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.*,
Respondents.

SHELL OIL PRODUCTS COMPANY LLC, *ET AL.*,
Petitioners,
v.
MAC'S SHELL SERVICE, INC., *ET AL.*,
Respondents.

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

REPLY BRIEF FOR SHELL OIL PRODUCTS COMPANY LLC, MOTIVA ENTERPRISES LLC, AND SHELL OIL COMPANY

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CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Shell Oil Products Company LLC, Motiva Enterprises LLC, and Shell Oil Company state that the corporate disclosure statement included in their opening brief remains accurate.

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The text of the PMPA could not be more clear: Unless a franchisor "terminate[s]" a franchise or "fail[s] to renew" a franchise relationship, the plaintiff has no claim. 15 U.S.C. §2802(a). As the government explains, "[u]nder any usual understanding of the statutory language, a franchisor can be said to 'terminate' an existing franchise

* * * only when it 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." Gov't Br. 10. Likewise, a franchisor cannot have "fail[ed] to renew" a franchise relationship where "the parties entered into a new franchise agreement." *Id.* at 23. Congress deliberately limited the PMPA's cause of action to the critical events of termination and nonrenewal, leaving traditional state authority over franchise regulation otherwise intact.

The verdict in this case cannot be reconciled with any plausible interpretation of the statutory terms. Shell and Motiva did not "terminate any franchise * * * prior to the conclusion of [its] term." 15 U.S.C. §2802(a)(1). It is undisputed that four of the eight dealers were still operating their franchises at the time of trial, almost five years after their alleged "termination," earning as much as $200,000 a year doing so. Shell Br. 10, 14. Three other dealers operated throughout the terms of their franchise agreements, selling their businesses or otherwise ceasing operations only *after* the agreements ended. *Id.* at 11 & n.8. And the eighth dealer left the service-station business for unrelated reasons. *Id.* at 11. In no sense were any of those franchises "terminated." Nor did Shell or Motiva "fail to renew" any franchise relationship. Seven of the eight dealers were offered and signed renewal agreements. *Id.* at 10-11 & nn.7-8. And the eighth left the service-station business before Motiva had any occasion to renew. *Id.* at 11.

The courts below nonetheless upheld a multimillion-dollar judgment on the Alice-in-Wonderland theory that "termination" does not really require a "termination": A dealer is "terminated," they held, whenever the franchisor's conduct represents "'such a material change that it

effectively ended the lease, even though the plaintiffs continued to operate the business.'" J.A. 447. That is a bit like pronouncing a patient "effectively deceased" even though he "continues to live an active lifestyle." The standard is "indeterminate, internally contradictory, and unworkable." Gov't Br. 8.

Plaintiffs' effort to rewrite the statute to support their claims is unavailing. The PMPA's text and history refute their contention that Congress intended to allow constructive termination claims at all, much less jettisoned the usual requirements of such claims by dispensing with any termination requirement altogether. And plaintiffs' attempt to extrapolate a cause of action by blending inapposite statutory provisions with a newly minted theory of "attempted" termination fares no better.

I. SHELL AND MOTIVA DID NOT "TERMINATE" THE DEALERS' FRANCHISES

Plaintiffs do not dispute that "no actual termination occurred" in this case. J.A. 432. At no point did Shell or Motiva refuse them any of the three statutory elements of their franchises—use of the trademark, supply of fuel, or use of the service-station premises. Plaintiffs therefore resort to a theory of "constructive" termination. They claim that Motiva's alleged breach of oral promises to continue the rent subsidy forever (despite written terms to the contrary) "constructively" terminated their franchises even though they continued as franchisees, receiving all three statutory franchise elements.

The PMPA's text and history foreclose those claims. In contexts where this Court has recognized "constructive" claims in the past (such as constructive discharge under Title VII), Congress acted against a backdrop of longstanding precedent in the most directly relevant context. When Congress enacted the PMPA, by contrast,

claims for constructive termination in the most relevant contexts—state franchise laws and the Uniform Commercial Code—were unheard of. In any event, even a "constructive" termination requires an end to the relationship. That did not occur here.[1]

A. The PMPA Does Not Permit Claims for Constructive Termination

1. *The Act's Text and History Foreclose Constructive Claims*

Plaintiffs assert (at 26) that constructive termination claims "fit[] well within the rights afforded by the PMPA." But as Shell and Motiva explained (at 31), the PMPA applies only where the "*franchisor* * * * terminate[s] [the] franchise." 15 U.S.C. § 2802(a)(1) (emphasis added). That phrasing does not by itself naturally en-

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[1] In a footnote in their statement (at 13-14 n.12), plaintiffs urge that Shell and Motiva "did not object to a contrary jury instruction" and "failed to raise this argument in their [Rule 50(a)] motion." As already explained, see Pet. Reply in No. 08-372, at 9 n.4, the first contention is both irrelevant and meritless. This case involves a challenge to the sufficiency of the evidence, not the jury instructions. An appellant need not object to jury instructions to preserve a sufficiency claim. See *Boyle* v. *United Techs. Corp.*, 487 U.S. 500, 513-514 (1988); 9B Wright & Miller, *Federal Practice and Procedure* § 2537, at 624-625 (3d ed. 2008). Plaintiffs also ignore counsel's express objection to the instruction below. See J.A. 368-369. While they quote a later comment that counsel "thought the *overall* instruction was fine," C.A. App. 1308 (emphasis added), they ignore that counsel renewed the earlier, specific objection at the same time, see *id.* at 1309. Plaintiffs' contention that the sufficiency argument was not preserved in the Rule 50(a) motion likewise fails. Plaintiffs never raised this objection in their brief in opposition. Cf. Br. in Opp. in No. 08-372, at 11 n.3. The objection is therefore waived. See Sup. Ct. R. 15.2. And Shell and Motiva *did* press the issue at length in their Rule 50(a) motion. See J.A. 208-213. Plaintiffs nowhere explain why that argument is inadequate.

