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 CTIA – THE WIRELESS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

CTIA – The Wireless Association represents all segments of the wireless communications industry. Members of CTIA include service providers, manufacturers, wireless data and Internet companies, and other industry participants. CTIA has filed *amicus* briefs in this Court and other federal courts on a variety of issues of interest to the wireless industry in such disparate cases as *Bartnicki* v. *Vopper*, 532 U.S. 514 (2001), *City of Rancho Palos Verdes* v. *Abrams*, 544 U.S. 113 (2005), and *Bell Atlantic Corp.* v. *Twombly*, No. 05-1126 (argued Nov. 27, 2006). In the present case, the Court granted CTIA's motion for leave to file a brief as *amicus curiae* at the petition stage.

Members of CTIA sell a variety of sophisticated communications products, such as Internet-accessible mobile phones, that benefit from point-of-sale consumer services. The Court's decision on the question presented here will directly affect how those companies market such devices.

SUMMARY OF ARGUMENT

I. There is a consensus among lower courts, antitrust scholars, and economists that vertical restrictions on intrabrand competition are usually procompetitive and beneficial to consumers. Such restraints are adopted for a host of legitimate, procompetitive reasons. In one fashion or another, vertical restraints are designed and operate to

[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. R. 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 a monetary contribution to the preparation or submission of this brief.

promote interbrand competition among rivals. There is no serious intellectual support for the proposition that such restrictions, or any category of such restrictions, are always or almost always anticompetitive and deserving of *per se* condemnation. Minimum resale price maintenance is one such vertical restriction.

Manufacturers, and intermediate distributors such as members of *amicus* CTIA, limit intrabrand retail price competition for legitimate and procompetitive reasons in a wide range of industries. By guaranteeing a minimum gross margin between wholesale and retail prices, a manufacturer or intermediate distributor can enlarge the number of retailers that are willing to sell the product and create and preserve retailers' incentives to invest in valuable non-price competitive behavior, such as advertising and promoting the product. Retailers' incentives to provide such costly services are severely undermined when a competitor offers lower prices without providing them and without incurring the associated costs. Manufacturers and intermediate distributors have legitimate interests in preventing this free-riding behavior, and consumers benefit from receiving the services that vertical price restraints can promote. In the absence of a cartel (not alleged in this case), manufacturers and intermediate distributors do not use minimum resale price maintenance as a device to achieve monopoly profits. Such profits require a restriction in supply, yet a vertical restriction (unless accompanied by horizontal collusion) affects only one brand; it does nothing to eliminate or reduce interbrand competition. The current *per se* treatment of minimum resale price maintenance imposes large costs on businesses and consumers alike, and produces few, if any, countervailing benefits.

II. The arguments offered in defense of retaining the *per se* rule are unpersuasive. In *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.,* 220 U.S. 373 (1911), this Court justified a ban on resale price maintenance on the ground that the practice is an unlawful restraint on alienation. That theory did not survive this Court's later decisions rejecting a rule of *per se* invalidity for vertical nonprice restraints and for maximum resale price restraints. *Continental T.V., Inc.* v. *GTE Sylvania Inc*., 433 U.S. 36 (1977); *State Oil Co.* v. *Khan*, 522 U.S. 3 (1997). This *per se* rule also is defended on the ground that it is necessary to prevent resale price maintenance from being used to enforce a manufacturer- or distributor-level price-fixing cartel. But resale price maintenance does not invariably—or even usually—stem from or lead to cartelization, resale price maintenance is not invariably anticompetitive, and the rule of reason and direct prohibitions on cartels are sufficient to police resale price maintenance for potential cartel activity. Another common defense of the *per se* rule—that one cannot be *sure* that manufacturers really have service-enhancing reasons to wish to protect their dealers' prices, and that low price rather than high service is the one thing we can be *sure* consumers desire—paternalistically substitutes scholars' and courts' beliefs about consumer preferences for the surest measure of consumer preferences, the market. That defense likewise ignores the discipline *inter*brand competition places on ineffective or mistaken manufacturer policies. Finally, some argue that Congress has endorsed the *Dr. Miles* rule. But no positive law today dictates that resale price maintenance be deemed unlawful *per se*, and the legislation used to support this congressional-acceptance argument was repealed long ago.

III. This Court has recognized that *stare decisis* has limited weight in the antitrust arena, where Congress intended that liability rules would be adjusted in light of judicial experience. That experience, coupled with the overwhelming weight of scholarship by the legal profession and economics academy, reveals that minimum resale price maintenance should not be prohibited across the board. This Court often has abandoned *per se* rules when they prove mistaken as a matter of antitrust policy. In particular, the Court has acknowledged that vertical restraints differ materially from horizontal ones and so should not be outlawed *per se*. Few antitrust precedents have been as thoroughly discredited as *Dr. Miles*. Accordingly, *stare decisis* considerations should not dissuade the Court from abandoning a rule that is economically damaging and that the Court never would adopt if the issue arose for the first time today.

ARGUMENT

THE ANTITRUST LAWS SHOULD NOT TREAT MINIMUM RESALE PRICE MAINTENANCE AS A *PER SE* UNLAWFUL BUSINESS PRACTICE

Section 1 of the Sherman Act proscribes concerted action only if it unreasonably restrains competition. Ordinarily, courts determine whether particular conduct is anticompetitive through a case-specific application of a Rule of Reason, which requires the factfinder to assess the relevant considerations in deciding whether a practice is an unreasonable restraint on competition.[2] Certain practices, however, are deemed *per se* illegal, dispensing with the need for case-by-case evaluation. But since *per se* rules of illegality condemn practices without even asking if they promote competition in a particular setting, they create a risk of falsely condemning procompetitive conduct.[3] Accordingly, *per se* rules of illegality are appropriate only for "conduct that is manifestly anticompetitive."[4] Proponents of any such rule have the burden of proving, "based upon demonstrable economic effect,"[5] that it is "'immediately obvious'" or known through

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[2] *See, e.g.*, *Texaco, Inc.* v. *Dagher*, 547 U.S. 1, 126 S. Ct. 1276, 1279 (2006); *Sylvania*, 433 U.S. at 49; *Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238 (1918); *Standard Oil Co.* v. *United States*, 221 U.S. 1, 60 (1911).

[3] *See Polygram Holding, Inc.* v. *FTC*, 416 F.3d 29, 34 (D.C. Cir. 2005) (Ginsburg, C.J.).

