In the Supreme Court of the United States

LEEGIN CREATIVE LEATHER PRODUCTS, INC.,
PETITIONER

v.

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

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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Whether vertical minimum resale price maintenance agreements should be deemed per se illegal under Section 1 of the Sherman Act, 15 U.S.C. 1, or whether they should instead be evaluated under the rule of reason.

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8 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* (2d ed. 2004) 18

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Howard P. Marvel, *The Resale Price Maintenance Controversy: Beyond the Convenon ́al Wisdom* , 63 Anontrust L.J. 59 (1994). 14, 23

Howard P. Marvel & Stephen McCafferty:

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The Welfare Effects of Resale Price Maintenance, 28 J.L. & Econ. 363 (1985) 20, 23

Frank Mathews A& Ralph Winter, *The Law and Economics of Resale Price Maintenance*, 13 Rev. Indus. Org. 55 (1998) 15

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Thomas R. Overstreet, Jr., *Resale Price Maintenance: Economic Theories and Empirical Evidence* (FTC 1983) 14, 20

Robeif Pitofsky, *In Defense of Discounters: The No-Frills Case for a* Per Se *Rule Against Veifacal Price Fixing*, 71 Geo. L.J. 1487 (1983) 26

Richard A. Posner:

In the Supreme Court of the United States

No. 06-480

LEEGIN CREATIVE LEATHER PRODUCTS, INC.,
PETITIONER

v.

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

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

The United States Department of Justice and the Federal Trade Commission have primary responsibility for enforcing the federal antitrust laws. The question in this case is whether an agreement between a supplier and its dealer that sets the dealer's minimum retail price constitutes a per se violation of Section 1 of the Sherman Act, 15 U.S.C. 1, or is instead properly analyzed under the rule of reason. The Court's resolution of that question may affect both federal antitrust enforcement and the extent to which private enforcement of the antitrust laws achieves its intended purpose.

1. Petitioner manufactures women's accessories, including handbags, shoes, and jewelry, that are sold through retailer

2. The court of appeals affirmed. Pet. App. 1a-11a. Petitioner did not challenge the jury's finding that it had entered into an agreement to fix the minimum price at which its dealers would sell its products, but rather challenged the application of a per se rule to its conduct. *Id.* at 3a. The court of appeals rejected petitioner's contention, concluding that it "remain[ed] bound by [this Court's] holding in *Dr. Miles*." *Id.* at 4a. The court of appeals also found that the trial court had properly excluded Professor's Elzinga's 1 Tf0.014 Tc -0.0161 Tw 12 0 0.01D9.1469 583.32 Tm(h)Tj

ments, yet they have no economic incentive to enrich dealers with supra-competitive profits while reducing their own sales.

To be sure, RPM limits intrabrand price competition and in some circumstances can harm consumer welfare by supporting cartel efforts by manufacturers or dealers. But non-price vertical restraints can also harm consumer welfare, yet they are subject to the rule of reason. *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977). Nor is there any basis for presuming that RPM will always or almost always support cartel efforts. Likewise, indirect indication of past congressional support for the per se rule of *Dr. Miles* does not counsel against this Court's revisiting the issue in light of subsequent decisions and modern economic analysis.

D. The principle of stare decisis does not justify reaffirmation of *Dr. Miles*. That principle has less force in the antitrust context, because Congress expected this Court to give continuing shape to the meaning of the antitrust laws in keeping with "changed circumstances and the lessons of accumulated experience." *State Oil Co.* v. *Khan*, 522 U.S. 3, 20 (1997). That is particularly true with respect to decisions applying the per se rule, rather than the rule of reason, because that choice is based on experience and economic analysis of particular economic behavior. If experience or economic analysis points in a different direction over time, there is no basis for maintaining a clearly outdated rule. This Court thus has overruled per se prohibitions against non-price vertical restraints and maximum vertical price restraints when "the theoretical underpinnings of those decisions" have been "called into serious question." *Id.* at 21.

restraint of trade * *

ate only for those restraints, such as horizontal price agreements among competitors, that have a "pernicious effect on competition and lack * * * any redeeming virtue." *Northern Pac. Ry.* v. *United States*, 356 U.S. 1, 5 (1958).

2. The determination that a specific practice should be treated as unlawful per se must rest upon experience in analyzing the practice and examining "the actual impact of these arrangements on competition." *White Motor Co.* v. *United States*, 372 U.S. 253, 263 (1963). Any "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than * * * upon formalistic line-drawing." *GTE Sylvania*, 433 U.S. at 58-59. Per se condemnation is "appropriate '[o]nce experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it." *Khan*, 522 U.S. at 10 (brackets in original (quoting *Arizona* v. *Maricopa County Med. Soc'y*, 457 U.S. 332, 344 (1982)).

Application of a per se rule embodies a generalization that "certain kinds of agreements will 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.*, 525 U.S. at 133. "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." *GTE Sylvania*, 433 U.S. at 50 n.16. This Court has accordingly been "reluctan[t] to adopt *per se* rules with regard to 'restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately

obvious.'" *Khan*, 522 U.S. at 10 (quoting *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 458-459 (1986)).

