1 IN THE SUPREME COURT OF THE UNITED STATES
2 - - - - - - - - - - - - - - - - - x
3 LEEGIN CREATIVE LEATHER :
4 PRODUCTS, INC., :
5 Petitioner :
6 v. : No. 06-480
7 PSKS, INC., DBA KAY'S :
8 KLOSET...KAY'S SHOES. :
9 - - - - - - - - - - - - - - - - - x
10 Washington, D.C.
11 Monday, March 26, 2007
12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 10:03 a.m.
15 APPEARANCES:
16 THEODORE B. OLSON, ESQ., Washington, D.C.; on behalf of
17 Petitioner.
18 THOMAS G. HUNGAR, Deputy Solicitor General, Department
19 of Justice, Washington, D.C.; on behalf of United
20 States, as amicus curiae, supporting Petitioner.
21 ROBERT W. COYKENDALL, ESQ.; Wichita, Kan; on behalf of
22 Respondent.
23 BARBARA D. UNDERWOOD, ESQ., Solicitor General, New York,
24 N.Y.; on behalf of New York, et al., as amicus
25 curiae, supporting Respondent.

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1 P R O C E E D I N G S

2 (10:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument

4 first this morning in case 06-480, Leegin Creative

5 Leather Products versus PSKS Incorporated. Mr. Olson.

6 ORAL ARGUMENT OF THEODORE B. OLSON

7 ON BEHALF OF THE PETITIONER

8 MR. OLSON: Mr. Chief Justice, and may it

9 please the Court:

10 The per se illegality rule for resale price

11 maintenance is widely recognized to be outdated,

12 misguided and anticompetitive. It should be replaced

13 with the same rule of reason standard that applies to

14 other forms of vertically imposed marketing

15 restrictions.

16 The Sherman Act bars only unreasonable

17 restraints of trade and the court presumptively applies

18 a rule of reason analysis to determine whether a

19 restraint is unreasonable.

20 Per se rules should be rare and imposed only

21 where the court is virtually certain based upon

22 considerable economic experience that a practice is

23 nearly invariably anticompetitive. Vertical minimum

24 retail -- resale price maintenance are plainly not

25 invariably anticompetitive. In fact, a broad consensus

1 of economists and decisions of this Court recognize that
2 vertical restraints promote interbrand competition,
3 which is the goal of the antitrust laws and are rarely,
4 if ever, anticompetitive.
5 JUSTICE GINSBURG: There was an argument
6 made, Mr. Olson, that it is somewhat difficult to
7 distinguish vertical from horizontal in this context,
8 that in fact, the agreement that the manufacturer made
9 with the dealers was more successful in getting a
10 horizontal accord among the dealers than if the dealers
11 had attempted it themselves, in which case some might
12 have held back.
13 MR. OLSON: Well, the economists who have
14 looked at the use of resale price maintenance have said
15 that that would very rarely, if ever, be the case. It
16 certainly could not be the case in this industry in
17 connection with this participant in the marketplace.
18 There are something like 5,000 dealers that the Brighton
19 products are sold through. There are thousands and
20 thousands of other competing dealers, hundreds of
21 products.
22 What the Court has said repeatedly is that
23 programs such as this may promote interbrand
24 competition, perhaps --
25 JUSTICE STEVENS: Mr. Olson, suppose just

1 the dealers in New York, the retail dealers agreed among
2 themselves on the price. Would that be lawful?
3 MR. OLSON: No. I think that that would be
4 covered by a horizontal prohibition, Justice Stevens.
5 JUSTICE STEVENS: Would you say that it's
6 per se unlawful?
7 MR. OLSON: I think it would be, as
8 horizontal restraint among competing dealers, it could
9 be a per se violation under horizontal rules if it was
10 -- if it was -- involved the manufacturer in some way,
11 it could be dealt with by the rule of reason.
12 JUSTICE STEVENS: Why should that be any
13 different from the arrangement where those dealers all
14 got together in the convention and recommended to the
15 manufacturer that he impose a vertical restraint of
16 precisely the same dimensions? Why --
17 MR. OLSON: What this Court said in
18 Sylvania, and said again in the State Oil versus Khan,
19 is that the manufacturer has very, very little incentive
20 to increase --
21 JUSTICE STEVENS: No, but I'm asking what if
22 he did, why should you draw a distinction?
23 MR. OLSON: Because the motivation for the
24 arrangement, if it comes from a manufacturer -- you're
25 suggesting a hypothetical in which all of the dealers in

1 a particular area would get together to impose this on a
2 manufacturer. I think it's very unrealistic that that
3 would happen.
4 JUSTICE STEVENS: No. They just passed a
5 resolution asking the manufacturer to impose this
6 vertical restraint and ways to do it. Should that be
7 different from one in which the manufacturer does it
8 independently?
9 MR. OLSON: I think that if the manufacturer
10 makes a decision, whether it's because dealers would
11 like to see that happen or not, as this Court said in
12 Business Electronic versus Sharp Electronics, there's of
13 course relationships between the dealers and the
14 manufacturers, that the dealers may have an interest in
15 doing this, because they may find for the same reason
16 that the manufacturer does that it promotes the sales of
17 products. The record is clear in this case that this
18 was an effective strategy for the Brighton company, the
19 Brighton Leegin company that's manufacturing the
20 Brighton products, to enter a very difficult and highly
21 competitive marketplace, and it was successful.
22 CHIEF JUSTICE ROBERTS: Maybe, Mr. Olson,
23 you could give us an example where the rule of reason
24 would find a violation in this situation?
25 MR. OLSON: Well, it might be a situation,

1 the economists have written about this, say that it
2 would be very rare, and would require retailers with a
3 strong powerful market power to impose a situation where
4 the manufacturer would do that to help facilitate a
5 horizontal cartel. That certainly was not involved in
6 this case, and that would probably be found to violate
7 the rule of reason. In addition, it would probably be
8 unlawful under the horizontal rules established by this
9 Court. That was not an issue in this case. The
10 economists say that that would very seldom happen.
11 JUSTICE BREYER: You say very. Which
12 economists? I know the Chicago school tends to want
13 rule of reason and so forth. Professor Sherer is an
14 economist, isn't he? Worked at the FTC for a long time.
15 A good expert in the field. He points out the drug
16 industry after you got rid of -- after you got rid of
17 resale price maintenance, the margins fell 40 percent.
18 The drug stores it went down 20 percent. He says with
19 blue jeans, alone, it saved American consumers $200
20 million to get rid of it. And his conclusion is, as in
21 the uniform enforcement of resale price maintenance, the
22 restraints can impose massive anti-consumer benefits.
23 Massive.
24 MR. OLSON: Well --
25 JUSTICE BREYER: What that sounds like is

1 that if at least he, who is an economist, thinks if you
2 get rid of Dr. Miles, every American will pay far more
3 for the goods that they buy at retail. Now that's one
4 economist, of course. There are other whose think
5 differently. So how should we decide this?
6 MR. OLSON: Well --
7 JUSTICE BREYER: Should we overturn
8 Dr. Miles and run that risk?
9 MR. OLSON: In, in the vast majority of the
10 economist whose have looked at this have come out to the
11 opposite conclusion, Justice Breyer. Secondly --
12 JUSTICE BREYER: We're supposed to count
13 economists?
14 MR. OLSON: No. No. I think that --
15 JUSTICE BREYER: Is that how we decide it?
16 (Laughter.)
17 MR. OLSON: But what this Court -- what this
18 Court has repeatedly said, that under circumstances such
19 as this where there's a consensus among leading
20 respected economists, that is one factor. There's
21 another factor --
22 JUSTICE BREYER: Well, I haven't seen a
23 consensus. A consensus? Isn't, doesn't Sherer and all
24 these people, doesn't that point of view count, too?
25 MR. OLSON: This is one factor that the

