, sometimes expressly. *See, e.g.*,

[41] *See, e.g.,* Douglas H. Ginsburg, *Vertical Restraints: De Facto Legality Under the Rule of Reason*, 60 Antitrust L.J. 67 (1991). Plaintiffs cannot win nonprice restraints cases not because such restraints are never anticompetitive, but rather because the hurdles for recovery are so high. Not only must plaintiffs jump through the "agreement" hoops that the Court has established for RPM, *see, e.g., Parkway Gallery Furn., Inc. v. Kittinger/Pennsylvania House Group, Inc.*, 878 F.2d 801 (4th Cir. 1989), but, as petitioner points out, lower courts have ordinarily required plaintiffs to make a threshold showing that the manufacturer has market power, Pet. Br. 37, and "[m]ost cases have made clear that power will not be inferred unless the defendant's market share is significant." 8 Areeda & Hovenkamp ¶1645c, at 404-05. Whatever the merits of a market share screen for nonprice restraints, *see* Sullivan & Grimes §7.3a1, at 384-88 (noting that firms with small market shares but powerful brands may have significant market power), it is not responsive to the risks of RPM such as dealer pressure and facilitating coordinated interaction among manufacturers or dealers. *See* 8 Areeda & Hovenkamp ¶1633c, at 330-32.

[42] Thus in *Toys "R" Us*, for example, the government prevailed by proving a horizontal group boycott by manufacturers orchestrated by the retailer. 221 F.3d 928. And in the minimum advertised pricing case brought against the music companies, the FTC found that their cooperative advertising programs, although not per se illegal, had effectively eliminated the ability of retailers to sell at a discount (because all discount advertising was forbidden) and stated that "henceforth . . . arrangements that have the same practical effect" as minimum RPM would be considered "unlawful . . . without a detailed market analysis, even if adopted by a manufacturer without substantial market power." *Time Warner*, 2000 FTC LEXIS 40, *32. Reversing *Dr. Miles* would presumably preclude such a rule and likely hamper the ability of the FTC to obtain settlements in cases like *Time Warner.*

N.Y. Gen. Bus. L. §369-a (2007). Repealing *Dr. Miles* threatens to recreate the balkanized state of affairs that existed prior to the Consumer Goods Pricing Act of 1975, when fair trade was legal in some states and illegal in others. Indeed, given the anti-consumer effect of RPM, states that follow the Sherman Act can be expected to adopt "Leegin repealers" (either by statute or judicial construction), perhaps replicating the confusion, uncertainty, and expense that has resulted from the divergent treatment of indirect purchaser damage actions under the Sherman Act and state law. *See* Donald I. Baker, *Hitting the Potholes on the* Illinois Brick *Road*, Antitrust, Fall 2002, at 14.

IV. IF THE COURT OVERRULES *DR. MILES*, IT SHOULD ADOPT A REBUTTABLE PRESUMPTION THAT MINIMUM RPM IS UNLAWFUL

The case for overruling *Dr. Miles* has not been made. However, if the Court determines otherwise, it should adopt a rebuttable presumption that RPM is unlawful, rather than an open-ended rule of reason.[43] Such an

[43] Many commentators who do not favor a per se rule advocate treating RPM as presumptively unlawful or otherwise reject a *Sylvania* rule of reason. *See, e.g.,* 8 Phillip E. Areeda, *Antitrust Law* ¶1633c, at 378-81 (1989) (would allow RPM if defendant proves the absence of number of specified factors); Thomas R. Overstreet Jr. & Alan A. Fisher, *Resale Price Maintenance and Distribution Efficiency: Some Lessons from the Past*, 3 Contemp. Policy Issues 43, 53-54 (1985) (maintaining that rule of reason would be "a litigation nightmare" and advocating compromise of continuing per se ban with limited exceptions, such as for new entrants and firms with small market shares if the largest firms do not use RPM); Comanor & Scherer Br. 8-9 (maintaining that Court should treat distributor-induced RPM as per se illegal and evaluate other instances under structured rule of reason); Jayma M. Meyer, *Relaxation of the Per Se Mantra in the Vertical Price Fixing Arena,* 68 S. Cal. L. Rev. 73 (1994) (advocating rebuttable presumption of illegality); Thomas A. Piraino, Jr., *Reconciling the Per Se and Rule of Reason Approaches to Antitrust Analysis*, 64 S. Cal. L. Rev. 685 (1991) (advocating ancillary restraints approach under which RPM induced by dealer coercion would be summarily condemned).

approach does less violence to the 96 years of this Court's jurisprudence firmly holding that RPM is illegal, and is more respectful of the determination by Congress and the States over the last 32 years that RPM is pernicious. A presumption of illegality is also warranted by the simple fact that RPM ordinarily *directly* raises prices to consumers and by the absence of theoretical and empirical evidence that consumers *generally* benefit from these higher prices. *Cf. NCAA v. Board of Regents*, 468 U.S. 85, 110 (1984) ("naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis"); *Polygram Holding, Inc. v. F.T.C.*, 416 F.3d 29, 36 (D.C. Cir. 2005) (restraint is presumed unlawful if "it is obvious that a restraint of trade likely impairs competition"). If businesses wish to raise prices to consumers by agreement, it is hardly unreasonable to place the burden on them to justify the practice in a particular case.

Under this approach, a manufacturer may rebut the presumption of illegality by proving that RPM is reasonably necessary to achieve a legitimate business purpose that benefits consumers. *Cf. Polygram*, 416 F.3d at 36 (to rebut presumption "defendant must either identify some reason the restraint is unlikely to harm consumers or identify some competitive benefit that plausibly offsets the apparent or anticipated harm."). "To prove a legitimate purpose, the manufacturer must offer proof that it has such a purpose and that the restraint serves it." 8 Areeda ¶1633d2, at 384. In addition, there must be substantial evidence that less restrictive alternatives (e.g., promotional allowances) "would be significantly more costly or significantly less effective." *Id.* at 386; *see Dr. Miles*, 220 U.S. at 406 (to sustain restraint it must be "limited to what is fairly necessary, in the circumstances of the particular case"). Evidence that RPM was imposed in response to pressure from a significant retailer or retailers would militate against any legitimate purpose. *See* 8 Areeda & Hovenkamp ¶1648, at 442; Comanor & Scherer Br. 9.

If the manufacturer rebuts the presumption of illegality by proving a legitimate business purpose that benefits consumers, the burden would shift to the plaintiff to establish that RPM is nonetheless anticompetitive. *Cf. Polygram*, 416 F.3d at 36 (defendant's justification may be rebutted with sufficient evidence "to show that anticompetitive effects are in fact likely"). For example, the plaintiff may show that RPM facilitates a manufacturer's cartel or oligopoly pricing, or significantly restricts consumer choice or retailing innovation. One way plaintiff could meet its burden is by showing that the upstream market is concentrated or by showing widespread coverage of RPM in downstream markets. *See* Comanor & Scherer Br. 9-10; 8 Areeda & Hovenkamp ¶1633c, at 330-31.[44]

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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[44] If the Court overrules *Dr. Miles* because the goal is "to avoid the continued necessity to make tenuous distinctions between economically indistinguishable conduct," U.S. Br. 28, then the Court should also harmonize its definition of concerted action for horizontal and vertical restraints and treat RPM coerced by a manufacturer's threatened refusal to deal as an RPM agreement, subject to the presumption-based analysis. *See* Andrew I. Gavil et al., *Antitrust Law in Perspective* 363 (2002) (suggesting that "*Colgate's* fiction of 'no agreement' . . . might well be abandoned if *Dr. Miles* is ever overruled").