No. ________

In The
Supreme Court of the United States

MAC'S SHELL SERVICE, INC.; CYNTHIA KAROL; JOHN A. SULLIVAN; AKMAL, INC.; SID PARSHAD; RAM CORPORATION, INC.; J&M AVRAMIDIS, INC.; STEPHEN PISARCZYK,

Petitioners,

v.

SHELL OIL PRODUCTS, INC.; MOTIVA ENTERPRISES LLC; SHELL OIL COMPANY, INC.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The First Circuit held that in order to receive the protections of the Petroleum Marketing Practices Act ("PMPA" or "Act"), 15 U.S.C. § 2801 *et seq.*, a franchisee faced with an unlawful lease must either sign the lease and forego any potential claim that the lease violates the Act or refuse to sign the lease and then challenge the lease following receipt of a notice of nonrenewal. The Ninth Circuit rejected an interpretation of the PMPA that would require the franchisee to discontinue its business in order to preserve its rights under the Act. A single question is thus presented:

Whether the PMPA encompasses a claim for "constructive" nonrenewal of the franchise relationship where:

(i) the petitioner-franchisees filed suit prior to receiving new lease agreements that violated the Act;

(ii) the lease agreements were presented on a take-it-or-leave-it basis;

(iii) respondent-franchisor stated it would terminate the franchises unless petitioners signed the lease agreements; and

(iv) the franchisees signed the lease agreements, under protest, and pursued their legal claims against the franchisor.

LIST OF PARTIES AND RULE 29.6 STATEMENT

Pursuant to Rule 14.1(b), the caption contains the list of all parties appearing here and before the United States Court of Appeals for the First Circuit. Pursuant to Rule 29.6, neither Mac's Shell Service, Inc. ("Mac"), Akmal, Inc. ("Akmal"), RAM Corporation, Inc. ("RAM"), or J&M Avramidis, Inc. ("J&M") have any parent corporation, nor are there any publicly traded companies that own more than ten percent of the stock of Mac, Akmal, RAM or J&M.

Respondents are Shell Oil Products, Inc., Motiva Enterprises LLC, and Shell Oil Company, Inc.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

FEDERAL CASES:

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

CITATIONS FOR OPINIONS BELOW

The opinion of the Court of Appeals is reported at 524 F.3d 33 (1st Cir. 2008). The slip opinion is reprinted in the Appendix ("App.") at pp. 1-41. The district court's Order on Trial and Post-Trial Motions dated September 19, 2005 is unpublished and reprinted in the Appendix at pp. 42-47; its Memorandum of Decision dated October 22, 2003 is unpublished and reprinted in the Appendix at pp. 48-51. The order of the Court of Appeals denying the respondents' petition for rehearing and petition for rehearing en banc is unpublished and is reprinted in the Appendix at pp. 52-54.

BASIS FOR JURISDICTION

The Court of Appeals filed its opinion on April 18, 2008 and denied the respondents' petition for rehearing and petition for rehearing en banc on May 23, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves provisions of Title I of the PMPA, 15 U.S.C. § 2801 *et seq*. The pertinent provisions are reproduced in the Appendix at pp. 55-80.

STATEMENT OF THE CASE

A. Introduction

This petition seeks this Court's resolution of a split between the First and Ninth Circuits concerning the scope of protection afforded by the PMPA to franchisees who face termination or nonrenewal of their franchise agreements unless they accept onerous – and unlawful – contract terms.[1] The circuits are fundamentally split over whether a franchisor can lawfully present its franchisees with the Hobson's choice of accepting unlawful contract terms or risking their livelihoods on the chance that a court will grant a preliminary injunction.

Petitioners are a group of eight Massachusetts dealers/franchisees[2] selected by the district court to

[1] Petitioners believe that the respondents will also file a petition seeking a writ of certiorari in this case. They have filed an Application for Extension of Time In Which to File a Petition for Writ of Certiorari for up to and including September 20, 2008.

[2] Separate actions brought by franchisees doing business in Massachusetts, New Hampshire, and Rhode Island were consolidated for pre-trial purposes pursuant to 28 U.S.C. § 1407 in the District of Massachusetts (Zobel, J.). *In re Shell Oil Prods. Co. Dealer Franchise Litig.*, 206 F. Supp. 2d 1373 (J.P.M.L. 2002). The district court selected ten Massachusetts plaintiffs to proceed with a first phase of discovery and to trial. In the interim, the claims of the remaining dealers were stayed. Of the ten initial plaintiffs, one plaintiff settled his claims on the eve of trial and another lost on summary judgment. Plaintiff Mac's Shell operated two stations. Thus, eight plaintiffs operating nine stations proceeded to trial. App. 3.

first prosecute their claims against the defendants Shell Oil Company Inc., Shell Oil Products Company LLC (collectively "Shell"), and Motiva Enterprises, LLC ("Motiva").[3] The claims of the next three dealers (of the more than forty remaining plaintiffs) will be tried separately with the first trial scheduled to begin in November 2008. This Petition, while of immediate import to the petitioners and those dealers waiting to try their claims, raises an issue of statutory construction, the resolution of which will necessarily have a substantial legal and practical impact on nearly 75,000[4] independent service station dealer/franchisees across the country for whom the prohibitions and remedies of the PMPA stand as the principal bulwark against threats to their livelihoods and long-term investments in their franchises. The substantial uncertainty created by the circuit split leaves tens of thousands of dealers disarmed and ill-equipped to respond to a similar effort by franchisors attempting to take over their stations. With rising gasoline prices being outstripped only by the soaring

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[3] Motiva was a joint venture formed in 1998 by Shell, Texaco, Inc. and Saudi Refining, Inc. Petitioners' contracts with Shell were assigned to Motiva at that time. Shell apparently has now acquired its joint venture partners' interests in Motiva. *Abrams Shell v. Shell Oil Co.*, 343 F.3d 482, 484 n.2 (5th Cir. 2003).

