No. 08-240

IN THE

Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

MEMORANDUM IN RESPONSE

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QUESTION PRESENTED

The Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. §§ 2801-2806, regulates the circumstances in which an oil refiner or distributor can "terminate" or "fail to renew" a service station franchise relationship. The question presented is:

Whether a franchisee can claim it was subjected to a "constructive non-renewal" in violation of the Act, even if the franchisee in fact is offered and signs a renewal agreement continuing the franchise relationship.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Shell Oil Products Company LLC, Motiva Enterprises LLC, and Shell Oil Company, Inc., state as follows:

1. Shell Oil Company is a Delaware corporation and a wholly owned subsidiary of Shell Petroleum, Inc. Shell Petroleum, Inc. is a Delaware corporation, the shares of which are owned directly or indirectly by Shell Petroleum N.V. Shell Petroleum N.V. was founded under the laws of the Netherlands. The shares of Shell Petroleum N.V. are owned 100% by Royal Dutch Shell plc, a publicly traded company. Royal Dutch Shell plc is the ultimate parent company of the companies which comprise the Shell Group.

2. Motiva Enterprises LLC is a Delaware limited liability company in which Shell Oil Company and Saudi Refining Inc. respectively own directly or indirectly 50% of the ownership interests. The ultimate parent company of Saudi Refining Inc. is the Saudi Arabian Oil Company ("Saudi Aramco"). Saudi Refining Inc. and Saudi Aramco are not publicly traded companies.

3. Shell Oil Products Company was formed as a Delaware corporation wholly owned by Shell Oil Company. On April 1, 2001, Shell Oil Products Company converted to a Delaware limited liability company now known as Shell Oil Products Company LLC. Shell Oil Products Company LLC is wholly owned by Shell Oil Company.

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MEMORANDUM IN RESPONSE

The Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. §§ 2801-2806, regulates the circumstances in which an oil refiner can "terminate" or "fail to renew" a service station franchise. The question presented in this case arises out of the Act's "fail to renew" clause. It asks, in essence, whether a franchisee can claim it was subjected to a "constructive non-renewal" in violation of the Act even if it in fact is offered and signs a renewal agreement, and thereby continues the franchise relationship.

Respondents in this case (Shell Oil Products Company LLC, Motiva Enterprises LLC, and Shell Oil Company, Inc.) have filed a separate petition for a writ of certiorari from the same judgment (No. 08-372), seeking review of the corresponding issue under the PMPA's "terminate" clause. The question presented in that petition is whether a franchisee can claim it was "constructively terminated" in violation of the Act even if it in fact continues to operate under its franchise agreement.

The court below correctly interpreted the PMPA to bar the constructive non-renewal claims raised in this petition. Nonetheless, respondents agree that further review of the court of appeals' resolution of that issue—along with its resolution of the constructive termination issue raised in No. 08-372—is appropriate. Both questions have divided the courts of appeals. Both are recurring questions of national importance. And the petitions in this case and No. 08-372 represent the ideal vehicle for review. They not only present those closely related issues squarely, but also present them on review of the same judgment, permitting their efficient resolution by this Court in a single proceeding.

STATEMENT

I. STATUTORY FRAMEWORK

A. Oil refiners provide motor fuel to the public through service stations that are often operated by independent dealers. A petroleum franchise agreement between the refiner and the dealer typically authorizes the dealer to use the refiner's trademark, provides for the supply of fuel, and may also include a lease of the physical premises. See S. Rep. No. 95-731, at 17 (1978).[1]

[1] Often, different aspects of the franchise relationship are set forth in separate contracts. See, *e.g.*, C.A. App. 1334-1346, 1395-1410. Those contracts are often referred to collectively as the "franchise agreement," and we follow that convention here.

Those franchise agreements ordinarily have a specified term (*e.g.*, three years) after which they automatically expire. See, *e.g.*, C.A. App. 1412. The parties can "renew" the franchise relationship at the end of the stated term by executing a new agreement. See S. Rep. No. 95-731, at 18.

In the 1970s, Congress received "numerous complaints by franchisees of unfair terminations or non-renewals of their franchises." S. Rep. No. 95-731, at 17. In 1978, Congress responded by enacting the PMPA. Pub. L. No. 95-297, 92 Stat. 322 (1978) (codified in part as amended at 15 U.S.C. §§ 2801-2806).

Rather than regulate all aspects of the franchise relationship, Congress focused on the two specific events that had prompted complaint—"termination and non-renewal." S. Rep. No. 95-731, at 19. Congress sought to "define the rights and obligations of the parties to the franchise relationship in the crucial area of termination of a franchise or non-renewal of the franchise relationship." *Ibid.* Concerned about the "uneven patchwork of rules governing franchise relationships which differ from State to State," Congress also sought to impose a "single, uniform set of rules governing the grounds for termination and non-renewal." *Ibid.*

To those ends, the PMPA contains a series of interlocking provisions that "prohibit[] a franchisor from *terminating* a franchise during the term of the franchise agreement and from *failing to renew* the relationship at the expiration of the franchise term, unless the termination or nonrenewal is based upon a ground specified or described in the legislation and is executed in accordance with the notice requirements of the legislation." S. Rep. No. 95-731, at 15 (emphasis added). To provide "certainty and uniformity in franchise relationships which permeate a nationwide motor fuel distribution and marketing network," the Act also "preempts state law in the subject areas in which the federal legislation deals, i.e., termination and non-renewal of franchise relationships." *Id.* at 16. In allowing for termination and non-renewal on specified grounds, Congress "recognize[d] the importance of providing adequate flexibility so that franchisors may initiate changes in their marketing activities to respond to changing market conditions and consumer preferences." *Id.* at 19. The Act thus strikes a careful balance between protecting franchisees and affording franchisors necessary flexibility.

B. Section 101 of the PMPA identifies the franchise agreements subject to the Act's restrictions. It defines the term "franchise" as a contract under which a refiner authorizes a retailer to use its trademark in selling motor fuel (as well as similar arrangements between refiners and wholesale distributors or between distributors and retailers). 15 U.S.C. § 2801(1)(A). The Act further provides that the "franchise" includes any agreement providing the retailer with a "supply of motor fuel" or authorizing the retailer to "occupy leased marketing premises." *Id.* § 2801(1)(B); S. Rep. No. 95-731, at 29. Those three elements—the right to use a trademark, to occupy premises, and to receive motor fuel—are often referred to as the "statutory elements" of a franchise. Pet. App. 3 n.1.