compass "constructive" terminations—situations where the *franchisee abandons* one or more elements of the franchise in response to allegedly intolerable franchisor conduct. Under the statutory terms, it is not enough that the franchise *was terminated*. It must have been the *franchisor* that terminated it. In normal speech, "bathing" a child does not include causing the child to bathe himself; "combing" someone's hair does not include causing him to comb it himself. Likewise here, one would not ordinarily say that a "franchisor * * * terminate[d] [the] franchise" merely because its conduct led the franchisee to terminate the franchise itself. Congress knows how to cover not only *doing* an act but *causing* another to do it. See, *e.g.*, 18 U.S.C. §2(b) ("Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."); 42 U.S.C. §1983 ("subjects, or causes to be subjected"); 15 U.S.C. §717t(a); 16 U.S.C. §825o(a); 47 U.S.C. §501. Congress did not do so here.

The legislative history erases any doubt. Despite lengthy hearings, committee reports, and floor debates, plaintiffs cannot identify a single statement endorsing constructive termination claims. To the contrary, the sole statement addressing the issue *rejects* them. See Shell Br. 31-32. At the Senate hearing, a *franchisee* trade group representative noted that the Act "deal[t] with only a part of our overall problem" because, although it would "provide needed re[l]ief in so far as the dealer's tenure in the service station is concerned," it did not address "economic terminations resulting from anticompetitive and other unfair marketing practices engaged in by some suppliers"—precisely what plaintiffs claim should constitute a "constructive" termination here. *Petroleum Marketing Practices Act: Hearing on S. 19, S.*

743, and H.R. 130 Before the Subcomm. on Energy Conservation and Regulation of the S. Comm. on Energy and Natural Resources, 95th Cong. 185 (1977) (Binsted). The representative understood that those "economic terminations" would have to be addressed by "separate legislation." *Ibid.* Yet plaintiffs ask this Court to read such claims into the PMPA itself.

Unable to ground constructive termination claims in the Act's text or history, plaintiffs urge the Court (at 26) to adopt them as a "legal fiction to meet the demands of 'convenience and justice.'" Where this Court has recognized "constructive" claims in the past, however, it has done so only because Congress enacted the relevant statute against a backdrop of settled precedent that Congress was presumed to have incorporated. As the government explains (at 20), "[t]he soundness of [constructive termination claims] depends in large measure on the longstanding recognition of the concept of 'constructive termination' in analogous contexts." For example, in *Pennsylvania State Police* v. *Suders*, 542 U.S. 129 (2004), this Court adopted the "constructive discharge" theory under Title VII only because the theory was well established in the employment context at the time that statute was enacted. The National Labor Relations Board had recognized constructive discharge claims since the 1930s; courts of appeals had upheld them for almost as long; and "[b]y 1964, the year Title VII was enacted, the doctrine was solidly established in the federal courts." *Id.* at 141-142. That made it reasonable to infer that Congress had intended to incorporate the doctrine into Title VII. Congress is presumed to be aware of settled interpretations, and a term "'transplanted from another legal source * * *

brings the old soil with it.'" *Evans* v. *United States*, 504 U.S. 255, 259-260 & n.3 (1992).[2]

Here, by contrast, there was no "longstanding recognition" of constructive termination claims in the "soil" of the contexts Congress considered relevant when it enacted the PMPA. To the contrary, such claims were unheard of. First, as Shell and Motiva explained (at 25-27), the Act's seemingly tautological definition of "termination" to include "cancellation," 15 U.S.C. §2801(17), draws on terminology from Section 2-106 of the Uniform Commercial Code. Congress's decision to incorporate terminology from the U.C.C. is highly significant: So far as we have found, *no* court has ever recognized claims for "constructive termination" or "constructive cancellation" under the U.C.C. See Shell Br. 32. Plaintiffs offer no other explanation for the origins of the Act's definitional provision, and make no attempt to reconcile their constructive termination theory with Congress's invocation of a context that rejects it.

Second, Congress focused on the state franchise statutes that regulated the same subject-matter and were the target of one of Congress's principal objectives—replacing the "uneven patchwork" of state laws with a "single, uniform set of rules." S. Rep. No. 95-731, at 19 (1978). In that context too, constructive termination claims were utterly unknown at the time the PMPA was enacted. As Shell and Motiva explained (at 32-34 & n.16), numerous statutes regulated franchise termination by 1978; claims for *actual* termination or non-renewal under

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[2] By its terms, moreover, Title VII covers not only "discharge[s]" but also any discriminatory "terms, conditions, or privileges of employment." 42 U.S.C. §2000e-2(a)(1); *Suders*, 542 U.S. at 143. The PMPA contains no similarly expansive language.

those statutes were common.[3] But the earliest case we have found addressing a claim for "constructive termination" of a franchise in those terms was decided in 1979—a year *after* Congress enacted the PMPA. See *Sexe* v. *Husky Oil Co.*, 475 F. Supp. 135, 137 (D. Mont. 1979). A doctrine more lacking in "longstanding recognition" is difficult to imagine.