[4] PRICEWATERHOUSECOOPERS, THE ECONOMIC IMPACT OF FRANCHISED BUSINESSES, VOLUME II: RESULTS FOR 2005, 134 (2008), *available at* http://www.franchise.org/uploadedFiles/Franchisors/Other_Content/economic_impact_documents/EconomicImpactVolIIpart1.pdf.

profits of franchisors like the defendants, this petition is especially timely. This Court should grant certiorari to resolve the single critical question of the availability of a claim for constructive nonrenewal under the Act.

At trial petitioners asserted two separate and distinct claims under the PMPA: one for "constructive termination" and another for "constructive nonrenewal." Shell constructively terminated their franchises, the dealers argued, by assigning their franchise agreements to Motiva which eliminated a rent subsidy that had been promised and provided to dealers by Shell for almost two decades. The jury found under the court's instructions that the assigned Shell leases were effectively terminated. App. 21-22. The constructive termination claim was endorsed by the court of appeals in no uncertain terms. App. 24. ("Indeed, this case presents a strong argument for the doctrine of constructive termination.").

Petitioners' constructive nonrenewal claim was based on the new leases that Motiva presented to the dealers after the rent subsidies were eliminated. The new leases changed the rent formulation and dramatically increased rents. Petitioners claimed that the leases proffered by Motiva were adopted for the purpose of converting petitioners' stations into company-operated stations, an express prohibition under the Act. 15 U.S.C. § 2802(b)(3) (App. 64-65). In the face of unlawful leases proffered by Motiva on a take-it-or-leave-it basis (and under threat of termination if the dealers refused to sign the Motiva leases), the dealers filed suit challenging the lawfulness of the renewal leases and executed the agreements under protest.

To be sure, the constructive nonrenewal claim did not fail because the court of appeals determined that the defendants' underlying conduct was not violative of the Act. Defendants' conduct most certainly was, and the First Circuit opinion squarely hits the mark on this score.

> At trial, the Dealers argued that Shell assigned the franchise agreement to Motiva, even *created* Motiva, in order to squeeze them out of their franchises. They presented evidence that this was the reason for the change in the rent formulations, the elimination of the Subsidy, and the dramatic increase in rents they paid. If the jury accepted this as the reason [and the jury did], the case falls within the scope of the PMPA, which is designed . . . to prevent the franchisors from improperly terminating franchises and thereby to ensure that franchisees benefit from successful investment in their franchises.

App. 24 (emphasis in original); *see also* App. 26 n.13 ("What the PMPA does forbid is franchisors using their power to dictate impossible franchise terms in order to force the franchisees to walk away from their investments or to sell them at artificially low prices.").

The First Circuit rejected the petitioners' constructive nonrenewal claims, holding that, procedurally, the Act "requires [a franchisee] faced with objectionable contract terms [to] refrain from ratifying those terms by executing the contracts (even 'under protest') and operating under them" and offers relief for a franchisor's improper conduct only when there is an actual nonrenewal of the franchise relationship. App. 30.[5] In other words, according to the circuit, a dealer presented with a questionable lease must either (i) sign the lease and forgo the claim that the lease violates the Act or (ii) refuse to sign, receive a notice of termination, and risk his/her franchise on the chance that a court will issue injunctive relief.

On the other hand, the Ninth Circuit recognized the Catch-22 quality of such a restrictive reading of the PMPA in *Pro Sales, Inc. v. Texaco, U.S.A.*, 792 F.2d 1394, 1399 (9th Cir. 1986). In *Pro Sales*, the court observed that the "purpose of the PMPA is to protect 'franchisees from arbitrary or discriminatory termination or non-renewal of their franchises,'" and

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[5] In its decision, the First Circuit notes that constructive nonrenewal claims have been rejected by the Seventh Circuit in *Dersch Energies, Inc. v. Shell Oil Co.*, 314 F.3d 846 (7th Cir. 2002) and the Fifth Circuit in *Abrams Shell v. Shell Oil Co.*, 343 F.3d 482 (5th Cir. 2003). *Dersch* is not directly on point since the plaintiff's claim was not, as here, based on a violation of § 2802 (App. 60-71), but rather a violation of § 2805(f). (App. 74-80). In a vigorous dissent, Judge Cudahy decried the majority's approach and criticism of the Ninth Circuit's decision in *Pro Sales,* discussed above. The Fifth Circuit in *Abrams Shell, supra,* adopts the reasoning in *Dersch*.

