No. 06-480

In The
Supreme Court of the United States

LEEGIN CREATIVE LEATHER PRODUCTS, INC.,

Petitioner,

v.

PSKS, INC. D/B/A KAY'S KLOSET . . . KAY'S SHOES,

Respondent.

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

BRIEF OF *AMICUS CURIAE* CONSUMER FEDERATION OF AMERICA IN SUPPORT OF RESPONDENT

RACHEL WEINTRAUB
Consumer Federation of America
1620 Eye Street, N.W.
Washington, D.C. 20006
(202) 387-3121

PETER A. BARILE III
1370 Avenue of the Americas
New York, NY 10019
(212) 728-2200
Counsel of Record

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

INTEREST OF *AMICUS CURIAE*[1]

The Consumer Federation of America ("CFA") is the nation's largest consumer advocacy group, composed of two hundred and eighty state and local affiliates, representing consumer, senior citizen, low-income, labor, farm, public power, and cooperative organizations, with more than fifty million individual members. The CFA appears regularly before legislative, judicial, and administrative bodies at the federal, state, and municipal levels. In particular, the CFA provided testimony to Congress during the hearings that preceded the passage of the Consumer Goods Pricing Act of 1975, a law that is at the heart of this case.

The CFA's members include consumers interested in promoting vigorous competition at all levels of production and distribution in the nation's economy. Robust competition at the retail level benefits American consumers by yielding lower prices, more choice, better service, and increased innovation. The CFA has a strong interest in the proper application and the vigilant enforcement of the antitrust laws, including the *per se* rule against minimum resale price maintenance, which, when properly applied and enforced, serves to ensure the benefits of such competition to American consumers.

SUMMARY OF ARGUMENT

For nearly a century, under Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, it has been a *per se* illegal "restraint of trade" for manufacturers and retailers to agree to fix a minimum retail price. During that time, the

[1] All parties have consented to the filing of this brief. The parties' letters of consent have been lodged with the Clerk. Under S. Ct. Rule 37.6, *amicus curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amicus curiae*, its members, or its counsel, has made monetary contributions to the preparation or submission of this brief.

per se rule against resale price maintenance ("RPM") has safeguarded low consumer prices and an abundance of consumer choice, witnessing an unparalleled period of dynamic innovation in retailing by fostering competition at the retail and manufacturing levels. By preventing RPM, which is designed to discourage price cutting, the *per se* rule has set the stage for innovative retailers to continually enter the market, offering new and lower priced alternatives to consumers. By encouraging such entry, the *per se* rule has enhanced "intertype competition," that is, competition among different kinds of retailers, such as boutiques, department stores, superstores, and online sellers—providing substantial benefits to consumers.

Accumulated experience has shown that RPM invariably raises consumer prices. Both empirical evidence and economic theory confirm that this is so. By facilitating cartelization and by giving rise to unilateral incentives for dealers and manufacturers to keep prices artificially high, RPM raises consumer prices, even in the absence of manufacturer market power. After a limited but failed experiment with "fair trade," which legalized RPM under color of state law for a period of time, Congress passed the Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801, which amended the Sherman Act to restore and to preserve the *per se* rule as part of an historic effort to combat inflation.

The plain language and the import of the Consumer Goods Pricing Act have been recognized by this Court on more than one occasion. By its express terms, the amendment provides that it was adopted "to provide lower prices for consumers," and, therefore, precludes the application of a rule of reason to RPM, as it is undeniable that RPM actually imposes higher prices on consumers.

The proposed theoretical justifications in defense of RPM, while appropriate for other types of vertical restraints, are quite limited in their application and are belied by the real-world historical and empirical evidence demonstrating the anticompetitive effects of RPM and the benefits of the *per se* rule. Such theoretical justifications can in no way offset the higher consumer prices, lower consumer choice, and stifled innovation that history teaches will follow the elimination of the *per se* rule. A rule of reason designed to entertain such justifications thus would provide cold comfort to American consumers; for it is widely recognized that to accord RPM a rule of reason treatment would effectively make RPM *per se* legal.

There is no good reason to abandon the venerable *Dr. Miles* rule. This is especially true given the common law nature of antitrust, in light of America's experience with the anticompetitive effects of RPM and the dynamic benefits of the *per se* rule; the expressed endorsement of the rule by Congress; and the widespread reliance on the rule by American consumers for decades. The Court should reaffirm that minimum resale price maintenance is *per se* illegal and affirm the judgment of the court of appeals.

ARGUMENT

MINIMUM RESALE PRICE MAINTENANCE SHOULD REMAIN *PER SE* ILLEGAL

I. ELIMINATION OF THE *PER SE* RULE WILL SIGNIFICANTLY IMPEDE THE ECONOMIC DYNAMISM IN DISTRIBUTION ENJOYED BY CONSUMERS SINCE THE *DR. MILES* CASE WAS DECIDED

"The American system for distributing goods and services is a wonder to behold for its variety and its remarkable efficiency." HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE 181 (2005). It is such a "wonder" due in great measure to the many innovations in retailing that have occurred since the Court decided *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

Innovations in retailing are fostered by an environment conducive to *intertype* competition—the competition between different *kinds* of retailers. *See* JOSEPH CORNWALL PALAMOUNTAIN, JR., THE POLITICS OF DISTRIBUTION 38 (1955).[2] Experience teaches that new types of retailers enter the market as low-cost alternatives to traditional retailers, passing their inherent cost-savings on to consumers by cutting prices and often offering more convenient service. With RPM in place, the opportunities and incentives for such potential entrants to provide innovative low-cost retail solutions to consumers are diminished, if not eliminated. By stifling price competition and consumer choice, RPM creates barriers to entry for new types of firms and denies consumers the benefits of the efficiencies that such potential new entrants might pass on, as well as the disciplining effect that such competition has on both the retail and manufacturing sectors. The *per se* rule has served consumers well by acting as a force to prevent the formation of such barriers to entry and, as a result, has witnessed successive revolutions in retailing that have directly and significantly contributed to consumer welfare.