Plaintiffs do not attempt to fill that glaring gap—they do not cite a *single* pre-1978 case recognizing a claim for constructive termination of a franchise. The government proposes only one—*American Motors Sales Corp.* v. *Semke*, 384 F.2d 192 (10th Cir. 1967). Gov't Br. 19. But as Shell and Motiva explained (at 34 n.16), *Semke* did not rely on a constructive termination theory. The statute at issue (the Automobile Dealers' Day in Court Act) was not limited to terminations, but covered *any* franchisor failure "'to act in good faith in performing or complying with any of the terms or provisions of the franchise.'" 384 F.2d at 194 n.1 (quoting 15 U.S.C. § 1222). And the court relied on legislative history peculiar to that statute. See

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[3] For examples from 1977 alone, see *C.A. May Marine Supply Co.* v. *Brunswick Corp.*, 557 F.2d 1163, 1164 (5th Cir. 1977); *Boatland, Inc.* v. *Brunswick Corp.*, 558 F.2d 818, 819-822 (6th Cir. 1977); *Russ Thompson Motors, Inc.* v. *Chrysler Corp.*, 425 F. Supp. 1218, 1219-1220 (D.N.H. 1977); *Sundown Imports, Inc.* v. *Ariz. Dep't of Transp.*, 565 P.2d 1289, 1290 (Ariz. App. 1977); *Am. Motors Sales Corp.* v. *New Motor Vehicle Bd.*, 69 Cal. App. 3d 983, 985 (1977); *Int'l Harvester Co.* v. *Calvin*, 353 So. 2d 144, 146-147 (Fla. App. 1977); *AAMCO Indus., Inc.* v. *DeWolf*, 250 N.W.2d 835, 838-840 (Minn. 1977); *Am. Motors Sales Corp.* v. *Perkins*, 251 N.W.2d 727, 728 (Neb. 1977); *Sw. Distrib. Co.* v. *Olympia Brewing Co.*, 565 P.2d 1019, 1020-1021, 1024-1025 (N.M. 1977); *Am. Oil Co.* v. *Columbia Oil Co.*, 567 P.2d 637, 639-641 (Wash. 1977).

id. at 195.[4] Congress's failure to replicate that broad statutory text or legislative history in the PMPA renders *Semke* irrelevant here. In any event, one ambiguous case that does not even mention "constructive termination" is hardly comparable to the "solidly established" and "long-standing" precedent that the government deems necessary and that this Court invoked to justify constructive discharge claims under Title VII in *Suders*.

Plaintiffs assert (at 36-37 & n.19) that five *post-enactment* cases acknowledge constructive termination claims under other franchise statutes. But those cases—most of which postdate the PMPA by more than 20 years—shed no light on Congress's intent when it enacted the statute in 1978. And the post-enactment case law is at best mixed: At least *eight* courts have expressly *repudiated* the constructive termination doctrine under other franchise statutes. See Shell Br. 32-33 & n.15.[5] The theory thus is not "solidly established" even now.

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[4] The court acknowledged that the dealer (not the franchisor) had terminated the dealership, and could find "no case" upholding liability on those facts. 384 F.2d at 195. Nonetheless, the court invoked a comment in the ADDCA's legislative history addressing franchisor coercion that "'*relate[d] to* the termination * * * of the dealer's franchise.'" *Ibid.* (emphasis added). Whatever the merits of that legislative-history-driven interpretation, *Semke* does not stand for any general theory of constructive termination.

[5] Although plaintiffs assert (at 36 n.19) that "[m]any" of those cases "do not foreclose a constructive termination theory," they take issue with only two, and even as to those, they err. The court in *Speed Auto Sales, Inc.* v. *American Motors Corp.*, 477 F. Supp. 1193 (E.D.N.Y. 1979), squarely held that, "[s]ince the complaint fails to allege that Speed has been terminated * * * , no claim is stated under the law." *Id.* at 1199. The court further observed that the complaint failed to allege even a constructive termination, but that was an alternative holding. See *ibid.* ("Even were such a theory cognizable * * * ."). The court in *Fuller Ford, Inc.* v. *Ford Motor Co.*, No.

2. Barnes's *Assignment-Based Theory Cannot Support Constructive Termination Claims*

Courts allowing constructive termination claims under the PMPA have relied on the assignment-based theory of *Barnes* v. *Gulf Oil Corp.*, 795 F.2d 358 (4th Cir. 1986). *Barnes* held that a plaintiff could establish constructive termination by showing either an assignment of the franchise followed by a breach of one of the three franchise elements, or an assignment that is invalid under state law. See *id.* at 361-364. As Shell and Motiva explained (at 34-40), neither theory makes sense. The PMPA addresses terminations, not lawful assignments followed by contract breaches or ineffective assignments already addressed by state law. The government refuses to endorse either of *Barnes*'s theories, and plaintiffs only further obfuscate them.

a. Plaintiffs deny that *Barnes*'s "assignment-plus-breach" theory effectively federalizes all breach-of-contract claims. Citing the decision below, they urge (at 33) that constructive termination requires a "'breach of the lease [that] "was such a material change that it effectively ended the lease, even though the plaintiffs continued to operate the business."'" But that standard is so incoherent as to provide no limit at all. It is like asking a

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CIV. 00-530-B, 2001 WL 920035 (D.N.H. Aug. 6, 2001), held that the state-law termination provision "does not apply to constructive terminations." *Id.* at *13. The court merely noted in the course of reaching that conclusion that the plaintiff might nonetheless have a claim under a *different* provision that did *not* address terminations. See *ibid.* Plaintiffs also purport to distinguish *Barney Holland Oil Co.* v. *FleetCor Technologies, Inc.*, 275 F. App'x 351 (5th Cir. 2008), and *Robert Basil Motors, Inc.* v. *General Motors Corp.*, No. 03-CV-315A, 2004 WL 1125164 (W.D.N.Y. Apr. 17, 2004), but the former case was cited for a different point (at 43 n.22), and the latter was not cited at all.

jury to decide whether a defendant is "effectively guilty" even though he is innocent, or "effectively negligent" even though he exercised due care. Plaintiffs insist (at 34) that the court's standard is no less manageable than the "materiality" standard used in securities-fraud cases. Not so: Materiality determinations may leave room for judgment, but at least the standard is coherent.