1 Court should consider and the Court has considered in
2 the past when dealing with something that the Court
3 itself has said, is an anachronistic and chronologically
4 schizoid rule, to have a rule of reason for certain
5 vertical restraints and a fixed, rigid, per se rule with
6 respect to other vertical restraints. The Court -- the
7 Court itself has made those pronouncements.
8 The enforcing agencies have changed their
9 view with respect -- and they are here today, the
10 Antitrust Division and the Federal Trade Commission, all
11 of whom have announced that they believe that it is very
12 rare for a rule such as this, for an arrangement such as
13 this to be anticompetitive.
14 JUSTICE GINSBURG: But it was not so long
15 ago that the Department of Justice took a different
16 view. And of all of the vertical restraints, this is
17 the only one where Congress has been a player. I mean,
18 Congress allowed the fair trade laws to operate. And
19 then it withdrew that. There's no other restraint where
20 they are has been congressional action, where the
21 argument could be made, well, Congress is well aware of
22 this, the Court should allow them to make the change, if
23 they so will.
24 MR. OLSON: Essentially, the same argument
25 was made in the Sylvania -- at the time of the Sylvania

1 case. The same argument was made just a term or two go
2 in connection with the Illinois Tool case that dealt
3 with tying arrangements. The same argument was made in
4 State Oil versus Khan. This Court has construed the
5 antitrust laws as an expression by Congress that the
6 courts should be aware of the dynamic potential in the
7 marketplace --
8 JUSTICE GINSBURG: But in those cases you
9 didn't have the counterpart to Miller-Tydings and
10 McGuire. That's what makes this -- this one different
11 in terms of congressional intention.
12 MR. OLSON: The repeal of those statutes,
13 Justice Ginsburg, repealed per se legality rules. It
14 was not a congressional expression against the rule of
15 reason --
16 JUSTICE STEVENS: No, but there was in the
17 patent case, though, Mr. Olson. We relied on the fact
18 that the patent law changed.
19 MR. OLSON: Yes, you did.
20 JUSTICE STEVENS: Yes.
21 MR. OLSON: And that was a, that was one
22 factor, however, Justice Stevens. I think, as I read
23 that opinion, the Court was also concerned with the fact
24 that the, the per se rule which -- and the Court said
25 the statement thing just a few weeks ago in the

1 Weyerhaeuser case -- to the extent there's practices
2 that can be procompetitive, the Court should not set a
3 low threshold of illegality, especially low per se
4 illegality threshold. There were -- there have been --
5 it is worth emphasizing that the Court has repeatedly
6 said we don't want per se rules when we don't have a
7 substantial body of economic experience that shows us
8 that this practice --
9 CHIEF JUSTICE ROBERTS: What about -- what
10 about the reliance interest, though? I mean, hasn't a
11 whole industry of discount stores developed in reliance
12 on the Dr. Miles rule? And don't we need to be
13 concerned about the disruption to that established
14 practice?
15 MR. OLSON: There's really no evidence that
16 the marketplace as it exists today is a result of the
17 Dr. Miles rule of 1911, Chief Justice --
18 JUSTICE SOUTER: Isn't there evidence that
19 the, basically that the rise of the Wal-Marts and the
20 Targets is correlated with the demise of fair trade?
21 So -- that there's that correlation.
22 MR. OLSON: Actually I looked into that,
23 Justice Souter. And me, my limited historical research
24 is that the -- those discounters were coming on strong
25 before 1975 which is when the, the consumer price,

1 whatever it was, act was passed in response to that.
2 There are -- the evidence basically shows
3 that -- and this Court has said -- that it's interbrand
4 competition that ultimately produces lower prices.
5 JUSTICE BREYER: Well, I don't know. We
6 have -- you talked about -- just for fun I got out of
7 the library a book by Professor B. S. Yamey, called
8 resale price maintenance where he has five economists --
9 now maybe you're not going to count them as economists.
10 Now I didn't find in that book a single argument that
11 isn't also in your briefs, nor did I find in your brief
12 as single argument that isn't in the book.
13 There's one interesting thing about the
14 book. It was written in 1966. So I guess my question
15 is what's changed? Now I know two things have changed.
16 One is there's evidence in Canada, Britain,
17 and in the states that were under Miller-Tydings, that
18 when you got rid of resale price maintenance, prices
19 went down. That's changed. And the second thing that's
20 changed is there's far more concentration, I gather,
21 today in the retail side of the market than there are
22 used to be, a factor which makes resale price
23 maintenance dangerous because it's more likely to take
24 place at the request of the dealers.
25 Now, I see those two changes. My question

1 to you is looking at Yamey's book which is called Resale
2 Price Maintenance, so you might have found even it even
3 on Google, and -- what's changed? What's new?
4 MR. OLSON: Well, a number of things have
5 changed. The -- the number of respected individuals,
6 notwithstanding that book, who have looked at it and
7 have focused on the marketplace, have said that because
8 it allows -- it increases the possibility of interbrand
9 competition, it can provide incentives for dealers to
10 provide service, differences in the products. And other
11 things that have happened since then, are this Court's
12 decision in the Sylvania case, which -- which involved
13 an elaborate analysis of vertical restrictions and found
14 that they are largely procompetitive and undermine the
15 ruling -- the reason for a per se rule.
16 This Court's decision in State Oil versus
17 Khan, and the other cases that this Court is very well
18 aware of where per se rules have systematically been
19 dismantled because they are artificial themselves in the
20 marketplace. This --
21 JUSTICE KENNEDY: Mr. Olson, does brand
22 competition generally help retailers, or is this a
23 question that can't be answered?
24 MR. OLSON: Did you say inter --
25 JUSTICE KENNEDY: Interbrand, interbrand

1 competition? Do retailers like interbrand competition?
2 MR. OLSON: Well, I don't know that -- I
3 don't know whether people like competition. But the
4 antitrust laws like competition and this Court likes
5 competition. And this Court has said that interbrand --
6 JUSTICE KENNEDY: Well, but we're talking
7 about inter -- we're talking about retailers. It, it
8 seems to me at the outset of the argument, you -- you
9 acknowledged, and I think it is the general rule -- that
10 if the retailers themselves have this resale price
11 maintenance, it is invalid. Well, if the manufacturer
12 does this just for the convenience of the retailers, and
13 that's -- many of the examples in your brief, it is for
14 the convenience and for the benefit of the retailers,
15 then why shouldn't there be a per se rule? Why should
16 we allow the manufacturer to do something we that
17 wouldn't allow the retailers to do, if it's for the
18 retailers?
19 MR. OLSON: Well, the manufacturer is very
20 unlikely to do this for the convenience of the
21 retailers, to -- because it's in the interest of the
22 manufacturer to have the retail price as low as possible
23 so that the manufacturer will sell as many of the
24 manufacturers' products as possible.
25 JUSTICE SCALIA: If -- if, if indeed that's,

1 that's what he's aiming at, low price. Is it the object
2 of the -- is the sole object of the Sherman Act to
3 produce low prices?
4 MR. OLSON: No.
5 JUSTICE SCALIA: I thought it was consumer
6 welfare.
7 MR. OLSON: Yes, yes, it is.
8 JUSTICE SCALIA: And I thought some
9 consumers would prefer more service at a higher price.
10 MR. OLSON: Precisely.
11 JUSTICE SCALIA: So the mere fact that it
12 would increase prices doesn't prove anything. It
13 doesn't prove that it's serving consumer welfare. If,
14 in fact, it's giving the consumer a choice of more
15 service at a somewhat higher price, that would enhance
16 consumer welfare, so long as there are competitive
17 products at a lower price, wouldn't it?
18 MR. OLSON: That's -- that's absolutely
19 correct.
20 JUSTICE SCALIA: So I don't know why, why we
21 should have to focus our entire attention on whether
22 it's going to -- going to produce higher prices or not.
23 The market out there has different goods at different
24 prices which have different qualities that attract
25 different consumers.