rejected a reading of the PMPA where "a franchisee would be forced to choose between accepting an unlawful and coercive contract in order to stay in business [or] rejecting it and going out of business in order to preserve a cause of action." 792 F.2d at 1399 (citation omitted).[6] Such a scenario was contrary to the intent Congress invoked when enacting the PMPA, and thus the court held that "a franchisee who signs a successor contract under protest and promptly seeks to invoke its rights under the PMPA . . . has not 'renewed' the franchise relationship so as to bar relief under the PMPA." *Id.*

The circuits have interpreted the PMPA to widely divergent ends – the First Circuit's cramped reading of the statute effectively denies franchisees the protections Congress intended when it passed the Act, while the Ninth Circuit's reading fulfills the Act's purpose and is consistent with Congress's intent. This Court should grant certiorari to definitively resolve the circuit split and bring clarity and guidance to the often tumultuous and contentious relationship

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[6] Several district courts have, like *Pro Sales*, allowed constructive nonrenewal claims. *See Dean v. Kerr-McGee Ref. Corp.*, 714 F. Supp. 1155, 1158 (W.D. Okla. 1988); *Siecko v. Amerada Hess Corp.*, 569 F. Supp. 768, 771 n.2 (E.D. Pa. 1983); *Meyer v. Amerada Hess Corp.*, 541 F. Supp. 321, 329 (D.N.J. 1982); *RKJ Enters., Inc. v. Sun Co., Inc.*, 1998 WL 833857, at *3 (E.D. Pa. Dec. 2, 1998) ("Congress did not intend to force a franchisee to abandon the franchise relationship to invoke the protection of a law designed to protect a franchisee's interest in continuing that relationship"); *Sun Franchise Ass'n v. Sun Ref. and Mktg. Co.*, 1992 WL 97359, at *4 (E.D. Pa. April 29, 1992).

between powerful franchisors and franchisees, many of whom are cash-strapped small business owners.

B. Factual Background

This case was born when defendants hatched a plan to drive petitioners out of business and capture their profits by converting franchisee-operated stations to company-operated stations. Each of the petitioners, like each of the dealers whose claims have yet to be tried, lease their service stations from Shell (and now Motiva). The terms of the leases, including the amount of the rent, are unilaterally established by the franchisor and are not subject to negotiation. For nearly two decades, commencing in 1982 and continuing until shortly after Motiva was formed, Shell promised and delivered a rent subsidy that offset the flat monthly rents provided for in petitioners' service station leases. The subsidy was continuously offered to and utilized by each of the dealers and was understood by the dealers to be part of their leases. The evidence showed, as the First Circuit recognized, that the subsidy was intended by Shell to be permanent. App. 4. ("Various representations were made to the Dealers to the effect that the Subsidy or something like it would always exist, the contract rent was to be disregarded, and the cancellation provision was only intended to be invoked in a situation like war or an oil embargo."). App. 4 and 18.

Prior to the formation of Motiva the majority of gasoline stations in Shell's network were independent franchise dealers like the petitioners. With the creation of Motiva, the defendants embarked on a secret plan to transform their gasoline distribution network. Motiva's primary objective was to acquire "quality" dealers and convert them to company-operated facilities which would allow defendants to capture profits then being earned by independent dealers. The plan to convert the network was part of the "Strategic Marketing Initiative" ("SMI"). Initial plans called for the conversion of hundreds of independent stations to company-operated stations at a cost of several hundred million dollars. Motiva's goal for Massachusetts was to increase the number of company-operated stations and decrease the number of independent stations in certain markets by more than 70%. If forced to purchase the goodwill in each franchisee's business, however, the defendants anticipated having to pay each dealer $200,000 or more per station. By early 2000, the defendants had targeted the stations to be converted, including the stations operated by the petitioners and remaining plaintiffs.

Beyond the staggering cost, another major impediment to the conversion of the dealerships was the restrictions imposed by the PMPA, which limited Motiva's right to terminate the franchises. From defendants' perspective, converting dealers to company-operated stations would be beneficial because company-operated stations would not be subject to PMPA restrictions. Defendants' documents acknowledged the need to devise "methods to overcome these restrictions."

Ultimately, defendants instituted a plan to squeeze the dealers out of business, thus appropriating their stations without incurring the huge cost of buy-outs and effectively avoiding the limitations imposed by the PMPA. To this end, the subsidy was eliminated, which the defendants understood would cause dramatic increases in rent and result in the closure of some franchisee-operated stations. In addition, new Motiva leases were drafted to replace expiring Shell leases. These Motiva leases were presented to the dealers on a "take-it-or-leave-it" basis. The petitioners were told that if they refused to sign the new Motiva leases, their franchises would be terminated. While the Motiva leases differed in several ways from the Shell leases, the most significant change not surprisingly was the manner in which rent was calculated, the net effect of which was that rents increased even further. The evidence showed that the defendants knew that the new leases would cause a decrease in the number of independent dealers. With the implementation of the SMI, the number of independent stations in Massachusetts decreased from 177 (in January 1998) to 96 (in January 2003); during the same time period, the number of company-operated stations increased from 3 to 40. The dramatic effectiveness of the defendants' scheme underscores the need for clarification of the law from this Court.