Nor do plaintiffs explain why the "assignment-plus-breach" theory is a plausible interpretation of the PMPA's text. Plaintiffs insist that the court of appeals' standard has "solid roots" in the PMPA because it "harkens back" to the Act's provision declaring a dealer's breach of a material franchise provision to be grounds for termination. See Dealers Br. 33-34 (citing 15 U.S.C. §2802(b)(2)(A)). But the fact that the Act identifies a dealer's breach as one *justification* for termination does not prove that Congress meant to *equate* mere contract breaches with "terminations." Plaintiffs' further assertion (at 34) that the standard "harkens back" to the Act's supposed "incorporat[ion] [of] state assignment law which invokes a 'materiality' standard" is circular—it assumes the legitimacy of the assignment-based theory it seeks to defend. Besides, the whole point of the First Circuit's unintelligible standard was to *dispel* the notion that "any material breach of the lease would necessarily be sufficient," J.A. 447; the standard thus cannot possibly "harken[ ] back" to provisions that *invoke* a "materiality" standard. And plaintiffs never even begin to explain why a *prior valid assignment* should convert breaches into terminations.

Plaintiffs' attempt to defend *Barnes*'s alternative theory—that an assignment amounts to a constructive termination if it is invalid under state law—fares no better. *Barnes* simply misunderstood assignment law: An inva-

lid assignment may be *ineffective*, and thus fail to transfer the assignor's contract to the assignee, but it does not terminate the contract between the original parties. See Shell Br. 39 (citing authorities). Plaintiffs cite nothing in response. They assert that Congress intended "terminate" to include invalid assignments because an unrelated statutory provision defines "failure" to exclude noncompliance with invalid franchise terms. Dealers Br. 34-35 (citing 15 U.S.C. §2801(13)(C)). But the Act does not define "terminate" as a "failure" to do anything. And even if it did, the "failure" definition would not transform invalid (and thus ineffective) assignments into terminations.

b. The government conspicuously refuses to endorse *Barnes*'s assignment-based theory. And the government agrees that there can be no "termination" absent an end to one of the three franchise elements. Gov't Br. 10. The government suggests, however, that a constructive termination could exist if a franchisor's conduct compelled a dealer "to abandon one (or more) of the franchise elements"—by, for example, "foreclos[ing] any reasonable possibility that the business could be operated profitably." *Id.* at 21. We assume the government is not suggesting that the PMPA converts franchisors into guarantors of dealer profitability; the government presumably means to require at least that the dealer's loss of a statutory franchise element have resulted from the franchisor's wrongful conduct with respect to that element. See Shell Br. 44 & n.25. Even so, the government's proposed standard—never before adopted by any court applying the PMPA—would exponentially expand liability under the Act. Until now, "'constructive termination' claims under the PMPA * * * have been limited to one specific context: when a franchisor has assigned the franchise

agreement to a third party." *Atl. Autocare, Inc.* v. *Shell Oil Prods. Co. LLC*, 605 F. Supp. 2d 463, 467-470 & nn.3-4 (S.D.N.Y. 2009) (canvassing precedents); see Shell Br. 34-35.[6] Under the government's approach, however, unsuccessful dealers dissatisfied with franchisor policies could claim constructive termination *whether or not* their franchises had ever been assigned.

Shell and Motiva agree with the government that *Barnes*'s assignment-based theory is incoherent. But the appropriate remedy is to reject the assignment-based theory of constructive termination, not to reject the assignment-based *limitation* on that theory. As explained above, the PMPA's text and history simply do not support claims for constructive termination. See pp. 4-9, *supra*. The fact that two decades of case law under the PMPA have limited constructive termination claims to the quirky area of assignments is yet another reason to reject the doctrine, not to import far broader theories that are wholly foreign to the PMPA.

3. *Constructive Termination Claims Frustrate Congress's Objectives*

Plaintiffs appeal to policy (at 21), but Congress's policies point the other way. Congress sought to "*clearly define* the rights and obligations of the parties." S. Rep. No. 95-731, at 19 (emphasis added). The standard that plaintiffs defend, however, is incoherent. See pp. 10-11, *supra*; Gov't Br. 8. And *any* constructive termination standard destroys the certainty Congress sought to achieve.

Constructive termination claims inevitably embroil courts and juries in intractable line-drawing exercises.

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[6] Plaintiffs identify only a single, unreported decision allowing a claim outside the assignment context. See Dealers Br. 33 n.18.

While extreme (and thus unrealistic) hypotheticals are easy to imagine, constructive termination claims invite *every* unsuccessful dealer to make a federal case out of its failure by claiming that franchisor fuel prices, rent, or trademark policies caused it to fail. But countless factors affect a dealer's viability, and Congress did not enact the PMPA to make franchisors guarantors of dealer profitability. Constructive termination suits would require a jury to determine not only why the dealer failed, but also whether a "typical" dealer would have failed under those circumstances (and what a "typical" dealer is). See Shell Br. 44 & n.24. The moment one expands the Act beyond *actual* terminations of a franchise—*i.e.*, *actual* refusals by the franchisor to provide one of the three statutory franchise elements—Congress's goal of "clearly defin-[ing]" the parties' rights and obligations gives way to conflict and protracted litigation.