This Court has never analyzed the likely economic effects of RPM, much less found that RPM has a predictably "pernicious effect on competition and lack[s] * * * any redeeming virtue." *Northern Pac. Ry.*, 356 U.S. at 5. Because RPM agreements have been unlawful since the *Dr. Miles* decision in 1911, moreover, lower courts have been precluded from considering evidence of the competitive purposes and effects of particular RPM agreements. Thus, the per se prohibition against RPM has never been justified in accordance with the high standards for imposition of per se rules enunciated in *Northern Pacific* and subsequent decisions of this Court. It is clear that RPM falls far short of the current standard for per se condemnation of a practice.

Although RPM may have anticompetitive effects in a particular case, there is no basis "to predict with confidence that the rule of reason will condemn it" because the practice is invariably or almost invariably anticompetitive and lacking in any redeeming social value. *Khan*, 522 U.S. at 10 (quoting *Maricopa Co. Med. Soc'y*, 457 U.S. at 344). To the contrary, there is a widespread consensus that permitting a manufacturer to control the price at which its goods are sold may promote *inter*brand competition and consumer welfare in a variety of ways. Because "the primary purpose of the antitrust laws is to protect interbrand competition," *Khan*, 522 U.S. at 15; *GTE Sylvania*, 433 U.S. at 52 n.19, RPM cannot be classified as a manifestly anticompetitive practice worthy of per se condemnation.

As Justice White observed in his concurring opinion in *GTE Sylvania*

prices, in some circumstances other forms of sales efforts may better serve the interests of both consumers and manufacturers, even if not the dealers.

By fixing the minimum price at which the good may be sold (and thus guaranteeing the retailer a certain margin over the cost of the good to the retailer), RPM provides retailers with an incentive to expend resources in order to attract additional customers for that product, thereby furthering the manufacturer's competitive goals. RPM thus can have the same types of procompetitive effects recognized in *GTE Sylvania* with respect to nonprice vertical restraints such as exclusive territories. "Resale price maintenance, like other vertical restraints, is typically a response to a supplier's problem of inducing distributors to provide adequate levels of distribution for its products." Section of Antitrust Law, ABA, *Antitrust Law and Economics of Product Distributio 0 12 156 3 Tm(b)TjETBT3w BT/TT0 1 T*

products unknown to the consumer." *GTE Sylvania*, 433 U.S. at 55; see Pet. App. 36a (Elzinga Report) ("Leegin's pricing policy is designed to induce and incent store-owners and sales personnel

free-riding problem and thereby increase competition and enhance consumer welfare." Economists Pet. Stage Amici Br. 5 (Economists Br.). The most prominent pro-com

3. RPM may promote the sale of the manufacturer's product even absent free riding

Even in the absence of free riding, RPM may help the manufacturer encourage retailers to sell its products vis-a-vis rival brands.[1] By ensuring retailers an adequate margin over the wholesale price of the product, RPM provides retailers with an incentive to make non-price sales efforts that attract customers away from other brands. Such sales efforts extend beyond product exhibition and demonstration, on which other retailers can free ride, and include such factors as the attractiveness and location of retail stores and the speed and efficiency with

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[1]

As this Court observed in *GTE Sylvania*, however, the common law notion disfavoring restraints on alienation has been subjected to near-universal criticism by antitrust commentators. 433 U.S. at 53 n.21. While that common-law rule may have had resonance with the *Lochner*-era Court, it has limited utility in interpreting the antitrust statutes. The *GTE Sylvania* Court refused to rely on that ancient rule, holding

of dealer freedom alone is

pressed in *GTE Sylvania* justifies the continued characterization of RPM as a per se offense.

First, the Court noted Justice Brennan's earlier assertion in his concurring opinion in *White Motor Co.*, 372 U.S. at 268, that, unlike vertical nonprice restraints, RPM "almost invariably" reduces interbrand competition. But Justice Brennan did not identify any theoretical explanation or empirical support for that assertion, and the intervening years have not filled either void. To the contrary, as the Court recognized in *GTE Sylvania* itself, the impact of vertical restraints is generally *constrained* by interbrand competition: "when interbrand competition exists, * * * it provides a significant check on the exploitation of intrabrand market power because of the ability of consumers to substitute a different brand of the same product." 433 U.S. at 52 n.19. And if a manufacturer does possess interbrand market power, it is not likely to use RPM as a way to raise resale prices; if elevation of resale price were the manufacturer's ultimate purpose, the manufacturer could simply raise its own price to the distributor and thereby keep for itself any higher revenues resulting from the higher price.

Economists have observed, moreover, that nonprice vertical restraints, such as exclusive territories, can more completely restrict intrabrand competition than does RPM. While exclusive territorial restrictions can eliminate virtually all intrabrand competition, RPM permits retailers to engage in intrabrand competition on factors other than price, "leav[ing] multiple sellers of the brand in the same geographic market to engage in interbrand competition."

exclusive territories as a method of limiting price competition among dealers.").