1 MR. OLSON: I -- I agree completely. I
2 would like to reserve the balance of my time for
3 rebuttal, but let me say that that's what this Court has
4 said over and over again. If you -- the purpose of the
5 antitrust laws is not price, but it's competition,
6 because competition between competing manufacturers give
7 the consumers more choice. Some people may want the
8 cheapest product. Some people may want the product
9 that's more available to them. They may wish the return
10 policy or the warranty policy or the repair policy that
11 the dealer provides. And in this marketplace
12 particularly, that system of providing competition is
13 consistent with the antitrust laws and has produced
14 success in the marketplace.
15 JUSTICE GINSBURG: Mr. Olson, before you sit
16 down, there's just one thing that wasn't covered in your
17 argument or in the brief, but the complaint alleged in
18 this case that Leegin allowed certain favored dealers to
19 discount; this plaintiff, but others were allowed to
20 discount. And if that were true, as a matter of fact,
21 then that would be a -- a plain violation of antitrust
22 law, wouldn't it?
23 MR. OLSON: This -- but the case was never
24 litigated on that basis. It wasn't considered on that
25 basis in the Court of Appeals. It came up sort of as a

1 late thought in the opposition to the petition for
2 certiorari. But that is not this case. The case was
3 litigated on the per se rule of Dr. Miles.
4 CHIEF JUSTICE ROBERTS: Thank you,
5 Mr. Olson.
6 JUSTICE GINSBURG: -- in the complaint,.
7 CHIEF JUSTICE ROBERTS: Thank you,
8 Mr. Olson.
9 Mr. Hungar?
10 ORAL ARGUMENT OF THOMAS G. HUNGAR
11 ON BEHALF OF UNITED STATES,
12 AS AMICUS CURIAE SUPPORTING PETITIONER
13 MR. HUNGAR: Thank you Mr. Chief Justice,
14 and may it please the Court.
15 The same considerations that led this Court
16 in Sylvania and State Oil to reject outmoded per se
17 rules compel that same result here. The Dr. Miles rule
18 conflicts with this Court's modern antitrust
19 jurisprudence in three fatal --
20 JUSTICE BREYER: Maybe I'll put my question,
21 which is really just one for this. I understand
22 perfectly that the per se rule is a result of balancing
23 differ things. Of course, resale price maintenance does
24 raise prices, and it is very often anticompetitive. Of
25 course, sometimes, there are good reasons for it that

1 might help consumers.

2 Now, in addition, you need clear rules. Now

3 those three sets of things require a balance. And we

4 have a hundred years of history where this Court and

5 Congress and others have balanced those three sets of

6 considerations, and they've come out one way. Now, the

7 Department of Justice wants to rebalance them and come

8 out the other way.

9 There are good arguments on both sides. Why

10 should we overrule a case that's 96 years old, in the

11 absence of any -- any -- congressional indication that

12 that's a good idea, when it's simply a question in a

13 difficult area of people reaching a slightly different

14 weight on some these three sets of things?

15 MR. HUNGAR: Several reasons, Your Honor.

16 It's not -- it's not a close question whether this Court

17 under its modern antitrust jurisprudence as an initial

18 matter would impose a per se rule in this context.

19 There is economic -- there is consensus among the

20 respected economists --

21 JUSTICE BREYER: I would think it is quite a

22 close question.

23 MR. HUNGAR: I don't think you, Your Honor.

24 Given that --

25 JUSTICE BREYER: All right, even so. Go

1 ahead.

2 MR. HUNGAR: Given that this Court's test,

3 the question this Court's modern cases ask, in

4 distinguishing between the rule of reason and the per se

5 rule, is whether the challenged conduct is always or

6 almost always anticompetitive. That's what the Court

7 has said.

8 JUSTICE BREYER: Price fixing, horizontal, I

9 guess, or territorial divisions, we should overturn

10 those too.

11 MR. HUNGAR: Certainly not, Your Honor.

12 Because that, that is almost always anticompetitive in

13 our experience and in the experience of the courts. But

14 the same is not true in the resale price maintenance

15 context. Dr. Miles has foreclosed the courts from

16 conducting the kind of analysis that would actually look

17 into this question. But the empirical data that are

18 available would suggest that anticompetitive

19 explanations for resale price maintenance do not have

20 very much explanatory power. When you actually look at

21 the cases that have been litigated, they involve

22 manufacturers without market power, unconcentrated

23 markets, no evidence in the vast majority of those cases

24 of any cartelization going on. So the anticompetitive

25 explanations, while certainly valid in some cases, do

1 not appear to explain most of the retail price
2 maintenance that has been litigated. It's true that
3 retail price maintenance can but does not always result
4 in price increases, but, as Justice Scalia pointed out,
5 price is not the only thing that consumers care about.
6 And there is widespread consensus in the economic
7 literature and in this Court's recent cases that
8 price-based vertical restraints, just like non-price
9 based vertical restraints, while they generally reduce
10 intrabrand competition, generally enhance interbrand
11 competition.
12 In Monsanto and Business Electronics,
13 this Court made clear that price vertical restraints,
14 like minimum resale price maintenance, frequently, in
15 fact usually, have the same or similar effects to the
16 non-price vertical restraints to which this Court now
17 applies rule of reason analysis. So the reason in --
18 JUSTICE STEVENS: Wouldn't your argument
19 also apply to a conspiracy among the New York dealers in
20 this product just to fix prices? Because there's plenty
21 of interbrand competition, I think. I don't think you
22 can say it's absolutely clear that that would always be
23 anti-competitive because they would also agree to
24 provide additional services.
25 MR. HUNGAR: No, Your Honor, because

1 horizontal -- the important thing to keep in mind is
2 that the incentive of the manufacturer when the
3 manufacturer --
4 JUSTICE STEVENS: I'm talking about a case
5 in which it's the dealers who want to agree to provide
6 extra services at higher prices as their method of
7 better serving the public and they all agree that they
8 have to be conscious about the competition from other
9 brands. Why can we be absolutely certain that's always
10 going to be harmful to the consumer?
11 MR. HUNGAR: Your Honor, the reason why we
12 know that is always or almost always harmful is that the
13 incentive at a horizontal level of a retailer cartel,
14 just like the incentives of the participants in a
15 manufacturing cartel --
16 JUSTICE STEVENS: They might be precisely
17 the statement as the manufacturers: We think we'll make
18 more, all make more money if we concentrate on service
19 rather than price.
20 MR. HUNGAR: No, Your Honor, because the
21 manufacturer's incentive is not to increase the profits
22 of the retailers, but the retailers when they get
23 together obviously have a very different incentive,
24 which is not to benefit the manufacturer.
25 JUSTICE BREYER: What you say is right.