Plaintiffs' interpretation also defies Congress's objective of "provid[ing] certainty and uniformity" in the area of termination and non-renewal by replacing an "uneven patchwork" of state-law standards with a "single, uniform set of rules." S. Rep. No. 95-731, at 16, 19. As *amicus curiae* API explains (at 18-22), constructive termination claims cause the statutory definition of "terminate" to turn on state law—a result impossible to square with Congress's goal of uniformity. Plaintiffs point (at 42-43) to other provisions of the PMPA that reference state law. But those discrete provisions merely confirm that Congress knew how to reference state law when it wanted to. None suggests that Congress meant to destroy the very uniformity it sought to achieve by incorporating varying state-law standards into the definition of "terminate" at the heart of the Act.

The PMPA, moreover, preempts inconsistent state law. 15 U.S.C. §2806(a)(1). Expanding the Act to reach constructive terminations thus ousts traditional state authority. See Shell Br. 29. In that regard, the PMPA is very different from the statute this Court construed to allow constructive discharge claims in *Suders*, which expressly *preserved* state remedies. See 42 U.S.C. §2000e-7. This Court does not lightly infer that Congress "significantly changed the federal-state balance." *United States* v. *Bass*, 404 U.S. 336, 349 (1971). Plaintiffs' construction would do precisely that.

That expansive displacement of state law is wholly unnecessary. Dealers claiming *constructive* termination *necessarily* have state-law remedies, because a breach of the franchise agreement is an element of the claim. See Shell Br. 44 n.25. Here, for example, plaintiffs prevailed on breach-of-contract claims for the very conduct—Motiva's discontinuance of the rent subsidy—that formed the basis of their constructive termination claims. *Id.* at 28. Constructive termination claims thus are not necessary to protect dealers from capricious rent increases, $1,000-per-gallon fuel prices, or any other obvious breach of the franchise agreement that threatens the dealer's viability. They merely distort resolution of state-law contract disputes by inviting plaintiffs to convert state-law claims into "constructive terminations" to obtain punitive damages, attorney's and expert witness fees, and liberal injunctive relief under federal law. See *id.* at 29-30.

That is precisely why Congress limited the PMPA to franchise *terminations*—actual deprivations of one of the three statutory elements of the franchise. Congress understood that franchise relationships are "basically contractual in nature," but it saw a gap in contract remedies: Franchisors could use their greater bargaining power to

insist on broad contractual termination rights and then exercise those rights over trifling franchisee errors. See S. Rep. No. 95-731, at 17-18. Congress filled that gap by regulating terminations. Congress thus was not seeking to federalize breach-of-contract claims; it was concerned primarily about terminations *permitted by* the contract terms. Plaintiffs, however, would transform the PMPA into precisely the federal breach-of-contract remedy Congress chose not to enact.

B. Even If the PMPA Permitted Constructive Termination Claims, It Would Not Apply Where the Dealer Continued as a Franchisee

In any event, no plausible theory of constructive termination could support the judgment here. Even assuming the PMPA reaches constructive terminations, a franchisor's conduct "does not fall within the statutory prohibition unless it has the effect of ending at least one of the three prerogatives that the franchise entails." Gov't Br. 11-12. Plaintiffs never abandoned any of those three elements. To the contrary, they operated as franchisees long after their alleged "termination," earning as much as $200,000 a year doing so.

1. *"Constructive" Claims in Other Contexts Require an End to the Relationship*

Plaintiffs' constructive termination theory cannot be reconciled with *any* other area of the law, because "analogous common-law doctrines have traditionally 'require[d] an actual severance of the relationship.'" Gov't Br. 18. An employee claiming constructive discharge "'must leave the workplace'"; a tenant claiming constructive eviction "'must move out'"; a franchisee claiming constructive termination under other statutes must end the franchise. See *id.* at 18-19; Shell Br. 41-43 & nn.20, 22; J.A. 446. The termination is "constructive" only in

the sense that the plaintiff rather than the defendant ends the relationship—not in the sense that there is no "termination" at all.

While plaintiffs do not dispute that constructive discharge requires an end to employment, they suggest in passing (at 38 & n.20) that constructive eviction might not require an end to the tenancy. Two of the cases they cite, however, merely recognize that a tenant forced to abandon *part of* the premises can sue for constructive eviction *from that portion*. See *Minjak Co.* v. *Randolph*, 140 A.D.2d 245, 248 (N.Y. App. Div. 1988); *County Holding Corp.* v. *Brati Inc.*, No. 2001-38KC, 2002 WL 1275031, at *1 (N.Y. Sup. App. Term Mar. 15, 2002). One of those cases *expressly reaffirms* the "requirement of abandonment of premises." *Minjak*, 140 A.D.2d at 248. The third case merely holds that a tenant confronted with conditions that would justify abandoning the premises and suing for constructive eviction can repair the condition and offset the cost from his rent instead. See *Marini* v. *Ireland*, 265 A.2d 526, 535 (N.J. 1970). Finally, while plaintiffs urge that modern courts take a more contractual view of the landlord-tenant relationship in place of the "traditional remedy of constructive eviction *which requires abandonment of premises*," Dealers Br. 38-39 & n.21 (emphasis added), that undercuts their position. Franchise agreements are likewise contractual, and dealers confronted with breaches can pursue contract remedies—precisely what plaintiffs successfully did here.

Plaintiffs, moreover, do not dispute that, in the most analogous area—state franchise statutes—courts require an actual end to the relationship. Plaintiffs quibble (unsuccessfully) over how many courts allow constructive claims *at all*. See pp. 9-10 & n.5, *supra*. But they cannot dispute that—with only a few exceptions, all of which

postdate the PMPA's enactment—courts that do recognize constructive claims require an end to the franchise. See Shell Br. 42-43 & nn.22-23.

