Nos. 08-240 and 08-372

In the Supreme Court of the United States

MAC'S SHELL SERVICE, INC., ET AL., PETITIONERS

v.

SHELL OIL PRODUCTS COMPANY LLC, ET AL.

SHELL OIL PRODUCTS COMPANY LLC, ET AL., PETITIONERS

v.

MAC'S SHELL SERVICE, INC., ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

ELENA KAGAN
Solicitor General
Counsel of Record
CHRISTINE A. VARNEY
Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
DAVID A. O'NEIL
Assistant to the Solicitor General
CATHERINE G. O'SULLIVAN
NICKOLAI G. LEVIN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

The Petroleum Marketing Practices Act (PMPA or Act), 15 U.S.C. 2801 *et seq.*, limits the circumstances in which petroleum refiners or distributors may "terminate" a franchise or "fail to renew" a franchise relationship involving the sale or supply of motor fuel.

In No. 08-372, *Shell Oil Products Co. LLC* v. *Mac's Shell Service, Inc.*, the question presented is whether a franchisee may assert a claim of "constructive termination" under the PMPA when it continues to operate the franchise by purchasing the same fuel, reselling it under the franchisor's trademark, and occupying the leased marketing premises.

In No. 08-240, *Mac's Shell Service, Inc.* v. *Shell Oil Products Co. LLC*, the question presented is whether a franchisee who signs a renewal agreement "under protest" and operates under the terms of the agreement may maintain a claim for "constructive nonrenewal" under the Act.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page

Statutes:

In the Supreme Court of the United States

No. 08-240

MAC'S SHELL SERVICE, INC., ET AL., PETITIONERS

v.

SHELL OIL PRODUCTS COMPANY LLC, ET AL.

No. 08-372

SHELL OIL PRODUCTS COMPANY LLC, ET AL., PETITIONERS

v.

MAC'S SHELL SERVICE, INC., ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States. In the view of the United States, both petitions for a writ of certiorari should be granted.

STATEMENT

1. The Petroleum Marketing Practices Act (PMPA or the Act), 15 U.S.C. 2801 *et seq.*, prohibits petroleum refiners and distributors from "terminat[ing]" any franchise involving the sale or supply of motor fuel "prior to the con-

clusion of the term, or [its] expiration," or from "fail[ing] to renew any franchise relationship," except for enumerated reasons and after written notice. 15 U.S.C. 2801(1)(A), 2802, 2804.[1] The Act defines the term "franchise" to include any contract allowing a retailer or distributor to use the franchisor's trademark, to purchase motor fuel for resale, or to occupy leased marketing premises. 15 U.S.C. 2801(1)(B). These three types of agreements are commonly described as the "statutory elements of the franchise." Pet. App. 3 n.1.[2] The term "franchise relationship" is defined as the parties' "respective motor fuel marketing or distribution obligations and responsibilities" in connection with the franchise. 15 U.S.C. 2801(2). "'[T]ermination' includes cancellation," and "fail to renew" means "a failure to reinstate, continue, or extend the franchise relationship." 15 U.S.C. 2801(14) and (17).

If a franchisor violates specified provisions of the PMPA, its franchisee may bring suit in federal district court. 15 U.S.C. 2805. The Act provides for a wide range of remedies, including compensatory damages, reasonable attorneys' fees and expert costs, punitive damages, and "such equitable relief" as the court deems necessary to address the statutory violation. 15 U.S.C. 2805(a), (b)(1), (d) and (e). The Act also requires district courts to grant preliminary injunctive relief preserving the status quo if the franchisee shows that its franchise has been terminated or that its franchise relationship has not been renewed, that "there exist sufficiently serious questions going to the merits to make such questions a fair ground for litigation," and that the balance of equities favors such relief. 15 U.S.C.

---

1 Special rules apply to trial and interim franchises. 15 U.S.C. 2803.

2 Unless otherwise noted, all references to "Pet." and "Pet. App." are to the petition and appendix in No. 08-240.

2805(b)(2). The PMPA preempts state law governing termination and nonrenewal to the extent such law is inconsistent with the Act. 15 U.S.C. 2806(a)(1).

2. Between 1982 and 1998, Shell Oil Products Co. LLC (Shell) offered its franchisees a rent subsidy called the Variable Rent Program (VRP). Pet. App. 3. That subsidy reduced the monthly rent by a set amount for every gallon of gasoline the franchisee sold above a specified threshold. *Ibid.* Shell renewed the subsidy in annual notices to franchisees. *Ibid.* Although the notices "explicitly provided for cancellation with thirty days' notice," various oral representations suggested that "the [s]ubsidy or something like it would always exist." *Id.* at 3-4.