1 What you say there is right. I feel I'm back in 1966.
2 The argument against that is, we don't know which way
3 the push comes. The large retailers, Home Depot,
4 whatever they are, huge retailers, they want -- or maybe
5 it isn't the discounters, it's some other once. We
6 don't know which way. You're throwing it into court.
7 You're throwing it before 12 people who may or may not
8 work this thing out. So the argument against what
9 you're saying is not logic. It's empirical and
10 administrative.
11 MR. HUNGAR: Your Honor --
12 JUSTICE BREYER: That's what it was. That's
13 what it is now, I guess.
14 MR. HUNGAR: Your Honor, in State Oil the
15 same argument was made. The argument was made that,
16 while we don't have compelling empirical evidence that
17 Albrecht results in harm to the economy, we don't have
18 compelling empirical evidence that resale price
19 maintenance, maximum resale price maintenance, is
20 generally pro-competitive, and in the absence of such
21 empirical evidence there's no basis for overturning
22 precedent. This Court unanimously --
23 JUSTICE SOUTER: We do have empirical
24 evidence, though, don't we, that the decision of this
25 case is going to be very significant in the sort of

1 battle between Wal-Mart and the Main Street stores; and
2 why should this Court in effect take a shot in the dark
3 at resolving that, as distinct from leaving it to
4 Congress, which is in a position to know more about
5 where the shot is going to land than we are?
6 MR. HUNGAR: This Court -- I'm sorry.
7 There's no empirical evidence that I'm aware of about
8 what impact eliminating Dr. Miles would have on the
9 Wal-Marts of the world.
10 JUSTICE SOUTER: That's my point. But it
11 seems to me there is a body of some empirical evidence
12 that the success of the Wal-Marts and the Targets and
13 the Home Depots was a success which was correlated with
14 the elimination of price maintenance by the States.
15 MR. HUNGAR: I don't think so, Your Honor.
16 In fact, as Mr. Olson pointed out, the K-Marts of the
17 world began during the fair trade era.
18 JUSTICE SOUTER: They began, but they have
19 flourished in the post-fair trade era.
20 MR. HUNGAR: Yes, Your Honor, but I think
21 considerations likes the opening up of international
22 trade and the development of markets like China to
23 supply low-cost goods have a lot more to do with the
24 success of the Wal-Marts of the world than a rule like
25 Dr. Miles.

1 Remember, it's perfectly legal under current
2 law for manufacturers to impose the same sort of
3 constraints as long as they do it by fiat and unilateral
4 enforcement rather than by agreement. So the suggestion
5 that somehow this is going to revolutionize the economy
6 if Dr. Miles is overruled is simply unsupportable.
7 CHIEF JUSTICE ROBERTS: Well then, what's
8 the great benefit then in changing the rule if it's
9 perfectly legal to achieve the same result already?
10 MR. HUNGAR: As the Ping amicus brief, the
11 Ping Golf Club Manufacturer amicus brief, indicates it's
12 extremely expensive and inefficient to follow the
13 Colgate regime, that for those manufacturers for whom
14 resale price maintenance would be in effect a strategy
15 like Leegin it's more efficient to do it in many
16 circumstances by agreement, rather than the disruption
17 that is entailed when you terminate a dealer without
18 further discussion for discounting one item in order to
19 keep your policy in place.
20 JUSTICE SOUTER: But doesn't that answer
21 your argument that there isn't reason to believe that
22 there is going to be disruption if Dr. Miles goes,
23 because now it's going to be easy?
24 MR. HUNGAR: Your Honor, in 1945 during the
25 height of the fair trade era the FTC did a study which

1 concluded only about 5 percent of the economy was
2 affected by fair trade. And the fair trade regime,
3 remember, is a different and more extreme regime. There
4 it was per se legality, not rule of reason. So it's
5 just -- there's just no basis for these assertions that
6 somehow the economy is going to be massively changed.
7 But it is also perfectly clear and undisputed that there
8 are circumstances in which it is more efficient for a
9 manufacturer to adopt resale price maintenance. It will
10 enhance its ability to compete and it will provide
11 consumers more of what they want, and that is a good
12 thing and the antitrust laws should not automatically
13 foreclose that merely because in a small percentage of
14 cases it is conceivable that there can be
15 anticompetitive effects.
16 JUSTICE SOUTER: Isn't it fair to say that
17 there is reason to believe that there may be a massive
18 reorientation in the retail economy if Dr. Miles goes?
19 And that gets to my problem, why should we be the people
20 to make a guess as opposed to the Congress as the
21 institution to make the guess?
22 MR. HUNGAR: I'm not aware of any reason to
23 believe that, Your Honor, based on the historical record
24 and based on the modern realities. The Wal-Marts of the
25 world have succeeded because of their discounting

1 strategy. That's not going to change, and manufacturers
2 have an incentive to have their goods sold through those
3 stores and that's not going to change either in the vast
4 majority of cases. And With respect --
5 JUSTICE GINSBURG: If the rule of reason is
6 the one that applies, I gathered, perhaps incorrectly,
7 from Mr. Olson's remarks that this would be -- this case
8 would be thrown out on summary judgment, it would never
9 get to trial. How do you think the rule of reason would
10 operate if it were the rubric under which this case were
11 to be decided?
12 MR. HUNGAR: Your Honor, I think it would
13 operate as it does usually, which is the plaintiff would
14 be required to establish an anticompetitive effect
15 resulting from the challenged conduct, and once that
16 burden is overcome the defendant would be required to
17 come up with some legitimate business justification,
18 some pro-competitive results that outweigh that. And
19 only if they could do that would they succeed.
20 JUSTICE GINSBURG: Well, that's the formula,
21 but I take it from what you said and Mr. Olson said that
22 the plaintiff could never get across the first
23 threshold?
24 MR. HUNGAR: We don't agree with that, Your
25 Honor. In cases where resale price maintenance is being

1 used to facilitate cartelization, either at the
2 manufacturer or the retail level, the plaintiff could
3 prevail. Also in, for example, in an oligopolistic
4 market.
5 JUSTICE GINSBURG: But in this case, this
6 case has none of those features.
7 MR. HUNGAR: Well, right.
8 JUSTICE GINSBURG: Leegin loses under the
9 rule of reason, right?
10 MR. HUNGAR: We don't know that. It seems
11 likely to assume that, though, and that's not a bad
12 thing. Leegin is obviously not dominant in the market.
13 It's obviously not going to succeed unless what it is
14 offering at a higher price is what consumers want, and
15 that is a good thing under the antitrust laws.
16 CHIEF JUSTICE ROBERTS: Thank you,
17 Mr. Hungar.
18 MR. HUNGAR: Thank you.
19 CHIEF JUSTICE ROBERTS: Mr. Coykendall.
20 ORAL ARGUMENT OF ROBERT W. COYKENDALL
21 ON BEHALF OF THE RESPONDENT
22 MR. COYKENDALL: Thank you, Mr. Chief
23 Justice, and may it please the Court:
24 As recently as last month, this Court
25 restated a guiding principle of antitrust jurisprudence:

1 Discouraging price cuts and depriving consumers of low
2 prices is bad antitrust policy. RPM prohibits price --
3 JUSTICE SCALIA: Is that right? I mean, You
4 really think that antitrust policy means when -- any
5 arrangement that produce a higher price is bad?
6 MR. COYKENDALL: Well, we aren't talking
7 about any arrangement --
8 JUSTICE SCALIA: I mean, a lot of consumers
9 want, you know, extended warranties. They want show
10 rooms where they can go and look at things. All of
11 which costs more money. And where you can not have
12 resale price maintenance the customers -- or you have
13 the free rider problem. The customers shop at the place
14 that has the big show room, likes at all the product
15 there, and goes and buys it from somebody else who has
16 not incurred that expense.
17 Now, I just don't think that all the
18 customers want is cheap. I think they want other things
19 besides cheap. I think they want service. I think they
20 want selection. I think they want the ability to view
21 goods and so forth. Why do you discount all of those
22 things?
23 MR. COYKENDALL: I don't discount all those
24 things. All those things are available under our
25 current regime where we have a per se prohibition

1 against resale price maintenance.