Section 102 sets forth the Act's principal substantive restrictions. It states that, except as permitted by the Act, no franchisor may "(1) terminate any franchise * * * prior to the conclusion of the term, or the expiration date, stated in the franchise," or "(2) fail to renew any franchise relationship." 15 U.S.C. § 2802(a). Subsection (b)(2) sets forth permissible grounds for terminating a franchise agreement during its stated term or declining to renew it on expiration of that term. *Id.* § 2802(b)(2). For example, a franchisor may terminate a franchise agreement or refuse to renew a franchise relationship where the franchisee fails "to exert good faith efforts to carry out the provisions of the franchise" despite appropriate warnings. *Id.* § 2802(b)(2)(B).

Subsection 102(b)(3) lists additional grounds that, although insufficient to justify termination during a franchise agreement's stated term, justify non-renewal at the end of its term. 15 U.S.C. § 2802(b)(3). One of those grounds is "[t]he failure of the franchisor and the franchisee to agree to changes or additions to the provisions of the franchise." *Id.* § 2802(b)(3)(A). The PMPA thus does not require franchisors to keep offering the same terms in each succeeding agreement. Instead, when it comes time for renewal, the franchisor can propose contract terms different from the terms in the expiring agreement—even if those new terms alter the parties' relative economic burdens. The franchisor can then refuse to renew the franchise relationship if the franchisee does not agree to those new terms. The statute, however, imposes two qualifications on those rights: The new terms must be proposed by the franchisor "in good faith and in the normal course of business" and must not be "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." *Ibid.*

Section 104 sets forth notification procedures a franchisor must follow before terminating a franchise agreement or declining to renew a franchise relationship. 15 U.S.C. § 2804. Normally, the franchisor must provide written notice of its intent to terminate or not to renew "not less than 90 days prior to the date on which such termination or nonrenewal takes effect." *Id.* § 2804(a). Where 90 days' notice is impractical, the franchisor must provide notice on the earliest date on which notice is "reasonably practicable." *Id.* § 2804(b)(1). In all cases, the notice must state the franchisor's "intention to terminate the franchise or not to renew the franchise relationship, together with the reasons therefor." *Id.* § 2804(c). In practice, Section 104 requires franchisors desiring new terms at the time of renewal to propose them well in advance of the expiration of the existing franchise agreement: If the parties disagree about the new terms, the franchisor must provide at least 90 days' notice of its intent not to renew the relationship based on the franchisee's refusal to accept the new terms.

Section 105 establishes a private cause of action for violations of the Act, subject to a one-year statute of limitations. 15 U.S.C. § 2805(a). The dealer has the burden of proving that a termination or non-renewal has taken place; the franchisor, however, has the burden of justifying the termination or non-renewal. *Id.* § 2805(c).

Section 105 directs courts to grant "such equitable relief as the court determines is necessary to remedy the effects of any failure to comply with [the Act], including declaratory judgment, mandatory or prohibitive injunctive relief, and interim equitable relief." 15 U.S.C. § 2805(b)(1). That section also sets forth a standard for preliminary injunctive relief that differs significantly from the ordinary standard in civil cases: Under Section 105, courts are *required* to grant a preliminary injunction if (1) the "franchise of which [the plaintiff] is a party has been terminated or the franchise relationship of which he is a party has not been renewed"; (2) there are "sufficiently serious questions going to the merits to make such questions a fair ground for litigation"; and (3) the balance of hardships favors relief. *Id.* § 2805(b)(2). Taken together, Sections 104 and 105 create a procedural structure that (1) requires franchisors to announce their intention to terminate or not to renew a franchise relationship in advance; and (2) provides franchisees aggrieved by such a decision with a 90-day period in which to seek injunctive relief preserving the status quo before the termination or non-renewal can take effect.

Section 105 also provides for monetary relief. Prevailing plaintiffs are entitled to recover actual damages and, in any case involving "willful disregard" of the Act's requirements, punitive damages. 15 U.S.C. § 2805(d)(1)(A)-(B). Plaintiffs are also entitled to recover attorney's fees and expert witness fees whenever they recover more than nominal damages. *Id.* § 2805(d)(1)(C).

Finally, Section 106 addresses the PMPA's relationship to state law. To the extent the PMPA applies, "no State or any political subdivision thereof may adopt, enforce, or continue in effect any provision of any law or regulation * * * with respect to termination * * * of any such franchise or to the nonrenewal * * * of any such franchise relationship unless such provision of such law or regulation is the same as the applicable provision" of the PMPA. 15 U.S.C. § 2806(a)(1).

II. PROCEEDINGS BELOW

A. Background

This case arises out of franchise agreements between respondent Shell Oil Company ("Shell") and various Shell service station operators in Massachusetts. Those franchise agreements specified a monthly "contract rent" for lease of the station premises. Pet. App. 3. For many years, Shell also offered a rent reduction program (referred to by the court of appeals as a "subsidy") that reduced the amount of rent a dealer had to pay depending on the volume of gasoline sold. *Id.* at 3-4. The written program terms "explicitly provided for cancellation [of that program] with thirty days' notice." *Ibid.*; see, *e.g.*, C.A. App. 3533 ("Shell may, at its option, upon at least 30 days' prior notice to you, * * * discontinue the Program at the end of any month * * * ."). The franchise agreements also contained integration clauses requiring that any modification be in writing. Pet. App. 17.

In 1998, Shell, Texaco, and Saudi Refining combined their gasoline marketing operations in the eastern United States by forming respondent Motiva Enterprises LLC ("Motiva"). See Pet. App. 3; C.A. App. 2476.[2] Shell assigned its rights and obligations under its franchise agreements to the new entity. Pet. App. 3. One of the challenges faced by Motiva was that the companies forming it had previously offered different terms to their respective dealers. See Pet. App. 45. For example, unlike Shell, Texaco did not offer a volume-based rent subsidy. C.A. App. 1167. And, unlike Shell, Texaco calculated rent using an asset-based formula—10% of the value of the land, plus 11.5% of the value of the buildings, plus 11.5% of the value of the equipment. See *id.* at 1176, 1219.