Unable to dispute the legal landscape, plaintiffs ask this Court to ignore it because petroleum franchises are supposedly "'unique.'" Dealers Br. 38. Not so. No less than service-station franchisees, tenants or employees are parties to "continuing relationship[s]" and may have made substantial "investment[s]" in their homes or careers. Cf. *ibid.* There is no reason the law should require longtime tenants to abandon their homes before claiming constructive eviction, or longtime employees to sacrifice their jobs before claiming constructive discharge, but not require a service-station operator to end its franchise before claiming constructive termination. And plaintiffs do not even attempt to explain why service-station franchises are distinguishable from myriad other franchises covered by state statutes that require an end to the franchise (and often do not allow constructive claims at all).

Plaintiffs finally urge the Court (at 40) to ignore the employment and landlord/tenant contexts because Congress had no "particular or analogous settings in mind." But that underscores why the Court should not recognize constructive termination claims at all. The PMPA's text does not encompass such claims. See pp. 4-5, *supra*. The only way the Court could recognize the claims is *if* Congress had some analogous context in mind where the claims had traditionally been allowed. The accurate observation that there is no evidence Congress meant to incorporate constructive termination concepts from employment or landlord/tenant law is precisely why the PMPA should not be read to authorize constructive termination claims. The contexts that Congress focused on

were not employment and landlord/tenant law, but state franchise statutes and the Uniform Commercial Code—contexts where constructive termination claims had *never* been recognized when the PMPA was enacted and are not clearly established even today. See pp. 7-9, *supra*.

2. *The Act's Limitations Period and Injunctive Remedies Do Not Support Plaintiffs' Claims*

Plaintiffs argue that other provisions of the PMPA show that Congress contemplated claims by dealers that continue as franchisees. They urge (at 22) that the Act's statute of limitations demonstrates that Congress could not have intended "terminate" to mean "end" because that provision lists both the date of termination and the date of violation as alternative accrual dates. See 15 U.S.C. §2805(a). Some PMPA violations, however, do not occur until *after* termination. See, *e.g.*, *id.* §2802(d)(1) (requiring franchisor to remit portion of condemnation award to dealer where franchise was terminated due to condemnation); *id.* §2802(d)(2) (requiring franchisor to offer right of first refusal if franchise was terminated due to destruction of premises but station was rebuilt). The statute of limitations' two-pronged structure thus does not prove that "terminate" means something other than "terminate." It shows only that some violations do not occur upon termination.

Plaintiffs alternatively argue (at 20-28) that, because the Act authorizes preliminary injunctive relief, 15 U.S.C. §2805(b)(2), Congress could not have intended to require franchisees to go out of business before invoking the Act. Plaintiffs are correct that a dealer seeking preliminary relief must prove that "the franchise of which he is a party *has been terminated*." *Id.* §2805(b)(2)(A)(i) (emphasis added). But that does not necessarily mean the dealer must have *gone out of business* before bringing

suit. A franchisor must furnish a dealer with a notice of termination in advance of the date the termination "takes effect." *Id.* §2804(a)(2). As a result, in cases of *actual* termination, the date a dealer is "terminated" and the date the dealer stops operating are typically distinct. As the government explains (at 16 n.6), just as an employee who receives a pink slip could describe himself as *having been* "fired" even if his last day at work has not yet arrived, a dealer that receives a notice of termination can describe itself as *having been* "terminated" even though the termination "takes effect" later. Similarly, where a franchisor refuses to provide a statutory element such as fuel, the dealer could describe itself as *having been* "terminated," even if it can operate for a few days before its inventory runs out. The PMPA's requirement that the franchise "ha[ve] been terminated" before the dealer seeks an injunction thus does not suggest that "terminate" means anything other than "terminate."

Moreover, notwithstanding plaintiffs' repeated invocations of courts' historic "equitable powers" (*e.g.*, Dealers Br. 21, 41), this is not a case about injunctive relief to prevent *anticipated* violations. Plaintiffs sought injunctive relief below but were denied it because they waited too long; they have not appealed that ruling. See J.A. 123-126. This is a case about retrospective monetary relief for alleged "terminations" that never occurred. Plaintiffs recovered over a million dollars in damages plus another million in attorney's and expert witness fees on the theory that their franchises were "terminated" when they in fact continued to operate as franchisees, using the same fuel, trademark, and premises. Nothing in the Act's injunctive framework supports that result.

3. *Plaintiffs' "Attempted" Termination Theory Fails*

Unable to show even a constructive termination, plaintiffs reinvent their suit as one for *attempted* termination. They allege that Shell and Motiva "*attempt[ed]* to terminate the[ir] franchise[s]" and "*intended* to * * * force an end" to them. Dealers Br. 20, 25 (emphasis added). They claim that this alleged attempt—even though unsuccessful—entitles them to damages. See *id.* at 27. That theory is baseless.

The dealers do not cite a single case that has ever allowed damages for "attempted" termination under the PMPA. Nothing in the Act's text, structure, or legislative history suggests Congress authorized such claims. That is not surprising. The very concept of civil liability for "attempt" is anomalous. Attempt offenses are well known in *criminal* law. See *United States* v. *Resendiz-Ponce*, 549 U.S. 102, 106-107 (2007); Model Penal Code §5.01. But they are largely unknown in tort law. See Goldberg & Zipursky, *Unrealized Torts*, 88 Va. L. Rev. 1625, 1636-1641 (2002). As Judge Posner succinctly put it: "There are no 'attempted torts.'" *United States* v. *Stefonek*, 179 F.3d 1030, 1036 (7th Cir. 1999); see also *Cenco Inc.* v. *Seidman & Seidman*, 686 F.2d 449, 453 (7th Cir. 1982). The notion that Congress jettisoned that longstanding principle in enacting the PMPA is fanciful. The dealers' attempt theory, moreover, was neither pressed in the court below, see Dealers C.A. Br. 40-50, nor presented to the jury, see J.A. 372-374. It cannot salvage the judgment.