In 1998, Shell and Texaco created a joint venture, Motiva Enterprises LLC (Motiva), to conduct their domestic gasoline marketing operations. Pet. App. 3. Shell assigned its rights and duties under the relevant franchise contracts to Motiva, which initially replaced the VRP with a different rent subsidy. *Ibid.* On January 1, 2000, however, Motiva ended that replacement subsidy, causing the Shell stations to pay "much more rent," and did not include the subsidy in the new leases it offered Shell franchisees when their franchise agreements expired. *Id.* at 4.

3. On July 27, 2001, 63 Shell dealers filed suit in federal district court, asserting state and federal claims. The dealers principally alleged that their property leases had incorporated the rent subsidy and that the elimination of the subsidy breached those leases. Pet. App. 5-6. In addition to alleging violations of their state-law contract rights, the dealers asserted that Shell's and Motiva's conduct had violated two provisions of the PMPA. First, the dealers alleged that Shell had "constructively terminated" their franchises, in violation of 15 U.S.C. 2802(a)(1), by assigning the contracts to Motiva and eliminating the rent subsidy. Pet.

App. 6. Second, the dealers claimed that Motiva's offer of new contracts without the rent subsidy amounted to a "constructive nonrenewal" of their franchise relationships, in violation of 15 U.S.C. 2802(a)(2), even though the dealers had signed new agreements "under protest." Pet. App. 6, 27.

On July 30, 2003, the dealers moved for a preliminary injunction under the PMPA. The district court denied the motion, explaining that because the dealers had "waited years before seeking preliminary injunctive relief," the court was unable to "turn the clock back" and "preserve the status quo." Pet. App. 49-50 (citation omitted).

After a 15-day trial involving a group of eight dealers selected by the court, the jury found against Shell and Motiva on all claims and awarded the dealers $3.3 million, including $1.3 million on the constructive termination claim and $1.2 million on the constructive nonrenewal claim. C.A. App. 548-558. The district court also awarded the dealers $1.16 million in attorneys' fees and $209,000 in expert witness fees under the PMPA. C.A. Def. Br. Addendum 27-29, 42. The court denied the dealers' request for punitive damages, however, observing that the elimination of the rent subsidy was partly attributable to changes in the industry and efforts to harmonize Shell's and Texaco's rent structures. Pet. App. 45. The district court denied the defendants' motions for judgment as a matter of law, 08-372 Pet. App. 34a-54a, and the defendants appealed.

4. The court of appeals affirmed in part, reversed in part, and remanded for reconsideration of costs and fees. Pet. App. 1-41. On the PMPA claims, the court affirmed the judgment on the constructive termination claim but reversed the judgment on the constructive nonrenewal claim. *Id.* at 20-32.

a. In sustaining the jury verdict on the constructive termination claim, the court of appeals explained that a franchisee may establish a violation of Section 2802(a)(1) by showing that, as a result of assigning the franchise, "the franchisor breached one of the three statutory components of the franchise agreement (the contract to use the refiner's trademark, the contract for the supply of motor fuel, or the lease of the premises)." Pet. App. 20-21 (citation omitted).[3] The court concluded that the dealers had made that showing because they had "prove[d] to the jury's satisfaction" that, by eliminating the rent subsidy, "Motiva breached the lease component of the franchise agreements." *Id.* at 21.

The court rejected the defendants' argument that, to constitute a constructive termination under the PMPA, any "breach must amount to a total deprivation of one of the three elements of the franchise." Pet. App. 22; see *id.* at 24. The court held that the "appropriate threshold" for a constructive termination claim was reflected in the jury instructions given in this case, which stated that the breach must constitute "such a material change that it effectively ended the lease, even though the plaintiffs continued to operate the business." *Id.* at 23. The court acknowledged that the doctrines of constructive discharge in employment law and constructive eviction in landlord-tenant law "require an actual severance of the relationship: [t]he employee must leave the workplace; the tenant must move out." *Id.* at 22-23. The court concluded, however, that such a rule should not apply under the PMPA because "sunk costs, optimism, and the habit of years might lead franchisees to try to make the new arrangements work, even when the terms have changed so materially as to make success impossible," and the "con-

