NOS. 06-35538, 06-35542, 06-35543

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COSTCO WHOLESALE CORPORATION,

Plaintiff/Appellee,

v.

ROGER HOEN, VERA ING, and MERRITT LONG, in their official capacities as members of the Washington State Liquor Control Board,

Defendants/Appellants,

and

WASHINGTON BEER AND WINE WHOLESALERS ASSOCIATION, a Washington non-profit corporation,

Intervenor Defendant/Appellant

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

No. CO4-360P
The Honorable Marcia J. Pechman
United States District Court Judge

BRIEF OF OHIO AND 22 OTHER STATES AS AMICI CURIAE ON BEHALF OF DEFENDANTS/APPELLANTS SEEKING REVERSAL OF DISTRICT COURT ORDER

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Rules

Rule 29(a) of the Federal Rules of Appellate Procedure..1

I. IDENTITY OF AMICI CURIAE

Ohio and 22 other States, submit this brief as amici curiae pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure.

II. SOURCE OF AUTHORITY TO FILE

Rule 29(a) authorizes the States to file an *amicus curiae* brief without obtaining the consent of the parties or leave of court.

III. INTEREST OF THE AMICI CURIAE

The States file this *amicus* brief to underscore their historic roles in controlling alcohol distribution systems within state borders. Every state has enacted laws that vigorously and effectively regulate the sale and distribution of alcohol. Most states, including Ohio, maintain complete regulatory control over alcohol within their borders, in part by use of a "three tier" distribution system. Under a three tier system, manufacturers may sell only to wholesalers; wholesalers may sell only to retailers; and only retailers may sell to a consumer. Each tier requires a license issued by the State. The District Court decision below calls into question such regulatory schemes. The States appear now as *amici* to express their grave concerns that the District Court's ruling, if allowed to stand, threatens the ability of the State of Washington and of all states with similar regulatory schemes

to protect their citizens and their economies by enforcing and monitoring their liquor distribution systems.

By definition, all regulation restricts competition. Yet, it is far too extreme a position to contend that, for that reason, the states may never regulate the sale of any product within their borders. State regulation is easily justified regarding alcohol, which is a unique and potentially dangerous product. Indeed, since the repeal of Prohibition in 1933, the States have exercised their police powers to restrict the sale and distribution of alcohol in order to protect the health, safety, and welfare of their residents. One example of such regulation is "tied house" restrictions, found in both state and federal law, which prevent vertical integration of the alcohol industry between the "three tiers" of alcohol manufacturers, distributors, and retailers. *Granholm v. Heald*, 544 U.S. 460, 466 (2005). The purpose of such arguably anticompetitive legislation is to "prevent a recurrence of the evils that were prevalent before prohibition when the large liquor interests controlled, through vertical and horizontal integration, the production and distributive channels of the industry." United States Department of Commerce, State Liquor Legislation (1941) at p. 20. "By enacting prohibitions against 'tied-house' arrangements, state legislatures aimed to prevent two particular dangers: the ability and potentiality of large firms to dominate local markets through vertical

and horizontal integration [...] and the excessive sales of alcoholic beverages produced by the overly aggressive marketing techniques of larger alcoholic beverage concerns." *California Beer Wholesalers Assoc. v. Alcoholic Beverage Control Appeals Board*, 5 Cal. 3d 402, 407 (1971) (internal citations omitted).

Such threats continue to be real, as shown by recently-concluded investigations into New York's liquor distribution system. That investigation revealed that liquor suppliers and wholesalers were involved in schemes to hand out millions in illegal payoffs to favored retailers. See www.oag.state.ny.us/press/2006/oct/oct30a_06.html (visited 11/6/2006). The three-tier system allows the States to address these types of market abuses by regulating alcohol distribution systems closely and strictly.

The *amici* States retain a strong interest in maintaining a highly-regulated environment over a potentially dangerous commodity—alcohol. Accordingly, the States have a compelling interest in ensuring that the health, safety and well-being of their citizens remain paramount in the enforcement of economic regulations such as those at stake here. The States, as sovereigns, have enacted important and effective regulations governing alcohol sales. As such, those enactments are neither nullified by the federal antitrust laws, nor do the actions taken pursuant to them give rise to federal antitrust liability.

