

1           IN THE SUPREME COURT OF THE UNITED STATES

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3   MAC'S SHELL SERVICE, INC.,                                 :

4   ET AL.,   :

5                                 Petitioners                         :

6                                 v.                                 :   No. 08-240

7   SHELL OIL PRODUCTS   :

8   COMPANY, LLC, ET AL.;   :

9   - - - - - - - - - - - - - - - - -x

10   And

11   - - - - - - - - - - - - - - - - -x

12   SHELL OIL PRODUCTS   :

13   COMPANY, LLC, ET AL.,   :

14                                 Petitioners                         :

15                                 v.                                 :   No. 08-372

16   MAC'S SHELL SERVICE, INC.,   :

17   ET AL.   :

18   - - - - - - - - - - - - - - - - -x

19   Washington, D.C.

20   Tuesday, January 19, 2010

21

22                                 The above-entitled matter came on for oral  
23   argument before the Supreme Court of the United States  
24   at 10:02 a.m.

25

1 APPEARANCES:

2 JEFFREY A. LAMKEN, ESQ., Washington, D.C.; on behalf of  
3 Shell Oil Products Company, LLC, et al.

4 DAVID O'NEIL, ESQ., Assistant to the Solicitor  
5 General, Department of Justice, Washington, D.C.;  
6 on behalf of the United States, as amicus curiae,  
7 supporting Shell Oil Products Company, LLC, et al.

8 JOHN F. FARRAHER, JR., ESQ., Washington, D.C.; on behalf  
9 of Mac's Shell Service, Inc., et al.

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7	On behalf of the United States,	
8	as amicus curiae, supporting Shell Oil	
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1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 first this morning in Case 08-240, Mac's Shell  
5 Service v. Shell Oil Products, and the consolidated case.  
6 Mr. Lamken.

7 ORAL ARGUMENT OF JEFFREY A. LAMKEN  
8 ON BEHALF OF SHELL OIL PRODUCTS  
9 COMPANY, LLC, ET AL.

10 MR. LAMKEN: Thank you, Mr. Chief Justice, and  
11 may it please the Court:

12 Congress enacted the PMPA to regulate two  
13 specific, but important, actions: Franchisors'  
14 termination of the franchise prior to the conclusion of  
15 the franchise term and the franchisors' non-renewal of  
16 the franchise relationship at the end of the agreement's  
17 term.

18 The statute responded to complaints about  
19 franchisors exercising broad contractual rights to  
20 terminate the franchise relationship that was not  
21 addressed by -- for trivial violations or at will, that  
22 was not previously addressed by State law. But Congress  
23 left all other aspects of the franchise relationship to  
24 State law.

25 Because the term "terminate," at the very

1    least, requires an end, we and the United States agree  
2    that the First Circuit erred in upholding a so-called  
3    constructive termination, where the dealers continued to  
4    receive each element of the statutory franchise -- that  
5    is the premises, the trademark, and fuel --

6               JUSTICE SCALIA:  Mr. Lamken, am I wrong that  
7    you don't really object to the recognition of  
8    "constructive termination," if that phrase is used the  
9    way it is used elsewhere in contract law?

10              MR. LAMKEN:  We don't believe that in contract  
11   law constructive termination exists or in the analogous  
12   State franchise statutes that existed at the time that  
13   the Congress enacted the PMPA.

14              JUSTICE SCALIA:  Gee, I thought -- I thought  
15   that if you had a lease and the landlord fails to  
16   provide heat, that you can move out and he will be  
17   deemed to have constructively evicted you.

18              MR. LAMKEN:  That's right.  The term  
19   "constructive eviction" we would -- we believe does  
20   exist, along with "constructive discharge."  But the  
21   precise terms that Congress used here were "terminate,"  
22   "non-renew," and "cancel," which are drawn from the law  
23   of contracts and the U.C.C., in particular, and from  
24   State franchise statutes.  We --

25              JUSTICE GINSBURG:  But that -- on that point,

1 the government differs with you. The government says,  
2 as Justice Scalia suggested, there can be such a thing  
3 as constructive termination, and you must terminate.