Motiva took two steps that unified those terms, but also led to the disputes at issue. First, after substituting a transitional subsidy program for 16 months, Motiva ended Shell's volume-based rent subsidy on January 1, 2000. Pet. App. 3-4; C.A. App. 2912. Second, as each dealer's franchise agreement expired, Motiva offered a new agreement that calculated rent using an asset-based "10-12-12" formula similar to the one Texaco had used—10% of the appraised value of the land, plus 12% of the value of the buildings, plus 12% of the value of the equipment. See Pet. App. 27; C.A. App. 3655. The com-

[2] The petition incorrectly states that Shell has since acquired its partners' interests. Pet. 3 n.3. *Texaco* sold its interest to Shell and Saudi Refining in January 2002, but Shell and Saudi Refining each remain a 50% owner. See Motiva Enterprises LLC, *Financial Information Letter 2008* (Apr. 15, 2008), http://www.motivaenterprises.com/static/motiva-en/downloads/about_motiva/who_we_are/Motiva_financial_letter_2008.pdf.

bined effect of those changes was to increase the net amount of rent the dealers paid. See C.A. App. 1182.

B. Proceedings in the District Court

1. On June 30, 2000, six Shell dealers and an unincorporated association named the "Shell Dealers Defense Group" filed a lawsuit against Shell and Motiva. See Pet. App. 4-5; C.A. App. 3793, 3798-3804. After the district court held that the Shell Dealers Defense Group lacked standing, 63 dealers purporting to be members of that group (including petitioners here) filed this suit on July 27, 2001. See Pet. App. 5; C.A. App. 52-64.

The complaint acknowledged that the written program terms authorized Shell to discontinue the rent subsidy on 30 days' notice. C.A. App. 70. But it claimed that the dealers—notwithstanding the written program terms and the express prohibition on oral modification—had relied on alleged oral statements by Shell sales representatives 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 a war or an oil embargo." Pet. App. 3-4; see C.A. App. 70-73. The suit thus claimed that Motiva's discontinuation of the rent subsidy was a breach of contract under state law. Pet. App. 5.

The complaint also included two federal PMPA claims. Although the dealers were never actually terminated and continued to operate their Shell stations after Motiva ended the rent subsidy, they claimed that discontinuation of the rent subsidy constituted a "constructive termination" of their franchise agreements in violation of the PMPA. Pet. App. 5-6. Similarly, although the dealers in fact renewed their franchise relationships by signing new franchise agreements with Motiva when their existing agreements expired, they claimed that those new agreements constituted "constructive non-renewals" of their franchise relationships because Motiva changed the way it computed rent by adopting an asset-based formula. See *id.* at 6. The dealers claimed that those changes were part of a plan to drive them out of business and convert their stations into company-owned stations. See *id.* at 27; C.A. App. 80.

On July 30, 2003, roughly two years after filing suit, plaintiffs moved for a preliminary injunction ordering Motiva to reduce their rent to July 1998 levels (plus a 5% annual adjustment). Pet. App. 49. The district court denied that motion on October 22, 2003. *Id.* at 48-51. It observed that "defendants did not terminate or fail to renew any of plaintiffs' leases"; rather, "[a]ll plaintiffs have signed new lease agreements." *Id.* at 49. The court also noted that plaintiffs "waited years before seeking preliminary injunctive relief." *Id.* at 50. Accordingly, the court held that "a preliminary injunction [was] inappropriate at this stage in the litigation." *Ibid.*

2. The district court nevertheless allowed the claims to proceed to trial. It selected eight of the 63 plaintiffs—petitioners here—to proceed first. C.A. App. 297.[3] A 15-day jury trial began on November 15, 2004.

a. Plaintiffs' theory at trial was that Motiva's new rent policies were designed to drive them out of business so that Motiva could buy their franchises at artificially low prices. The dealers admitted that, with one exception, they signed new franchise agreements with Motiva and continued to operate under those contracts. Four dealers signed new Motiva agreements on various dates from 2000 to 2003 and were still operating their stations

[3] The court initially selected ten dealers, C.A. App. 297, but one lost on summary judgment and another settled on the eve of trial, *id.* at 490, 805, 809-810.

at the time of trial in November 2004.[4] Three others signed new Motiva agreements and then operated under those agreements for months or years before selling their franchises or otherwise ceasing operations.[5] Only one dealer, Pisarczyk, did not sign a new Motiva agreement. He operated his station under an extension of his old Shell agreement until July 2000, five months before the franchise term ended; his son then purchased the property from Motiva to convert it into a garden center. C.A. App. 1071, 1077-1078, 1386-1387; Dist. Ct. Docket #227 Ex. EE.[6] Pisarczyk did not claim that his decision to leave the service-station business had anything to do with Motiva's rent policies. C.A. App. 1070-1078.

Some of the dealers signed the new agreements under protest; others did not. The owner of Mac's Shell wrote "[s]igned under protest or if not acceptable under protest then I sign without protest" on his new Motiva agreements. C.A. App. 1381, 1385. Three others sent correspondence to Motiva protesting the new agreements.

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[4] Prashad signed a new Motiva agreement on July 13, 2000. C.A. App. 1347-1348. Karol signed an agreement on December 21, 2000. *Id.* at 1376-1377. Mac's Shell signed agreements for its two stations on October 23, 2001. *Id.* at 1380-1381, 1384-1385. Akmal signed an agreement on December 18, 2003. *Id.* at 1368-1369. All four dealers were still operating at the time of trial. *Id.* at 846, 897, 942, 996.

[5] Avramidis signed a new Motiva agreement on January 7, 2002, and then operated his station until April 30, 2004. C.A. App. 1009, 1372-1373. RAM's owner signed a new agreement on May 10, 2001, and then operated the station until September 2001, when he sold it to a third party. *Id.* at 992, 1390-1391. Sullivan signed a new agreement on May 3, 2000, and then operated his station until September 2000, when he sold it to Motiva. *Id.* at 882, 1393-1394.

[6] Because Pisarczyk was operating under an extension to his Shell agreement, he paid the "contract rent" from his old agreement and never paid the Motiva asset-based rent that was the basis for the dealers' constructive non-renewal theory (although, like the other dealers, he no longer received the subsidy).