Competition between different types of retailers "is a vital part of a free market system for distribution of goods and services." LAWRENCE A. SULLIVAN & WARREN S. GRIMES, THE LAW OF ANTITRUST, § 6.1, at 323 (2d ed. 2006). Indeed, the "gale of creative destruction" that brings competition from "the new type organization . . . which commands a decisive cost or quality advantage" is not confined to the manufacturing sector; for in the "retail trade, the competition that matters arises not from additional

[2] *See also* PATRICK DUNNE & ROBERT F. LUSCH, RETAILING 117 (3d ed. 1999); Robert L. Steiner, *How Manufacturers Deal with the Price Cutting Retailer: When are Vertical Restraints Efficient?*, 65 ANTITRUST L.J. 407, 419-26 (1997); Harry S. Gerla, *Restoring Rivalry as a Central Concept in Antitrust Law*, 75 NEB. L. REV. 209, 245 (1996); Robert L. Steiner, *The Nature of Vertical Restraints*, 30 ANTITRUST BULL. 143, 152-56 (1985); Richard M. Steuer, *Exclusive Dealing in Distribution*, 69 CORNELL L. REV. 101, 123-24 (1983).

shops of the same type, but from the department store, the chain store, the mail order house and the supermarket. . . ." JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 84-85 (3d ed. 1950).

The phenomenon of evolutionary innovation in distribution is widely recognized and studied in the field of marketing as the "wheel-of-retailing," a theory that explains the rise and fall of various modes of retail distribution. *See* PHILIP KOTLER & GARY ARMSTRONG, PRINCIPLES OF MARKETING 448 (10th ed. 2004). History shows that new and more efficient types of retailers first enter the market as low-cost dealers to compete with incumbents, only to be then subsequently challenged by yet another generation of new and more efficient retailers of still a different type. This cycle repeats itself again and again over time, always bringing increasingly efficient modes of retailing to the consuming public. Because entry is contingent on the ability of new firms to enter the market by offering lower prices, RPM, by stabilizing price levels and preventing low-price competition, erects a potentially insurmountable barrier to entry for such low-price innovators, who represent "the very heart of a free market competitive system." Robert Pitofsky, *In Defense of Discounters: The No-Frills Case for a Per Se Rule Against Vertical Price Fixing*, 71 GEO. L.J. 1487, 1493 (1983).

Petitioner and its *amici* do not acknowledge "the dynamic effects that spring from the rule against resale price maintenance." Eleanor M. Fox, *Consumer Beware Chicago*, 84 MICH. L. REV. 1714, 1717 n.14 (1986). In assuming that the retail sector is a mere conduit exhibiting atomistic competition, they overlook the robust contribution that intertype competition has played in the development of the American economy. Instead, they focus on a short-term efficiency analysis predicted by a static microeconomic model that does not account for the significant benefits that intertype competition brings to consumers and the economy over the long run. Thus, they fail to recognize that with supermarkets as much as with semiconductors, "competition's role in spurring innovation—that is, in maintaining dynamic efficiency—has secured a central position in antitrust analysis, leading us to take a broader focus that incorporates issues of innovation and progress over time." Hon. Deborah Platt Majoras, Chairman, Federal Trade Commission, *The Federal Trade Commission in the Online World: Promoting Competition and Protecting Consumers*, Address to the Progress & Freedom Foundation's Aspen Summit, at 19 (Aug. 21, 2006), *available at* http://www.ftc.gov/speeches/majoras.htm.

Currently, consumers have the choice of buying the very same product accompanied by varying degrees of customer service at a variety of price levels from a variety of different kinds of dealers. Where the choice of price and quality is left to the consumer, intertype competition is preserved because the "free market will decide the mix of price, quality, and related attributes that consumers value most." Robert H. Lande, *Consumer Choice as the Ultimate Goal of Antitrust*, 62 U. PITT. L. REV. 503, 503 n.3 (2001). By "impeding the 'ordinary give and take of the market place,'" *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 459 (1986) (quoting *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978)), RPM denies consumers the opportunity to choose the optimal mix, and so new retailers have little opportunity or incentive to create more efficient methods of distribution to serve consumers, because such potential entrants could never pass on any of their inherent cost-savings to customers on price-maintained branded products. However, "[w]hen they are allowed to compete freely, resellers are likely to develop innovative means of delivering services consumers desire." Thomas A. Piraino, Jr., *A Proposed Antitrust Approach to the Conduct of Retailers, Dealers, and Other Resellers*, 73 WASH. L. REV. L.J. 799, 855 (1998).

As it is axiomatic that "immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress [and] that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone," *United States v. Aluminum Co. of America*, 148 F.2d 416, 427 (2d Cir. 1945), it is unsurprising that historically the chief proponents of RPM have been associations of established retailers. Indeed, a primary argument in favor of RPM was to protect existing retailers from new and "more efficient dealers." VIII PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, ¶ 1629b, at 298 (2d ed. 2004).[3] While established dealers and their captive manufacturers might enjoy maintaining the *status quo* through the use of RPM, it is at the expense of consumers, who are denied the benefits of the innovations in distribution made possible by robust intertype competition.