C. The PMPA

The First Circuit's reading of the PMPA with respect to the constructive nonrenewal claim finds no basis in the text of the Act and bristles against the very purpose and objectives that prompted Congress to enact the PMPA. As then Judge Breyer stated in *Veracka v. Shell Oil Co.*, 655 F.2d 445, 448 (1st Cir. 1981), "[t]he legislative history of the Marketing Act shows that its basic effort to prevent franchise terminations reflects a recognition of the disparity of bargaining power between the franchisor and franchisee and an effort to prevent coercive or unfair franchisor practices." Congress was anxious to prevent a franchisor from taking over a successful station operation and appropriating the benefit of the goodwill that the franchisee had developed. *Id.* The PMPA sought to address three primary concerns:

> [T]hat franchisee independence may be undermined by the use of actual or *threatened termination or nonrenewal* to compel compliance with the franchisor marketing policies; that gross disparity of bargaining power may result in franchise agreements that amount to contracts of adhesion; and that termination or nonrenewal may disrupt the reasonable expectations of the parties that the franchise relationship will be a continuing one.

Beachler v. Amoco Oil Co., 112 F.3d 902, 904 (7th Cir. 1997) (emphasis added) *citing* S. Rep. No. 95-731, 95th Cong., 2d Sess. 17-19, reprinted in 1978 U.S.

Code Cong. & Admin. News 873, 875-77; *Pro Sales,* 792 F.2d at 1399 (same).

The legislative history of the Act reflects a grave concern that franchise independence could be undermined by the use of "actual or threatened termination or nonrenewal." *Pro Sales,* 792 F.2d at 1399. The drafters of the Act stated their concerns plainly:

> [T]he prospect of non-renewal of the franchise relationship hangs over the relationship. . . . *Actual threats of non-renewal are not essential to the leverage the prospect of non-renewal provides a franchisor over the activities of a franchisee. The prospect is ever present* and the franchisee can readily comprehend the implications of departing from the marketing policies of the franchisor, even if in some cases those policies are contrary to the franchisee's economic interest.

S. Rep. No. 731, 95th Cong., 2d Sess. at 18 (emphasis added). As the court of appeals noted, "[b]ecause franchisees claimed that this unequal power was often wielded through arbitrary or discriminatory termination or nonrenewal, or *threats* of termination or nonrenewal, the PMPA aimed to remove this potent weapon from the franchisor's arsenal." App. 7. (emphasis in original) (*citing* S. Rep. No. 95-731 at 17; 1978 U.S. Code Cong. & Admin. News at 876).

Accordingly, the PMPA forbids termination of a franchise or nonrenewal of a franchise relationship except under enumerated circumstances. App. 8; 15 U.S.C. § 2802(b)(2)-(3) (grounds for termination and nonrenewal). App. 60-66. Specifically with respect to this case, the Act prohibits termination and nonrenewal where the purpose of the termination or nonrenewal is to convert the leased premises to operation by employees or agents of the franchisor for the franchisor's own account. App. 25 n.12; 15 U.S.C. § 2802(b)(2)(E)(ii); 2802(b)(3)(D)(ii). App. 63-66. Thus, under § 2802(b)(3) (App. 64-66) an appropriate ground for nonrenewal of the franchise relationship occurs when the franchisor and franchisee fail to agree on terms proposed by the franchisor in good faith and the ordinary course of business so long as the purpose is not to convert stations to the franchisor's control or otherwise to prevent the renewal of the ongoing relationship:

> (A) The failure of the franchisor and franchisee to agree to changes or additions to provisions of the franchise, if –
>
> > (i) such changes or additions are the result of determinations made by the franchisor in good faith and in the normal course of business; and
> >
> > (ii) such failure is not the result of the franchisor's insistence upon such changes or additions for the purpose of converting the leased marketing premises to operation by employees or agents of the franchisor for the benefit of the franchisor or otherwise preventing the renewal of the franchise relationship.

The import of this prohibition was understood by the First Circuit, which noted that without the Act's express restriction on the franchisor's ability to convert dealer franchises to its own use, "the franchisor could extract any increase in value by the franchisee's investment without sharing that increase with the franchisee. This would dampen the incentive for a franchisee to develop the business." App. 25-26.

The Act's "Enforcement Provisions," section 2805 (App. 74-80), provides that a franchisee may maintain a civil action against the franchisor for failure to comply with the requirements of section 2802 (and section 2803, not relevant here) so long as the action is commenced within one year of the latter of the date of termination of the franchise or nonrenewal of the franchise relationship; or the date the franchisor fails to comply with the requirements of sections 2802 and 2803.[7] § 2805(a). App. 74-75. Moreover, the Act empowers courts to grant such equitable relief "as the court determines is necessary to remedy the effects of any failure to comply with the requirements of sections 2802 or 2803 of this title, including declaratory relief, mandatory or prohibitive injunctive relief, and interim equitable relief." § 2805(b)(1). App. 75-76. The court may grant a preliminary injunction if the

[7] In circumstances where the franchisor seeks an actual termination or nonrenewal, the Act requires the franchisor to provide notice of termination and nonrenewal not less than 90 days under most circumstances before the termination or nonrenewal is to take effect. § 2804.

franchisee (i) shows that the franchise has been terminated or the franchise relationship has not been renewed; (ii) there exists a sufficiently serious question going to the merits to make such question a fair ground for litigation; and (iii) the court determines on balance that the hardship imposed on the franchisor by granting an injunction will be less that the hardship the franchisee will face if preliminary relief is denied. § 2805(b)(2). App. 75-76. Although the burden of proving a termination of the franchise or the nonrenewal of the franchise relationship rests with the franchisee (as one might expect), the franchisor bears "the burden of going forward with evidence to establish as an affirmative defense that such termination or nonrenewal was permitted under section 2802(b). . . ." § 2805(c). App. 76-80.