See *id.* at 876, 2128, 2132. Another dealer claimed he had signed under protest simply by participating in the suit, even though he noted no protest on the renewal documents. See *id.* at 1011 ("I'm in the lawsuit here, so I'm protesting with the lawsuit."); *id.* at 1372-1373. The other two dealers did not testify that they had signed under protest. To the contrary, one testified that the new agreement "gave [her] hope" because her new Motiva rent was lower than the contract rent she was paying under her old Shell contract after the subsidy ended. *Id.* at 862. And the other testified that the appraised value used to calculate his new rent was "about right." *Id.* at 900-901, 916.[7]

b. To support their claim that Shell and Motiva sought to drive them out of business, plaintiffs presented evidence that Motiva had plans to increase the number of company-owned stations, in part by repurchasing franchises from dealers if "mutually agreeable" terms could be reached. See C.A. App. 925-926, 930-931, 2671, 3602-3606, 3646, 3649. The dealers also presented an expert, Jeffrey Bernard, to testify that Motiva's rents were excessive compared to industry standards. Bernard was a former Mobil employee who had left the company four-and-a-half years earlier. *Id.* at 1054. He claimed that Mobil based its rents on an "8-8-8" formula (*i.e.*, 8% of the value of the land, buildings, and equipment), and that he had heard that Sunoco and Cumberland had rent formulas "consistent" with Mobil's. See *id.* at 1054-1055, 1060-1061. Another witness opined that the appraisals Motiva used to calculate rent were too high. *Id.* at 1041.

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[7] Although the petition claims that the new Motiva agreements "dramatically increased rents" over the old Shell contract rents, Pet. 4; see also Pet. App. 4, evidence showed that, on average, the new rents were *lower*—only the cancellation of the rent subsidy increased the dealers' net rents. See C.A. App. 1182.

c. Shell and Motiva vigorously disputed plaintiffs' claims. They denied that their sales representatives had promised that the rent subsidy would be permanent. See C.A. App. 1211, 3596, 3723. And they explained that the new rent policies reflected changed business conditions.

As an initial matter, Motiva "had to evolve a uniform rent structure" for both its Shell-branded and its Texaco-branded dealers. Pet. App. 45. Unlike Shell, Texaco did not offer a volume-based rent subsidy, and it used an asset-based "10-11.5-11.5" formula to calculate rent. See p. 8, *supra*. The new terms thus reflected the simple fact that Motiva needed to adopt a consistent rent structure for all its dealers. See C.A. App. 1175-1176, 3608, 3786.

The new policies were also designed to bring the Shell dealers' rents in line with prevailing practices in an increasingly competitive marketplace. See C.A. App. 1175-1176, 1217-1218. The rent subsidy based on gasoline sales had made Shell dealers' rents the "lowest in the industry," yet the subsidy was not producing the desired increase in gasoline sales. See *id.* at 1176, 1183, 1224, 3653. And "the entire industry was changing the manner of computing rent" by "switch[ing] to a formulation based on the value of the station's real estate." Pet. App. 45. That shift reflected "a change in the use of gas stations from simply selling gasoline and oil to including also convenience stores and other amenities." *Ibid.*

Shell and Motiva also presented proof that Motiva's "10-12-12" rent formula was consistent with industry standards. While plaintiffs' expert Bernard had suggested that ExxonMobil continued to use an "8-8-8" formula, C.A. App. 1061, the ExxonMobil manager responsible for the firm's rent programs from 2000 until 2004 directly contradicted that testimony. He stated that, shortly after Bernard left, the company changed its formula to "10-10-10" in 2001 and then to "12-12-12" in 2003—*more* than the "10-12-12" formula Motiva adopted.

Id. at 1188. Sunoco also charged "12-12-12" by 2002. *Id.* at 1189-1190. Cumberland's contracts manager testified that his company charged "11-11-11" from 1998 through 2003. *Id.* at 1205. An economics professor surveyed formulas at seven major companies and found them consistent with Motiva's. See *id.* at 1219. Finally, another expert demonstrated that the analysis of plaintiffs' appraiser was flawed. See *id.* at 1240-1244.

The evidence also showed that some stations remained quite profitable under the new rent structure. From 2000 to 2003, Mac's Shell averaged more than $200,000 in net income and owner compensation each year from its two Shell stations (and a related towing service operated using station employees and facilities). C.A. App. 968-971, 3556. RAM's net income doubled to $57,000 the year after the subsidy ended; in the words of its owner, the station "looked pretty good profit-wise." *Id.* at 992-996, 3557. Karol earned more in 2001 under a new Motiva agreement than in any other year since 1994. *Id.* at 856.

3. The jury found Shell and Motiva liable on all counts to all eight plaintiffs, awarding damages of $3.3 million, including $1.2 million for constructive nonrenewal. C.A. App. 548-558. Shell and Motiva moved for judgment as a matter of law, but the court denied the motion. Pet. App. 46. The court awarded another $1.16 million in attorney's fees and $209,000 in expert witness fees under the PMPA. Def. C.A. Br. Add'm 28-29, 42. It entered a final judgment under Federal Rule of Civil Procedure 54(b). Pet. App. in No. 08-372, at 34a-35a.

C. Proceedings in the Court of Appeals

The Court of Appeals for the First Circuit affirmed in part and reversed in part. Pet. App. 1-41. The court of appeals rejected Shell and Motiva's argument that the dealers could not claim "constructive termination." *Id.* at 20-26. The court acknowledged that the dealers had continued to operate their franchises after the event that purportedly constituted a "constructive termination" of their franchise agreements—namely, the cancellation of the rent subsidy. See *id.* at 22-23. But it ruled that plaintiffs did not have to cease operating their franchises in order to claim "constructive termination" under the PMPA. *Id.* at 23. That holding is the subject of Shell and Motiva's petition in No. 08-372.

With respect to plaintiffs' "constructive non-renewal" claims, however, the First Circuit held that "the PMPA does not support a claim for nonrenewal under these circumstances," where "each Dealer signed a new agreement (albeit 'under protest')." Pet. App. 27. The court noted that "[t]he Ninth Circuit is the only circuit so far to recognize a claim for constructive nonrenewal." *Id.* at 28 (citing *Pro Sales, Inc.* v. *Texaco, U.S.A.*, 792 F.2d 1394 (9th Cir. 1986)). But the Ninth Circuit's approach "has been rejected by the other circuits to consider the issue," including 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). Pet. App. 28.

As the First Circuit explained, the Fifth and Seventh Circuits both concluded that allowing claims for "constructive non-renewal" despite renewal of the franchise relationship would be at odds with the Act's elaborate notice and preliminary relief provisions. Pet. App. 28. "[T]his notice-and-preliminary-relief structure is 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." *Ibid.* A dealer confronting objectionable contract terms can refuse to sign the new agreement, triggering a notice of non-renewal; the dealer can then bring suit during the 90-day notice period and seek a preliminary injunction to preserve the status quo while the court determines the legality of the franchisor's proposed renewal terms.