[4] *Sylvania*, 433 U.S. at 49.

[5] *Sylvania*, 433 U.S. at 58-59.

"'experience'"[6] that a practice has "a pernicious effect on competition and lack[s] * * * any redeeming virtue"[7] because it "'would always or almost always tend to restrict competition and decrease output.'"[8] A particular business practice therefore should be held *per se* unlawful only when "'experience'" with it will "'[e]nable the Court to predict with confidence that the rule of reason will condemn it.'"[9]

Under that approach, minimum resale price maintenance should not be deemed unlawful *per se* for three reasons:

First: Resale price maintenance directly and ordinarily serves legitimate, procompetitive goals. Among other things, the practice is used to create incentives for retailers to engage in point-of-sale product advertising and promotion, to maintain adequate inventory, and to train sales personnel to explain new, complex, or technical products. Manufacturers and intermediate distributors could reasonably believe that resale price maintenance is necessary to prevent some retailers from free riding off the presale services supplied by others, and market forces will provide the necessary discipline if they are wrong, because inefficient practices will result in loss of sales to *interbrand* competitors.

Second: The rationale for a rule of *per se* illegality has become obsolete over time. The Court adopted that rule in 1911 in *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*[10] before it had experience with vertical restraints. Since then, the Court has rejected *per se* rules in closely analogous

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[6] *Khan*, 522 U.S. at 10 (quoting *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332, 344 (1982)).
[7] *Northern Pacific Ry*. v. *United States*, 356 U.S. 1, 5 (1958).
[8] *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co*., 472 U.S. 284, 289-90 (1985) (quoting *Broadcast Music, Inc.* v. *CBS*, 441 U.S. 1, 19-20 (1979)); *Khan*, 522 U.S. at 10.
[9] *Khan*, 522 U.S. at 10 (quoting *Maricopa*, 457 U.S. at 344).
[10] 220 U.S. 373.

circumstances.[11] Moreover, resale price maintenance also is not so inherently likely to serve as a façade or tool for price fixing that it should be condemned without giving a party a chance to defend its use. The Justice Department has ample tools to investigate horizontal cartels, and the Rule of Reason is fully satisfactory to review specific vertical practices. Accordingly, the substantive antitrust rules governing vertical restraints need not be manipulated in order to deal with the problem of horizontal restraints. Finally, no Act of Congress dictates the result in this case. At one time, Congress lifted the *per se* ban on resale price maintenance when permitted by state law, and later it repealed that law. But Congress has never amended the Sherman Act to incorporate the *Dr. Miles* rule.

Third: *Stare decisis* considerations do not justify retention of the *Dr. Miles* rule. This Court adopted that rule nearly 100 years ago, long before it acquired experience with the pro-competitive benefits of vertical restraints; the Court often has recognized that Congress intended it to adjust federal antitrust jurisprudence in light of contemporary wisdom and experience; and this Court has done precisely that in the closely related areas of vertical nonprice restraints by abandoning outdated rules that treated such practices as *per se* illegal. *Stare decisis* considerations therefore do not dictate retention of a competitively damaging rule that this Court would not adopt today in the first instance.

[11] *State Oil* v. *Khan*, 522 U.S. 3 (1997) (rejecting a *per se* rule of illegality for maximum resale price maintenance); *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 59 (1977) (rejecting a *per se* rule of illegality for nonprice vertical restraints); *cf. Illinois Tool Works* v. *Independent Ink, Inc.*, 547 U.S. ___, 126 S. Ct. 1281 (2006) (rejecting a *per se* rule that a patent creates monopoly power).

I. MINIMUM RESALE PRICE MAINTENANCE COMMONLY SERVES LEGITIMATE, PROCOMPETITIVE PURPOSES AND SHOULD NOT BE OUTLAWED ACROSS THE BOARD

A. Manufacturers and intermediate distributors use vertical restraints for a host of legitimate, procompetitive reasons. In one fashion or another, vertical restraints are designed and operate to promote interbrand competition among rivals by restraining intrabrand competition among multiple dealers offering the same product. Over the last 30 years, this Court has recognized on a number of occasions that vertical restraints can be procompetitive.[12]

Minimum resale price maintenance (also known as RPM) is one type of vertical restraint. Sometimes used in lieu of vertical integration, minimum resale price maintenance constrains the lowest price at which a dealer can offer a supplier's product.[13] Although this Court banned that practice in 1911 in the *Dr. Miles* case, for more than two decades there has been widespread agreement among antitrust scholars[14]

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[12] *See Sylvania*, 433 U.S. at 54 ("Vertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products."); *Monsanto Co.* v. *Spray-Rite Serv. Corp*., 465 U.S. 752, 762-763 (1984); *Business Electronics Corp.* v. *Sharp Electronics Corp*., 485 U.S. 717, 728 (1988); *Khan*, 522 U.S. at 15-19.

[13] A vertically integrated firm would set its own resale price to consumers, so resale price maintenance is a partial substitute for vertical integration. Roger D. Blair & David L. Kaserman, *Antitrust Economics* 353 (1985).

[14] *See, e.g.*, 8 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1611 (2d ed. 2004); Robert H. Bork, *The Antitrust Paradox* 280-98 (1993 ed.); William F. Baxter, *The Viability of the Vertical Restraints Doctrine*, 75 CAL. L. REV. 933, 935 (1987); Terry Calvani & Andrew G. Berg, *Resale Price Maintenance After* Monsanto*: A Policy Still at War With Itself*, 1984 DUKE L.J. 1163, 1180-82; Frank Easterbrook, *Antitrust Law Enforcement in the Vertical Restraints Area: Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J. 135, 146-48

and economists[15] alike that minimum resale price maintenance is a legitimate business practice that manufacturers

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(1984); Herbert Hovenkamp, *The Antitrust Enterprise* 123-24, 186-91 (2005); Timothy J. Muris, *Improving the Economic Foundations of Competition Policy*, 12 GEO. MASON L. REV. 1, 17 (2003); Richard A. Posner, *Antitrust Law* 172-73, 189 (2d ed. 2001). *But see* Robert Pitofsky, *In Defense of Discounters: The No-Frills Case for a Per Se Rule Against Vertical Price Fixing*, 71 GEO. L.J. 1487 (1983).