D. Procedural History

The underlying case had its genesis in *Tsanikilides, et al. v. Shell Oil Products Company, Inc., et al.*, Civil Action No. 00-11295, an action commenced in the United States District Court for the District of Massachusetts on June 30, 2000. The plaintiffs in *Tsanikilides* were nine individual lessee-dealers and a group of additional lessee-dealers whose interests were represented in the suit by an unincorporated association known as the "Shell Dealers Defense Group" ("Defense Group"). Each of the petitioners were members of the Defense Group at the time the *Tsanikilides* complaint was filed.[8]

On March 15, 2001, the district court determined that the Defense Group lacked standing. On May 1, 2001, the individual members of the Defense Group, including the petitioners, filed a motion to amend the complaint in order to assert claims against the defendants. The defendants opposed the motion to amend arguing that the inclusion of "86 new plaintiffs" would prejudice their ability to complete discovery by the established deadline. On June 12, 2001, the district court denied the motion to amend but provided that "[p]laintiffs may file a new case which may be deemed to be related." This action was filed on July 27, 2001. Approximately two weeks later, the *Tsanikilides* case was dismissed without prejudice by stipulation.

Ultimately, after substantial efforts to obtain discovery of the defendants, including motions to compel discovery filed by the dealers, the case was tried to a jury from November 15 to December 7, 2004.[9] On December 8, 2004, the jury rendered a

[8] *Tsanikilides* was filed before the petitioners actually received the Motiva leases to be signed, except for one of the petitioners who was presented with the lease about a month before suit.

[9] The district court noted that defendants were "exceedingly slow" in responding to petitioners' discovery requests and that the delay was "inexcusable." The district court sanctioned defendants for their delay and misconduct. *See* Memorandum of Decision at p. 3. App. 48-51.

unanimous verdict in favor of the petitioners on all submitted claims. Final judgment under Rule 54(b) was entered on October 27, 2006. As noted, the First Circuit filed its opinion on April 18, 2008.

REASONS FOR GRANTING THE PETITION

A. The Petition Presents A Substantial Issue On Which The Courts Of Appeals Are Fundamentally Divided.

One is hard pressed to find more divergent approaches to an issue of statutory construction than those found in the First Circuit's decision in this case and the Ninth Circuit's decision in *Pro Sales*. Nor is one likely to find a case that strikes a more responsive cord than this case with the underlying legislative purpose and policies of the PMPA. This is not a Petition seeking to test the legal waters of a tangential, obscure, or esoteric issue or claim that will have little real world impact. It is not a Petition where the underlying facts are uncertain or poorly developed, the claims unclear or the jury's determination clouded in any respect. The court of appeals makes clear that the evidence was more than sufficient to conclude that the defendants engaged in a scheme that was fundamentally violative of the petitioners' rights under the Act. In all respects other than its treatment of petitioners' constructive nonrenewal claim, the First Circuit's judgment and reasoning are unassailable. But it is equally evident that the court's rejection of the petitioners' constructive nonrenewal theory is primarily based on self-created policy grounds that find no support in the language of the Act or the legislative history.

When stripped of these inventive concerns (discussed hereafter), the textual support in the PMPA for the position of the First and Seventh Circuits becomes thin. The First Circuit cites *Dersch* for the proposition that the requirement for a notice of nonrenewal (§ 2804) and the availability of preliminary relief (§ 2805(b)(2)) evidence that Congress intended to limit the reach of the PMPA to cases where either a notice is given or an actual nonrenewal has taken place. App. 28. But Judge Cudahy's dissent in *Dersch* is on the mark: the mere availability of preliminary relief is irrelevant to the fundamental analysis of the basic rights under the PMPA that inure to the benefit to the franchisees.

> The majority also faults the *Pro Sales* court for ignoring the PMPA provisions for receipt of the formal notice of termination and immediate recourse to preliminary injunctive relief. I fail to see the relevance of this point. The fundamental analysis of the basic merits of rights under the PMPA by the Ninth Circuit is quite different from the analysis by the majority here. Whether the *Pro Sales* court thought the PMPA provisions for notice and preliminary relief were important, let alone critical, does not seem to me significant in the context of its basic approach. After all, preliminary status-quo maintaining procedures are purely ancillary to statutory

> rights. They may afford a more orderly mode for enforcing rights, but they are hardly central to the analysis. Nor does § 2805(b)(2) significantly alter the balance of bargaining power as between franchisor and franchisee.