[3] The court also stated that a franchisee could establish constructive termination if an assignment of the franchise violated state law. Pet. App. 21. The dealers do not appear to have asserted such a theory.

gressional plan would be frustrated by requiring a franchisee to go out of business before invoking the protections of the PMPA." *Id.* at 23 (citation omitted).

b. The court of appeals reversed the judgment of liability on the constructive nonrenewal claim, concluding that the PMPA does not encompass such a claim "where the franchisee has signed and operates under the renewal agreement complained of." Pet. App. 27-32. While recognizing that the Ninth Circuit had permitted recovery on a constructive nonrenewal theory in *Pro Sales, Inc.* v. *Texaco, U.S.A.*, 792 F.2d 1394 (1986), the court of appeals observed that "*Pro Sales* has been rejected by the other circuits to consider the issue." Pet. App. 28 (citing *Abrams Shell* v. *Shell Oil Co.*, 343 F.3d 482 (5th Cir. 2003), and *Dersch Energies, Inc.* v. *Shell Oil Co.*, 314 F.3d 846 (7th Cir. 2002)). Citing the structure of the PMPA, which requires notice of nonrenewal and permits the franchisee to seek preliminary injunctive relief under a relaxed standard, the court explained 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.* The court therefore concluded that the Act "requires that franchisees faced with objectionable contract terms refrain from ratifying those terms by executing the contracts (even 'under protest')." *Id.* at 30.

Because in this case "the Dealers signed the new agreements 'under protest' and continued in operation under the new agreements," Pet. App. 30, the court of appeals held that they could not claim constructive nonrenewal. Were the rule otherwise, the court explained, a "franchisee [could] sign the contract and simultaneously challenge it," giving the franchisee the benefit of the contract with nothing to lose "[i]f its claims were rejected by the courts." *Ibid.* In the court's view, that result would violate "the balance Congress has struck" in the PMPA. *Id.* at 30-31.

DISCUSSION

The court of appeals erred in sustaining the jury verdict on the claim of constructive termination under 15 U.S.C. 2802(a)(1). Notwithstanding the elimination of their rent subsidy, the dealers continued to operate their franchises by using Shell's trademark, purchasing Shell gasoline for resale, and occupying the leased premises. A franchisor does not "terminate" a franchise within the meaning of Section 2802(a)(1), even "constructively" or informally, unless it brings at least one statutory element of the franchise to an end. The court of appeals correctly concluded, however, that the defendants in this case did not "fail to renew any franchise relationship" within the meaning of Section 2802(a)(2) because the franchisees signed and operated under renewed franchise agreements.

This Court should grant both petitions. The circuits are divided on both questions presented, which raise similar issues that are of substantial importance to a crucial sector of our economy. This Court's guidance would benefit franchisors and franchisees in the petroleum industry by clarifying the scope of the PMPA and by removing the uncertainty regarding the interaction between state and federal remedies in this context. Inconsistent interpretations of the PMPA by different courts of appeals also undermine Congress's intent to prescribe nationally uniform standards on the matters covered by the Act.

I. THE COURT SHOULD GRANT THE PETITION IN NO. 08-372 AND HOLD THAT THE DEFENDANTS DID NOT "TERMINATE" THE RELEVANT FRANCHISES WITHIN THE MEANING OF THE PMPA

A. The Court Of Appeals Erred In Holding That A Franchisee May Recover For Constructive Termination Even If It Continues To Sell The Same Fuel, Use The Same Trademark, And Occupy The Same Premises

The court of appeals held that "a breach of the franchise agreement need not result in complete deprivation of a statutory element of the franchise to support a constructive termination" claim under 15 U.S.C. 2802(a)(1). Pet. App. 24. That conclusion was incorrect. Under any usual understanding of the statutory language, a franchisor can be said to "terminate" an existing franchise within the meaning of Section 2802(a)(1) only when it cancels or forces an end to the franchisee's purchase of the franchisor's fuel, its use of the franchisor's trademark, or its occupation of the leased marketing premises. Because the dealers in this case continued to exercise each of those three prerogatives long after the defendants withdrew the rent subsidy, the defendants cannot be found to have "terminate[d]" the franchises in violation of the PMPA.

1. The PMPA does not establish general federal standards of fair dealing in petroleum marketing but rather addresses only a narrow category of conduct. *Inter alia*, the Act provides that, subject to specified exceptions, a motor-fuel franchisor may not "terminate any franchise" before its expiration date. 15 U.S.C. 2802(a)(1). The Act defines the term "franchise" to encompass "a set of definite agreements" concerning the lease of the marketing premises, the supply of the franchisor's motor fuel, and the use of the franchisor's trademark. Pet. App. 7-8; 15 U.S.C. 2801(1)(B).