4 MR. LAMKEN: Yes. It's not so much that we  
5 differ; it's that our fallback position is the same as  
6 the government's, but they do not endorse our primary  
7 position, which is that there is no such thing as  
8 constructive termination.

9 We believe it would be a mistake to recognize  
10 constructive termination in this context for three  
11 reasons: The first is the one I already mentioned, is  
12 that, in the most analogous context that existed at the  
13 time Congress acted, State franchise statutes that used  
14 terms like "terminate," "non-renew," "cancel," the terms  
15 that Congress used, there was -- the notion of  
16 constructive termination was frankly unheard of.

17 Even today, under those statutes it is not a  
18 well-accepted concept, having been rejected by  
19 approximately half the States to have considered it.

20 CHIEF JUSTICE ROBERTS: Well, but all -- under  
21 one view, all the dealer is doing is mitigating damages.  
22 In other words, the deal is off. He's in effect been  
23 terminated. You're saying, well then, he has to pack up  
24 and leave. He can stay and still reduce the damages you  
25 are going to have to pay.

1           MR. LAMKEN: On the contrary, Your Honor.  
2    It's not so much -- there isn't a mitigation of damages,  
3    any more than an employee claiming constructive  
4    discharge, for example, would be mitigating damages by  
5    staying in her job. The settled rule, even when  
6    constructive claims are recognized, is that an employee  
7    claiming --

8           CHIEF JUSTICE ROBERTS: Well, but there --

9           MR. LAMKEN: -- constructive discharge must  
10   move out, must quit the job, and the tenant claiming  
11   constructive eviction must leave the job. That is the  
12   nature, even where constructive discharge and  
13   constructive termination -- constructive eviction  
14   claims, are recognized. That is the settled rule.

15           If you have something else, for example,  
16   there's a breach of contract, you can claim your breach  
17   of contract, and you can sue for damages while  
18   continuing to operate. But if you're going to claim  
19   that it wasn't a mere breach of contract, but in fact it  
20   was a constructive termination, that you've lost all the  
21   rights to continue to operate -- you may not get fuel,  
22   you may not get --

23           CHIEF JUSTICE ROBERTS: Well, you've lost the  
24   rights to operate at a particular level. In other  
25   words, if they say -- I don't know how the deal works,

1 but, you know, you've got to charge \$10 a gallon or, you  
2 know, you've got to close the convenient mart or  
3 whatever, you have lost the right to operate at that.  
4 The terms of the lease under which you were operating  
5 have been effectively terminated. That doesn't mean you  
6 can't still make money, and it doesn't mean you have to  
7 give that up, but --

8 MR. LAMKEN: Well --

9 CHIEF JUSTICE ROBERTS: -- but the deal has  
10 been terminated.

11 MR. LAMKEN: I think, Mr. Chief Justice, you  
12 have confused breach with termination. The failure to  
13 give the rights on the terms provided in the lease or  
14 the agreement would be a breach of contract. But  
15 termination in contract law has long been understood to  
16 be something entirely different, which is the absolute  
17 refusal to provide the elements such that it's obvious  
18 to any observer that there is -- these elements will not  
19 be resumed.

20 Corbin on Contracts, for example, describes  
21 termination as occurring "when either party, pursuant to  
22 a power created by agreement or law, puts an end to the  
23 contract," "extinguishing future obligations of both  
24 parties to the agreement."

25 CHIEF JUSTICE ROBERTS: What did Williston say



1 about it? Contract --

2 MR. LAMKEN: Pardon.

3 CHIEF JUSTICE ROBERTS: What does Williston  
4 say about it?

5 MR. LAMKEN: Williston didn't actually address  
6 that. Corbin addresses it because he talks about the  
7 U.C.C., and the U.C.C. in turn says: "On termination,  
8 all obligations" --

9 JUSTICE KENNEDY: Is -- is leaving the  
10 premises the sine quo non of a termination?

11 MR. LAMKEN: It's the sine qua non of any  
12 termination under this statute, we would believe, if you  
13 recognize constructive termination.