Dersch, 314 F.3d at 872 (Cudahy, J., dissenting); *see also United States v. Campos-Serrano*, 404 U.S. 293, 298 (1971) ("If an absolutely literal reading of a statutory provision is irreconcilably at war with the clear congressional purpose, a less literal construction must be considered."); *Lynch v. Overholser*, 369 U.S. 705, 710 (1962) ("The decisions of this Court have repeatedly warned against the dangers of an approach to statutory construction which confines itself to the bare words of a statute, for 'literalness may strangle meaning.'" (citations omitted)); *E.F. Hutton Group v. United States*, 811 F.2d 581, 586 (D.C. Cir. 1987) ("'While the intention of the legislature must be ascertained from the words used to express it, the manifest reason and obvious purpose of the law should not be sacrificed to a literal interpretation of such words.'") (*quoting Peirce v. Van Dusen*, 78 F. 693, 696 (6th Cir. 1897)).

The preliminary injunction language does demonstrate that the provisions of the Act cannot be construed and applied in a rigid manner. The language literally requires the franchisee to show that the franchise has been terminated or the franchise relationship has not been renewed. But, as the Seventh Circuit pointed out, this must be taken to mean attempted termination if the injunctive relief is to be of any use. *See* 524 F.3d at 48 (App. 27) (*citing Lippo v. Mobil Oil Corp.*, 776 F.2d 706, 720 (7th Cir. 1985)). In the same way, the notice of nonrenewal is deemed the equivalent of actual nonrenewal for purposes of maintaining suit. The point is, as Judge Cudahy points out, that "[c]onstructive nonrenewal merely means treating something which is literally or in fact *not* nonrenewal as actual nonrenewal for purposes of litigation." *Dersch*, 314 F.3d at 869 (Cudahy, J., dissenting).

The First Circuit read a requirement into the statute – that a dealer actually receive a nonrenewal – that is simply not present in the text of the Act. In sum, the availability of potential injunctive relief is too thin a reed to carry the full weight of an interpretation that Congress intended to prohibit dealers from challenging the legality of a franchisor's conduct through a reservation of rights. As Judge Cudahy notes, nothing in the statute indicates a preference (let alone a mandate) for the procedural requirement by the majority to the approach taken in *Pro Sales*. *Dersch,* 314 F.3d at 869 n.3 (Cudahy, J., dissenting).

The *Pro Sales* court correctly held that the congressional plan would be frustrated by requiring a franchisee to go out of business before invoking the protections of the PMPA. 792 F.2d at 1399. A franchisee is forced to choose between accepting an unlawful and coercive contract in order to stay in business and rejecting it and going out of business in order to preserve a cause of action. *Id.* "Such a Catch-22 is inconsistent with congressional intent." *Id.* The court noted that Congress was concerned with threats of nonrenewal as well as actual nonrenewals, and that requiring an actual nonrenewal gives no relief from threats, only from actions. The court also acknowledged the force of simple economics.

> Indeed, such a rule might provide an incentive to the franchisor to insist on a contract that is illegal under the PMPA but with which the franchisee can stay in business, because the franchisee would have to go out of business and file suit to contest the legality of the terms, something few franchisees can afford to do.

Id.[10] And notwithstanding the ability to obtain a preliminary injunction, few franchisees have the economic wherewithal to wage litigation battles against formidable defendants like Shell. The instant case is a testament to the substantial funds and litigation resources needed to pry out the facts from the defendants, and demonstrates the difficulty of obtaining detailed evidence of defendants' hidden scheme at

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[10] For Judge Cudahy the

> important thing . . . is not the procedural formalities (not) observed by Dersch, but rather the possibility of maintaining suit without suffering a loss of fuel supply. . . . [A franchisee] should not be deprived of [an] opportunity . . . , whether or not there was some other procedure that might have provided a similar opportunity. . . . [T]he procedure proposed by the majority is far from clear from the text of the statute and seem to me in no way superior to the *Pro Sales* approach.

314 F.3d at 870 n.3 (Cudahy, J., dissenting).

the preliminary injunction stage. One can well imagine the prospect of a preliminary injunction, without firm evidence of a scheme and the potential harm that Motiva could trumpet given the restraint and interference in Motiva's business dealings with over 60 franchisees that an injunction would entail. In any event, none of these practical concerns trouble the opinions of the First, Seventh and Fifth Circuits. "It is important that a statute not be read in an atmosphere of sterility, but in the context of what actually happens when human beings go about the fulfillment of its purposes." 2A N. Singer, *Sutherland Statutory Construction* § 45.12 at 61 (5th ed. 1992).

B. The First Circuit's Reasoning Does Not Otherwise Support The Denial Of The Constructive Nonrenewal Claim.

As noted, the First Circuit read the PMPA to require that franchisees who are faced with objectionable contract terms refrain from "ratifying" those terms by executing the contracts even under protest and operating under them. App. 30. In the court's view, to allow a franchisee to sign under protest and at the same time challenge the renewal "would extend the period of uncertainty through the entire first year of a contract that in this case was only three years." App. 30. In addition, the court perceived what can best be described as some unfairness in allowing a constructive nonrenewal claim when the franchisee has taken no risk.

> Recognizing constructive nonrenewal also would enable a franchisee to sign the contract

> and simultaneously challenge it. If its claims were rejected by the courts, the franchisee would have lost nothing and could continue to operate the franchise under the agreement with the PMPA-enforced reasonable expectation of continuation and renewal. Absent a claim for constructive nonrenewal, a franchisee must wait for a notice of termination to bring suit under the PMPA. The franchisee therefore risks the end of the franchise if the claim fails and so must carefully weigh the decision to sign or sue. This is the balance Congress has struck, and should we prefer another we would not be free to impose it. Consequently, we reject application of constructive nonrenewal to these facts.