Under U.S. Supreme Court precedent, as well as this Court's own precedents, Washington's laws regulating the sale and delivery of alcohol should have been upheld, because these laws are a reasonable and permissible exercise of the States' police power and are *not* pre-empted by federal antitrust law. Because the *amici* States' individual regulatory schemes are put at risk by the incomplete and erroneous analysis of the court below, we urge this Court to reverse the district court's judgment.

IV. SUMMARY OF ARGUMENT

This Court should reverse the district court's decision, which undercuts traditional state authority to regulate the liquor distribution system within state borders. State laws that restrict competition in alcohol markets are appropriate and do not conflict with federal antitrust statutes. The district court's review of the Washington regulatory enactments, however, was flawed in three important respects. First, the court invalidated eight independent provisions of Washington's alcohol laws based upon the erroneous conclusion that Washington's laws, duly enacted by its legislature, irreconcilably conflict with, and are thus pre-empted by, federal antitrust laws. *Costco Wholesale Corp. v. Hoen,* 407 F. Supp. 2d 1234, 1242 (W.D. Wash. 2005). Moreover, the district court incorrectly analyzed the state action exemption from the antitrust laws, which was first announced by the

United States Supreme Court in *Parker v. Brown*, 317 U.S. 341 (1943). The district court erred in concluding that the State regulations at issue were not unilateral restraints imposed by the State, but instead were tantamount to state delegation of regulatory authority to private entities, or State approval of purely private agreements, which are subjected to an entirely different state action analysis.

Finally, the district court improperly determined that the different statutes in Washington's regulatory scheme need not be analyzed independently and that any offending portions need not be severed, despite Washington's severability law, which provides for severing any specific portions of statutes found to be invalid. "Under Washington law, a statute is not to be declared unconstitutional in its entirety unless the invalid provisions are unseverable and it cannot reasonably be believed that the legislature would have passed the one without the other, or unless the elimination of the invalid part would render the remainder of the act incapable of accomplishing the legislative purposes." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 506 (1985) (holding that severability is the course the court of appeals should have pursued in applying Washington state law). Instead the district court struck down virtually the entire regulatory scheme completely ignoring Washington state law on severability. Cf. *Leavitt v. Jane L.*, 518 U.S. 137 (1996)

(per curiam) (summarily reversing court of appeals decision refusing to apply state severability clause under state law).

By disregarding significant United States Supreme Court precedent and failing to analyze Washington's liquor laws under the proper standards, the district court decision threatens similar regulatory enactments in virtually every other State. Because the district court decision is plainly erroneous, this Court should reverse it.

V. ARGUMENT

A. The Twenty-first Amendment empowers States to regulate alcohol sales and distribution systems within their borders, and States have long used that power so that the alcohol market has never been free of all state regulation.

Extensive State regulation of alcohol sale and distribution systems is not a recent development. Since Prohibition was repealed in 1933, States have regulated extensively the sale and delivery of alcohol within their borders. And, since the Twenty-first Amendment was ratified, many of the regulations that States enacted restrict the free flow of alcohol—and thus inevitably restrict competition. When Prohibition was repealed, the States were authorized to control the sale and distribution of alcohol within their borders. Virtually all States adopted a three tier system for alcohol sales:

> Following repeal of the Eighteenth Amendment, the vast majority of states, including California, enacted alcoholic beverage control laws. These statutes sought to forestall the generation of such evils and excesses as intemperance and disorderly marketing conditions that had plagued the public and the alcoholic beverage industry prior to prohibition. [...] By enacting prohibitions against "tied-house" arrangements, state legislatures aimed to prevent two particular dangers: the ability and potentiality of large firms to dominate local markets through vertical and horizontal integration and the excessive sales of alcoholic beverages produced by the overly aggressive marketing techniques of larger alcoholic beverage concerns. [...] The principal method utilized by state legislatures to avoid these antisocial developments was the establishment of a triple-tiered distribution and licensing scheme.