Although during the "fair trade" era, the proponents of RPM were partially successful in securing the legality of RPM for some products in some states for a period of time, the *per se* rule has endured and promoted intertype competition to the great benefit of American consumers, having let thrive a wondrous variety of retail options, such as department stores, mail-order businesses, supermarkets, superstores, and online retailers. *See* Fox, *supra*, at 1717 n.14. Had antitrust law been lenient on RPM on a nationwide basis for all of this time, it is unlikely that society would have benefited as it has from these "pioneering developments that have changed our lives and lifestyles." PHILIP KOTLER,

[3] *See also* F.M. SCHERER & DAVID ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 548-49 (3d ed. 1990); I THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 462 (Earl W. Kintner, ed. 1978); DANIEL J. BOORSTIN, THE AMERICANS: THE DEMOCRATIC EXPERIENCE 111 (1973); REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 153 (1955); PALAMOUNTAIN, *supra*, at 42; Richard C. Schragger, *The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920-1940*, 90 IOWA L. REV. 1011, 1013 (2005); Reinhold Wolff & Duncan Holthausen, *The Control of Retail Prices Under the Fair Trade Laws*, DUN'S REVIEW, at 15 (July 1938); *Speeches Regarding Resale Price Maintenance*, NATION'S BUSINESS, at 33 (Feb. 16, 1914).

ACCORDING TO KOTLER: THE WORLD'S FOREMOST AUTHORITY ON MARKETING ANSWERS YOUR QUESTIONS 58 (2005).

Absent the *per se* ban on RPM, would there ever have been a Sears & Roebuck, an A&P, a Walgreens, a K-Mart, or a Wal-Mart, as we have come to know them? The evidence suggests not. Twenty-five years ago, when the specter of widespread RPM loomed prior to the *Monsanto* case, several leading executives in the discount retailing business, including a Wal-Mart executive, were interviewed regarding the effect that RPM might have on their businesses. *See Forward: Antitrust and the Discounters' Case Against Resale Price Maintenance*, 14 ANTITRUST L. & ECON. REV. 1 (1982). At that time, Wal-Mart was a decidedly regional player with 520 stores in 14 states, with annual sales of $3.6 billion. *See* S. Robson Walton, *Antitrust, RPM, and the Big Brands: Discounting in Small Town America*, 14 ANTITRUST L. & ECON. REV. 81, 81 (1982). S. Robson Walton, like so many of his contemporaries, predicted that relaxing the *per se* ban on RPM would be a "great danger" to Wal-Mart's business. *Id*. at 83.

Not long after that interview, the Court refused to heed the call of the Antitrust Division to overrule *Dr. Miles*. Since then, the *per se* rule has remained firmly in place, ensuring the development of a "quintessential American success story." RICHARD VEDDER & WENDELL COX, THE WAL-MART REVOLUTION: HOW BIG-BOX STORES BENEFIT CONSUMERS, WORKERS, AND THE ECONOMY 179 (American Enterprise Institute 2006); *see also* S. Robson Walton, *Wal-Mart, Supplier-Partners, and the Buyer Power Issue*, 72 ANTITRUST L.J. 509, 510-11 (2005). By 2005, Wal-Mart's sales had grown nearly one-hundred-fold, to $312.4 billion, with the company serving 138 million customers per week in 6,200 stores spanning the globe, with 3,800 stores located all across the United States. *See The Wal-Mart Timeline*, *at* http://www.walmartfacts.com/content/default.aspx?id=3.

This story is more than a testament to the retail business opportunities created by the *per se* rule against RPM, however; for Wal-Mart's success has directly contributed to consumer welfare. Having "mastered the ability to obtain products cheaply," Schragger, *supra*, at 1088, Wal-Mart has passed on its cost-savings to consumers and is credited by economists with having single-handedly held down inflation for the entire country. *See* Steven Greenhouse, *Wal-Mart, a Nation Unto Itself*, N.Y. TIMES, Apr. 17, 2004, at 7. By increasing consumer surplus and thus real income, Wal-Mart has "enriched millions of consumers, many of them persons of modest means." VEDDER & COX, *supra*, at 179. Had the Court taken up the Antitrust Division on its invitation to overrule *Dr. Miles* in the *Monsanto* case, would this have been possible? Further to the point, absent the commercial incentives available to the pioneers of online retailing to sell brand-name products at prices reflecting the efficiency of new business models, would Internet commerce have developed as it has? Would there ever have been an Amazon.com?

The wheel-of-retailing is no "free ride." Rather, it is creative destruction at work. Vigorous intertype competition has been a hallmark of our progression from the Industrial Revolution that heralded the Sherman Act to today's Information Age. Yesterday's "knave," to quote Justice Holmes from his *Dr. Miles* dissent, is today's Sam Walton or Jeff Bezos. By impeding dynamic new entrants' ability to pass along efficiency gains to customers, RPM stifles important free market forces to the detriment of American consumers. To overrule *Dr. Miles* would serve to entrench current modes of retailing and delay—or perhaps even prevent—The Next Big Thing. Since "the worst mistake we can make is to assume that we know it all," Majoras, *supra*, at 11, perhaps the most important reason to uphold the *Dr. Miles* rule is explained by the old adage: "If it's not broken, don't fix it."[4]

II. ACCUMULATED EXPERIENCE SHOWS THAT RPM VIRTUALLY ALWAYS LEADS TO HIGHER CONSUMER PRICES

Experience has shown that RPM agreements virtually always raise consumer prices. Both empirical evidence and economic theory confirm this undeniable fact. RPM has been shown to dramatically increase prices not only on price-maintained products, but also on other competitive products by facilitating cartelization and by giving rise to unilateral incentives for dealers and manufacturers to raise prices, even in the absence of manufacturer market power.

RPM prevents price cutting—the very "essence of competition." *State Oil Co. v. Kahn*, 522 U.S. 3, 15 (1997). "Price," this Court has held time-and-again, is the "central nervous system of the economy." *Prof'l Eng'rs*, 435 U.S. at 696. Absent predation, "low prices benefit consumers regardless of how those prices are set, and . . . do not threaten competition," *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, No. 05-381, slip op. at 6 (U.S. Feb. 20, 2007) (quoting *ARCO v. United States Petroleum Co.*, 495 U.S. 328, 340 (1990)), as "[i]t is in the sound commercial interests of the retail purchasers of goods and services to obtain the lowest price possible." *Reiter v. Sonotone Corp.*,

[4] *Oversight Hearings on Authorization of the Antitrust Division of the Department of Justice Before the Subcommittee on Monopolies and Commercial Law of the House Committee on the Judiciary*, 99th Cong., at 17 (1985) (statement of Prof. Lawrence S. Sullivan); *cf. Public Comments Received by the Antitrust Modernization Comm'n* (2004) (memorandum of Robert H. Bork), *available at* http://www.amc.gov/comments/bork.pdf ("The antitrust laws, in my opinion, are performing well, in fact better than at any time in the past seventy-five years. It follows that I think there is very little need for 'modernization.' ").