2 JUSTICE SCALIA: Well, they aren't

3 available. This company thought that it could provide

4 higher service if it could assure its retailers that

5 they would not be undercut by people who are not

6 providing that kind of service.

7 MR. COYKENDALL: And there's no question

8 that even the plaintiff in this case was providing that

9 service. He was providing it more efficiently and he

10 just wanted to pass those efficiencies on.

11 JUSTICE SCALIA: I don't, I don't know that

12 there's no question about that. There's certainly no

13 question that this company was successful in breaking

14 into a difficult market with its strategy of assuring

15 its retailers a cushion so that they could provide the

16 service.

17 MR. COYKENDALL: The record shows that with

18 this specific company, most of the growth of its sales

19 occurred before it established a resale price

20 maintenance policy. So there are no demonstrated

21 benefits from this company of imposing and enforcing a

22 resale price maintenance policy.

23 CHIEF JUSTICE ROBERTS: What is your main

24 objection to -- I mean, it's hard to propose a rule of

25 reason. Why, why can't the rule of reason work to

1 promote the objectives you've just articulated?
2 MR. COYKENDALL: Well, as a practical matter
3 for someone in my position, or plaintiff's position,
4 it's impossible for a small dealer to muster the
5 resources in order to put forth -- CHIEF JUSTICE
6 ROBERTS: For a small dealer. But as we've already
7 heard, the dealers who engage in the discount policy are
8 prices like Target and Wal-Mart. Those aren't small
9 dealers. Those are behemoths in the retailing industry.
10 MR. COYKENDALL: I would suggest that those
11 are not the people that really are being protected by
12 this particular per se prohibition. It is the small mom
13 and pop operation like my client that wants to innovate
14 and expand and pass on efficiencies and compete with the
15 big discounters who might have power of their own in
16 order to secure discounts.
17 JUSTICE ALITO: So you don't agree with the
18 argument that we've heard this morning that the
19 transformation of American retailing since the 1970s and
20 the rise of the large-scale low-price retailers has
21 anything to do with the end of the fair trade laws and
22 that overruling Dr. Miles would reverse that?
23 MR. COYKENDALL: No, I absolutely agree with
24 that. But it's resale price maintenance that enables
25 these initiators, these small companies, these small

1 operations, to grow and innovate, achieve the
2 efficiencies, and pass those on, attract customers by
3 reducing prices. And all that is stopped by imposition
4 of a resale price --
5 JUSTICE ALITO: Is there anything to suggest
6 that the large-scale low-price retailers who were
7 supposedly dependent on Dr. Miles are -- support its
8 retention? Have they filed amicus briefs here or
9 otherwise suggested that this is essential to their
10 continuing operation?
11 MR. COYKENDALL: Again, the large-scale
12 dominant players in the retail industry have their own
13 market power. They don't need the protection of the
14 per se rule in order to enforce them. It's the next
15 generation that this rule really aims to protect.
16 JUSTICE SCALIA: I don't understand that. I
17 mean, if it was really the case that they were going to
18 be losing, losing profits, I think they would have been
19 here. I mean, we talk about the Wal-Marts and the
20 Targets. They're not here on amicus briefs because
21 they're -- what they're selling is cheap. They are
22 selling price, and people who want low price and for
23 whom that's of value above all other things are going to
24 continue to go to those stores. So they're not going to
25 be harmed by the fact that some manufacturers want to

1 provide not just the low price -- of course, they'll try
2 to keep the price as low as possible -- but service.
3 I just don't see what, what harm can
4 possibly come, so long as there's no market dominance,
5 from allowing some people to make their money on service
6 and -- rather than cheap price.
7 MR. COYKENDALL: Well, again I would suggest
8 that under this current system the way it is we have
9 both the full service providers of complete service that
10 offer goods at a certain price and we have discounters
11 selling those same goods. There is currently a mix of
12 service and price that better serves the economy than
13 just having one cookie cutter -- a one size fits all
14 approach that you would have with resale price
15 maintenance.
16 JUSTICE KENNEDY: Well, I thought the per se
17 rule was the cookie cutter approach.
18 MR. COYKENDALL: Well, in terms of
19 prohibiting price or in terms of, yes, prohibiting price
20 fixing, that's true. But it permits stores to have full
21 price and full service and charge high prices for that
22 service, and it permits discounters to reduce price,
23 reduce service and cater to those customers who want the
24 goods with lower service.
25 JUSTICE BREYER: The Internet -- is it --

1 you would have said four years ago, or I think we are in
2 this argument, you would have said that it's the large
3 discounters, the growing discounters, the Walgreen's of
4 the world who want to get rid of retail price
5 maintenance, it's there to help the mom and pops. Okay.
6 They're in now, they're big, and they may want to
7 maintain resale prices because they may want to extract
8 the other profit, while the Internet little company
9 comes in and says I can get it to you cheaper.
10 Now I can imagine circumstances like you
11 say. I can imagine they're not like you say. I don't
12 know. And so what should I do if I really don't know?
13 MR. COYKENDALL: Well, there is no doubt
14 that resale price maintenance raises prices to
15 consumers. The only economic doubt is whether there are
16 any redeeming effects of those prices; and that's where
17 the economic dispute of this is.
18 CHIEF JUSTICE ROBERTS: Well, I thought the
19 Ping brief that was referenced earlier made a point that
20 it made, the prices may be -- resale price -- the
21 current Dr. Miles rule may result in increased prices
22 because of the inefficiencies for those retailers, or of
23 those manufacturers who want to establish a regime where
24 something other than price is important, and they have
25 to do that unilaterally, which increases inefficiencies.

1 MR. COYKENDALL: Well, Your Honor, I would
2 suggest that, first of all, eliminating the per se rule
3 would not decrease the inefficiencies of the Colgate
4 doctrine. If they want to impose resale price
5 maintenance in order to avoid even a rule of reasoned
6 approach, they would have to go --
7 JUSTICE GINSBURG: Even with the tremendous
8 anomaly that the employer -- that the -- the
9 manufacturer cannot do this by agreement, but he can do
10 it just unilaterally and terminate any dealers that
11 won't go along? Those two are substitute of each other.
12 Colgate seems to say you can achieve the same end but
13 we're not going to let you do it by agreement, you have
14 to do it on your own, and then you have to do the
15 draconian thing of terminating the dealer.
16 MR. COYKENDALL: I believe that anomaly
17 really lies at the heart of the Sherman Antitrust Act
18 which is aimed at contracts, combinations and
19 conspiracies. Unilateral conduct isn't reached by that,
20 it's the price of being in a fair country. People can
21 deal in ways that they want to with this particular
22 issue.
23 But again, eliminating the per se rule will
24 not help Ping out if they want to maintain their retail
25 price maintenance as legal, as unilateral. They'll

1 still have to go through these same machinations.
2 CHIEF JUSTICE ROBERTS: Why is that? Why
3 can't -- eliminating the rule, I thought the whole point
4 was they would just put in their contracts, you have to
5 sell it at this price, and they could enforce the
6 contracts, rather than having to have these machinations
7 of making sure they don't do anything that looks like an
8 agreement with their retailers.
9 MR. COYKENDALL: Well, again, then they
10 would be subject to a rule of reason analysis and the
11 uncertainties occasioned with that as to whether this
12 contract is lawful. If they want to avoid that, then of
13 course, they would have to stick with the Colgate
14 doctrine.
15 Your Honor, this particular case, we have
16 clear evidence that RPM was used to facilitate a
17 horizontal retailer cartel. We have evidence in the
18 briefs that Leegin would gather its dealers in a dealer
19 meeting, discuss the policy, agree to changes, and reach
20 a consensus, and then enforce that policy against
21 everyone.
22 One of the evils of resale price maintenance
23 is specifically this: It does facilitate the formation
24 of cartels.
25 JUSTICE STEVENS: Yeah, but the conspiracy