Plaintiffs, however, bypassed that statutory route. "[R]ather than insist on receiving notices of nonrenewal, the Dealers signed the new agreements 'under protest' and continued in operation under the new agreements." Pet. App. 30. That, the First Circuit held, was inconsistent with Congress's design: "[J]ust as the PMPA requires a clear indication from franchisors that they seek nonrenewal of a franchise relationship, it likewise requires that franchisees faced with objectionable contract terms refrain from ratifying those terms by executing the contracts (even 'under protest') and operating under them." *Ibid.* A contrary rule "would enable a franchisee to sign the contract and simultaneously challenge it," permitting franchisees to speculate on legal claims in court while continuing to operate their franchises and subjecting franchisors to unwarranted uncertainty. *Ibid.*

In a footnote, the First Circuit noted that the plaintiff in the Ninth Circuit's *Pro Sales* case had "filed [suit] immediately and * * * obtained preliminary relief so that it never operated under the new contract." Pet. App. 30 n.14. The First Circuit reserved judgment on whether the outcome here would have been different under those circumstances. *Id.* at 31 n.14. But the court of appeals observed that the Seventh Circuit had found those circumstances "irrelevant" in *Dersch*. *Id.* at 30-31 n.14. And it noted that those circumstances would not alleviate its own concern about "allow[ing] a franchisee to challenge an agreement as a nonrenewal while retaining the right to take advantage of that agreement should the challenge fail." *Id.* at 31 n.14. Summarizing its decision, the court held that it would "not recognize a claim for nonrenewal under the PMPA where the franchisee has signed and operates under the renewal agreement complained of." *Id.* at 32.

DISCUSSION

The question presented in this petition is, in essence, whether a plaintiff that has renewed its franchise relationship by signing a new franchise agreement can nonetheless sue the franchisor under the PMPA on the theory that its franchise relationship was "constructively non-renewed." The First Circuit correctly refused to recognize such a claim. Nonetheless, as the petition argues, that ruling implicates a circuit conflict on an issue of national importance to petroleum refiners and service station franchisees alike. The Ninth Circuit allows constructive non-renewal claims where the franchisee renews its relationship; the Fifth and Seventh Circuits have expressly rejected the Ninth Circuit's position; and the First Circuit followed the lead of the Fifth and Seventh Circuits here. The resulting circuit conflict undermines the uniformity that Congress sought to achieve by enacting the PMPA.

The question presented in this petition, moreover, is the counterpart to the issue under the "terminate" clause presented in Shell and Motiva's petition from the same judgment (No. 08-372). The question presented in that petition is whether a plaintiff that continues to operate its franchise under a franchise agreement can sue the franchisor under the PMPA on the theory that its franchise agreement was "constructively terminated." The First Circuit recognized such a claim here. That question, too, has divided the circuits. These two petitions thus afford the Court the opportunity to resolve two closely related circuit conflicts on review of a single judgment.

As plaintiffs themselves observe, moreover, "the First Circuit's analysis of the constructive termination claim is incompatible with [its analysis of] the petitioners' constructive nonrenewal claim." Pet. 29. The "terminate" and "fail to renew" clauses of the PMPA are virtual twins. It is hard to imagine that Congress intended to allow a franchisee who continues to operate his franchise and renews his franchise relationship to claim a "constructive" violation of one clause but not the other. Accordingly, Shell and Motiva agree that this petition—like the petition in No. 08-372—should be granted.

I. THE CIRCUITS ARE DIVIDED OVER WHETHER A PLAINTIFF THAT RENEWS ITS FRANCHISE RELATIONSHIP CAN CLAIM "CONSTRUCTIVE NON-RENEWAL" UNDER THE PMPA

The courts of appeals are squarely divided over whether a plaintiff can claim constructive non-renewal despite renewing his franchise relationship. That conflict runs deeper than plaintiffs acknowledge.

A. The Circuits Are Divided

1. As plaintiffs observe, the Ninth Circuit has ruled that a franchisee can claim that the franchisor "failed to renew" his franchise relationship in violation of the PMPA, even if the franchisee in fact signs a renewal agreement. In *Pro Sales, Inc.* v. *Texaco, U.S.A.*, 792 F.2d 1394 (9th Cir. 1986), Texaco had proposed a new franchise agreement that reduced the dealer's fuel allocation. *Id.* at 1396. As the dealer's earlier contract expired, the dealer signed the new agreement "under protest" and sued under the PMPA, claiming that Texaco had acted in bad faith. *Ibid.* A temporary restraining order issued two days later. *Ibid.*

The district court dismissed the suit on the ground that the dealer had renewed the franchise relationship and thus could not show a "nonrenewal." 792 F.2d at 1396. The Ninth Circuit reversed. It opined that the "congressional plan would be frustrated by requiring a franchisee to go out of business before invoking the protections of the PMPA." *Id.* at 1399. Citing legislative history, it stated that "Congress was concerned about *threats* of nonrenewal as well as nonrenewals themselves." *Ibid.* Accordingly, the court concluded that "a franchisee who signs a successor contract under protest and promptly seeks to invoke its rights under the PMPA, as Pro Sales did here, has not 'renewed' the franchise relationship so as to bar relief under the PMPA." *Ibid.* (footnote omitted).

The Ninth Circuit noted that the dealer had also argued that the district court's prompt entry of a TRO supported reversal. 792 F.2d at 1399 n.6. According to the dealer, it had not "renewed" its franchise relationship because it had operated under the TRO rather than the new agreement. *Ibid.* The Ninth Circuit, however, refused to rest its decision on that ground, reasoning that the TRO was "uniquely within the power of the district court to grant" and thus beyond the dealer's control. *Ibid.* The court held that, so long as the dealer signed the contract "under protest" and "promptly s[ought] to invoke its rights under the PMPA" by "filing * * * a PMPA action," it did not matter whether the dealer obtained injunctive relief. *Id.* at 1399 & n.6. The dealer, the court stated, "cannot be required" to obtain injunctive relief in order "to preserve [its] rights under the Act" to sue for nonrenewal. *Id.* at 1399 n.6.

2. At least three other circuits have reached the opposite result, holding that a dealer cannot claim "constructive non-renewal" if he renews the franchise relationship by signing a new agreement. In *Dersch Energies, Inc.* v. *Shell Oil Co.*, 314 F.3d 846 (7th Cir. 2002), for example, the refiner proposed new contract terms that the dealer deemed objectionable. Rather than seek an injunction, the dealer signed the new agreement "under protest" and, approximately a year later, filed suit under the PMPA. *Id.* at 849-851. The suit claimed that the new contract terms constituted a "constructive nonrenewal of the parties' franchise relationship." *Id.* at 852.