442 U.S. 330, 342 (1979). *See also Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 234 (1st Cir. 1983) (Breyer, J.) (antitrust policy "discouraging legitimate price competition" should be avoided). Retail price competition is so important to our free market system that the right of retailers to communicate prices to consumers is protected by the First Amendment. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 515 (1996).

A. Empirical Evidence Shows That RPM Dramatically Raises Consumer Prices

America's experience with the inflationary price effects of RPM is ignored at the peril of the American consumer. Study after study has confirmed that consumer prices are far higher when RPM is allowed.[5] American consumers experienced firsthand the anticompetitive and inflationary effects of RPM during the "fair trade" era. Fair trade was abandoned and the *per se* rule against RPM was reinstated in 1975 to combat inflation. The repeal of fair trade was no whim. Rather, it was a deliberate response to a failed experiment. A wealth of evidence before Congress showed that consumer prices were far higher where RPM was not prohibited. For instance, many of the same consumer goods sold at prices on average as much as 27 percent higher in fair trade states than in non-fair trade states. *See* KINTNER, *supra*, at 958. Additionally, prices for certain products declined much as 40 percent in states where fair trade laws were repealed by state law prior to federal repeal. *Id*. at 978. Overall, numerous studies estimated that RPM cost American consumers anywhere from $3 billion up to $6.5 billion annually—in 1975 dollars. *Id*. at 958.

[5] *See* AREEDA, *supra*, ¶ 1604b, at 40; SCHERER & ROSS, *supra*, at 555; Ittai Paldor, *Rethinking RPM: Did the Courts Have it Right All Along?* at 63-68 (S.J.D. Thesis, University of Toronto 2007), *available at* http://www.papers.ssrn.com/sol3/papers.cfm?abstract_id=959336.

Today, the cost to consumers of treating RPM leniently on a nationwide basis would be staggering. An illustrative 1982 study estimated that reinstituting RPM nationally would raise prices on about one-third of consumer products by as much as 20 percent, costing consumers up to $18 billion annually. *See Antitrust and the Discounters' Case Against Resale Price Maintenance*, *supra*, at 3-4. If those estimates hold true 25 years later, the cost to American consumers will reach and exceed $40 billion annually. *Accord* VEDDER & COX, *supra*, at 17 (estimating aggregate consumer surplus resulting from big-box discounting segment to be $40 billion).

B. RPM Raises Consumer Prices by Facilitating Cartels

The Court has observed that collusion, the "supreme evil of antitrust," *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004), is facilitated by resale price maintenance. *See, e.g.*, *Continental T.V. Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 51 n.18 (1977).[6] Indeed, "collusive pressure by dealers may best explain" the existence of RPM on products sold in multibrand outlets where dealer services or other such considerations could not possibly have been important to manufacturers, including arrangements involving:

> gasoline, auto parts, toiletries, paper, beer, men's shoes, rainwear, women's and children's clothing, underwear, cosmetics, perfumes, over the counter drugs, tobacco products and accessories, simple photographic supplies, drug store watches and clocks, eyeglass lenses, and small appliances.

[6] *See also* AREEDA, *supra*, ¶ 1604a, at 36; SULLIVAN & GRIMES, *supra*, § 6.1a, at 321-22; Pitofsky, *In Defense of Discounters*, *supra*, at 1490-91; *cf.* AREEDA, *supra*, ¶ 1604c, at 46 & n.45 (observing infirmities of surveys of reported cases that might be taken to suggest otherwise).

AREEDA, § 1604b, at 39; *see also* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY, § 11.2b, at 396-97 (1994). Thus, "experience shows that the manufacturer is often induced to act as an organizer of the dealer's cartel by dealer threats or enticements." Pitofsky, *In Defense of Discounters*, *supra*, at 1490.

There are "good reasons" why retailers would want to involve suppliers in a dealer cartel. HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra*, § 11.2b, at 395. A "dealer cartel with manufacturer-supplier participation is likely to produce a more stable and durable dealer cartel than a purely horizontal arrangement." Pitofsky, *In Defense of Discounters*, *supra*, at 1490. The cartel will be strengthened because manufacturer participation can dramatically cut down on "cheating":

> [I]f the majority can convince the manufacturer-supplier to participate (and if vertical price fixing were in some circumstances legal, or difficult to prove illegal because of rule of reason treatment), the manufacturer-supplier will be able to cut off the dissenters' access to the product. Participation by the manufacturer-supplier thereby stabilizes the cartel. The arrangement will be particularly effective if, as is usually the case, the dealers agree to police violations.

Id.; *see also* AREEDA, *supra*, ¶ 1604c, at 45. While such conspiracies have proven particularly prevalent at the retail level, RPM also has the propensity to facilitate collusion at the manufacturer level by deterring cheating and facilitating information exchange, especially in concentrated markets. *Id.*, ¶ 1606a, at 81. This effect is an "additional anticompetitive factor to add to the rigidifying price effect that almost always occurs at the dealer level." Pitofsky, *In Defense of Discounters*, *supra*, at 1490.