1 that it facilitated was just with intrabrand
2 competition. There wasn't conspiracy that affected
3 interbrand competition.
4 MR. COYKENDALL: Retail --
5 JUSTICE STEVENS: So I'm not sure that
6 economically it makes any difference whether the dealers
7 are the one who decide to do it or the manufacturer was,
8 or they all did it at the same time.
9 MR. COYKENDALL: Horizontal conspiracies,
10 even among a single brand, has always been a per se
11 violation of the antitrust law. You can look back at
12 the --
13 JUSTICE STEVENS: No, but if we say the rule
14 or reason should apply to all cases that just affect
15 intrabrand competition, I'm not sure why we should keep
16 this outmoded rule about horizontal conspiracies that
17 only affect intrabrand competition.
18 MR. COYKENDALL: There you're striking
19 really at the heart of the -- the heart of the Sherman
20 Act, et al., holding that horizontal conspiracies, which
21 nobody believes promote competition, could be justified
22 under the same thinking.
23 JUSTICE SCALIA: No, but it's a totally -- I
24 cannot imagine why a horizontal conspiracy among dealers
25 could ever produce consumer welfare. It will be a

1 horizontal conspiracy to get more money out of the
2 consumer; but whereas the manufacturer who wants to
3 impose resale price maintenance, his interest isn't to
4 give the retailer as much -- more money than the
5 retailer is now making. He's going to try to keep their
6 margin just as low as it ever was, so that he can sell
7 as many of his products as possible consistent with his
8 desire to sell his product by attaching to it more
9 service, better warranty, more showrooms, whatever.
10 You know, horizontal conspiracy, the
11 incentives are entirely different. When you're dealing
12 with a manufacturer, it seems to me his incentive is
13 still to keep the price as low as possible consistent
14 with the additional good that he wants to give consumers
15 to attract those consumers to his product.
16 MR. COYKENDALL: In this particular case
17 there is a complete alignment of incentives, because the
18 manufacturer was also a retailer competing in this
19 market. He has the incentive to increase retailer
20 profits.
21 JUSTICE SCALIA: Well, if that's the case
22 and if that makes a difference, the rule of reason would
23 allow you to make that argument. But you -- but you
24 want to say it's bad across the board for everybody. If
25 indeed there's something peculiar about this case, the

1 rule of reason would allow you to argue that.
2 MR. COYKENDALL: Well, Your Honor, we would
3 suggest that the horizontal conspiracy between Leegin as
4 a retailer and the other retailers offering his products
5 is more than just a rule of reason approach. That would
6 be per se illegal under this Court's precedents.
7 Retail price maintenance also has the
8 problem we discussed earlier of perpetuating incumbent
9 forms of distribution at the expense of the innovative
10 and more efficient distribution means. Retailers, in
11 retail competition matters, retailers should be entitled
12 to innovate, pass efficiencies along to customers in the
13 form of lower prices, attract new customers, and grow in
14 that manner.
15 JUSTICE GINSBURG: Mr. Coykendall, the -- on
16 the question -- you alleged in the complaint that there
17 was some discounting allowed by, how do you pronounce
18 it, Leegin?
19 MR. COYKENDALL: Leegin.
20 JUSTICE GINSBURG: Leegin. And Mr. Olson
21 says that that wasn't pursued at trial; is that correct?
22 MR. COYKENDALL: That particular aspect was
23 referred to; it wasn't pursued as a separate part of
24 this. Prior to trial, the judge did rule that the
25 Dr. Miles line of cases applied and the conduct would be

1 judged under the per se rule. So certain aspects with
2 respect to the horizontal conspiracy and the differences
3 in discounts -- I mean, developed that much.
4 JUSTICE GINSBURG: Suppose you were to lose,
5 you would still have that claim, I take it?
6 MR. COYKENDALL: Well, yes. We would
7 suggest the record is sufficient that on remand the
8 instruction given the jury as to the standard by which
9 their conduct could be judged could be sustained as a
10 per se violation under the rules related to horizontal
11 conspiracies as well. And again, I would suggest that
12 perhaps if the Court doesn't reach that, it should
13 remand to the Fifth Circuit for them to consider whether
14 that is a possibility.
15 Resale price maintenance can distort
16 consumer choice. The retailers -- so the person comes
17 into the store -- the retailers can exercise pressure to
18 influence the selection of higher margin products over
19 ones that may better fit the consumer needs. That is an
20 evil of resale price maintenance, whether or not it does
21 promote efficiencies.
22 And if resale price maintenance does act as
23 it is theorized, to increase retailer services, some
24 consumers will be worse off, they'll be paying for
25 services they don't want.

1 There are alternatives to RPM.
2 JUSTICE SCALIA: I don't suppose there's any
3 -- I don't suppose there's any way to protect against
4 the fallout to the consumer, is there? I mean if
5 indeed, if indeed a store presses on a consumer a
6 product that's more expensive than what he needs or --
7 and what he wants, is this a real argument against this,
8 that there's some stupid consumers whose can be conned?
9 I mean, whatever rule we adopt, that's going to be the
10 situation.
11 MR. COYKENDALL: Well, if -- what you're
12 doing is you're building in this high margin that gives
13 the retailer an incentive to do that. If there is no
14 resale price maintenance so that margin isn't
15 guaranteed, the incentive disappears. What is clear is
16 that retail -- resale price maintenance is a blunt
17 instrument to achieve any economies.
18 JUSTICE SCALIA: You're assuming that the --
19 that the retailer has a higher margin on the resale
20 price good. Why do you assume that?
21 MR. COYKENDALL: That's the only incentive,
22 the only reason for imposing resale prices
23 JUSTICE SCALIA: He's only going to be given
24 the thing if he does the kind of additional service that
25 the manufacturer wants. That's the whole purpose of it.

1 And the manufacturer is going to try to keep his margin
2 just as low as he can consistent with the -- you know --
3 consistent with selling as many products as he can.
4 MR. COYKENDALL: Well, there are more
5 efficient ways than RPM to achieve any benefits of
6 efficiency, such as contracts with the retailers to
7 provide those additional demand creating services. He
8 could pay the retailers to provide those services. He
9 could provide those services directly, I would suggest.
10 CHIEF JUSTICE ROBERTS: Why would you argue
11 that those are more efficient than resale price
12 maintenance?
13 MR. COYKENDALL: The resale price
14 maintenance amounts to nothing more than throwing money
15 at the problem. You're guaranteeing a margin and you're
16 hoping that it's going to be used somehow for the
17 consumer's benefit, and you've got no guarantee that any
18 dealer is going to use the margin that they're
19 guaranteed in any way to service the consumers.
20 And I would suggest that in geographically
21 isolated areas --
22 CHIEF JUSTICE ROBERTS: Well, you can add
23 the contractual provisions you were talking about to a
24 contract that has a minimum resale price. The minimum
25 resale price is to take away the incentive from the

1 retailer not to carry through on the non-price aspects.
2 MR. COYKENDALL: If you have a contract
3 requiring those services, you don't need the minimum
4 resale price. That's just completely unnecessary. And
5 that would prohibit the efficient dealer from passing on
6 those efficiencies to its consumers.
7 JUSTICE KENNEDY: Does that presume a
8 contract in which the retailer has a separate charge for
9 the service?
10 MR. COYKENDALL: It could be. It may not.
11 JUSTICE KENNEDY: If not, I don't see how
12 that would work under your rule.
13 MR. COYKENDALL: Well, under -- the idea is
14 the manufacturer chooses to deal with only those dealers
15 that offer this particular service. They sign a
16 contract to provide that service. If they don't want to
17 provide that service, they don't sign the contract,
18 these don't get the goods. It's as simple as that.
19 If the question is providing a larger margin
20 to the dealer, the most efficient way is for the
21 manufacturer simply to lower their wholesale price, and
22 the margin the dealer receives is higher.
23 Again, if there are other efficiencies, they
24 might be achieved by exclusive territories as permitted
25 by Sylvania or by the Colgate doctrine.