California Beer Wholesalers Assoc., Inc. v. Alcoholic Beverage Control Appeals Board, 5 Cal.3d 402, 407 (1971) (internal citations omitted).

Through either a State monopoly system or a licensing system, States exercise their police powers to restrict the sale and distribution of alcohol for the purpose of protecting the health, safety, and welfare of their residents. In the post-Prohibition era, no State has left the market for alcohol utterly unregulated—and for good reason. As Justice Stevens lamented in his dissent in *Granholm,* "Today many Americans, particularly those members of the younger generations who make policy decisions, regard alcohol as an ordinary article of commerce, subject to substantially the same market and legal controls as other consumer products." *Granholm v. Heald*, 544 U.S. 460, 494 (2005) (Stevens, J. dissenting). In a 1941 Supreme Court decision, the importance of careful control over alcohol was

explained in this way: "The people of the United States knew that liquor is a lawlessness unto itself. They determined that it should be governed by a specific and particular Constitutional provision. They did not leave it to the courts to devise special distortions of the general rules as to interstate commerce to curb liquor's 'tendency to get out of legal bounds.'" *Duckworth v. Arkansas*, 314 U.S. 390, 398-99 (1941) (Jackson, J. concurring). Washington, like every other State, exercised its police powers and enacted an extensive scheme for regulating the sale and distribution of alcohol within its borders. Costco believes that Washington's regulations should be limited by federal antitrust law.

In the district court, Costco sought relief from Washington's strict alcohol regulations because those regulations conflicted with Costco's business model. Costco alleged that the Washington regulatory scheme prevented it from using its business model in purchasing beer and wine, and thus prevented it from being able to negotiate more competitive prices. See (Compl. par. 11-13.) The States urge this Court to recognize that the interest of a single commercial enterprise to pursue its chosen business model pales in comparison to the vital State interests in exercising their police powers to further the health, safety, and well-being of their citizens.

B. The Sherman Act does not pre-empt Washington's alcohol laws.

In *Rice v. Norman Williams Co.*, 458 U.S. 654 (1982), the Supreme Court explained that a party must meet an extremely high standard in order to establish that the Sherman Act pre-empts a state law. Specifically, a state law cannot be preempted by the Sherman Act unless "the statute on its face irreconcilably conflicts with federal antitrust policy." *Id.* at 659. Moreover, the Court explained this very high threshold for pre-emption as:

> [a] state statute, when considered in the abstract, may be condemned under the antitrust laws *only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases,* or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute. Such condemnation will follow under § 1 of the Sherman Act only when the conduct contemplated by the statute is *in all cases* a *per se* violation.

Id. at 661 (emphasis added). The Court could not have been clearer in *Rice*—invalidation of state statutes by pre-emption is an extraordinary remedy, not to be pursued lightly.

Ignoring the clear instruction of *Rice*, the district court did not apply the very high threshold necessary for a proper pre-emption analysis. Instead, the district court erroneously adopted Costco's argument that Washington's regulatory framework is "irreconcilably in conflict with federal antitrust law." *Costco,* 407 F. Supp.2d at 1242. In accepting Costco's low-threshold argument, the district court failed to give any consideration to the Supreme Court's mandate that pre-emption

is appropriate only when the statute at issue requires a *per se* violations of the antitrust laws "in all cases."

Further, as the Supreme Court has observed, a state law will not be preempted even if it affects the market in the same way that a *per se* violation would. *Fisher v. City of Berkeley*, 475 U.S. 260 (1986) (rejecting facial challenge even though "it cannot be denied" that rent-control ordinance would affect the market "in much the same way" as a horizontal price-fixing conspiracy). *See also Massachusetts Food Ass'n v. Massachusetts Alcoholic Beverages Control Comm'n*, 197 F.3d 560 (1st Cir. 1999) (statute that prohibited any one firm or person from owning more than three licensed retail liquor outlets in the state held not preempted).