C. RPM Raises Consumer Prices Even in the Absence of Cartelization

A formal dealer cartel is not necessary for a manufacturer to adopt RPM in its unilateral self-interest in response to dealer power and other forces at odds with the interests of consumers. The view that RPM is often benign, however, is based upon the premise that the manufacturers' interest is always aligned with that of the end consumer—a "short-run and rather impractical view of the distribution process." Pitofsky, *In Defense of Discounters*, *supra*, at 1491. For instance, a "manufacturer might be forced to restrain distribution in order to appease one or more individually powerful dealers." AREEDA, *supra*, ¶ 1604d, at 47. Given the current state of the retail industry, which has grown ever so concentrated,[7] this threat is of acute concern.

Manufacturers likewise have an interest in maintaining high retail prices in order to avoid wholesale price erosion—an interest also not shared by consumers. "[O]ver the long haul, it is likely that the profits from a high retail price will be shared by both the manufacturer and the dealer: the manufacturer in a higher wholesale price and the dealer in a higher retail price." Pitofsky, *In Defense of Discounters*, *supra*, at 1493; *see also* AREEDA, *supra*, ¶ 1606c, at 85-86. Vigorous retail price competition eats away at the profits of retailers such that retailers will eventually pressure the manufacturer to drop its wholesale price. The reduction in wholesale price will lead the manufacturer's competitors to do so too, thus allowing for consumer prices to fall not only within a brand but among competing brands. RPM is a device to thwart such price erosion by preventing retailers from cutting prices, but it

---

[7] *See, e.g.*, U.S. Dep't of Justice, Antitrust Division, *Statement on the Closing of its Investigation of Whirlpool's Acquisition of Maytag* (Mar. 29, 2006), *available at* http://www.usdoj.gov/atr/public/press_releases/2006/215326.htm.

is at the expense of interbrand competition and consumer welfare.

A rational manufacturer with less relative power than its retailers might also unilaterally adopt RPM as a logical way of favoring a majority of its established outlets that might like to be protected from competition from upstart discounters. *See* AREEDA, *supra*, ¶ 1604a, at 36; Steiner, *How Manufacturers Deal with the Price Cutting Retailer, supra*, at 419-26. Any of the manufacturer's competitors without market power would then follow suit or risk having their product dropped by those dealers. This opportunity would allow producers with powerful brands—whose products could not be profitably dropped by a multibrand dealer—to raise their prices, as their inherent product differentiation allows them to price their brands above the rest. *See, e.g.*, SULLIVAN & GRIMES, *supra*, § 6.2b, at 331; *id.*, § 6.3c, at 345. As there are relatively few products with substantial brand equity for any particular relevant product, oligopolistic forces will likely raise the price level of those products, and prices of brands with less power and house-branded products will follow suit. As a result of such emulation, in the aggregate, consumer prices will rise dramatically—even absent collusion.

III. RPM CANNOT BE JUSTIFIED AS REASONABLE BY THE PROCOMPETITIVE POTENTIAL OF OTHER DISTRIBUTION STRATEGIES

This case is not *Sylvania*, nor is it *Khan*. Unlike other cases in which this Court has abandoned the *per se* rule in favor of a rule of reason analysis, experience reveals the anticompetitive effects of RPM on innovation and on price to be far too severe to allow justification. RPM should not be evaluated under the rule of reason, despite any linguistic appeal that such a characterization might tempt. The fundamental differences between RPM and other vertical restraints, as well as the limits of the asserted procompetitive justifications for RPM, reveal that the *per se* rule should remain in place.

A. RPM and Other Vertical Restraints Materially Differ

RPM has far different effects in kind and in scope than do other vertical restraints. To begin with, while maximum vertical price fixing leads to lower prices, RPM invariably leads to higher prices. Although setting a price ceiling often serves to benefit consumers by lowering prices, setting a price floor through RPM will always have the opposite effect. *See Khan*, 522 U.S. at 15. It therefore makes perfect sense to evaluate maximum vertical price fixing under the rule of reason while at the same time standing firm against RPM with "a *per se* rule affecting the conduct of the entire marketplace." *Id.* at 19. As the practices have opposite effects, adopting opposing standards for each will serve the very same goal: to promote price cutting, a practice that "directly benefits consumers." *Weyerhaeuser*, slip op. at 5.

Nonprice restraints likewise "threaten fewer harms to competitive interests" than does RPM. AREEDA, *supra*, ¶ 1630b, at 302. By their nature, nonprice restraints are (i) self-limiting, in that they can only rationally apply to certain goods and dealers, and (ii) narrowly tailored to meet their particular procompetitive objectives. On the other hand, RPM is an overly broad and unnecessary means by which to achieve any of the procompetitive benefits of restricted distribution. As a result, it is true that RPM agreements "so often prove so harmful to competition and so rarely prove justified that the antitrust laws do not require proof that an agreement of that kind is, in fact, anticompetitive in the particular circumstances." *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 133 (1998).

B. The Asserted Procompetitive Justifications Do Not Justify RPM

It is said RPM may prevent free-riding, foster brand image, and provide an extra incentive for dealers to carry a producer's unpopular product. While such procompetitive goals may justify imposing other vertical restraints, they cannot justify RPM. Even where theoretically applicable, RPM is a particularly indirect and unreliable method of attaining these goals, all of which can be achieved by far more direct and far less restrictive means.

1. The Free-Rider Problem Does Not Justify RPM

To be sure, the Court has recognized that nonprice vertical restraints may be justified on the basis of ensuring that dealers provide pre-sale services desired by the manufacturer to promote its products. *See Sylvania*, 433 U.S. at 54-55. However, for an overwhelming number of products, the argument that RPM is likewise justifiable is "nonsense." Robert Pitofsky, *Why Dr. Miles Was Right*, 8 REGULATION 27, 29 (1984). The free-rider "problem" does not justify RPM for a number of reasons:

First, implicit in the free-rider justification is that a lower-priced dealer does not or cannot provide the desirable pre-sale services. Thus, the theory fails to account for the more efficient dealer who can both provide desired pre-sale services and save the customer money at the same time. Rather than discouraging free-riding, it will often be the case that RPM will serve to discourage innovation, resulting in higher consumer prices and lower consumer choice, without inducing any added services.