App. 30-31 (footnote omitted). There are several problems with the court's reasoning.

The court provides no reasonable explanation why the language of the Act compels the conclusion that the franchisee is required to risk the end of the franchise if its claim fails. Indeed, it is a rather jarring conclusion when considered in light of the disparate bargaining power of the parties and the very purpose of the Act to provide a counterbalance for the franchisees. Nor can such a policy be deemed justified by any interests of the franchisor. Even granting the court's assumption that the dealer does not take a risk by signing the lease under protest, that does not mean that the franchisee will somehow benefit from a windfall and does not in any way undermine or harm the franchisor's rights under the Act or otherwise. One reasonably assumes that the leases proffered by Motiva in this case, which substantially increased the dealers' rent, reflected arrangements that Motiva thought beneficial to its business interests. Similarly, with respect to the court's concern about extending the period of uncertainty, although as a practical matter some cases may effectively cease upon the court's disposition of a request for a preliminary injunction, the ultimate resolution of the franchisee's claim may well take years to resolve, even if a notice of nonrenewal is issued and suit is commenced. In other words, even had the petitioners forced Motiva to issue notices of nonrenewal, there is every likelihood that the case would have engaged the parties and the district court for the same period of uncertainty.

Another problem is that the court of appeals' suggestion that signing the Motiva leases under protest constituted a ratification effectively turns the definition of ratification on its head. Ratification requires voluntary action, and this Court has recognized in analogous situations that causes of action are not barred where payments have been made under protest where the only choice provided, as here, is to make the improper payment under protest or to discontinue an entire line of business. *See United States v. State Tax Comm'n of Mississippi*, 412 U.S. 363, 368 n.11 (1973) where this Court noted, in refuting the suggestion in a lower court concurring opinion that the petitioner's claim was barred because the payments were voluntary, that the state tax commission gave "no choice except to pay the markup . . . in order to obtain liquor supplies or else to cease dispensing alcoholic beverages altogether –

that is, to discontinue an entire line of business. Obviously, this was no choice at all. The payments of the markup were obtained only by coercion; they were paid under protest; and thus they hardly can be said to have been voluntary." *See also United States v. Williams*, 514 U.S. 527, 532 (1995) ("Assumpsit refund actions were unavailable to volunteers, a limit that would not have barred Williams because she paid under protest.") (*citing Philadelphia v. Collector*, 5 Wall. 720, 731-732, 18 L. Ed. 614 (1867)) ("Where the party voluntarily pays the money, he is without remedy; but if he pays it by compulsion of law, or under protest, or with notice that he intends to bring suit to test the validity of the claim, he may recover it back. . . ."). Other authorities similarly support the view that a party reserves its rights when it enters into an agreement "under protest." For example, this case is analogous to the circumstances confronted by the Alabama Supreme Court in *Ex Parte Wright*, 443 So.2d 40 (Ala. 1983), where public school teachers who signed new contracts "under protest and duress" argued that the contracts violated the Alabama Teacher Tenure Act. The Act created permanency of teacher employment by providing that cancellation of a teacher's contract can only be based on grounds set forth in the Act pursuant to the procedure in the Act. 443 So.2d at 42. The Court of Civil Appeals concluded that by signing the contracts the teachers had consented to the changes. *Id.* at 41. The Court of Civil Appeals' decision, the Alabama Supreme Court noted, "in effect would mean that the teachers, by signing a new contract, waived any rights they had to protest the partial cancellation." *Id.* at 42. The Alabama Supreme Court rejected the reasoning of the Court of

Civil Appeals, noting that "ordinary contract principles do not control when they conflict with the intent of the tenure law." *Id.* at 41. Further, the Supreme Court noted that even if it could find that the teachers did agree to the new contract, "we would apply the principle that an attempted waiver of the protection afforded by teacher tenure laws is ineffectual on public policy grounds." *Id.* at 42. *See also* Uniform Commercial Code § 1-207(1) (1990) ("A party who with explicit reservation of rights performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as 'without prejudice,' 'under protest' or the like are sufficient.").

That the court was disquieted by its ruling is clear from its observation of "limited scope of the PMPA" and more specifically from the first of the "unexpected consequences" the court found looming as a potential problem.

> The first is that franchisors will conform their behavior to the letter of the law but still use their position of power to impose their will on franchisees. The statute is of course not a panacea and cannot be faulted for what it fails to do. But some statutory protection is worse than none when it serves a protective cover for the very misdeeds it purports to eliminate.

App. 31.