4. *Congress Did Not Intend the PMPA To Be One-Sided*

Finally, plaintiffs assert (at 40-42) that Congress intended the PMPA to be one-sided legislation that favors

only dealers. That is not true. The Senate and House reports both state that the Act seeks to "*strike a balance* between the at times conflicting interests of the parties." S. Rep. No. 95-731, at 15 (emphasis added); H.R. Rep. No. 95-161, at 13 (1977) (same). Similar comments recur throughout the legislative history. See Gov't Br. 13. That balance is reflected in the statute's careful pairing of provisions that protect dealers with other provisions that, for example, allow franchisors to respond to changing market conditions, 15 U.S.C. § 2802(b)(3)(A), and preempt inconsistent state laws, *id.* § 2806(a)(1). Those latter provisions are hard to explain if Congress sought to benefit only dealers.

Plaintiffs urge (at 41) that the PMPA is "remedial legislation" that must be "liberal[ly] construe[d]." But one could conversely argue (as many courts have held) that the PMPA should be *narrowly* construed because it derogates from franchisors' common-law property rights. See, *e.g.*, *Clark* v. *BP Oil Co.*, 137 F.3d 386, 391 (6th Cir. 1998). The balance Congress struck is best effectuated, not by tilting the playing field, but by giving a fair and evenhanded reading to the provisions Congress saw fit to enact. The PMPA by its terms regulates franchise "terminat[ions]" while leaving other aspects of the relationship to state law. Awarding millions of dollars for "termination" to dealers still operating their franchises requires not a "liberal" construction but a lawless one.

II. Shell And Motiva Did Not "Fail To Renew" Any Franchise Relationship

Plaintiffs' constructive non-renewal claims fail for similar reasons. Just as "terminate" means "terminate," "fail to renew" means "fail to renew." Because plaintiffs were offered and signed renewal agreements, Motiva did not "fail to renew" their franchise relationships. Plain-

tiffs insist (at 44) that Motiva "constructively" failed to renew the relationships because the new agreements were intended to drive them out of business. Plaintiffs distort the record,[7] but their accusations are ultimately beside the point. Plaintiffs were offered and signed renewal agreements. As a result, Motiva could not have "fail[ed] to renew" their franchise relationships.

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[7] For example, plaintiffs' implausible suggestion (at i) that Shell *formed Motiva* to drive them out of business has no support in the record at all. Cf. *Texaco Inc.* v. *Dagher*, 547 U.S. 1, 6 n.1 (2006). Plaintiffs also assert (at 8) that Shell was "[u]nwilling to negotiate a buyout" and "devised a plan to force its franchisees out of business," but they cite nothing to support either claim. Plaintiffs contend (at 9) that the new agreements included "rent increases and other terms that were designed to discourage the dealers from renewing and to enable Motiva to convert the franchise-operated stations to direct operations." Instead of citing evidence, however, they cite the jury instructions and verdict. J.A. 375, 382. Plaintiffs state (at 9 & n.9) that the new rents were expected to "result in the 'closure' of franchise stations" and a "transition to direct operations," but the cited testimony merely notes that *some* franchise stations might not be able to pay the higher rents, not that Shell wanted to eliminate its franchisees. See C.A. App. 3615-3616, 3628. Plaintiffs assert (at 10) that two dealers "sold their businesses below market value," but the cited testimony establishes only the obvious fact that franchise values went down when rents went up. *Id.* at 882-884, 978. Plaintiffs also contend (at 10) that some dealers remained profitable only because of "ancillary businesses," but they refer to things like selling "snack[s]," "cigarette[s]," and "lottery [tickets]." *Id.* at 917. Given that the entire service-station industry had shifted to offering such amenities (the very reason for the change in industry rent structure), see J.A. 402, it is hardly surprising that a service station would not remain competitive if it stopped selling everything but gasoline. Finally, while plaintiffs repeatedly make claims about what the jury "found" (*e.g.*, Dealers Br. i), the jury made no specific factual findings, see J.A. 376-386, and—given the compelling evidence of good-faith business reasons for the challenged lease changes, see J.A. 402-403—there is no reason to believe the jury accepted every theory plaintiffs offered.

A. The Act Requires Non-Renewal

Plaintiffs urge (at 45) that the Act does not require a notice of non-renewal to support a claim. That is true but irrelevant. What the Act *does* require is a "fail[ure] to renew." 15 U.S.C. §2802(a)(2). A franchisor can fail to renew a dealer *lawfully* by giving the required notice. Alternatively, the franchisor can fail to renew the dealer *unlawfully*—for example, by refusing to renew *without* the required notice. But there can be no claim for non-renewal without a "fail[ure] to renew" of some sort.

Plaintiffs assert (at 46) that there is no "good reason" why a dealer's rights should depend on whether the dealer is presented with an "unlawful lease on a 'take-it-or-leave-it' basis" rather than a notice of non-renewal. But there are legitimate reasons why a multistate franchisor like Motiva might insist on uniform terms, and nothing in the PMPA prohibits insistence on standardized contracts. See J.A. 218; *Abrams Shell* v. *Shell Oil Co.*, 343 F.3d 482, 485, 488-489 (5th Cir. 2003). Plaintiffs, moreover, simply beg the question by labeling the proposed leases "unlawful" when the cause of action by its terms requires a non-renewal, not a renewal on terms the dealer dislikes.