"Terminate" is a well understood term that had the same meaning when Congress enacted the PMPA in 1978 as it has now: "bring to an end." *The Random House Dictionary of the English Language* 1465 (1966). Consistent with that common understanding, Congress provided in the PMPA that "[t]he term 'termination' includes cancellation," 15 U.S.C. 2801(17), a word that similarly denotes an end or nullification. Thus, a franchisor can "terminate" a "franchise" under the PMPA only by engaging in conduct that brings at least one of the three statutory components of the franchise to an end.

A franchisor (or its assignee) typically terminates a franchise by explicitly canceling one or more of the franchise elements prior to the expiration date. Even without such an explicit cancellation, however, the franchisor may "terminate" the franchise within the meaning of Section 2802(a)(1) by engaging in conduct that effectively forces an end to one of the statutory elements. Thus, a franchisor can "terminate" a franchise by offering the franchisee fuel on terms so disadvantageous as to amount to a refusal to supply, or by taking actions that, as a practical matter, prevent the franchisee from continuing to occupy the leased premises. In those circumstances, the "termination" may be termed "constructive," although the term "informal" is more accurate. See *Dersch Energies*, *Inc.* v. *Shell Oil Co.*, 314 F.3d 846, 864 n.17 (7th Cir. 2002) ("In the context of the PMPA, constructive means 'not directly expressed, but inferred,' *The Compact Oxford English Dictionary* 322 (2d ed. 1989), i.e., an indirect or informal termination or nonrenewal.").

A franchisor cannot reasonably be said to "terminate" a franchise, however, when its franchisee continues to exercise all three prerogatives that the franchise entails. The court of appeals erred in holding that the elimination of the rent subsidy could constitute a termination of the franchises when the dealers continued to occupy the leased premises, use Shell's trademark, and purchase Shell gasoline for resale. Pet. App. 23. Although the court purported to equate "termination" with conduct that "effectively ended" the franchise, it upheld a verdict in the dealers' favor "even though the [dealers] continued to operate the business[es]" long after the rent subsidy had been withdrawn. *Ibid.*

2. The history and purpose of the PMPA do not support the decision below. The court of appeals regarded its reading of Section 2802(a)(1) as consistent with Congress's intent "to ensure that franchisees benefit from successful investment in their franchises." Pet. App. 24. But the PMPA was a compromise measure designed to "strike a balance between the at times conflicting interests of [franchisors and franchisees]." S. Rep. No. 731, 95th Cong, 2d Sess. 15 (1978) (*Senate Report*); see 123 Cong. Rec. 10,384 (1977) (statement of Rep. Brown) (the Act "represent[s] a delicate and effective compromise"). Congress intended the Act to limit the circumstances in which franchisors can use or threaten the "extreme remedy" of termination. *Senate Report* 18; see *id.* at 29 (suggesting that a franchisee could bring a claim where "the real estate lease or motor fuel supply agreement" was "terminat[ed]" or the trademark license was rendered "valueless"). Yet Congress also "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. Consistent with that recognition, Congress chose not to forbid franchisors from instituting changes that, although unfavorable to the franchisee, do not bring the franchise to an end. See *Dersch Energies*, 314 F.3d at 856 ("[T]he PMPA strikes a balance between the rights of franchisors and the rights of franchisees, by affording franchisees important but limited procedural rights, while at the

same time providing franchisors with significant latitude to respond to changing market conditions."). By expanding the PMPA's coverage to conduct that is not encompassed within its text, the decision below disrupts "the balance Congress has struck." Pet. App. 31.

3. The court of appeals' understanding of the equities in this case was flawed. The court surmised that "sunk costs, optimism, and the habit of years might lead franchisees to try to make the new arrangements work," and it concluded that "[t]o require an actual abandonment of years of work and investment before we recognize a right of action under the PMPA would be unreasonable." Pet. App. 23. But that analysis ignores the existence of state-law remedies. Although Congress intended Section 2802(a)(1) to apply only to terminations, state-law mechanisms remain available for breaches of contract that do not bring an end to the franchise. The dealers' continued enjoyment of the three essential elements of the franchise did not (as the jury's verdict on their state-law claims makes clear) prevent them from obtaining meaningful redress for the contract breaches that were found to have occurred.[4] That continuing relationship simply remitted the dealers to state law to obtain relief on their contractual claims.