14 JUSTICE KENNEDY: But aren't there -- aren't  
15 there some operators that own their own premises?

16 MR. LAMKEN: That's right. That's why it  
17 would have to be a determination of one of the three  
18 franchise elements. The way the statute's written, each  
19 of the different --

20 JUSTICE KENNEDY: So only one of the three  
21 would suffice in your view?

22 MR. LAMKEN: That's right. Each of these  
23 separate elements is treated as a franchise, and you can  
24 have the termination of any one of the three, and that  
25 is a termination of the franchise --

1 JUSTICE KENNEDY: Just --

2 MR. LAMKEN: -- defined within the agreement.

3 JUSTICE KENNEDY: Just testing your view,  
4 suppose there are two franchisees, and in each case the  
5 oil company reduces the amount they're paying for the  
6 gas. One franchisee can't afford it, leaves, quits --  
7 termination. The other franchisee has a considerable  
8 amount of savings, and he protests, but he stays in  
9 business. Different result?

10 MR. LAMKEN: Well, in our view the result  
11 would be the same in both. Neither of those would be a  
12 termination, because --

13 JUSTICE KENNEDY: No, no. In my first, he  
14 ceases to operate and he moves out of the premises.

15 MR. LAMKEN: Right. In our view it has to be  
16 the franchisor that terminates, not the franchisee. But  
17 if one accepts the construct of the constructive  
18 termination, those would be different results, because,  
19 at the very least, termination requires an end to one of  
20 the franchise elements. And the individual who sues,  
21 having not -- having -- still receiving all the  
22 franchise elements, hasn't been terminated in any sense  
23 of the word.

24 But the key thing is he actually has a breach  
25 of contract action. Raising the price unreasonably on

1 an open price term has long, uniformly, comprehensively  
2 been addressed by State law, like U.C.C. 2-305.

3 So the answer always is you can sue for  
4 breach of contract. And Congress wasn't worried about  
5 the fact there might be breaches of contract that  
6 ordinary contract remedies don't sufficiently remedy.  
7 Congress's concern was the exercise of contractually  
8 broad rights to terminate and non-renew the  
9 relationship. And --

10 JUSTICE KENNEDY: If the government comes up  
11 here, as I think they will in a few minutes, and tells  
12 us that there is such a thing as constructive  
13 termination, do you know what hypothetical they give us  
14 to illustrate how that would work? I mean, it's their  
15 argument, but I'm curious. I will be curious to know  
16 how you would respond to that.

17 MR. LAMKEN: Well --

18 JUSTICE KENNEDY: In other words, there is a  
19 small universe of cases in which there is a constructive  
20 termination without leaving the premises, without  
21 severing the fuel, et cetera.

22 MR. LAMKEN: I don't --

23 JUSTICE KENNEDY: I just don't know what  
24 they're going to -- how you would respond to that?

25 MR. LAMKEN: Yes. I think the government

1 doesn't think that constructive termination extends to  
2 cases where you continue to receive all three franchise  
3 elements. They would believe that constructive  
4 termination requires at least one of those three  
5 elements to end, just as it does --

6 JUSTICE GINSBURG: Your position is that the  
7 franchisor has to be the one to terminate?

8 MR. LAMKEN: That's our position, yes. The  
9 franchisor has to be the one that exercises the  
10 termination. The notion of constructive termination,  
11 where the franchisee effectively abandons the premises  
12 in response to conditions it thought intolerable, that  
13 that is a constructive termination, and it was not a  
14 concept that existed under the most analogous statutes  
15 under the contract law from which the terms  
16 "termination," "non-renewal" --

17 JUSTICE GINSBURG: So that the franchisor can  
18 do outrageous things -- triple the rent, double the  
19 price of the fuel -- and you would say, even so, there's  
20 -- that doesn't count as a termination because the  
21 franchisor hasn't terminated?