Second, the Court in *GTE Sylvania* noted that RPM may facilitate cartelization. 433 U.S. at 51 n.18.[2] That possibility is a reason to subject RPM to the rule of reason. However, there is no basis in evidence or experience to predict that RPM "would always or almost always" be condemned under that standard. *Business Elecs.*, 485 U.S. at 723 (quoting *Northwest Wholesale Stationers, Inc.*, 472 U.S. at 289). Studies of RPM cases over many years have found relatively few instances of such anticompetitive uses of RPM. An analysis of all litigated RPM cases during 1976-1982 concluded that "collusion theories do not seem capable of explaining at least 85 percent of the cases." Pauline M. Ippolito, *Resale Price Maintenance: Empirical Evidence from Litigation*, 34 J.L. & Econ. 263, 292 (1991).[3] In any event, all cartel agreements are illegal per se, regardless

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[2] Manufacturers could use RPM, particularly when combined with exclusive dealing arrangements with their retailers, to facilitate a price-fixing conspiracy by enhancing their ability to detect departures from agreed-upon prices. In addition, retailers might act collectively to coerce a manufacturer to institute RPM as a means of thwarting competition from a discounting retail competitor. *Business Elecs.*, 485 U.S. at 725-726; Howard P. Marvel & Stephen McCafferty, *The Welfare Effects of Resale Price Maintenance*, 28 J.L. & Econ. 363, 365-369, 373-378 (1985); Overstreet 13-23.

[3] Another study found that only 7% of the horizontal conspiracy cases filed by the Department of Justice during 1890-1983 involved resale price maintenance. Stanley I. Ornstein, *Resale Price Maintenance and Cartels*, 30 Antitrust Bull. 401, 416-417 (1985). The same study found that only 10% of RPM complaints brought by the FTC during 1942-1983 involved cartels. *Id.* at 423. Still another report found that a "substantial portion of the [FTC]'s RPM enforcement efforts [from 1965-1982] have been concentrated in markets which appear to be structurally competitive." Overstreet 74.

to the *Dr. Miles* regime, H.R. Rep. No. 341, 94th Cong., 1st Sess. 3 (1975) (House Rep.); S. Rep. No. 466, 94th Cong., 1st Sess. 1-2 (1975), the legislative history suggests that Congress merely intended to end a special exemption from the Federal antitrust laws that allowed States to declare RPM per se *legal*. House Rep. 5.

In repealing the special exemption for RPM provided by the fair trade laws, Congress did not purport to freeze that status and deprive this Court of its recognized authority and flexibility to interpret the Sherman Act's general language in accordance with our growing understanding of commercial realities. Easterbrook 139. There is thus no support for the notion that Congress intended to preserve a per se ban on RPM even if subsequent developments in the law rendered that ban anomalous and markedly inconsistent with the treatment of other forms of vertical restraints. Likewise, the earlier prohibitions against the Department's use of appropriated funds to advocate *Dr. Miles*'s demise have not been in effect for over 20 years, and in any event are hardly a testament to the robustness of the *Dr. Miles* rule. Congress could have buttressed the *Dr. Miles* rule directly,

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b. It also has been argued that RPM necessarily harms those customers who are already poised to purchase the manufacturer's product without any special dealer services supported by RPM (so-called "inframarginal" customers). According to that argument, RPM forces inframarginal customers to pay more for a product they would have purchased in any event. Wil-

marketing strategy, manufacturers can be expected to adopt the best available alternative to RPM. For example, manufacturers might consider relatively inefficient vertical integration or offer services themselves that could be more efficiently produced by retailers, thereby decreasing consumer welfare. See p. 17, *supra*. Even under the *Dr. Miles* rule, moreover, manufacturers may lawfully adopt a policy of terminating retailers for failure to abide by the manufa

cal underpinnings of those decisions are called into serious question." *Khan*, 522 U.S. at 21. In an analogous context, this Court recently overruled its prior decisions establishing a presumption that patents confer market power in the context of a tying case, a presumption that did not comport with modern economic reality. *Illinois Tool Works Inc.* v. *Independent Ink, Inc.*

Even commentators who emphasize the potential anticompetitive effects of vertical restraints generally endorse some form of rule-of-reason analysis that takes into account the economic and market conditions in any given case. For examMie1xamMie1xamMie1xamMie1xam/TT0 1 Tf-0.0062 Tw 2 1og1

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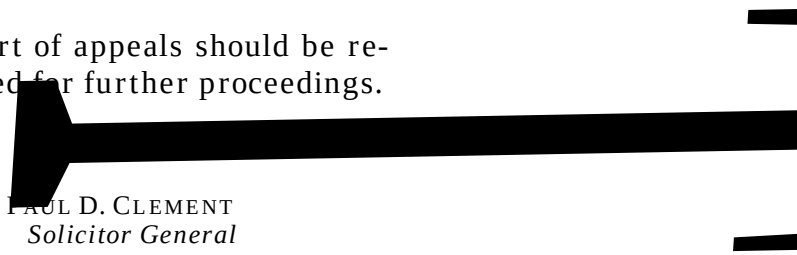
The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.



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