4. The decision below undermines the PMPA's goal of establishing "a single, uniform" federal standard for termi-

[4] The PMPA preempts any inconsistent state or local "law or regulation" governing the "termination" of a petroleum marketing franchise or the "nonrenewal" of a franchise relationship. 15 U.S.C. 2806(a). Outside of those specific areas, however, Congress neither provided a federal remedy for breaches of franchise agreements nor limited States' authority to do so. See H.R. Rep. No. 737, 103d Cong., 2d Sess. 2-3 (1994) ("PMPA preemption does not extend to state regulation of underlying contract provisions."); *Senate Report* 42 ("State laws dealing with [other] aspects of the relationship are not preempted.").

nation, *Senate Report* 19, by prescribing a confusing and indeterminate test for deciding whether a franchisor has "terminate[d]" a franchise. The court of appeals disavowed a holding that "any material breach of the lease would necessarily be sufficient to sustain the constructive termination claim." Pet. App. 23. It indicated instead that the relevant contract breach must effect "such a material change that it effectively ended the lease, even though the plaintiffs continued to operate the business." *Ibid.* But the court offered no workable standard for determining whether a particular contract breach has "effectively ended" the franchise when the franchisee is able and willing to continue, for a sustained period, all its operations. Nor could the court have done so, given the essential contradiction involved in declaring "effectively ended" a franchise that is ongoing in each of its basic components.

When a franchisor does not explicitly cancel any of the three elements of a petroleum marketing franchise, its conduct can properly be said to have "terminate[d]" the franchise only if a reasonable franchisee in the circumstances would be effectively compelled to abandon one (or more) of the franchise elements, as where the franchisor's conduct forecloses any reasonable possibility that the business could be operated profitably. And a franchisee cannot reasonably claim to have been subjected to such effective compulsion unless it either (a) actually ceases that aspect of its operations or (b) promptly seeks preliminary injunctive relief preventing the franchisor from carrying out its announced intent to engage in conduct that would leave the franchisee no reasonable alternative but to abandon at least one of the franchise elements.[5] As noted, the court of appeals' view

[5] A franchisee who receives notice of an impending formal termination need not wait for that event to occur before seeking a preliminary

that a sufficiently material change in the conditions under which a franchisee operates can "effectively" terminate a franchise "even though the [franchisee can] continue[] to operate the business" under the new conditions, Pet. App. 23, provides no coherent standard for identifying a constructive termination. The appropriate inquiry must concern whether continued exercise of the franchise elements is reasonably possible. Where it is, the franchisee cannot succeed on a claim of constructive termination.

B. The Courts of Appeals Are Divided On Whether A Constructive Termination Claim Requires An End To The Franchise

The courts of appeals disagree about whether a franchisor can violate 15 U.S.C. 2802(a)(1) even when the franchisee continues to exercise all the statutory components of the franchise. This Court should grant review to resolve that conflict.

---

injunction under the standards set forth in 15 U.S.C. 2805(b)(2). Although that provision requires the franchisee to show that "the franchise of which he is a party has been terminated," 15 U.S.C. 2805(b)(2)(A)(i), it should be construed in accordance with Congress's evident intent to permit franchisees to obtain emergency injunctive relief enabling them to continue operating under the preexisting terms while the dispute is in litigation. Preliminary injunctive relief should similarly be available when a franchisor announces its intent to engage in imminent conduct that would effectively force an end to a franchise element. In an appropriate case, therefore, a franchisee can make out a claim of constructive or informal termination without abandoning any of the basic components of its operation. In this case, however, the dealers "waited years before seeking preliminary injunctive relief," and at that point the court was unable to "turn the clock back." Pet. App. 49-50 (citation omitted). The dealers' continued operation of their franchises for a prolonged period of time after the withdrawal of the rent subsidy belies any contention that the withdrawal effectively compelled them to abandon their businesses.

1. Like the court below, the Fourth Circuit has permitted a franchisee to claim "constructive" termination under the PMPA even though the challenged conduct does "not result in complete deprivation of a statutory element of the franchise" and the franchisee "continue[s] to operate the business." Pet. App. 23-24. In *Barnes* v. *Gulf Oil Corp.*, 795 F.2d 358 (1986), the Fourth Circuit held that a franchisee stated a valid damages claim for termination based on a gasoline price increase that did not end any aspect of the franchise. *Id.* at 359. The court acknowledged that, despite the change in terms, the franchisee was "still in business," selling the franchisor's fuel under its trademark and occupying the leased premises. *Id.* at 360. The court concluded, however, that the price increase constituted a "constructive" termination because the PMPA was intended "to protect franchisees from overbearing, burdensome conduct by the franchisor during the term of the franchise." *Id.* at 362.