[15] *See, e.g.*, Roger D. Blair, Jill Boylston Herndon & John E. Lopatka, *Resale Price Maintenance and the Private Antitrust Plaintiff*, 83 WASH. U.L.Q. 657, 659, 697-714 (2005); David A. Butz, *Vertical Price Controls With Uncertain Demand*, 40 J.L. & ECON. 433 (1997); Dennis W. Carlton & Jeffrey M. Perloff, *Modern Industrial Organization* 423-34 (4th ed. 2005); Yongmin Chen, *Oligopoly Price Discrimination and Resale Price Maintenance*, 30 RAND J. ECON. 441 (1999); James Cooper, *et al*., *Vertical Restraints and Antitrust Policy: What About the Evidence?*, 1 COMPETITION POL. INT'L 45, 55-58 (2005); Raymond Deneckere, Howard P. Marvel & James Peck, *Demand Uncertainty and Price Maintenance: Markdowns as Destructive Competition*, 87 AMER. ECON. REV. 619 (1997); Raymond Deneckere, Howard P. Marvel & James Peck, *Demand Uncertainty, Inventories, and Resale Price Maintenance*, 111 Q.J. ECON. 885 (1996); Pauline M. Ippolito, *Resale Price Maintenance: Empirical Evidence from Litigation*, 34 J.L. & ECON. 263 (1991); Benjamin Klein, *The Economics of Franchise Contracts*, 2 J. CORP. FIN. 9 (1995); Benjamin Klein & Kevin M. Murphy, *Vertical Restraints as Contract Enforcement Mechanisms*, 31 J.L. & ECON. 265 (1988); Frank Mathewson & Ralph Winter, *The Law and Economics of Resale Price Maintenance*, 13 REV. INDUS. ORG. 57 (1998); Howard P. Marvel & Stephen McCafferty, *The Political Economy of Resale Price Maintenance*, 94 J. POL. ECON. 1074 (1986); Howard P. Marvel & Stephen McCafferty, *The Welfare Effects of Resale Price Maintenance*, 28 J.L. & ECON. 363 (1985); Howard P. Marvel & Stephen McCafferty, *Resale Price Maintenance and Quality Certification*, 15 RAND J. ECON. 346 (1984); Thomas R. Overstreet, Jr., Bureau of Econ., Fed'l Trade Comm'n, *Resale Price Maintenance: Economic Theories and Empirical Evidence* (Staff Report 1983); Lester G. Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J.L. & ECON. 86 (1960); Jean Tirole, *The Theory of Industrial Organization* 170-84 (1988); W. Kip Viscusi, John M. Vernon & Joseph E.

ordinarily use as a means of limiting *intra*brand competition in order to enhance *inter*brand competition, which is the "primary concern of antitrust law."[16]

Minimum resale price maintenance fosters competition and efficiency in many ways. By ensuring a minimum margin between wholesale and retail prices, a manufacturer or intermediate distributor can: (1) ensure that a larger number of retail outlets will carry the product; (2) spur nonprice competition among potential dealers for the right to sell the product; (3) create loyalty and honesty in retailers; (4) prevent deterioration in the image of quality or prestige created by the manufacturer's or intermediate distributor's marketing efforts; and (5) create and preserve retailers' incentives to invest in several forms of valuable non-price competitive behavior. Examples of such procompetitive non-price behavior include, among others: point-of-sale advertising and product promotion to educate consumers about new or complex products; adequate, well-organized inventory and prominent shelf space in individual outlets; the hiring or training of knowledgeable sales personnel to explain products; creation of an attractive shopping environment (*e.g.*, multiple, short cashier lines, and convenient, usable product samples); and the offer of after-sale services. A manufacturer's economic encouragement of these behaviors can cause retailers to create nonprice value for consumers that exceeds the value of a somewhat lower retail price, and therefore enhances demand for the product.

Efforts by manufacturers or intermediate distributors to offer consumers point-of-sale services are common in a wide range of industries. Consumers benefit directly from receiving

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Harrington, Jr., *Economics of Regulation and Antitrust* 283 (4th ed. 2005); Ralph A. Winter, *Vertical Control and Price Versus Nonprice Competition*, 108 Q.J. ECON. 61 (1993).

[16] *Sylvania*, 433 U.S. at 52 n.19; *see also Volvo Trucks North America, Inc.* v. *Reeder-Simco GMC, Inc.*, 546 U.S. 164, 126 S. Ct. 860, 872 (2006).

the services and indirectly from the augmented interbrand competition. And even dealers can benefit financially from increased consumer demand due to nonprice sales features. In sum, all parties can benefit from this practice.[17]

Retailers' incentives to provide costly point-of-sale services are severely undermined when a retailer that provides these services loses sales to a competitor that can offer lower prices because it does not provide such services and therefore does not incur the costs associated with them. A manufacturer or intermediate distributor has legitimate interests in preventing this kind of free-riding behavior, to encourage the provision of these retail services when they allow the manufacturer to engage more effectively in interbrand competition. Yet, without a minimum resale price, dealers knowledgeable or fearful of free-riding competitors would not offer these services, injuring the manufacturer and consumers alike.

The dramatic growth of Internet commerce has vastly increased the threat of free riding; retailers that provide costly point-of-sale services now lose sales to distant Internet sellers, not just local bricks-and-mortar free riders. If RPM were permissible, manufacturers or intermediate distributors could use that device to distribute their products through the Internet, while limiting free riding by Internet sellers. Instead, because RPM is currently *per se* illegal, manufacturers and intermediate distributors now face the

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[17] Manufacturers vary in their use of resale price maintenance. Some firms may find it useful for retailers to educate consumers about new products or about old ones that are purchased infrequently, such as electronics equipment or vehicles. Other companies may find it valuable to use RPM in lieu of or in conjunction with national advertising. Different manufacturers may abandon RPM over time as consumers gain familiarity with a product. And still other manufacturers may choose to rely entirely on national advertising for consumer education. Telser, 3 J.L. & ECON. at 95-96; Blair & Kaserman, *Antitrust Economics* 350; Mathewson & Winter, 13 REV. INDUS. ORG. at 68.

unattractive alternatives of forgoing Internet distribution entirely, or severely undermining the incentives of their bricks-and-mortar retailers to provide valuable point-of-sale services.