Second, where a retailer is a multibrand outlet, such as supermarket or department store, which is overwhelmingly the case, the "idea that the manufacturer can induce better services or more amenable surroundings by raising the retail price on one item is ridiculous." Pitofsky, *In Defense of Discounters*, *supra*, at 1493.

Third, the justification is applicable only to those goods for which pre-sale services are potentially desirable, such as were the televisions in *Sylvania*, the herbicides in *Monsanto*, or the calculators in *Sharp*. After all, what pre-sale services could possibly help sell a tube of toothpaste or a bottle of catsup? Allowing RPM to flourish would serve to raise prices for the vast majority of consumers' day-to-day purchases, while only theoretically increasing desired services on infrequently purchased, complex products that comprise only a very small fraction of overall consumer spending.

Fourth, even where potentially applicable, RPM is a particularly indirect way to foster such special services. Such services can be ensured expressly and directly via contract or non-price restraint with great precision, enabling a manufacturer to achieve any intended procompetitive benefit to interbrand competition without the great risk of anticompetitive harm caused by RPM.

Undeterred, Petitioner and its *amici* charge that the rise of Internet commerce has exacerbated the free-rider problem. This argument has it backwards and fails not only to appreciate the procompetitive impact of the Internet, but also to acknowledge the degree to which the Internet is used by both manufacturers and retailers to educate consumers prior to entering the store, rendering on-site pre-sale services less valuable to sellers and to buyers than ever. As the current Chairman of the Federal Trade Commission has recognized:

> The Internet has created enormous benefits for consumers through increased convenience, choice, and efficiency. It empowers consumers by providing them easy access to large amounts of information, allowing them to quickly research and compare product attributes and prices and to purchase products and services from all over the

> country or even the world without leaving home. The expanded choices and increased information that the Internet offers have intensified competition in a number of markets, all of which benefits consumers.

Majoras, *supra*, at 1-2.

As "customers are getting more educated and have better tools, such as the Internet, at their disposal," KOTLER, *supra*, at 23, the free-rider "problem" is not exacerbated but rather is minimized. Where large numbers of consumers are already familiar with products, the value of dealer information services is necessarily diminished. *See, e.g.,* F.M. Scherer, *Vertical Relations in Antitrust: Some Intellectual History*, 49 ANTITRUST BULL. 841, 855 (2004); William S. Comanor, *Vertical Price-Fixing, Vertical Market Restrictions, and the New Antitrust Policy*, 98 HARV. L. REV. 983, 1001 (1985). Because of the Internet, today's consumers have access to more product information than ever, making onsite pre-sale services less desirable from the perspective of not only the customer—who often already knows what he wants to buy before going to the store—but also the manufacturer—who has less of a need to subsidize in-store demonstration. This is evidenced by the fact that more and more consumers are foregoing visiting any store at all.

2. Enhancing Product Image Does Not Justify RPM

The class of products to which a brand image justification could plausibly apply is limited to luxury items and the like. For those relatively few products to which the image justification might be applicable, producer advertising and promotion via the mass media generally play a far more substantial role in shaping consumers' brand perception than does retail discounting. In any event, the most direct way to for a producer to safeguard the image of its product, as reflected by its retailer, is to refuse to do business with discounters, as a matter of right. *See, e.g.*, *Monsanto v. Spray-Rite Servs. Co.*, 465 U.S. 752, 761 (1984) (citing *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)).

Existing law allows PING and Brighton, as well as Callaway and Prada, for that matter, to achieve their legitimate goals in selling golf clubs or handbags without the need for any relaxation in the law to encourage a practice that experience teaches will inflate the prices for most all other consumer products that have no such "image" to enhance. Adopting a rule of reason would benefit luxury goods manufacturers and dealers at the expense of inflating the prices of groceries to consumers, and thus would be "nothing less than a frontal assault on the basic policy of the Sherman Act." *Prof'l Eng'rs*, 435 U.S. at 695.

3. Increasing Market Penetration Does Not Justify RPM

Finally, RPM is an overly restrictive method by which to achieve market penetration. First of all, manufacturers can always lower their wholesale price to dealers—rather than raise the retail price for dealers—to grant them an increased margin. Additionally, as with brand image, manufacturer advertising can and does serve to create consumer brand awareness for new products. Retailers will inevitably respond to consumer demand by stocking the shelves. Furthermore, manufacturers can and do pay promotional and slotting allowances to entice dealers to carry or display their product. All such practices are a more direct means of promoting interbrand competition without eliminating intrabrand and intertype competition, and the anticompetitive consequences of doing so.

Moreover, in-store promotion is not entirely beneficial. Such promotion often has a tendency to degrade demand quality, as the incentives to retailers and their salespersons generated by RPM may cause them to "push" a particular brand of product regardless of its merit, instead of providing accurate and unbiased information. *See* Warren S. Grimes, *Spiff, Polish, and Consumer Demand Quality: Vertical Price Restraints Revisited*, 80 CAL. L. REV. 815, 832 (1992). In such situations, which happen all too frequently, the manufacturer and the retailer benefit—in the form of increased sales and margins—but it is the consumer who is left holding the bag.

C. A Rule of Reason Will Not Adequately Deter RPM

The "experience of the market has been so clear," *California Dental Ass'n v. FTC*, 526 U.S. 756, 780-81 (1999), that the Court can be confident that RPM almost always raises prices and stifles innovation, and almost never furthers any procompetitive benefit that cannot be achieved by less restrictive means. On the other hand, abandoning the *per se* rule would "lead to far more vertical price fixing than we have now," AREEDA, *supra*, ¶ 1633, at 330, resulting in severe under-deterrence and unwarranted consumer harm.