Two circuits have taken the opposite view. In *Clark* v. *BP Oil Co.*, 137 F.3d 386 (1998), the Sixth Circuit rejected a claim that an assignee's elimination of "price supports [and] other downward price adjustments" for gasoline constructively terminated a franchise. *Id.* at 389. The court reasoned that, absent a claim by the franchisee that the refiner "refuses to supply him with gasoline" altogether, the price change fell outside the scope of the PMPA because that Act "does not exist to redress every breach of an agreement between a gasoline station franchisee and franchisor." *Id.* at 391. The Sixth Circuit therefore concluded that "even if [the franchisee] can establish a breach of the price term," a change in the price of gasoline is not actionable under the PMPA if the franchisee "still retains use of BP's trademark, use of the [franchise] premises, and continues to receive BP-branded motor fuel." *Id.* at 392.[6]

Similarly, in *Portland 76 Auto/Truck Plaza, Inc.* v. *Union Oil Co.*, 153 F.3d 938 (1998), cert. denied, 526 U.S. 1064 (1999), the Ninth Circuit refused to permit a termination claim where a franchisee alleged that an assignee had "charged more for fuel, on worse terms," but had not ended the franchise. *Id.* at 948. Although the court "assume[d] for purposes of discussion" that a claim for constructive termination might lie in some circumstances, it held that "[f]or the assignment to have amounted to a constructive termination, it would have had to force [the franchisee] out of its business." *Ibid.* The franchisee failed to establish such a claim, the court concluded, because the franchisee "stayed in business until the time came for renewal" despite the price increase. *Ibid.*[7]

---

[6] The dealers contend that *Clark* does not conflict with *Barnes* or the decision below because the franchise agreement in *Clark* contained "an open price term which could be freely changed by BP." 08-372 Br. in Opp. 14. But the court in *Clark* made clear that it rejected the PMPA claim for reasons independent of whether there was a state-law breach of contract. The court concluded that "even if the [franchisee] can establish a breach of the price term," a constructive termination would arise only if the assignee effectively "refuse[d] to supply [the franchisee] with gasoline," ending that statutory element of the franchise. 137 F.3d at 391.

[7] The dealers argue (08-372 Br. in Opp. 14-15) that *Portland 76* is inconsistent with the Ninth Circuit's earlier decision in *Little Oil Co.* v. *Atlantic Richfield Co.*, 852 F.2d 441 (1988). In *Little Oil*, the court approved an instruction requiring "unduly burdensome and overbearing" marketing changes to establish constructive termination. *Id.* at 445. The court in *Little Oil*, however, was responding to a *franchisee's* challenge to the instruction on the ground that it was too demanding. The court therefore had no occasion to address whether more was required to establish constructive termination. The Ninth Circuit resolved that question in the affirmative in *Portland 76*.

Two other circuits have indicated their agreement with the approach of the Sixth and Ninth Circuits, without squarely resolving the question. The Seventh Circuit remarked in *dicta* that a franchisor "terminate[s]" a franchise within the meaning of the PMPA only when a statutory component of the franchise is "terminated or discontinued." *Dersch Energies,* 314 F.3d at 859. And the Eleventh Circuit "question[ed]" whether the supply component is even "implicate[d]" when a franchisee has not alleged a "refus[al] to supply him with gasoline." *Shukla* v. *BP Exploration & Oil, Inc.*, 115 F.3d 849, 854 (1997).

2. The inconsistent rulings that have produced this circuit conflict frustrate one of the primary purposes of the PMPA. In enacting that statute, Congress sought to establish "a single, uniform set of rules" governing the termination of petroleum franchises so that refiners, many of whom operate nationwide, can organize their affairs without facing a "patchwork" of standards. *Senate Report* 16, 19. The disagreement among the courts of appeals leaves refiners without consistent guidance about the scope of federal law and subjects tens of thousands of franchisees to different rules depending on where they are located. See 08-372 Pet. 27. In addition, because the Act preempts inconsistent state laws relating to franchise terminations, 15 U.S.C. 2806(a)(1); see note 4, *supra*, uncertainty about the scope of the PMPA prohibition on termination could create corresponding uncertainty about the continuing viability of state-law remedies for breach of contract.