In the absence of a cartel, manufacturers and intermediate distributors do not use minimum resale price maintenance as a device to achieve monopoly profits. Such profits require a restriction in supply, yet a single manufacturer's vertical restriction affects only one brand; it does nothing to eliminate or reduce interbrand competition. It also would be irrational for a manufacturer to use resale price maintenance to allow distributors to earn a monopoly return; that would be tantamount to giving money to distributors. And if all that a manufacturer wanted were to increase prices, it would simply raise the price charged to distributors.[18]

A manufacturer may sometimes misgauge consumer preferences, and a particular decision to promote non-price competition by suppressing intrabrand price competition could conceivably make consumers, on the whole, worse off. The reason, however, is not that the manufacturer has done something anticompetitive, and the reasonable response to this phenomenon is not strict treble-damage liability for

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[18] The same principles apply even when the manufacturer is the dominant firm in an industry. Minimum resale price maintenance does not enable a dominant firm to extract monopoly profits from consumers. If a manufacturer is a monopolist, it can make pricing decisions without need for this restraint, since the exercise of its market power is not itself illegal. Hovenkamp, *The Antitrust Enterprise* 291 (there is no "no-fault" antimonopoly rule); *e.g.*, *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 294 (2d Cir. 1979); *Blue Cross & Blue Shield United of Wisconsin* v. *Marshfield Clinic*, 65 F.3d 1406, 1412-13 (7th Cir. 1995) (Posner, C.J.); *Alaska Airlines, Inc.* v. *United Airlines, Inc.*, 948 F.2d 536, 548-49 (9th Cir. 1991); *Williamsburg Wax Museum, Inc.* v. *Historic Figures, Inc.*, 810 F.2d 243, 252 (D.C. Cir. 1987); *Kartell* v. *Blue Shield of Massachusetts*, 749 F.2d 922, 927 (1st Cir. 1984); *Trace X Chem., Inc.* v. *Canadian Indus., Ltd.*, 738 F.2d 261, 268 (8th Cir. 1984).

guessing wrong. Because sellers of products can be more profitable by giving consumers what they want than what they do not want, the incentive of the manufacturer is aligned with that of the body of consumers, and a misapprehension of consumers' tradeoffs is merely the result of imperfect information or bad business judgment, not a diminution in competition. Moreover, *inter*brand rivals can take advantage of such a mistake by offering consumers the cheaper, no-frills product if that is what consumers (in the requisite numbers) want. The market, not a court, will "punish" the manufacturer for any mistakes it makes.[19] And here the record facts suggest that petitioner did *not* make any mistake, but rather correctly chose a strategy to advance both its own business interests and consumer welfare. *See* Pet. App. 37a-38a. The self-correcting "problem" of manufacturer restraints that do not in practice optimize consumer welfare for some limited period of time is trivial in comparison to the procompetitive benefits of resale price maintenance, and certainly no reason for a *per se* rule against the practice.

Moreover, were RPM not categorically forbidden, it would be relatively easy to identify those cases in which a firm's RPM policy produces a net decrease in consumer welfare by providing services that consumers do not value enough to justify paying higher prices. As Judge Posner has explained, a determination whether consumers have benefited is precisely equivalent to a determination whether the vertical restraint caused the output of the firm imposing the restraint to rise or fall. "If its output expanded, the restriction must have made the firm's product more attractive to consumers on balance, thereby enabling the firm to take business from its competitors. * * * The increase [in interbrand competition] *must* exceed any net reduction in intrabrand competition considered in both its price and service aspects. * * * If, on balance, the product is more attractive to consumers, as

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[19] *See* 8 Areeda & Hovenkamp, *supra*, ¶ 1612e, at 149.

demonstrated by the fact that more of it is sold, the net effect on competition must be positive."[20]

Thus, perversely, the instances of RPM most likely to be corrected by the market itself (because they are unprofitable) are the only ones that (in the absence of a cartel) might even possibly reduce overall consumer welfare and therefore be of conceivable antitrust concern. The instances of RPM most likely to be attacked in litigation—sustained, *successful* efforts by a manufacturer to increase its output and improve its brand image and profitability—are those most clearly beneficial to consumers.

B. This Court has acknowledged that every other means through which manufacturers may limit intrabrand competition can be procompetitive. A manufacturer may lawfully limit intrabrand competition by vertically integrating into retailing;[21] by announcing a suggested retail price and unilaterally terminating any retailer that charges less;[22] by contractually limiting the geographic area or the class of customers that a retailer may serve;[23] and by agreeing with retailers on a maximum retail price.[24] Like resale price maintenance, all of these practices have both the purpose and the effect of limiting intrabrand competition, but this Court has recognized that such practices often increase interbrand competition. Their net effect is usually procompetitive, and none of these practices is subject to *per se* condemnation; indeed, the vertical restriction that is the most similar to resale

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[20] Richard A. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6, 21 (1981) (emphasis in original).

[21] *See United States* v. *Addyston Pipe & Steel Co*., 85 F. 271, 287 (6th Cir. 1898) (Taft, J.), *aff'd as modified*, 175 U.S. 211 (1899); *cf. United States* v. *United States Steel Corp.*, 251 U.S. 417 (1920).

[22] *United States* v. *Colgate & Co.*, 250 U.S. 300 (1919); *Monsanto*, *supra*; *Sharp Electronics*, *supra*.

[23] *Sylvania*, *supra*.

[24] *Khan*, *supra*.

price maintenance—a manufacturer's unilateral policy of refusing to sell to any dealer than charges less than the price "suggested" by the manufacturer—is *per se lawful*.

Judicial experience has confirmed that vertical restraints are almost always procompetitive. When non-price vertical restraints were mistakenly treated as *per se* unlawful, the result was described by Judge Ginsburg (formerly the Assistant Attorney General in charge of the Antitrust Division) as a "plaintiffs' picnic" that produced a surge of meritless antitrust litigation.[25] *Sylvania* corrected that mistake by holding that the legality of non-price vertical restraints must be judged by their actual competitive effects; in the 14 years after *Sylvania* was decided, plaintiffs won in only four of the 45 reported decisions involving non-price vertical restraints.[26] And that sample of 45 litigated cases, of course, involved those restraints that were *most* likely to be anticompetitive. For the vast majority of vertical restraints, no plaintiff even *alleged* an anticompetitive effect. In light of this judicial experience with non-price vertical restraints, there is no reason to believe that resale price maintenance is virtually always anticompetitive. Vertical agreements that limit intrabrand price competition should be treated in the same way as non-price vertical restraints.