For all practical purposes, adopting a rule of reason would make RPM virtually legal, for all practical purposes. It is well-known that because of the burdens associated with full rule of reason litigation, it will be the rare instance where a rule of reason RPM case is even brought—no matter how anticompetitive such arrangements might be. Indeed, the rule of reason is "one of the most costly procedures in antitrust practice." HOVENKAMP, THE ANTITRUST ENTERPRISE, *supra*, at 105. Taking on such a heavy burden in prosecuting a case would rarely be justified by the expected value of any outcome and so a lenient rule of reason treatment for RPM "would probably amount to *per se* legality." Pitofsky, *Why Dr. Miles Was Right*, *supra*, at 30. *Cf.* Herbert Hovenkamp, *Vertical Restrictions and Monopoly Power*, 64 B.U. L. REV. 521, 521 (1984). Due to this concern, where, as here, experience has shown a type of agreement to be categorically anticompetitive, "[f]or the sake of business certainty and litigation efficiency," the Court classifies such agreements as illegal *per se*, despite the theoretical possibility that there may be some such agreements "that a full blown inquiry might have proved to be reasonable." *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 344 (1982).

The potential for under-deterrence is amplified by the rule of reason's principal consideration—whether or not a *manufacturer* has market power. In the context of RPM, where it is dealer and not manufacturer power that is often the root cause, such a test "has no meaning." HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra*, § 11.1, at 436. Moreover, this ubiquitous and notoriously difficult to detect dealer power that gives rise to RPM—whether or not the product of an actual conspiracy—cannot by itself be effectively deterred by the *per se* rule against horizontal price fixing. *See* AREEDA, *supra*, ¶ 1604a, at 36. In short, abandoning the *per se* rule against RPM in favor of the rule of reason would "not constitute sound antitrust policy." *Weyerhaeuser*, No. 05-381, slip op. at 5.

IV. THE CONSUMER GOODS PRICING ACT OF 1975 ESTABLISHES THAT RPM SHOULD REMAIN *PER SE* ILLEGAL

After experiencing the effects of RPM during the "fair trade" era, America abandoned RPM. Not long after assuming office, President Ford embarked upon a campaign to unify the country in battling inflation, an integral part of which was a "return to the vigorous enforcement of antitrust laws." Hon. Gerald R. Ford, President of the United States, *Whip Inflation Now* (Oct. 4, 1974), *available at* http://millercenter.virginia.edu/scripps/digitalarchive/conferenceDetail/30. Central to that objective was the repeal of the "fair trade" exemptions. *See* White House Press Release (Jan. 29, 1975), *reprinted in* KINTNER, *supra*, at 953. The initiative was so overwhelmingly popular that Congress was largely "unable to find anyone willing to take a stand" against repeal. Eileen Shannon, *No Defenders of "Fair*

Trade" are Found at Repeal Hearing, N.Y. TIMES, Feb. 19, 1975, at 72.

On December 12, 1975, President Ford signed into law the Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801, to "make it illegal for manufacturers to fix the prices of consumer products sold by retailers." Hon. Gerald R. Ford, President of the United States, *Presidential Statement Upon Signing H.R. 6971* (Dec. 12, 1975), *reprinted in* KINTNER, *supra*, at 981. The Act reinstated the *per se* rule against RPM, foreclosing the application of the rule of reason. *See California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 102 (1980); *Sylvania*, 433 U.S. at 51 n.18. To now adopt a rule of reason for RPM would directly conflict with the language and the import of this amendment, and would otherwise conflict with the stated will of Congress.

A. The Plain Language of the Act Mandates that RPM Remain *Per Se* Illegal

The plain language of the Act, though sparse, is dispositive. By its terms, the Consumer Goods Pricing Act is an "Act to amend the Sherman Antitrust Act to provide lower prices for consumers." Other than the technical provisions setting forth the effective date and repealing the Miller-Tydings and McGuire Acts, the phrase "to provide lower prices for consumers" is the Act's only descriptive language, and is therefore the "key to open the understanding" of this amendment. *Coosaw Mining Co. v. South Carolina*, 144 U.S. 550, 562 (1892).

Failing to "constru[e] the text according to its normal import," *Smith v. United States*, 508 U.S. 223, 244 (1993) (Scalia, J. dissenting), Petitioner and its *amici* advocate a standard of liability that conflicts with this language; for a rule of reason would necessarily allow RPM to be deemed reasonable (and ruled legal) in cases where the practice actually *raises* prices to consumers—exactly the opposite of what the Act calls for. Such an interpretation would invariably and impermissibly produce "absurd results." *United States v. Wilson*, 503 U.S. 329, 334 (1992).

That the Act itself does not include the term "*per se* illegal" is of no consequence. *See F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 163 (2004) (holding FTAIA to pertain to subject matter jurisdiction despite no mention of that term in the statute). Indeed, Congress knows full well how to draft legislation to require federal courts to engage in a rule of reason analysis. *See, e.g.*, 15 U.S.C. § 4302; 35 U.S.C. § 271(d)(5). Moreover, given that the state of the law in 1975 was that RPM was *per se* illegal, by amending the Sherman Act to eliminate the fair trade exemptions, the Act incorporated the *per se* rule into the Sherman Act itself. *See Beck v. Prupis*, 529 U.S. 494, 504 (2000) (holding contemporaneous understanding of elements of civil conspiracy incorporated into the RICO Act).