The Seventh Circuit held that Dersch could not sue for constructive non-renewal because its "franchise relationship with the defendants was renewed within the meaning of the PMPA." 314 F.3d at 859. The court noted that "the PMPA was enacted to address one narrow, yet crucial, aspect of petroleum franchise relationships—the termination of franchises and the nonrenewal of franchise relationships." *Ibid.* Although the court acknowledged that "terminat[ing] or discontinu[ing]" the franchisee's right to use its trademark, to receive motor fuel, or to occupy the premises could amount to a non-renewal, the court held that "when a franchisee alleges that a franchisor has 'failed to renew' the parties' franchise relationship, * * * it must demonstrate that at least one of the three essential components of a petroleum franchise has been discontinued." *Id.* at 859-860.

The Seventh Circuit expressly "reject[ed] * * * the constructive nonrenewal theory advanced * * * by the Ninth Circuit" in *Pro Sales*. 314 F.3d at 864. It noted that Dersch had not "'promptly s[ought] to invoke its rights under the PMPA,'" *id.* at 865, but chose not to rest on that narrow ground. Instead, the Seventh Circuit rejected *Pro Sales* outright. It observed that "the *Pro Sales* court completely disregard[ed] the statutory protection afforded to franchisees who receive a formal notice of termination or nonrenewal under the PMPA," including the "ability to obtain an injunction" maintaining the status quo while the court determines the lawfulness of the proposed renewal terms. *Ibid.* It thus refused to "accept the Ninth Circuit's assertion in *Pro Sales* * * * that franchisees would be forced to go out of business before invoking the protections of the Act unless they are permitted to sign renewal agreements under protest." *Ibid.* The court concluded that, "by signing the renewal agreement, and thus renewing its statutory 'franchise,' Dersch divested itself of the right to bring an action" for constructive non-renewal under the PMPA. *Id.* at 866.

The Fifth Circuit reached the same result in *Abrams Shell* v. *Shell Oil Co.*, 343 F.3d 482 (5th Cir. 2003). As in *Dersch*, the dealers in *Abrams Shell* were presented with renewal agreements they deemed objectionable; they nevertheless signed the agreements and continued to operate while pursuing a "constructive nonrenewal" claim. *Id.* at 484-486. The Fifth Circuit "f[ound] the Seventh Circuit's reasoning in *Dersch Energies* to be especially persuasive" and "appl[ied] the same logic." *Id.* at 489. The dealers' claims failed, the court held, because the defendants had not "failed to renew the relevant agreements." *Ibid.* The Fifth Circuit "recognize[d] that the Ninth Circuit adopted a different test for constructive nonrenewal claims in *Pro Sales*." *Id.* at 489 n.16. But it stated: "In *Dersch Energies*, the Seventh Circuit rejected the *Pro Sales* approach based on a 'franchisee's ability to obtain an injunction under the PMPA' in cases of nonrenewal. We reject the *Pro Sales* approach on the same basis." *Ibid.* (citation omitted).

In this case, the First Circuit joined the Seventh and Fifth Circuits, holding that "the PMPA does not support a claim for nonrenewal under these circumstances," where "each Dealer signed a new agreement (albeit 'under protest')." Pet. App. 27. It noted that "[t]he Ninth Circuit is the only circuit so far to recognize a claim for constructive nonrenewal," and that "*Pro Sales* has been rejected by the other circuits to consider the issue." *Id.* at 28-29. It endorsed *Dersch*'s observation that the Act's "notice-and-preliminary-relief structure is 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." *Id.* at 28. It thus refused to "recognize a claim for nonrenewal under the PMPA where the franchisee has signed and operates under the renewal agreement complained of." *Id.* at 32.

In a footnote, the First Circuit noted that "[i]n *Pro Sales* the suit was filed immediately *and the plaintiff obtained preliminary relief* so that it never operated under the new contract." Pet. App. 30 n.14 (emphasis added). The First Circuit refused to address "whether a preliminary injunction enabling the franchisee to avoid operating under the new agreement combined with an immediate suit, as in *Pro Sales*, would satisfy the requirements for bringing suit under the PMPA." *Id.* at 31 n.14. That footnote does not reconcile the circuit conflict. The Seventh and Fifth Circuits refuse to attach any significance to facts such as whether the dealer promptly filed suit, instead holding categorically that a dealer cannot claim constructive non-renewal after signing a renewal agreement. See *Dersch*, 314 F.3d at 866; *Abrams Shell*, 343 F.3d at 489.[8]

Nor does the footnote reconcile the First Circuit's decision with *Pro Sales*. The dealer in *Pro Sales* did three things: It signed the new agreement under protest; it promptly filed suit under the PMPA; and it obtained a

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[8] In *Dersch*, the Seventh Circuit noted that the dealer had delayed filing suit and thus would have lost "even were [the court] inclined to consider applying the reasoning of *Pro Sales*." 314 F.3d at 865. But the court pointedly refused to rest its decision on that narrow ground, and instead outright "reject[ed] * * * the constructive non-renewal theory * * * endorsed by the Ninth Circuit." *Id.* at 864-865; accord Pet. App. 30-31 n.14 (noting that *Dersch* found the promptness of suit "irrelevant"). In *Abrams Shell*, the Fifth Circuit adopted the Seventh Circuit's reasoning; it did not even *mention* any facts bearing on how promptly the plaintiffs filed suit. 343 F.3d at 489. Even the court below acknowledged that allowing constructive non-renewal suits is problematic under any conditions because it "allow[s] a franchisee to challenge an agreement as a nonrenewal while retaining the right to take advantage of that agreement should the challenge fail." Pet. App. 31 n.14.

TRO. 792 F.2d at 1399 & n.6. The Ninth Circuit explicitly rested its holding on *only* the first two facts. See *ibid.* Preliminary relief, the court held, "cannot be required to preserve the franchisee's rights under the Act"—what mattered was "[t]he signing of a contract *under protest* and the *filing of a PMPA action*." *Id.* at 1399 n.6 (emphasis added). The decision below cannot be reconciled with the Ninth Circuit's decision on a ground—that "the plaintiff obtained preliminary relief"—the Ninth Circuit expressly held irrelevant. In this case, moreover, at least some of the dealers satisfied the two *Pro Sales* conditions by signing "under protest" and promptly "filing * * * a PMPA action." See pp. 9-12 & nn.4-5, *supra*. Those plaintiffs would have won under *Pro Sales*, but nonetheless lost here. This case thus squarely presents the circuit conflict for the Court's resolution.