Instead, under the *Dr. Miles* rule, businesses are forced to use more costly and less effective devices to limit intrabrand competition rather than resale price maintenance agreements, and to spend large amounts of time and money on antitrust compliance programs designed to ensure adherence to arbitrary distinctions that are as irrational and counterintuitive to business executives as they are to antitrust scholars. These costs are imposed on every manufacturer or intermediate distributor that relies on others to distribute and retail its

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[25] Douglas H. Ginsburg & Leah Brannon, *Determinants of Private Antitrust Enforcement in the United States*, 1 COMPETITION POLICY INT'L 29, 37 (2005).

[26] *Id*. at 42.

products. And the beneficiaries of this complexity are not consumers, distributors, or manufacturers, but lawyers.[27]

Consider just the costs of navigating between the *Dr. Miles* rule prohibiting resale price maintenance and the *Colgate* rule allowing firms to refuse to sell to dealers who will not follow a manufacturer's recommended resale price. The legality of a *Colgate* "announce and terminate" policy does not turn on an evaluation of its competitive effects. Rather, it turns on a formalistic inquiry into whether the supplier and dealer have engaged in verbal or nonverbal communications sufficient for them to be deemed to have entered into an agreement. Any back-and-forth communications that could give rise to an inference that the supplier asked the reseller to maintain a minimum price and that the reseller communicated his assent might suffice to allow a finding of agreement. Moreover, actions by a supplier other than immediate and indefinite termination of a noncompliant dealer raise a raft of questions whether they have "agreed" on a resale price. Here are just a few examples:

- Can a manufacturer take any retroactive action with respect to past sales, such as declining to give otherwise earned rebates or discounts or refusing to accept returns on terms otherwise applicable, or does such retroactive action permit the inference that manufacturer and dealer had agreed on resale prices and that the dealer breached the agreement?
- Can a manufacturer discuss with the dealer whether it will terminate the reseller, or just give the dealer a warning?
- Can a manufacturer adopt an "announce and terminate" policy for some products, but not for all?

[27] *See* Posner, 48 U. CHI. L. REV. at 14 ("The Court's distinction between price and nonprice restrictions has no intuitive meaning to the businessman, and makes his fortunes ever more dependent on whether he, his dealers, and his distributors, have good antitrust lawyers.").

- Can a manufacturer terminate a dealer for some elements of the manufacturer's product line, or must the dealer be terminated across the board?
- Can a manufacturer terminate only some noncompliant dealers, or must all be terminated?
- Can a manufacturer reinstate a wayward dealer, or will reinstatement be deemed an agreement to sell at the manufacturer's resale price?
- Can a manufacturer prohibit other dealers from transshipping goods to a terminated dealer, or will that be deemed an agreement between the manufacturer and the remaining dealers or among the remaining dealers to sell at the manufacturer's resale price?

The complexities demanded by this state of the law force companies to spend on legal fees money that is better spent on product research and development. This type of needless line-drawing exercise is precisely what *Sylvania* sought to end by stating that any "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than * * * upon formalistic line drawing."[28] And a distinction between "price" and "nonprice" vertical restraints, though encouraged by dictum in *Sylvania* itself,[29] is just such formalistic line drawing. "This distinction between price and nonprice restrictions is indefensible."[30]

II. THE ARGUMENTS OFFERED IN DEFENSE OF RETAINING A *PER SE* BAN ON MINIMUM RESALE PRICE MAINTENANCE ARE UNPERSUASIVE

In *Dr. Miles*, this Court justified a ban on resale price maintenance on the ground that the practice is an unlawful "restraint[] upon alienation."[31] Regardless of whether reliance

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[28] 433 U.S. at 58-59.
[29] 433 U.S. at 51 n.18.
[30] Posner, 48 U. CHI. L. REV. at 9.
[31] 220 U.S. at 404; *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 380 (1967) (so construing *Dr. Miles*).

on that ancient property law rule was appropriate in 1911,[32] that rationale did not survive this Court's 1977 decision in *Sylvania*, which rejected a rule of *per se* invalidity for vertical nonprice restraints, or the Court's 1997 decision in *Khan*, which rejected a rule of *per se* invalidity for maximum resale price restraints. A defense of *Dr. Miles* must lie elsewhere.

A. A tool to prevent cartels: The principal defense offered today for the *Dr. Miles* rule is that minimum resale price restraints can sometimes be used as a tool to monitor and enforce horizontal cartel agreements by manufacturers or retailers. That theoretical concern, however, finds scant support, at best, in actual experience. In cases challenging horizontal cartels, evidence that vertical restraints were used as a cartel tool is rare. Similarly, cases challenging vertical restraints rarely produce evidence of horizontal cartel agreements. *Dr. Miles* may have been one of those rare exceptions; the facts in that case suggest that the dealers there may have been involved in a cartel.[33] But in the overwhelming majority of resale price maintenance cases, as in this one, there is not even a hint of horizontal cartel behavior. *See* Pet. App. 32a, 34a-35a.

The leading scholarly defender of the *per se* rule against RPM has rested his analysis largely on the possibility of cartel facilitation. Dean Pitofsky has asserted that "experience shows that the manufacturer is often induced to act as an organizer of [a] dealer's cartel by dealer threats or

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[32] Justice Holmes did not think so. *Dr. Miles*, 220 U.S. at 412 (dissenting opinion); *see also* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897) ("For the rational study of the law the blackletter man may be the man of the present, but the man of the future is the man of statistics and the master of economics."); Bork, *The Antitrust Paradox* 285 ("It is hardly reassuring to learn that the sole basis for antitrust's answer to a modern business problem is the solution given three or four hundred years ago by an English judge who was talking about something else.").

[33] Herbert Hovenkamp, *The Antitrust Enterprise* 186 (2005).

enticements," and noted that through RPM "the manufacturer *may* tend to stabilize prices at the *manufacturer's* level."[34] From those premises, he leaps to the conclusion that "vertical price fixing *almost always* generates anticompetitive horizontal effects at the dealer level, and sometimes at the manufacturer level as well."[35]

Experience, however, simply does not show what Dean Pitofsky claimed. For the proposition that the use of RPM to facilitate dealer cartels was frequent, he cited only a decision of this Court and a law review article,[36] neither of which purports to support any proposition stronger than the point that RPM *can* be used to facilitate a dealer cartel.[37] For the proposition that RPM *may* facilitate manufacturer cartels, he made no claim about what experience shows. Actual empirical research attempting to address the question whether

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[34] Pitofsky, 71 GEO. L.J. at 1490 (first emphasis added).