Here, the district court did properly find one Washington law exempt from antitrust preemption. The court held that Washington's ban on retailer-to-retailer sales was not preempted by the Sherman Act because it is a "unilateral restraint" imposed purely by the state. (District Court Findings of Fact and Conclusions of Law 4/21/06 at p. 15). "Unlike the other restraints at issue in this case, this policy does not grant a degree of private regulatory power to private actors." *Id.*

But the district court erred in stopping there, as *all* of the Washington laws challenged here are unilateral restraints. For example, just as Washington

unilaterally declared a prohibition on retailer-to-retailer sales, Washington unilaterally imposed a ban on central warehousing. The ban on central warehousing is not an independent, private agreement reached among distributors that the State merely authorized after the fact, but is imposed by the State as regulator. To monitor and control the flow of alcohol in the State, central warehousing is prohibited. The Supreme Court has acknowledged that State laws that assist it in monitoring the flow of alcohol within its borders and prevent diversion of that alcohol within the State market are valid even under a Supremacy Clause challenge. See *North Dakota v. United States*, 495 U.S. 423 (1990).

The same is true of the other Washington laws at issue here. Uniform pricing requirements, bans on quantity discounts, delivered pricing requirements, and ban on credit sales, are all unilateral restraints, imposed by the State acting as a sovereign. They neither authorize private parties to exercise regulatory power nor merely approve a pre-existing private agreement. The State of Washington unilaterally imposed these restraints on the alcohol market, and simply enacted laws that private parties must obey.

The district court's error was not just in invalidating these particular laws, as the bigger problem—especially from the perspective of other States—was the test the district court used. The district court held that, in order to survive pre-emption

the regulator must bear the burden of providing "a pro-competitive rationale for the central warehousing ban." (District Court Supplementary Order 3/7/06 at p.4). Regulation of the alcohol market has never been based solely on competition, as "anti-competitive" regulation has always been part of alcohol regulation. States have never left the alcohol market to the thirstiest buyer and the most profit-hungry seller to determine price and market conduct. Since repeal of Prohibition, not one State has left its liquor market unregulated.

States have enacted extensive regulatory schemes to control the flow of alcohol within their borders in order to promote the welfare, safety, and morals of their residents. This Court has recognized the sale of alcohol as a "vice activity." "Vice activities" are a category of 'products or activities deemed harmful, such as cigarettes, alcoholic beverages, and prostitution,' which state legislatures have dealt with by means ranging from location restrictions to outright prohibition." *Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 737 (9th Cir. 2003). Most State regulatory schemes concerning alcohol include location restrictions as to where liquor permit premises may be located, and many states retain "dry" jurisdictions (prohibitions). The extensive regulations that States impose on alcohol are designed to displace unfettered business freedom in the matter of alcohol. The powers to tax, license, and regulate necessarily imply

limitations on a free market economy. See Easterbrook, *Antitrust and the Economics of Federalism*, 26 J. Law & Econ. 23, 27-29 (1983). "Regulation displaces competition…." *Id.* "Sometimes legislation may be justified as necessary to correct 'imperfections in the market, but in most cases legislation is designed to defeat the market altogether." *Id.* Thus, State regulation of alcohol markets is not automatically preempted by antitrust law merely because it is anti-competitive, for, if that were true, all alcohol regulations would be threatened. The Washington laws challenged by Costco are thus, not preempted by antitrust law.

Costco argues that because the State laws regulating alcohol have an adverse effect on its business model and therefore on competition, the regulations must violate antitrust laws. However, as the Supreme Court noted in *New Motor Vehicle Dealer Board of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96 (1978), "If an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed." 439 U.S. at 111 (citing *Exxon Corp v. Governor of Maryland*, 437 U.S. 117, 133 (1978). The States' concern is just that—if Costco's theory of adverse effect on competition is adopted, the States' power to engage in economic regulation in all areas, not just liquor, will be effectively destroyed.

In the final analysis, only if the challenged statute on its face mandates some anticompetitive conduct that is per se illegal in every case, without exception, with some private party involvement, will an otherwise valid state law be preempted by the Sherman Act. Costco fell far short of sustaining the heavy burden necessary to strike down a valid state regulatory structure, and thus, the Court erred in finding that the Washington regulatory system was pre-empted by the Sherman Act. For that reason, the District Court's ruling was improvident and should be reversed.