B. The Petition Errs in Asserting That *Dersch* and *Abrams Shell* Are Not "Directly on Point"

While invoking the conflict between the First and Ninth Circuits, plaintiffs disavow any reliance on the Seventh and Fifth Circuits' decisions in *Dersch* and *Abrams Shell*. Plaintiffs assert that *Dersch* is "not directly on point since the plaintiff's claim was not, as here, based on a violation of § 2802, but rather a violation of § 2805(f)." Pet. 6 n.5 (citation omitted).[9] And plaintiffs claim that *Abrams Shell* merely "adopt[ed] the reasoning in *Dersch*." *Ibid.* That attempt to distinguish *Dersch* and *Abrams Shell*—evidently intended to whittle down an adverse 3-1 circuit split into a 1-1 split—is unsuccessful.

Contrary to the petition's assertion, the plaintiff in *Dersch did* assert a constructive non-renewal claim under

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[9] Section 105(f) of the PMPA, 15 U.S.C. § 2805(f), prohibits franchisors from demanding certain waivers or releases in connection with franchise renewals.

§ 2802. The plaintiff *initially* alleged only a violation of § 2805(f). *Dersch*, 314 F.3d at 851-852. The district court ruled that the PMPA provides no jurisdiction for free-standing violations of that section; rather, "to secure relief * * * the franchisee must couch [its] relief in terms of a violation of §§ 2802-03." *Id.* at 852. The dealer then "amended its complaint to address the jurisdictional concerns raised in the district court's order, alleging that the defendants' coerced renewal violated *both § 2802 and § 2805(f)(1)*" because there had been a "*constructive nonrenewal* of the parties' franchise relationship." *Ibid.* (emphasis added). The district court's grant of summary judgment on *those* claims was the order appealed to the Seventh Circuit. *Id.* at 853-854. Thus, plaintiffs simply err in asserting that the claim in *Dersch* was "not, as here, based on a violation of § 2802." Pet. 6 n.5. And the idea that *Dersch* was "not directly on point" would certainly come as a surprise to the Seventh Circuit, which spent a good deal of its opinion criticizing the Ninth Circuit's misinterpretation of § 2802. See 314 F.3d at 864-866.

Plaintiffs' flawed analysis of *Dersch* also forecloses their effort to marginalize *Abrams Shell* as merely "adopt[ing] the reasoning in *Dersch*." Pet. 6 n.5. *Abrams Shell* does not even mention § 2805(f). Rather, like the plaintiffs in *Dersch* and like plaintiffs here, the plaintiffs there claimed that "their franchise agreements were constructively * * * nonrenewed" in violation of § 2802. 343 F.3d at 486 (emphasis omitted). Thus, the question presented implicates a persistent circuit split on which at least four courts of appeals have weighed in. The conflict is robust and well-developed.

II. THE COURT OF APPEALS' RULING WAS CORRECT

The First Circuit's rejection of the constructive nonrenewal claims was plainly correct. In enacting the

PMPA, Congress did not regulate petroleum franchise relationships comprehensively. Instead, Congress carefully tailored the statute to provide relief only when the franchisor "*terminate[s]* any franchise" or "*fail[s] to renew* any franchise relationship." 15 U.S.C. § 2802(a) (emphasis added). As the Senate Report observes, Congress sought to "define the rights and obligations of the parties to the franchise relationship *in the crucial area of termination of a franchise or non-renewal of the franchise relationship*." S. Rep. No. 95-731, at 19 (1978) (emphasis added). As a matter of plain text, when the refiner and the franchisee sign a new agreement, the refiner has not "fail[ed] to renew" the franchise relationship—whether or not the franchisee signs under protest or promptly files suit.

In the PMPA context, moreover, a claim for "constructive" non-renewal makes no sense. "Constructive" claims still require an actual end to the relationship: An employee claiming "constructive discharge" must actually leave employment; a tenant claiming "constructive eviction" must actually move out. See Pet. in No. 08-372, at 19-20; see also Pet. App. 22-23. The discharge or eviction is "constructive" only in the sense that the plaintiff is forced out by intolerable conditions rather than being expressly ordered out by the employer or landlord. In the PMPA context, a franchisor might similarly propose renewal terms so onerous that the franchisee is forced to refuse them. But at that point there would be an *actual* non-renewal. See 15 U.S.C. § 2802(b)(3)(A); p. 5, *supra*. Simply put, "when a franchisee alleges that a franchisor has 'failed to renew' the parties' franchise relationship, * * * it must demonstrate that at least one of the three essential components of a petroleum franchise"—use of the trademark, receipt of fuel, or occupancy of the premises—"has been discontinued." *Dersch*, 314 F.3d at 860.

The Ninth Circuit thought its construction necessary to implement legislative history addressing "*threats* of non-renewal." *Pro Sales*, 792 F.2d at 1399. But legislative history cannot create a remedy that the plain language of the statute omits. See *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992). In any event, the Ninth Circuit's holding was not necessary to address Congress's concern. As the First, Fifth, and Seventh Circuits all observed, the Act's 90-day notice requirement and preliminary-injunction procedures address precisely those circumstances. See pp. 20-22, *supra*. Those procedures not only undermine the Ninth Circuit's rationale, but also confirm that Congress did not contemplate suits of this type: "The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Alexander* v. *Sandoval*, 532 U.S. 275, 290 (2001); see also *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 19-20 (1979). That canon has particular force where, as here, Congress enacted a "'precisely drawn, detailed statute.'" *EC Term of Years Trust* v. *United States*, 127 S. Ct. 1763, 1767 (2007). If plaintiffs thought Motiva's new contracts were unlawful, they could have refused to sign them, drawn a notice of non-renewal, and then brought suit within the 90-day notice period seeking a preliminary injunction to maintain the status quo. Instead, plaintiffs renewed their contracts and waited until July 30, 2003—two years after filing suit—to seek injunctive relief. Pet. App. 49. Plaintiffs thus renewed their franchises and reaped the benefits of those franchises for years while simultaneously claiming in court that their franchises had not been renewed. That is not the remedy Congress contemplated when it created a cause of action for "fail[ure] to renew" under the PMPA.