II. THE COURT SHOULD GRANT THE PETITION IN NO. 08-240 AND HOLD THAT A FRANCHISEE MAY NOT CLAIM "CONSTRUCTIVE" NONRENEWAL WHEN IT SIGNS AND OPERATES UNDER A RENEWED FRANCHISE AGREEMENT

A. The Court Of Appeals Correctly Concluded That The Dealers Did Not Establish Constructive Nonrenewal

The PMPA provides that, subject to specified exceptions, a franchisor may not "fail to renew any franchise relationship." 15 U.S.C. 2802(a)(2). The court of appeals correctly held that a franchisee cannot claim constructive nonrenewal when, as in this case, it "has signed and operates under the renewal agreement complained of." Pet. App. 32. The PMPA defines "nonrenewal" as the "failure to reinstate, continue, or extend the franchise relationship." 15 U.S.C. 2801(14). A franchisee that signs, and then operates the franchise under, a renewal agreement cannot satisfy that definition.

The dealers resist that plain reading of the Act on several grounds. First, they contend that the decision below creates a "Catch-22" because it forces a franchisee "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." Pet. 20 (citation omitted). That contention, however, ignores the Act's requirement of advance notice of nonrenewal and its relaxed standards for issuance of a preliminary injunction. A franchisee need not go out of business in order to challenge a franchisor's "take it or leave it" offer to renew on modified terms. When a franchisee believes the proposed agreement is unlawful, it may refuse the offer. A franchisor that elects not to renew in the face of such an inability to agree on new terms must generally give the franchisee 90 days notice prior to the nonrenewal. 15 U.S.C. 2804(a).

During that period, the franchisee may seek a preliminary injunction under 15 U.S.C. 2805, allowing it to continue operating on the preexisting terms while the litigation proceeds. See *Dersch Energies*, 314 F.3d at 863.

Second, the dealers argue (Pet. 21) that the PMPA's remedial scheme is ineffective because few franchisees have the financial resources to bring suit to forestall an unlawful nonrenewal. The PMPA, however, allows successful dealers to recover attorneys' fees, expert costs, compensatory damages, and, in some circumstances, punitive damages. 15 U.S.C. 2805(d)(1). Such provisions are normally considered sufficient to encourage suit. Cf. *City of Riverside* v. *Rivera*, 477 U.S. 561, 578 (1986) ("The function of an award of attorney's fees is to encourage the bringing of meritorious civil rights claims which might otherwise be abandoned because of the financial imperatives surrounding the hiring of competent counsel.") (quoting *Kerr* v. *Quinn*, 692 F.2d 875, 877 (2d Cir. 1982)). And even if some dealers face economic difficulty in pursuing the remedies that the PMPA provides, that fact cannot justify holding the franchisor liable for "fail[ing] to renew [the] franchise relationship," 15 U.S.C. 2802(a)(2), when no failure to renew has actually taken place. Dealers in these circumstances may have a claim against the franchisors under state law, but not under the explicit terms of the PMPA.

Third, the dealers contend (Pet. 24-25) that they preserved their rights under the PMPA by signing the renewed agreements "under protest." Again, however, the PMPA affords franchisees the right to sue only to challenge an unlawful termination or nonrenewal of the franchise; the Act does not furnish them with a cause of action to seek redress for other grievances about the negotiation process or the manner in which a renewal occurred. Because the dealers renewed the franchise agreements, they had no relevant rights cognizable by suit under the PMPA to preserve. At the most, they possess state-law claims against their franchisors.

B. The Courts Of Appeals Are Divided About Whether A Franchisee May Claim "Constructive" Nonrenewal Under The PMPA When It Signs A Renewed Agreement And Operates Under Its Terms

1. a. In *Pro Sales, Inc.* v. *Texaco, U.S.A.*, 792 F.3d 1394 (1986), the Ninth Circuit recognized a claim of constructive nonrewal under the PMPA, holding that a franchisee that had signed a new agreement and promptly brought suit should not be deemed to have "'renewed' the franchise relationship so as to bar relief under the PMPA." *Id.* at 1399. The Fifth and Seventh Circuits have reached the opposite conclusion. In *Dersch Energies*, the Seventh Circuit "reject[ed] * * * the constructive nonrenewal theory * * * endorsed by the Ninth Circuit" in *Pro Sales* and held that a franchisee who signs a renewal contract cannot claim constructive nonrenewal even if the franchisee signs "under protest." 314 F.3d at 864-865. The Fifth Circuit, in *Abrams Shell* v. *Shell Oil Co.*, 343 F.3d 482 (2003), found "the Seventh Circuit's reasoning in *Dersch Energies* to be especially persuasive" and "reject[ed] the *Pro Sales* approach on the same basis." *Id.* at 489 & n.16.[8]