C. Regardless of the outcome of Costco's pre-emption argument, Costco's anti-trust challenge is barred under the doctrine of state action immunity.

Even if this Court were to find that the Washington law was preempted, the doctrine of state action immunity applies and protects the Act from invalidation under the antitrust law. "Legislation that would otherwise be preempted under *Rice* may nonetheless survive if it is found to be state action immune from antitrust scrutiny under *Parker v. Brown.*" *Fisher v. City of Berkeley,* 475 U.S. 260, 265 (1986).

As was first recognized in *Parker v. Brown,* federal antitrust laws do not apply to "state action or official action directed by a state." *Parker v. Brown,* 317 U.S. 341, 351 (1943) (rejecting Sherman Act challenge to state's price-enhancing supports for the raisin industry). Principles of federalism require respect for acts of

sovereign states—even those that arguably displace or undermine competition—because Congress did not intend to interfere with the reserved power of a state to enter into contracts or pass legislation in support of the general welfare.

More recently, in *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365 (1991), the Supreme Court confirmed that actions of the State as sovereign are exempt from the operation of the antitrust laws. In *Omni Outdoor*, the Court reviewed allegations that a municipal ordinance restricting billboard construction violated the Sherman Act. The Court noted that "the very purpose of the zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition..." *Id.* at 373. In rejecting the antitrust challenge, the Court held the Sherman Act does not apply to anticompetitive restraints imposed by the States "as an act of government." *Id.* at 370 (citing *Parker*). "Where the action complained of ... was that of the State itself, the action is exempt from antitrust liability regardless of the State's motives in taking the action." *Id.* at 377-78. The Court strongly reiterated its precedent that action of the State as a sovereign is not subject to the Sherman Act: "we reaffirm our rejection of any interpretation of the Sherman Act that would allow plaintiffs to look behind the actions of state sovereigns to base their claims on 'perceived conspiracies to restrain trade.' We reiterate that, with the possible

market participant exception, *any* action that qualifies as state action is '*ipso facto* . . . exempt from the operation of the antitrust laws.'" *Id.* at 379 (citing *Hoover v. Ronwin*, 466 U.S. 558, 568, 580 (1984).

The district court erred in permitting Costco to "look behind the actions of state sovereigns." It strayed from proper state action analysis by applying an analysis relevant to private agreements that are simply cloaked in state authority, rather than the correct analysis applicable to laws enacted by the State as sovereign. Specifically, in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980), the Court held that when reviewing State laws that either cloak private agreements with State authority, or when the State delegates its regulatory authority to private parties, courts must apply a two-prong test. Under the *Midcal* test, the State policy to restrain competition must be "clearly articulated" and "actively supervised" by the State itself. However, a State law that is *unilaterally* imposed by the State—whether that restraint is wise or unwise—does not require analysis under the *Midcal* test. The district court ignored this important distinction.

Just as in *Omni Outdoor*, the restraints that Washington imposes on its alcohol market are imposed as an act of government, and therefore are exempt from antitrust analysis. Washington's laws, and similar laws enacted by other

States, do not merely cast "such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." *Midcal*, 445 U.S. at 106. In *Midcal*, the Court held that California's wine-pricing law constituted illegal resale price maintenance as the wine producers held the power to dictate prices charged by wholesalers. In effect, California had delegated its regulatory power to private entities—the wine producers. *Id.* at 103. See also, *Rice*, 458 U.S. at 665 (Stevens, J. concurring) (holding that *Midcal* concerned a private agreement to fix prices). Unlike the laws challenged in *Midcal*, the State laws challenged here do not simply approve pre-existing private arrangements. Much to the contrary, they are the act of a sovereign imposing a regulatory restraint on a market.