[35] Pitofsky, 71 GEO. L.J. at 1491 (emphasis added).

[36] *United States* v. *General Motors Corp.*, 384 U.S. 127, 145-147 (1966); Ward Bowman, *The Prerequisites and Effects of Resale Price Maintenance*, 22 U. CHI. L. REV. 825, 830-831 (1955), *cited in* Pitofsky, 71 GEO. L.J. at 1490 n.19.

[37] Professor Bowman did *assert* that "examples" he had discussed—involving U.S. druggists' pressure on wholesalers between 1900 and 1904, similar pressure in the same industry in Great Britain between 1895 and 1906, and similar activities in the same industry in France between 1886 and 1933—"suggest that resale price maintenance is a method used by organized dealers to force unwilling manufacturers to work for them to protect dealer profit margins." 22 U. CHI. L. REV. at 830. He further asserted that this "simple, plausible explanation of resale price maintenance * * * *probably* explains *much* of its recent as well as its early use." *Id*. at 831 (emphasis added). But he provided no stronger empirical support than turn-of-the-century evidence from one industry in three countries, and he acknowledged elsewhere in the same article that "a great many manufacturers actively support resale price maintenance, even though their dealers are not organized to present the kind of united front found among drug and liquor dealers." *Id*. at 833 (footnote omitted); see also *id*. at 840-841 & nn.46-48.

RPM *is* used to facilitate cartels, by contrast, has concluded that such use is infrequent.[38]

In any case, the question here is not whether resale price maintenance can occasionally be anticompetitive, but whether it is virtually *always* anticompetitive. There is no reason to deprive businesses and consumers of the usual benefits of the practice merely because, in unusual cases, the practice might be misused by a cartel.

The continued application of the *per se* rule against horizontal price fixing is *not* at issue in this case. The Justice Department has wide-ranging authority to investigate suspected cartel activity by using grand jury subpoenas and Civil Investigative Demands, and, by offering leniency to individual and corporate whistleblowers, offers a powerful incentive to participating cartel members to identify anticompetitive activity.[39] And the Sherman Act provides ample tools to sue (and prosecute as a criminal offense) a cartel directly. Inflexible condemnation of an often-procompetitive practice because it *might sometimes* be associated with an always-illegal practice is unwarranted. Moreover, there is widespread agreement among the antitrust

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[38] Ippolito, 34 J.L. & ECON. at 281 (concluding that "there is little [empirical] evidence * * * to support the hypothes[is] * * * that collusion is the primary reason for the use of RPM"); *id*. at 282 (the evidence "suggests that noncollusive uses of RPM are far more common than collusive uses"); *id.* at 291-292 ("service- and sales-enhancing theories, taken together, appear to have greater potential to explain" observed uses of RPM than a collusion hypothesis); *id*. at 292 ("The evidence suggests that the collusion theories do not seem capable of explaining at least 85 percent of the cases, and, when taken together, the agency theories are plausible explanations for virtually all cases in the sample.").

[39] *See* U.S. Department of Justice, Antitrust Division, *Leniency Policy for Individuals* (Aug. 10, 2004), at http://www.usdoj.gov/atr/public/guidelines/0092.htm; U.S. Department of Justice, Antitrust Division, *Corporate Leniency Policy* (Aug. 10, 2003), at http://www.usdoj.gov/atr/public/guidelines/0091.htm.

bar that "[m]ost instances of resale price maintenance are beneficial to consumers and cannot reasonably be construed as efforts to restraint trade or monopolize any product or service."[40] Accordingly, the possibility that a facially legitimate business practice could be used to enforce a price-fixing agreement does not suffice to outlaw its use across the board.

B. Low price as the exclusive or nearly exclusive measure of consumer welfare: Another argument made in defense of the *per se* rule against RPM is that low price is so central a measure of consumer welfare that any practice that raises prices to consumers should be presumed—conclusively or nearly so—to harm consumer welfare. Advocates of this view belittle service competition, question how often manufacturers really use RPM to encourage dealers to provide better service, and suggest that they themselves know better than consumers what mix of low price and high service consumers want.

Dean Pitofsky, for instance, gives the hypothetical example of a manufacturer that sells its highly advertised product at a wholesale price of $20, after which the product can be found in some fashionable stores at a retail price of $35 but in discount houses at $22. Ignoring interbrand competition entirely, he asserts that the competition between the fashionable stores and the discount houses will force the retail prices in the fashionable stores to fall, and eventually

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[40] Hovenkamp, *The Antitrust Enterprise* 123-24. *Accord*, *e.g.*, ABA Section of Antitrust Law, *Antitrust Law and Economics of Product Distribution* 76 (2006) ("the bulk of the economics literature on RPM * * * suggests that RPM is more likely to be used to enhance efficiency than for anticompetitive purposes"); Baxter, 75 CAL. L. REV. at 944-45; Blair, Herndon & Lopatka, 83 WASH. U. L.Q. at 696; Easterbrook, 53 Antitrust L.J. at 135; Warren S. Grimes, *Brand Marketing, Intrabrand Competition, and the Multibrand Retailer: The Antitrust Law of Vertical Restraints*, 64 ANTITRUST L.J. 83, 89 (1995); Ippolito, 34 J.L. & ECON. at 281-82, 292; Mathewson & Winter, 13 REV. INDUS. ORG. at 66.

force the manufacturer to cut its wholesale price.[41] In Dean Pitofsky's eyes, it seems to be self-evident that consumers benefit from this process.

To ignore interbrand competition, however, is to distort the analysis in quite a major way. If low price alone is what consumers perceive as maximizing their welfare, the manufacturer that uses RPM to maintain a uniform retail price of $35 will create a golden opportunity for a *rival manufacturer* to take sales away from the first manufacturer by allowing its dealers to charge a $22 retail price for an equivalent product. If interbrand competition does *not* take away enough sales from the first manufacturer to force it to lower its price, it must be because consumers perceive the first manufacturer's product—and the services that accompany its sale—to justify paying more money. Consumers *necessarily* have concluded, in sufficient numbers to make a $35 retail price profit maximizing, that they *prefer* the higher-priced good to the lower-priced good. It is a strange conception of consumer welfare that refuses to honor that choice by consumers. And it is, if anything, even stranger to assume that *intra*brand competition by retailers will force manufacturers to cut prices while assuming that *inter*brand competition has had and will have no such effect.