B. The Legislative History of the Act and Subsequent Legislation Confirm that RPM Should Remain *Per Se* Illegal

Congress ended "fair trade" certain that the effect of the Act would be to make minimum resale price maintenance *per se* illegal. The legislative record is nothing short of compelling. In the Committee Reports and statements on the House and Senate floors, RPM was recognized as "*per se* illegal" on a number of occasions and otherwise referred to in similar terms. For instance, the House Report referred to RPM as "*per se* illegal under Section 1 of the Sherman Act." H. Rep. 341, 94th Cong. (1975), *reprinted in* KINTNER, *supra*, at 956. Similarly, the Senate Report stated that the "fair trade laws are in fact legalized price fixing," and that "[w]ithout these exemptions the agreements they authorize would violate the antitrust laws." S. Rep. 466, 94th Cong. (1975), *reprinted in* KINTNER, *supra*, at 973. On the floor of the House, Representative Rodino referred to such agreements as "*per se* violations of the antitrust laws" and as "classic restraints of trade." KINTNER, *supra*, at 962. Likewise, Representative Seiberling stated that RPM is a "*per se* violation of the Federal antitrust laws." *Id*. at 968. Other Congressmen and Senators expressed similar sentiments. *See id*. at 961-69, 975-80; *see generally* John F. Seiberling, *Antitrust Law Enforcement in the Vertical Restraints Area: Congress Makes Laws: The Executive Should Enforce Them*, 53 ANTITRUST L.J. 175 (1984). Put simply, "a rule of reason for RPM would clearly undermine Congress' intent." HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra*, § 11.1, at 394.

Not long after the Consumer Goods Pricing Act was enacted, Congress passed still more legislation confirming that that RPM is and should remain *per se* illegal. It prevented the Antitrust Division from arguing in this Court that the *Dr. Miles* rule be overturned, *see Monsanto*, 465 U.S. at 761 n.7, and otherwise expressed disapproval of the Antitrust Division's stance on the rule on a number of occasions. *See generally* Richard M. Steuer, *The Turning Points in Distribution Law*, 35 ANTITRUST BULL. 467, 498-500 (1990); David A. Marks & Jonathan M. Jacobson, *Price Fixing: An Overview*, 30 ANTITRUST BULL. 199, 236-39 (1985). This legislation carries "great weight," *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 380-381 (1969), in construing Section 1 of the Sherman Act, as amended by the Consumer Goods Pricing Act.

V. *STARE DECISIS* AND COMMON LAW PRINCIPLES COUNSEL IN FAVOR OF RETAINING THE *DR. MILES* RULE

On numerous occasions, the Court has enforced the *per se* rule against RPM since it decided *Dr. Miles*. The *per se* rule has been endorsed by Congress and relied upon by American consumers. Neither Petitioner nor its *amici* present any compelling evidence of the special circumstances required to abandon this venerable precedent. Indeed, America's experience with RPM and the *Dr. Miles* rule counsel in favor of adherence.

A "departure from the doctrine of *stare decisis* demands special justification." *Patterson v. McLean Credit Union,* 491 U.S. 164, 172 (1989). "This is especially true where, as here, the principle has become settled through iteration and reiteration over a long period of time," *Randall v. Sorrell*, 126 S. Ct. 2479, 2489 (2006), and is particularly so where, as is also the case here, the issue has been the subject of "careful, intense, and sustained congressional attention." *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424 (1986). It follows that where a settled interpretation setting forth a rule of law has become embedded in the fabric of our nation's culture, it will be upheld. *See, e.g.*, *Dickerson v. United States*, 530 U.S. 428, 443-44 (2000) (upholding requirement that police issue *Miranda* warnings).

The "long accepted practices of the American people," *44 Liquormart*, 517 U.S. at 517 (Scalia, J., concurring), counsel that the *Dr. Miles* rule be preserved. The judicial treatment of RPM "fundamentally affect[s] the day-to-day activities of consumers." Hon. Pamela Jones Harbour, Commissioner, Federal Trade Commission, *Vertical Restraints: Federal and State Enforcement of Vertical Issues*, Address to American Law Inst. and American Bar Ass'n on Product Distribution and Marketing, at 4 (forthcoming Mar. 8, 2007), *available at* http://www.ftc.gov/speeches/harbour.htm. Consumers have relied upon the ability to comparison shop on the basis of price between retailers for decades—whether it be for large purchases, such as automobiles, or smaller purchases such as foodstuffs and sundries. In so doing, they properly "expect that the promise of competitive markets is being met." *Id*. In reliance upon the Court's and Congress' repeated confirmation of the validity of the *Dr. Miles* rule, American consumers have come to depend upon vigorous competition among—and evolutionary innovation by—retailers as the rule of trade and as core to their consuming lives. But for the rule, many of the dynamic developments in distribution that have proven world-changing in the nearly one hundred years since *Dr. Miles* was decided might never have happened. No justifications have been presented that warrant abandoning the *per se* rule in light of this experience.

The common law tradition invoked by the Sherman Act, *Business Elec's Corp. v. Sharp Elec's Corp.*, 485 U.S. 717, 732 (1988), also counsels in favor of retaining the *Dr. Miles* rule. The common law looks to "experience," as reflected in the "story of a nation's development," rather than "the axioms and corollaries of a book of mathematics." OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881). The asserted procompetitive benefits of RPM are theoretical and speculative, as well as limited in both their applicability and their necessity. The anticompetitive effects of RPM, however, are proven and plain, applying broadly to all segments of the economy—in both the short and the long term. In deciding whether to retain the *Dr. Miles* rule, the Court should draw upon the "lessons of accumulated experience," *Khan*, 522 U.S. at 20, and be guided not by untested economic theories, but rather by America's experience in enduring the demonstrated anticompetitive effects of resale price maintenance and enjoying the dynamic benefits of the *per se* rule.

Neither special circumstances nor common law principles provide any good reason to now abandon a century of the Court's precedents, in direct conflict with the stated will of Congress and at the expense of the American consumer. Minimum resale price maintenance should remain *per se* illegal.

CONCLUSION

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

Respectfully submitted,

RACHEL WEINTRAUB
Consumer Federation of America
1620 Eye Street, N.W.
Washington, D.C. 20006
(202) 387-3121

PETER A. BARILE III
1370 Avenue of the Americas
New York, NY 10019
(212) 728-2200
Counsel of Record