Costco did not even attempt to argue that private parties had previously agreed to a ban on central warehousing, or a uniform delivered price, or had agreed to any of the other laws it challenged. Instead, Costco alleged that the State legislature was "captured" by private parties, which led to an illegal restraint of the market. However, the Supreme Court has rejected as "undesirable" the requirement of "such a close examination of a state legislature's intent to determine whether the federal antitrust laws would apply," because doing so would embroil the federal courts in the unnecessary interpretation of state statutes. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 44 n. 7 (1985). The State acting as a

sovereign imposed the regulatory market restraints challenged by Costco. Absent some showing that the State has merely cloaked pre-existing private agreements with a State imprimatur or granted regulatory power to private parties, State restraints on the liquor market fall outside the Sherman Act's reach. "The Sherman Act is a charter of economic liberty, but only as against *private* restraints." *Massachusetts Food Assoc. v. Massachusetts Alcoholic Beverages Control Commission*, 197 F.3d 560, 565 (1st Cir. 1999) (emphasis added).

Instead of following *Parker* and its progeny and declaring that the Washington laws were exempt from the Sherman Act as state action, the district court erroneously determined that the laws granted a degree of private regulatory power to private actors. Based upon this incorrect finding, it proceeded to analyze Washington's laws under the two-pronged test the Court set forth in *Midcal*. The state of Washington is not a *private party*, however, and the challenged conduct is that of the state legislature restraining the liquor market. Therefore, *Midcal* does not control. Because Washington's regulatory actions were plainly state action, the *Midcal* test does not apply. *See Patrick v. Burget*, 486 U.S. 94, 100 (1988) (holding that two-pronged *Midcal* test looks at "whether anticompetitive conduct engaged in *by private parties* should be deemed state action and thus shielded from the antitrust laws") (emphasis added); *Hoover v. Ronwin*, 466 U.S 558, 569 (1984)

("Where the conduct at issue is in fact that of the state legislature or supreme court, we need not address the issues of 'clear articulation' and 'active supervision.')

The gist of Costco's wholesale attack on alcohol regulation is that if the State enacts legislation that requires conduct that private parties could not agree to among themselves without violating antitrust laws, then the State's laws must fall. But this attack fails for several reasons. Many State regulations require conduct by private parties that the parties themselves could not agree to engage in. *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365 (1991) (municipal ordinance restricting new billboards upheld); Fisher *v. City of Berkeley*, 475 U.S. 260 (1986) (rent controls); *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48 (1985) (joint rate-making proposals). Indeed, the very requirement of refraining from selling alcohol to underage consumers, or restricting sales by wholesalers only to retailers—laws that every State has in effect—is conduct that individual parties could not agree to without violating the antitrust laws.

The Court of Appeals for the First Circuit rejected just such a "similar effects" theory in *Massachusetts Food Association v. Massachusetts Alcoholic Beverages Control Commission*, 197 F.3d 560 (1st Cir. 1999). In reviewing Massachusetts' law limiting a person or firm to having three retail liquor licenses the court noted: "the difficulty with this 'similar effects' argument is that much

direct government regulation prohibiting one form of economic activity or requiring another involves directives that private parties could not themselves implement without violating antitrust laws." *Id.* at 564-65. The court cautioned against leaving to federal judges the task of deciding which legislative enactments should survive, characterizing it as a return to *Lochner*-era substantive due process. *Id.*

State action that does not merely approve prior private agreements or that does not grant private regulatory authority are not subject to a *Midcal* analysis. When States act as sovereign regulators and enact laws that in the State's judgment are for the benefit of the health, safety and welfare of its residents, the *Parker* state action doctrine immunizes these laws from the Sherman Act. This well-established rule, ignored by the district court, respects the sovereignty of States and acknowledges the principles of federalism. Under this longstanding rule of law, Washington's liquor laws challenged by Costco are exempt from antitrust laws as state action.

D. The district court's erroneous decision puts at risk the very same three-tier systems that the Supreme Court found to be "unquestionably legitimate in *Granholm v. Heald.*

The Supreme Court has recognized the States' need for a regulated alcohol market, based not on competitive forces, but on state control. Specifically, the

Court has affirmed that state-run, three-tier systems—which by definition constrain competition—are legitimate. "States may also assume direct control of liquor distribution through state-run outlets or funnel sales through the three-tier system. We have previously recognized that the three-tier system itself is 'unquestionably legitimate.'" *Granholm v. Heald*, 544 U.S. 460, 489 (2005) (citing *North Dakota v. United States*, 495 U.S. 423, 432 (1990)). Given this acknowledgement and endorsement of anti-competitive state regulatory schemes, it follows that the federal antitrust laws do not preempt a state's liquor laws simply because those laws restrain competition in liquor sales. Further, the fact that the extensive state regulation of alcohol via a three-tier system may impede Costco's business plan is even less of a reason to invalidate State alcohol laws.