1 I would suggest the experience of the 30
2 years following the elimination of the fair trade laws
3 have shown the wisdom of the Dr. Miles decision which
4 places faith in the free market system. This Court
5 should continue to honor its precedents and respect the
6 will of Congress by adhering to the Dr. Miles rule.
7 CHIEF JUSTICE ROBERTS: Your reference to
8 the will of Congress, they haven't enacted legislation
9 that supports the result you seek.
10 MR. COYKENDALL: Your Honor, as this Court
11 observed in Sylvania, Congress by repealing the
12 Miller-Tydings McGuire Act did indicate its support for
13 the per se rule. I believe the Court should adhere to
14 that holding as well.
15 CHIEF JUSTICE ROBERTS: Thank you, counsel.
16 Ms. Underwood?
17 ORAL ARGUMENT OF BARBARA D. UNDERWOOD
18 ON BEHALF OF NEW YORK AS AMICUS CURIAE
19 SUPPORTING THE RESPONDENT
20 MS. UNDERWOOD: Mr. Chief Justice, and may
21 it please the Court:
22 When a manufacturer agrees with its
23 retailers to fix a minimum resale price, the whole point
24 of the agreement is to prevent price competition among
25 retailers, to prevent discounts. For almost 100 years

1 the Court has interpreted Section 1 of the Sherman Act
2 to prohibit such price fixing agreements. Any change in
3 that fundamental understanding of the statute should be
4 made by Congress and not by this Court.
5 The per se rule against resale price
6 maintenance is different in at least three ways from
7 other antitrust rules that this Court has overturned.
8 First, unlike the other rules, it alone has been settled
9 law for a century, reaffirmed over and over again by
10 this Court.
11 CHIEF JUSTICE ROBERTS: Well, it's also been
12 settled law for 90 years under the Colgate doctrine that
13 manufacturers can achieve the same results, albeit more
14 inefficiently. Doesn't it make sense to allow them to
15 adopt the most efficient means to an end that is already
16 completely legal?
17 MS. UNDERWOOD: No. That tension that you
18 -- that supposed anomaly that you described is simply a
19 result of the fact that the antitrust rule -- law does
20 not prohibit all anticompetitive behavior. It prohibits
21 agreements that are anti -- that restrain competition.
22 And so it will often be the case that it is
23 possible for somebody unilaterally to do something that
24 has the same effect as an agreement, or approximately
25 the same effect, as the antitrust law simply draws that

1 line because of a different value, a value in preserving
2 the independent action of individuals.
3 It is, however --
4 JUSTICE SCALIA: I'm not sure it's often the
5 case. Give me some other examples where you can achieve
6 the same industry-wide effect unilaterally.
7 MS. UNDERWOOD: Well, as you have observed,
8 virtually any vertical restriction could be accomplished
9 by having the manufacturer integrate the retailing
10 function and become one entity instead of two entities.
11 Then the possibility of conspiracy or agreement is
12 eliminated and the manufacturer, if he simply integrates
13 the whole function, is -- can fix prices, fix his, what
14 are in effect his own prices and be outside the reach of
15 the antitrust laws. There are other reasons why a
16 manufacturer might not find it convenient to do that
17 integration, but it is certainly possible by ceasing to
18 be multiple entities and to become one entity to avoid
19 the prohibitions of the antitrust law.
20 It is also -- so, this is old and well
21 settled. Unlike the Schwinn rule against territorial
22 restraints which was overturned only 10 years after it
23 was established, or the Albrecht rule against maximum
24 resale price maintenance which was overturned 29 years
25 after it was established, this has a much more settled

1 pedigree in the law and expectations have grown up
2 around it.
3 Second, it was endorsed and relied on by
4 Congress, not enacted by Congress but endorsed and
5 relied on by Congress, when Congress repealed the fair
6 trade laws in 1975 by amending the very statute this
7 Court is now asked to interpret.
8 JUSTICE SCALIA: Were they relying on
9 Dr. Miles or were they relying on us? That's the
10 question.
11 MS. UNDERWOOD: They were relying --
12 JUSTICE SCALIA: They left the situation
13 where it was, which is that the antitrust law is as
14 determined by this Court, and we had shown our
15 willingness to update the antitrust law when sound
16 economic doctrine suggests is necessary.
17 MS. UNDERWOOD: No. The legislative history
18 described in some detail in the Antitrust Institute's
19 brief shows that actually they were returning the law to
20 the per se rule against resale price maintenance because
21 they thought resale price maintenance was bad and should
22 be prohibited.
23 This is -- it is also true that --
24 CHIEF JUSTICE ROBERTS: But of course, they
25 could always pass a law saying that if their intent is

1 so clear. They didn't do that here.
2 MS. UNDERWOOD: That's true, they did not do
3 that here and I'm not suggesting that they did, only
4 that, uniquely among the rules that this Court has
5 established in the antitrust area, this rule has
6 received the repeated attention of Congress; and so the
7 Court's deference to Congress and reluctance to overturn
8 the rule should be at its peek as compared with those
9 other rules.
10 And third, price is different. This Court
11 has said that price competition is the central nervous
12 system of the economy. Other restraints, to be sure,
13 might indirectly affect price, but not with the same
14 absolute force. Territorial restraints don't absolutely
15 prevent price competition because customers can travel
16 or order by phone, mail, or Internet, and indeed under
17 territorial restraints there are often multiple
18 retailers in a particular territory who can compete.
19 Maximum price maintenance doesn't prevent competition at
20 all unless, as the Court noted in Khan, it's really
21 Minimum resale price maintenance in disguise, in which
22 case the Court in Khan said it's illegal.
23 Manufacturers can of course pay retailers
24 for the services that enhance the product that are being
25 advanced as the pro-competition benefit of resale price

1 maintenance. But the question for this Court is whether
2 the manufacturer should be allowed to use a price-fixing
3 agreement to make that payment to buy those services,
4 and that's not a question of fact for a jury to decide
5 in a rule of reason trial. That's a question of
6 statutory interpretation for this Court. It's a
7 question really of what kind of currency a manufacturer
8 can use to buy those retailer services.
9 It's also true that the claim that
10 price-fixing works to induce those services is both
11 debatable and untested. The retailers have no
12 obligations to provide services under the retail price
13 maintenance agreement at issue in this case and in other
14 cases.
15 CHIEF JUSTICE ROBERTS: But they could. I
16 mean, you could easily write the agreement saying you
17 have to charge this much and because you have to charge
18 this much you also have to provide the training, the
19 service, whatever the non-price inducements are.
20 MS. UNDERWOOD: You could. You could also
21 require those things without resale price maintenance
22 and then the retailer would be free to decide to raise
23 the price to pay for that or to provide it so
24 efficiently that he could in effect engage --
25 CHIEF JUSTICE ROBERTS: But then the