Plaintiffs insist (at 46-47) that they confront a "Hobson's Choice" because, unless they sign the renewal agreement, they risk having to "cease operations." But the whole point of the Act's relaxed injunctive standard—which requires not a probability of success but mere "serious questions" and omits any irreparable-harm requirement, 15 U.S.C. §2805(b)(2)—is to ensure that dealers with legitimate claims do *not* have to "cease operations." Dealers confronted with objectionable renewal terms can follow the course set forth in the statute: refuse to sign the renewal agreement; receive a notice of non-renewal

well before its effective date; and challenge the non-renewal while obtaining a preliminary injunction to maintain the status quo. See Shell Br. 50-52. As the government recognizes (at 28), dealers with meritorious claims face no difficulty vindicating their rights.[8]

B. Ratification Principles Are Irrelevant

Plaintiffs contend (at 48-50) that the court below erroneously relied on a "ratification" theory. They claim that, although they signed renewal agreements, the court should have disregarded the renewals because they allegedly reserved their rights by signing "under protest." But the problem with plaintiffs' suit is not that plaintiffs "ratified" the renewal agreements by signing them. The problem is that, where a dealer is offered and signs a renewal agreement, the franchisor has not "fail[ed] to renew" the franchise relationship—a prerequisite to any non-renewal claim. 15 U.S.C. § 2802(a)(2). Because there is no violation, there is nothing to waive by ratification.

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[8] The government argues that the Act covers not only *actual* non-renewals but also *constructive* non-renewals where a franchisor "insist[s] on changes that a franchisee would be forced to reject because continued operation under such terms would not be reasonably possible." Gov't Br. 23. The doctrine of "constructive non-renewal" has no more basis in the Act's text or history than the doctrine of constructive termination, and should be rejected for the same reasons. See pp. 4-9, *supra*. Nonetheless, so long as constructive non-renewal claims require an end to the relationship, the issue lacks practical significance. A dealer's refusal to agree to proposed renewal terms is grounds for non-renewal. 15 U.S.C. § 2802(b)(3)(A). Consequently, where a franchisor proposes renewal terms so burdensome that the dealer is forced to reject them, the franchisor ordinarily would issue a notice of non-renewal based on the failure to agree, at which point there would be an *actual* non-renewal. See Shell Br. 50-52; *Dersch Energies, Inc.* v. *Shell Oil Co.*, 314 F.3d 846, 863 (7th Cir. 2002); J.A. 452. Superimposing a "constructive" claim adds nothing.

Authorities such as U.C.C. § 1-207(1) are thus inapposite. Those authorities merely explain that conduct that might otherwise waive a pre-existing claim—such as paying an illegal tax or accepting defective performance—does not have that effect if done "under protest." The PMPA, however, confers no claim except in the two areas Congress addressed—termination and non-renewal. Absent a non-renewal, there is no right to sue, so there is nothing to "reserve" by signing under protest. The dealers did not waive valid claims by signing the renewal agreements; they simply made it impossible to prove an essential element of their claims—that Motiva "fail[ed] to renew" the franchise relationships. See Shell Br. 53; Gov't Br. 23-24.[9]

C. *Pro Sales* Is Unpersuasive

Finally, plaintiffs rely (at 51-54) on the Ninth Circuit's decision in *Pro Sales, Inc.* v. *Texaco, U.S.A.*, 792 F.2d 1394 (9th Cir. 1986). But no other court of appeals has adopted the Ninth Circuit's position, while four circuits have now flatly rejected its approach. See Shell Br. 50. As the Seventh Circuit explained in *Dersch Energies, Inc.* v. *Shell Oil Co.*, 314 F.3d 846, 864-866 (7th Cir. 2002), the PMPA contains a carefully calibrated notice-and-preliminary-injunction scheme for resolving renewal disputes. Constructive non-renewal claims allow dealers to bypass that structure—a point *Pro Sales* ignored. See

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[9] Plaintiffs' claim (at 49) that their attorney "wrote to Motiva (before any dealer signed a renewal lease) to protest the legality of the new leases" is misleading. The cited letter does not identify any of the eight dealers, and its objections have nothing to do with the rent policies at issue in this suit. See J.A. 129-131.

Shell Br. 52-53. Nothing in plaintiffs' brief undermines *Dersch*'s analysis.[10]

Plaintiffs finally attempt (at 54) to distinguish *Dersch* on the ground that they promptly filed suit. *Dersch*, however, did not turn on the suit's timeliness. See 314 F.3d at 865. The PMPA prohibits only "fail[ure] to renew," not renewal on terms a dealer finds objectionable but nevertheless accepts. See 15 U.S.C. § 2802(a)(2). Timeliness is irrelevant where, as here, there has been no non-renewal at all.

CONCLUSION

For the foregoing reasons and those set forth in Shell and Motiva's opening brief, the judgment of the court of appeals should be reversed with respect to the termination claims (No. 08-372) and affirmed with respect to the non-renewal claims (No. 08-240).

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[10] Plaintiffs criticize *Dersch* (at 53-54) for requiring a notice of non-renewal to establish a claim. But *Dersch* required only what the Act requires: a non-renewal. See 314 F.3d at 866. And plaintiffs' assertion (at 52) that *Dersch* "addressed a violation of section 2805(f), not section 2802," is simply wrong. See *id.* at 852 (plaintiff alleged violations of "both § 2802 and § 2805(f)(1)"); Mem. in Resp. to Pet. in No. 08-240, at 23-24.

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