Such a cavalier disregard for an important state interest in such a highly regulated arena is a matter of grave concern to the States. Particularly alarming is that, under the district court's reasoning, Washington's separate liquor licensing requirements, if challenged, likely would have been found to be preempted by the Sherman Act. Under the district court's analysis, requiring a license at all—as all states do—or limiting the number of liquor permits issued—as many State licensing laws do—likely would be found to be an output restraint, even though the U.S. Supreme Court has recognized that three-tier systems are "unquestionably

legitimate." *Granholm*, 544 U.S. at 489. The district court's analysis undermines the entire three tier system upon which States rely to control their alcohol distribution markets. This conflict with the Supreme Court decision in *Granholm* must be reversed.

E. The district court failed to recognize well-settled Washington law on severability and erroneously invalidated most of Washington's entire regulatory scheme.

Washington law is very clear that when state laws are subjected to a constitutional challenge, courts are to invalidate and sever from the statute the offending provisions. "An act of the legislature is not unconstitutional in its entirety because one or more of its provisions is unconstitutional unless the invalid provisions are unseverable and it cannot reasonably be believed that the legislature would have passed the one without the other, or unless the elimination of the invalid part would render the remainder of the act incapable of accomplishing the legislative purposes." *State v. Anderson*, 81 Wn.2d 234, 236, 501 P.2d 184, 186 (1972). Further, a severability clause contained in the legislation assists the courts in determining whether provisions of the act were intended to stand when one portion is invalidated. *Id.* Washington's liquor regulatory scheme contained a very clear severability clause, which in part states: "If any clause, part or section of this act shall be adjudged invalid, such judgment shall not affect nor invalidate the

remainder of the act, but shall be confined in its operation to the clause, part or section directly involved in the controversy in which such judgment was rendered." RCW 66.98.020. The district court erroneously invalidated virtually all of Washington's regulatory scheme for its alcohol market. States certainly have a strong interest in federal courts respecting state law when deciding questions of state law. The district court here ignored Washington's very clear severability provision. Due to its failure to properly apply state law to the issue of severability, the district court's decision must be reversed.

VI. CONCLUSION

For the above reasons, the *amici* States respectfully request the Court reverse the district court decision.

RESPECTFULLY SUBMITTED this 1st day of November, 2006.

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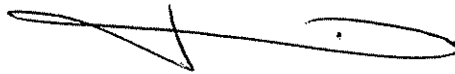

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CERTIFICATE OF SERVICE

I certify that I directed the original Amicus Brief to be filed with the Clerk of Court, U.S. Court of Appeals, Ninth Circuit, at P.O. Box 193939, San Francisco, California 94119-3939, and served upon David J. Burman and Syhlah Renee Alfonso, attorneys for appellant Costco, David M. Hankins and Martha P. Lantz, attorneys for appellees Roger Hoen, Vera Ing and Merritt Long; upon J. Bradley Buckhalter, John C. Guadnola and Paul R. Romain, attorneys for intervenor Washington Beer & Wine Wholesalers Association and to Hardy Myers, Mary H. Williams and Paul L. Smith, attorneys for amicus curiae State of Oregon on November 13, 2006, by mailing two copies, with postage prepaid, in an envelope addressed to:

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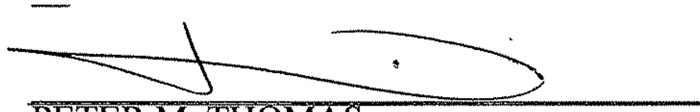

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Pursuant to Ninth Circuit Rule 32(e)(4), I certify that the Amicus Brief is proportionately spaced, has a typeface of 14 points or more and contains 6,175 words.

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