1 retailer, but then the retailer might have a real
2 incentive not to do a good job on the service because
3 they really want to market it for price, not for
4 service.
5 MS. UNDERWOOD: That really depends, doesn't
6 it, on what the consumers in the market want, and if
7 it's correct, if the manufacturer -- if the claim on
8 behalf of the manufacturer here is correct that what the
9 customers want is service, the retailers are in at least
10 as good a position to identify that fact as not.
11 I think the point --
12 CHIEF JUSTICE ROBERTS: Well, but there you
13 have the free rider problem, which is you go to the
14 fancy show room, you figure out what you want, and then
15 you buy it at the discount store.
16 MS. UNDERWOOD: Yes. That's at its peak,
17 perhaps, when you're talking about electronics. When
18 the shopping experience alone is what is thought to be
19 the benefit, which is often the case, you can't free
20 ride on that. You either shop in the place where you
21 like to shop or you shop -- or you have a different
22 shopping experience in Target.
23 JUSTICE SCALIA: But some manufacturers want
24 their product associated with excellent service, high
25 warranty, and all of that. And there is no way to get

1 that uniformly for that product without this kind
2 of agreement.
3 MS. UNDERWOOD: Yes, there is. The
4 manufacturer can contract for it. The manufacturer can
5 decline to deal with people who don't provide it. The
6 very same point that was being made earlier.
7 I think that the point here is that
8 permitting resale price maintenance would be such a
9 drastic change in the longstanding settled
10 interpretation of the Sherman Act that it doesn't really
11 qualify as the kind of common law evolution that this
12 Court has said is appropriate ordinarily in making
13 antitrust rules under the Sherman Act. If that change
14 is to be made at all, it should be made by Congress and
15 not by this Court.
16 JUSTICE STEVENS: Am I correct on the
17 congressional point that there was a period when
18 Congress would have prohibited the Solicitor General
19 from making the argument he made today?
20 MS. UNDERWOOD: Yes, there was such a
21 period. And this Court noted that fact in --
22 JUSTICE STEVENS: So there was a legislative
23 expression of a position on this particular issue?
24 MS. UNDERWOOD: There was a legislative
25 expression of position on this particular issue.

1 CHIEF JUSTICE ROBERTS: And that no longer
2 is applicable?
3 MS. UNDERWOOD: That is -- the Solicitor
4 General is no longer barred from making that argument,
5 as is evidenced today. What he --
6 JUSTICE SCALIA: I guess Congress changed
7 its mind then.
8 MS. UNDERWOOD: No, I think Congress found
9 it unnecessary or perhaps questioned the wisdom or
10 constitutionality of barring the Solicitor General from
11 making particular arguments.
12 JUSTICE SCALIA: I find it hard to believe
13 that.
14 (Laughter.)
15 MS. UNDERWOOD: But Congress has
16 consistently -- well, and the repeal -- the reason the
17 repeal of the Miller-Tydings Act seems particularly
18 relevant is that it is indeed -- it was an amendment to
19 this statute that this Court is being asked to
20 interpret, so it sheds some light on the on the meaning
21 of this statute as it stands.
22 JUSTICE GINSBURG: As Mr. Olson pointed out,
23 under the fair trade laws this was per se legal. So
24 that's kind of a different thing.
25 MS. UNDERWOOD: Yes. But when Congress

1 repealed that, there were considerable -- there was
2 considerable expression of legislative history, for
3 those who find legislative history helpful, that
4 declared opposition to resale price maintenance, not
5 simply that it was sometimes helpful and sometimes
6 hurtful. So to the extent Congress's intent can be
7 gleaned from that legislative history, it was an intent
8 to return to the regime of per se illegality.
9 JUSTICE GINSBURG: Maybe on the year by
10 year, don't spend any money on, maybe Congress decided
11 that wasn't an appropriate technique, but Congress has
12 used that after, hasn't it, in other cases?
13 MS. UNDERWOOD: It has, but I would question
14 the wisdom of that technique as a method of expressing
15 Congress's views. The fact that Congress went so far as
16 to use it once suggests a very strong view indeed.
17 CHIEF JUSTICE ROBERTS: Thank you,
18 Ms. Underwood.
19 Mr. Olson, you have 3 minutes remaining.
20 REBUTTAL ARGUMENT OF THEODORE B. OLSON
21 ON BEHALF OF THE PETITIONER
22 MR. OLSON: The Respondent and its amici
23 seem to recognize that what this Court said in State Oil
24 versus Khan, that a vertical restraint imposed by a
25 single manufacturer or wholesaler may stimulate

1 interbrand competition even as it reduces intrabrand
2 competition and, by the way, it enhances intrabrand
3 competition on matters of service and availability and
4 other things in addition to price. The Respondent and
5 their amici seem to have acknowledged these
6 pro-competitive factors but say you should do it by a
7 contract with 5,000 different retailers, which you then
8 have to go out and enforce, or you have to do it under a
9 Colgate system, which the Ping brief demonstrates it's a
10 blunt instrument, it requires terminating retailers with
11 which you had a relationship for years, it prohibits
12 even talking to the loyal retailers to fix small
13 problems.
14 JUSTICE STEVENS: But you're just giving
15 them an additional ground for termination.
16 MR. OLSON: Pardon me?
17 JUSTICE STEVENS: You're just giving, you're
18 just suggesting we should give them an additional ground
19 for termination.
20 MR. OLSON: No. What we're suggesting is
21 that the agreement is something, the details can be
22 worked out. The manufacturer can -- and the Ping brief
23 explains this. The manufacturer can go to the retailer
24 and say: Look, maybe you didn't get it right, your
25 sales person said the wrong thing; let's fix it, because

1 we want to be dealing together. The antitrust laws --
2 in other word, what the Respondent and its amici want or
3 they suggest forward integration, so you just acquire
4 all your retailers.
5 The benefits of these type of arrangements
6 provide the consumers with choices. It stimulates
7 interbrand competition. It promotes intrabrand
8 competition on things other than price. It provides
9 consumers with more choices. It ultimately gives more
10 freedom to the manufacturer to stimulate the sale of its
11 products, to enter the marketplace.
12 These are things that the Court has said,
13 and provides a more varied market price. The court has
14 repeatedly raid that the presumptive rule is a rule of
15 reason. Per se rules should be crossed out or not
16 adopted unless they're dealing with a practice which is
17 invariably anticompetitive. This practice, as
18 acknowledged, is procompetitive. It provides many
19 opportunities, and it is irrational for vertical
20 restrictions to exist in this world in the non-price
21 area or the maximum price area as subject to the rule of
22 reason and the minimum retail price maintenance under a
23 rigid per se rule that cannot be changed.
24 And as this Court has repeatedly held,
25 Congress intended by the use of restraint of trade and

1 the unreasonable restraint of trade for this court to
2 continue to breathe life into the restrictions of the
3 antitrust laws in the benefit of the consumer and in the
4 benefit of competition, eliminating rigid per se rules
5 which make it unlawful for a manufacturer to do
6 something that's rational in the marketplace, to give
7 consumer choices, or to do it in some indirect way that
8 is a lawyer's dream and an entrepreneur's nightmare
9 makes no sense at all.
10 For all those reasons, the rule of reason in
11 this area, as in the other areas, should replace the
12 per se rule which is rigid and anticompetitive at the
13 end of the day.
14 Thank you.
15 CHIEF JUSTICE ROBERTS: Thank you,
16 Mr. Olson.
17 The case is submitted.
18 (Whereupon, at 11:05 a.m., The case in the
19 above-entitled matter was submitted.)
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