Relatedly, Dean Pitofsky defends discounters as "the very heart of a free market competitive system," worries that they will be "den[ied] * * * access to products because they are aggressive in pricing (and perhaps more efficient as well)," and suggests that to allow RPM is giving "the manufacturer, in effect, * * * the power to put" no-frills discounters "out of business."[42] Only by again ignoring interbrand competition, however, and by treating as *a priori* incredible the proposition that consumers may in some circumstances *prefer* higher-

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[41] Pitofsky, 71 GEO. L.J. at 1492.
[42] Pitofsky, 71 GEO. L.J. at 1493.

priced goods, can Dean Pitofsky make those worries seem so serious.

If consumers truly would rather purchase goods from no-frills discounters, rivals of the manufacturer that refuses to allow discounters to carry its goods will clobber that manufacturer in the marketplace. The issue is not one of putting no-frills discounters out of business, but one of allowing different manufacturers to compete using different strategies, including a low-price, no-frills retail strategy and a high-price, high-service "luxury goods" retail strategy. Although Dean Pitofsky asserts that "[t]hose opposing *per se* rules in this area implicitly assume that the manufacturer knows better than the market what will or will not work in the marketplace,"[43] the exact opposite is actually the case. Those opposing *per se* rules in this area are completely agnostic about what will or will not work in the marketplace, but have confidence in the market itself to punish sellers who are wrong about what will work, in particular sellers who wrongly assume that a high-price, high-service mix will appeal to consumers and sellers who wrongly assume that their RPM policies will induce better service by dealers. Those advocating *per se* rules in this area are confident in their views that low price is always what consumers prefer, and unwilling to let consumers express their real preferences through the market. Instead, they use a rigid legal rule to force *every* manufacturer and intermediate distributor, except those vertically integrated to the retail level, to allow retail discounting of its product in all circumstances. It is the defenders of the *per se* rule, not its critics, who lack "[a] full commitment to a regime whereby competition governs the marketplace."[44]

C. Congressional ratification: Another defense is that, in 1975, Congress ratified the *Dr. Miles* rule by repealing

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[43] Pitofsky, 71 GEO. L.J. at 1493.
[44] Pitofsky, 71 GEO. L.J. at 1493.

legislation (the Miller-Tydings and McGuire Acts) authorizing states to permit resale price maintenance.[45] But that conclusion does not follow from its premise. At one time, Congress did suspend the *Dr. Miles* rule whenever a State chose to permit resale price maintenance, and Congress later lifted the suspension. But in so doing Congress did not revise the Sherman Act to incorporate the *Dr. Miles* rule and make it a permanent feature of antitrust law. The choice that Congress made in 1975 was not a decision to entomb development of antitrust law in its then-current state. Rather, Congress chose to return the development of federal antitrust law to the federal common law decisionmaking process, rather than to leave the matter to state legislatures.[46] And any hope that the Members of any particular Congress may have had as to the future course of antitrust that was not expressed in positive law does not bind the courts.[47] This Court is free to revisit the issue.[48]

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[45] *See* the Miller-Tydings Act, Pub. L. No. 75-314, 50 Stat. 693 (1937), and the McGuire Act of 1952, Pub. L. No. 82-543, 66 Stat. 631 (1952), repealed by the Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801.

[46] Bork, *The Antitrust Paradox* 288; Easterbrook, 53 Antitrust L.J. at 139; Posner, *Antitrust Law* 189.

In the 1980s, Congress twice added riders to appropriations bills prohibiting the Justice Department from arguing for reversal of the *Dr. Miles* rule. Pub. L. No. 99-180, 99 Stat. 1136 (1985); Pub. L. No. 98-166, § 510, 97 Stat. 1071, 1102 (1983); Calvani & Berg, 1984 DUKE L.J. at 1166 n.11. Even then, however, Congress did not limit private litigants' ability to challenge *Dr. Miles* or the Court's authority to reconsider its *per se* rule. Whatever import those appropriations bills may have had then, they are not in effect today.

[47] *See Puerto Rico Dep't of Consumer Affairs* v. *Isla Petroleum*, 485 U.S. 495, 501 (1988) ("[U]nenacted approvals, beliefs, and desires are not law."); *Train* v. *City of New York*, 420 U.S. 35, 45 (1975) ("[L]egislative intention, without more, is not legislation.").

[48] It is no defense of the *Dr. Miles* rule that it is necessary to protect small retail firms. (In fact, it could be argued that RPM benefits small manufacturers seeking to promote a new product, Grimes, 64

III. *STARE DECISIS* CONSIDERATIONS DO NOT JUSTIFY RETAINING AN OBSOLETE, ECONOMICALLY DAMAGING RULE THAT THIS COURT WOULD NOT ADOPT TODAY

Stare decisis considerations dictate that settled decisions ordinarily should receive considerable deference and should not be abandoned lightly.[49] But those considerations enjoy less weight in this context. In the antitrust laws, Congress authorized the federal courts to create a common law governing the competitive process,[50] and the antitrust laws, like the common law generally,[51] must "adapt[] to changed circumstances and the lessons of accumulated experience."[52] Aware that "[c]ourts do make mistakes,"[53] this Court has been receptive to Justice Frankfurter's sage advice that "[w]isdom too often never comes, and so one ought not to

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ANTITRUST L.J. at 100; Pet. 2-3, and small retailers wishing to provide services without the threat of free riding by others, Pet. App. 52a & n.46.) The antitrust laws protect the market, not individual firms whatever their size. *E.g.*, *Brooke Group, Ltd.* v. *Brown & Williamson Tobacco Corp*., 509 U.S. 209, 224 (1993) ("It is axiomatic that the antitrust laws were passed for 'the protection of *competition*, not *competitors*.'") (quoting *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320 (1962)); *Volvo*, 546 U.S. 164, 126 S. Ct. at 872 & n.4 (same); *Cargill, Inc.* v. *Monfort of Colorado, Inc*., 479 U.S. 104, 116 (1986) ("[T]he antitrust laws do not require the courts to protect small businesses from the loss of profits due to continued competition."); John H. Shenefield & Irwin M. Stelzer, *The Antitrust Laws: A Primer* 12-13 (4th ed. 2001).

[49] *E.g.*, *Khan*, 522 U.S. at 21.

[50] *Texas Industries, Inc.* v. *Radcliff Materials, Inc*., 451 U.S. 630, 643 (1981); *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 688 (1978).