The court below sided with the Fifth and Seventh Circuits. Pet. App. 30-31. The court noted that *Pro Sales* stands alone among circuit court decisions in recognizing a constructive nonrenewal claim and, citing *Dersch Energies*

[8] Both the Fifth and Seventh Circuits appear to recognize that a franchisee can claim "constructive" nonrenewal when "at least one of the three essential components of a petroleum franchise has been discontinued." *Abrams Shell*, 343 F.3d at 488 (citation omitted). The dealers have not alleged such a discontinuation.

and *Abrams Shell*, concluded 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. The court therefore held that franchisees may not claim "constructive" nonrenewal where they "signed the new agreements 'under protest' and continued in operation under the new agreements." *Id.* at 30.

b. In a footnote, the court of appeals suggested that *Pro Sales* may be distinguishable because, unlike the dealers here and in *Dersch Energies*, the plaintiff in *Pro Sales* "obtained preliminary relief so that it never operated under the new contract." Pet. App. 30 n.14. The court also declined to foreclose the possibility that a franchisee could claim constructive nonrenewal in such circumstances. *Ibid.*

Those observations do not diminish the split among the circuit courts. The Ninth Circuit in *Pro Sales* refused to rest its decision on the franchisee's attainment of a preliminary injunction. See 792 F.2d at 1399 n.6 (noting that such relief "is uniquely within the power of the district court to grant" and "cannot be required to preserve the franchisee's rights under the Act"). That court therefore indicated that it would reach the opposite conclusion from the First, Fifth, and Seventh Circuits even if the franchisee not only signed the new agreement but also operated under its terms. The Fifth and Seventh Circuits, moreover, did not regard the distinction as material to their disagreement with *Pro Sales*. See Pet. App. 30 n.14.

2. Although the decision below regarding constructive nonrenewal is correct and consistent with the decisions of the Fifth and Seventh Circuits, review is warranted to resolve the conflict with the Ninth Circuit's contrary holding in *Pro Sales*. As noted above, see p. 16, *supra*, divergent interpretations of the PMPA leave large numbers of franchisors and franchisees in the petroleum marketing

industry without consistent nationwide guidance as to their rights and obligations under federal and state law and undercut the congressional goal of establishing uniform standards.

In addition, because franchise agreements typically expire every few years, see Pet. App. 30, the question whether a franchisee must choose between signing a new agreement and pursuing a constructive nonrenewal claim recurs with significant frequency. And because the PMPA has a one-year statute of limitations, 15 U.S.C. 2805(a), the *Pro Sales* rule, which "[a]llow[s] a franchisee to sign 'under protest' and then later challenge the renewal," can "extend the period of uncertainty through the entire first year of a [renewal] contract." Pet. App. 30. That uncertainty increases the costs to franchisors exercising their right to implement good faith marketing changes at the time of renewal, see 15 U.S.C. 2802(b)(3)(A), and may lead them to forgo efficient strategies or "abandon the [franchise] model entirely," Pet. App. 31. Consumers ultimately may pay for the increased distribution costs through higher fuel prices. See generally *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 127 S. Ct. 2705, 2723 (2007) (explaining that consumers sometimes "suffer the consequences" of distributional inefficiencies).

3. The question presented in No. 08-240 is closely related to the question regarding constructive termination presented in No. 08-372. Both questions arise from the same set of facts and involve analogous arguments about the scope of the PMPA. In view of the importance of the issues presented and the uncertainty created by the existing circuit conflicts, this Court should grant review in both No. 08-240 and No. 08-372.

CONCLUSION

The petitions for a writ of certiorari should be granted.

Respectfully submitted.

ELENA KAGAN
Solicitor General

CHRISTINE A. VARNEY
Assistant Attorney General

MALCOLM L. STEWART
Deputy Solicitor General

DAVID A. O'NEIL
Assistant to the Solicitor General

CATHERINE G. O'SULLIVAN
NICKOLAI G. LEVIN
Attorneys

MAY 2009