The First Circuit's apparent deferral to the "limited scope of the PMPA" finds no berth in the text of the Act. The plain language of the Act does not foreclose a claim for constructive renewal. The fault lies not with the Act but rather with the court's cramped interpretation which effectively relegates the purpose of the statute to the sidelines. The court's reasoning is hardly an attempt to produce a harmonious reading of the statutory language and intent. A remedial statute like the PMPA is to be liberally and beneficently construed. *Seahorse Marine Supplies v. Puerto Rico Sun Oil Co.*, 295 F.3d 68, 73-74 (1st Cir. 2002). *See also Dennis v. Higgins*, 498 U.S. 439, 443 (1991); *Atchison T. & S.F.R. Co. v. Buell*, 480 U.S. 557, 562 (1987) ("We have recognized generally that the FELA is a broad remedial statute, and have adopted a 'standard of liberal construction in order to accomplish [Congress'] objects.'") (*quoting Urie v. Thompson*, 337 U.S. 163, 180 (1949)). Instead, the opinion strikes a discordant tone with the court figuratively throwing up its hands over the perceived limited scope of the PMPA.

This Court's recent decision in *Dada v. Mukasey*, 128 S.Ct. 2307, 2317 (2008) is instructive. *Dada* involved two provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). The statute provides that every alien ordered removed from the United States has a right to file a motion to reopen his or her removal proceedings. 128 S.Ct. at 2315-16. It also provides that an alien may request voluntary departure and if granted, the alien is required to depart within the period prescribed by immigration officials, which cannot exceed 60 days. Failure to depart within the prescribed time renders the alien ineligible for certain forms of relief, including adjustment of status, for a period of ten years. *Id.* at 2313-15. An Immigration Judge found Dada to be removable but granted his request for voluntary departure. The Board of Immigration Appeal affirmed and ordered Dada to depart within 30 days. Two days before the expiration of the 30-day period, Dada sought to withdraw the request for voluntary departure and to reopen the removal proceedings. *Id.* at 2311. Two months after the voluntary departure period had expired, the motion to reopen was denied on the ground that Dada had overstayed his voluntary departure period. The Fifth Circuit ultimately affirmed. This Court granted certiorari to resolve the disagreement among the courts of appeals. The Government argued that by requesting and obtaining permission to voluntarily depart, the alien knowingly surrenders the opportunity to seek reopening. *Id.* at 2316. Looking to the statute, this Court acknowledged that there was no ambiguity: the period within which the alien must depart voluntarily "shall not be valid for a period exceeding 60 days." 8 U.S.C. § 1229c(b)(2). As the Court noted, however, "[i]n determining the meaning of a statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." 128 S.Ct. at 2317 (*quoting Crandon v. United States*, 494 U.S. 152, 158 (1990) (*citing K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) and *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987))).

Noting that "[a]bsent tolling or some other remedial action," the alien who is granted voluntary departure but "whose circumstances have changed in a manner cognizable by a motion to reopen is between Scylla and Charybdis." 128 S.Ct. at 2318. As the purpose of the motion to reopen is to ensure a proper and lawful disposition, this Court noted it was reluctant to assume that the statute was designed to remove this important safeguard and particularly so when the plain text revealed no such limitation. Accordingly, the Court ruled that to safeguard the right to pursue a motion to reopen for voluntary departure recipients, the alien must be permitted to withdraw unilaterally a voluntary departure request before expiration of the departure period without regard to the underlying merits of the motion to reopen. *Id.* at 2319-20.

Here, in rejecting the constructive nonrenewal claim, the First Circuit made the same mistake the Fifth Circuit did in *Dada* – it failed to consider "the design of the statute as a whole and to its object and policy." 128 S.Ct. at 2317. The First Circuit's error is compounded by the fact that here, unlike in *Dada,* there is no express language mandating the procedural approach ultimately required by the circuit.

Finally, the First Circuit's analysis of the constructive termination claim is incompatible with the petitioners' constructive nonrenewal claim. The court recognized that "[w]here a franchisor has breached its obligations to the franchisee such that the franchisee faces the effective termination of the franchise, the

PMPA must treat that as a termination of the franchise." App. 26. And in this case it was clear given the elimination of the rent subsidy and the proposed new Motiva leases further increasing the dealers' rents and made on a take-it-or-leave-it basis, that the petitioners effectively faced the termination of its franchise relationship. *Dersch*, 314 F.3d at 871 (Cudahy, J., dissenting) (cause of action for constructive renewal arose "when Shell made its take-it-or-leave-it offer of renewal containing the contract terms that violated [§2802(b)(3)]." (footnote omitted)). What was said by the court of appeals in this case with respect to constructive termination is equally applicable to petitioners' constructive nonrenewal claim. "To require an actual abandonment of years of work and investment before we recognize a right of action under the PMPA would be unreasonable. The 'congressional plan would be frustrated by requiring a franchisee to go out of business before invoking the protections of the PMPA.'" App. 23 (*quoting Pro Sales*, 792 F.2d at 1399).

C. The Petition Raises A Question Of Broad And Immediate Impact On The Industry.

As noted, this Petition raises a question of importance to the petitioners, whose award of damages for the constructive nonrenewal claim totaled over $1 million, to the many dealers still waiting to try their claims, and in a real and immediate sense to the tens of thousands of independent service station dealer/franchisees across the country whose livelihood and long-term investment in their franchises are inexorably tied to the PMPA. This Court's decision will be felt immediately by franchisors and franchisees across the country and will provide much-needed guidance on this unsettled question of statutory interpretation. This Court has not had occasion to construe the PMPA, and the petition sought would provide the Court the opportunity to provide definitive guidance on the reach of the Act.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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