[51] *See* Paul Oskar Kristeller, *"Creativity" and "Tradition,"* 44 J. HIST. IDEAS 105, 112 (1983) ("We should realize from the beginning that a completely stable or rigid tradition that never admits change is humanly impossible and has never existed.").

[52] *Khan*, 522 U.S. at 20; *Sylvania*, 433 U.S. at 48-59.

[53] *Willy* v. *Coastal Corp.*, 503 U.S. 131, 139 (1992).

reject it merely because it comes late."[54] In antitrust law the Court often has retraced its steps when it concluded that an earlier path was wrongly chosen.[55] That has been particularly true in the case of vertical business practices, which this Court has come to appreciate as often procompetitive.[56]

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[54] *Henslee* v. *Union Planters Nat'l Bank & Trust Co.*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting).

[55] *Compare, e.g.*, *United States* v. *Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897) (adopting a rule of *per se* invalidity for horizontal price-fixing agreements), *with Standard Oil Co. of New Jersey* v. *United States*, 221 U.S. 1 (1911) (adopting a rule-of-reason analysis for all horizontal agreements), *with United States* v. *Trenton Potteries Co*., 273 U.S. 392 (1927) (readopting a rule of *per se* invalidity for horizontal price-fixing agreements), *with Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344 (1933) (applying a rule of reason to a horizontal output-restriction agreement), *with United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) (applying a rule of *per se* invalidity for horizontal price-fixing agreements), *with Broadcast Music, Inc.* v. *CBS,* 441 U.S. 1 (1979) (efficiency-enhancing horizontal price-fixing agreements may be subject to a rule-of-reason analysis), *with Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332 (1982) (applying a rule of *per se* invalidity for a horizontal maximum price-fixing agreement), *with NCAA* v. *Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85 (1984) (applying a rule of reason to a horizontal agreement to limit output), *and with Palmer* v. *BRG of Georgia, Inc.*, 498 U.S. 46 (1990) (per curiam) (applying a rule of *per se* invalidity for a horizontal market allocation agreement). Or *compare Chicago Board of Trade* v. *United States*, 264 U.S. 231, 238 (1918) (identifying factors used in the rule-of-reason analysis), *with FTC* v. *Indiana Federation of Dentists*, 476 U.S. 447, 458-59 (1986) (articulating a so-called "quick look" analysis).

[56] *Compare*, *e.g*., *White Motor Co.* v. *United States*, 372 U.S. 253 (1963) (adopting rule-of-reason analysis for vertical nonprice restraints), *with United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) (adopting a rule of *per se* invalidity for vertical nonprice restraints; overruling *White Motor*), *and with Continental T.V., Inc.* v. *GTE Sylvania, Inc*., 433 U.S. 36 (1977) (abandoning a rule of *per se* invalidity for vertical nonprice restraints; overruling *Schwinn*). Or *compare Dr. Miles Medical Co.* v. *John D. Park & Sons Co*., 220 U.S. 373 (1911) (a manufacturer cannot force a distributor to agree on a

This Court had little experience with vertical restraints at the time that it decided *Dr. Miles*. William Baxter, former Assistant Attorney General for the Antitrust Division, made that point succinctly: "Unlike the early cases involving horizontal restraints, none of the early vertical restraint cases wrestled with economic principle and explored the implications of the then-rudimentary learning about price theory or industrial organization." [57] By outlawing the practice in *Dr. Miles*, however, this Court denied itself, the lower courts, the academy, and the bar the opportunity to acquire the experience with vertical pricing mechanisms that is necessary before a business practice should invariably be outlawed.[58]

In the last 30 years, however, this Court has held that two closely related practices—vertical nonprice restraints (such as territorial restrictions) and maximum resale price maintenance—should not be deemed *per se* unlawful under

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manufacturer's pricing recommendation), *with United States* v. *Colgate & Co*., 250 U.S. 300 (1919) (a manufacturer may refuse to deal with a retailer that does not honor the manufacturer's pricing recommendations), *with United States* v. *General Elec. Co*., 272 U.S. 476 (1926) (a manufacturer can set a resale price by consigning the goods to a distributor, instead of selling them), *and with United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960), *and Simpson* v. *Union Oil Co*., 377 U.S. 13 (1964) (a manufacturer cannot enforce its pricing recommendations). Or *compare Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968) (adopting a rule of *per se* invalidity for maximum resale price maintenance), *with State Oil Co.* v. *Khan*, 522 U.S. 3 (1997) (rejecting a rule of *per se* invalidity for maximum resale price maintenance; overruling *Albrecht*).

[57] Baxter, 75 CAL. L. REV. at 933; *see also* Hovenkamp, *The Antitrust Enterprise* 186.

[58] Hovenkamp, *The Antitrust Enterprise* 186; *see American Airlines, Inc.* v. *Wolens*, 513 U.S. 219, 234-35 (1995) ("[I]n our system of adjudication, principles seldom can be settled 'on the basis of one or two cases, but require a closer working out.'") (quoting Roscoe Pound, *Survey of the Conference Problems*, 14 U. CIN. L. REV. 324, 339 (1940) (Conference on the Status of the Rule of Judicial Precedent)).

the antitrust laws.[59] *Stare decisis* did not prevent this Court from overruling unsound precedents in those cases. The factors that this Court found persuasive there—particularly the economic utility of vertical restraints in promoting interbrand competition[60]—militate powerfully in favor of treating the vertical practice at issue here as another generally permissible business decision. The "lessons of accumulated experience" that this Court found convincing in *Sylvania* and *Khan* are equally instructive here.

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It is inconceivable that this Court would conclude today, as a matter of first impression, that vertical resale price maintenance warrants *per se* condemnation. This case offers a perfect opportunity to revisit that issue. The Court adopted the *Dr. Miles* rule more than 95 years ago, long before it concluded that antitrust analysis should be guided by contemporary industrial organization theory. Contemporary antitrust legal and economic analysis has concluded that vertical restraints are usually procompetitive, not anticompetitive. And this case squarely presents the question whether the *Dr. Miles* rule should be overruled. The *Dr. Miles* rule has become an anachronism harmful to both competition and the development of sound antitrust law. This Court should overrule the *Dr. Miles* rule automatically and invariably condemning minimum resale price maintenance.

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[59] *Sylvania*, *supra*; *Khan*, *supra*.

[60] *Sylvania*, 433 U.S. at 49-52.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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