Plaintiffs argue that, in a variety of circumstances (*e.g.*, paying an unlawful tax or accepting defective performance on a contract), acting "under protest" may be sufficient to avoid a waiver of rights. Pet. 24-26. But that principle is beside the point. Plaintiffs did not have a valid claim under the PMPA that was "waived" when they renewed their agreements. The PMPA simply provides no claim at all except in the two narrow contexts Congress chose to address—termination and non-renewal. Because plaintiffs in fact renewed their franchise agreements, there was never any non-renewal, and plaintiffs thus never had any "right[]" to sue under the PMPA that they could have "reserve[d]." Cf. Pet. 25.

III. THE QUESTION PRESENTED IS A MATTER OF NATIONAL IMPORTANCE

Although the court of appeals correctly resolved the constructive non-renewal issue, Shell and Motiva agree that the petition presents a question of broad importance. Like the conflict underlying Shell and Motiva's petition in No. 08-372, the conflict here undermines Congress's goals in enacting the PMPA. Congress sought to provide "certainty and uniformity" in the "nationwide motor fuel distribution and marketing network" by replacing an "uneven patchwork" of state laws with a "single, uniform set of rules governing the grounds for termination and non-renewal." S. Rep. No. 95-731, at 16, 19. That goal of uniformity cannot be achieved when the Ninth Circuit applies one construction of the Act while the First, Fifth, and Seventh Circuits apply another.

Although the Ninth Circuit is the only circuit to have adopted plaintiffs' "constructive non-renewal" theory, the impact of its decision should not be underestimated. There are almost 20,000 service stations in the nine western States covered by the Ninth Circuit. See Nat'l Petroleum News, *MarketFacts 2007*, at 92 (2007). And, as the petition points out, district courts in a number of States outside the Ninth Circuit have embraced the reasoning of the Ninth Circuit's *Pro Sales* decision. Pet. 7 n.6.[10]

That conflict, moreover, concerns a critical issue under the Act. The PMPA focuses exclusively on two events—termination and non-renewal. 15 U.S.C. § 2802(a). Whether a plaintiff can assert a claim for non-renewal despite having renewed its franchise relationship thus goes to the Act's statutory core.

In regulating renewal decisions, Congress "recognize[d] the importance of providing adequate flexibility so that franchisors may initiate changes in their marketing activities to respond to changing market conditions and consumer preferences." S. Rep. No. 95-731, at 19. The PMPA thus allows franchisors to propose new contract terms when an agreement expires—even terms that reallocate the parties' economic burdens—subject only to narrow exceptions. 15 U.S.C. § 2802(b)(3)(A). The Ninth Circuit's approach, however, turns the exercise of that flexibility into an opportunity for franchisee speculation: Franchisees confronted with new terms can accept the new contract "under protest," wait a year, and then sue for "constructive non-renewal" despite having renewed their agreements and enjoyed the benefits thereof. Conversely, refiners exercising their statutory right to propose new contract terms may confront liability for non-renewal in a suit filed well into the term of the contract,

[10] The petition asserts that the question presented is important to the other dealers whose claims against Shell and Motiva remain to be tried in this litigation. Pet. 30; see also Pet. in No. 08-372, at 27. Since the petition was filed, the parties have tentatively settled those other claims in order to avoid the burdens of trial. That settlement, however, does not affect the claims presented in this petition or in No. 08-372, which have already been tried. Moreover, the fact that Motiva's change to its rent structure caused more than 60 service stations to file constructive non-renewal claims in federal court illustrates the issue's potentially expansive impact.

even though the proposed terms were accepted and proved profitable to both sides.

The need for certainty and uniformity is particularly acute at this juncture. Recent years have seen "great transformations" in the petroleum marketing industry. Am. Petroleum Inst., *Statement for the Record of the American Petroleum Institute for the Senate Judiciary Committee* 1 (Feb. 1, 2006). Those changing market conditions have led refiners to undertake restructurings at a "remarkable rate" in order to reduce operating costs and refocus their marketing strategies. Energy Info. Admin., *Restructuring: The Changing Face of Motor Gasoline Marketing* 6 (2001). In the past two years, there has been "a significant amount of activity * * * in the buying, selling and * * * consolidation of retail operations." Nat'l Petroleum News, *MarketFacts 2007*, at 4 (2007). Given those rapidly changing conditions, refiners need the full range of "flexibility * * * to respond to changing market conditions and consumer preferences" that Congress afforded them. S. Rep. No. 95-731, at 19. And refiners and franchisees alike need clear guidance over what remedies are available when a dispute arises. The circuit conflict makes it impossible in many jurisdictions to advise refiners or franchisees reliably about how to proceed in the face of such a dispute. That uncertainty underscores the need for review here.[11]

IV. THIS CASE IS AN IDEAL VEHICLE FOR REVIEW

This case is an especially good vehicle for review. As Shell and Motiva explain in their petition in No. 08-372,

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[11] Petitioners' reference to the purportedly "soaring profits of franchisors" (Pet. 3-4) has no bearing on the matter. In fact, refiner profits currently stand at only 6.8% of sales—substantially less than in other sectors including machinery (9.2%), chemicals (14.8%), and pharmaceuticals (26.3%). See Am. Petroleum Inst., *Putting Earnings into Perspective* 2 (Sept. 2008).

the decision below resolved two closely related issues, each of which has divided the circuits. The question presented in this case is whether a dealer who in fact renewed his franchise relationship—who continued his franchise by signing a new agreement—can nonetheless bring a claim for constructive non-renewal. The question presented in Shell and Motiva's petition is whether a dealer who was not terminated—who continued to operate his franchise uninterrupted—can nonetheless bring a claim for constructive termination.

Acknowledging the close relationship between those two questions, plaintiffs urge that the First Circuit erred by not resolving them the same way: "[T]he First Circuit's analysis of the constructive termination claim," they insist, "is incompatible with [its analysis of] the petitioners' constructive nonrenewal claim." Pet. 29. Shell and Motiva agree. The "terminate" and "non-renewal" clauses are parallel provisions in the Act, see 15 U.S.C. § 2802(a)(1)-(2); it is highly improbable that Congress intended to allow "constructive" claims in analogous circumstances under one provision but not the other.

This petition, together with the petition in No. 08-372, offers the Court the opportunity to resolve the conflicts on those two issues on review of a single judgment. Granting both petitions and consolidating the two cases for briefing and argument would avoid the needless waste of this Court's resources that would follow from taking up two separate cases with two distinct factual records at two different times. And if the Court is inclined to grant one of the two petitions, the additional burdens of granting the second as well would be minimal.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari—like the petition in No. 08-372—should be granted.

Respectfully submitted.

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