22 MR. LAMKEN: That's right, and precisely  
23 because all those things were comprehensively and  
24 uniformly addressed by contract law, uniform contract  
25 law. The --

1 JUSTICE KENNEDY: But then you'd just have a  
2 magic words test.

3 MR. LAMKEN: No, it does not reduce -- I mean,  
4 because we -- we agree that there can be a termination  
5 by deed as well as by words. For example, the outright  
6 refusal to provide the fuel, provide fuel at all, would  
7 be a termination. You don't have to say we are hereby  
8 rescinding all of your rights under the contract. At  
9 some point, it becomes obvious, clear to any observer.

10 JUSTICE SCALIA: Yes, but what happens after  
11 that? Don't you take the position that the station  
12 owner then has to refuse all other elements of the  
13 contract, right?

14 MR. LAMKEN: If -- no, our position would be  
15 that where the station owner abandons in response, that  
16 would not be an actual termination. The government  
17 would take the view that that's a constructive  
18 termination.

19 JUSTICE SCALIA: Now, wait, wait --

20 MR. LAMKEN: And the problem this gets you --

21 JUSTICE SCALIA: I thought you said there is a  
22 termination by the company if it fails to provide one of  
23 the three basic elements, right?

24 MR. LAMKEN: Yes, that is correct, Justice  
25 Scalia.

1 JUSTICE SCALIA: That is a termination?

2 MR. LAMKEN: That is.

3 JUSTICE SCALIA: What response has to be made  
4 by the station owner? Anything?

5 MR. LAMKEN: Well --

6 JUSTICE SCALIA: He can continue to take the  
7 other two elements?

8 MR. LAMKEN: Well, it's particularly -- I  
9 mean, since the franchise is described as having three  
10 elements --

11 JUSTICE SCALIA: Yes or no?

12 MR. LAMKEN: He can continue taking the other  
13 two elements.

14 JUSTICE SCALIA: And there has still been a  
15 termination?

16 MR. LAMKEN: Well, there has been a  
17 termination of the franchise, which is defined as having  
18 three -- effectively three separate franchise  
19 agreements. Each of the different elements is treated  
20 like it's a different contract or a different agreement.  
21 So if you terminate one, there has been a termination of  
22 the franchise, because the franchise is defined to  
23 encompass all three elements. You've got to get --

24 JUSTICE ALITO: Well, what is the government's  
25 --

1 JUSTICE SCALIA: Whoa, whoa, whoa, whoa, whoa.

2 This is all one contract, isn't it? You are saying --

3 MR. LAMKEN: No --

4 JUSTICE SCALIA: You're saying you can

5 terminate a third of the contract?

6 MR. LAMKEN: Yes. Oftentimes these are in

7 separate contracts, and in this case there are actually

8 two contracts as opposed to three. And, yes, the way

9 the statute's --

10 JUSTICE SCALIA: And they are not contingent

11 on each other, so that at any time the company could

12 terminate one of them and stick the station owner with

13 the other two?

14 MR. LAMKEN: Well, one could imagine a

15 situation where the trademark is withdrawn, but you can

16 continue to be a lessee of the premises and market the

17 fuel as an unbranded --

18 JUSTICE SCALIA: Not continues to be. You

19 must continue to be.

20 MR. LAMKEN: Yes. But the contract could be

21 written that way, Your Honor.

22 JUSTICE SCALIA: That sounds like a very

23 strange way to write the contract.

24 MR. LAMKEN: Well, the way Congress wrote the

25 statute was to define the franchise --

1 JUSTICE SCALIA: I'm not talking about writing  
2 the statute. I'm talking about writing the contract.

3 MR. LAMKEN: Well --

4 JUSTICE SCALIA: Do you really think that  
5 that's how those contracts should be interpreted?

6 MR. LAMKEN: Your Honor, sometimes they are,  
7 for very good reasons, written as independent contracts  
8 and sometimes they will be dependent contracts,  
9 depending on the nature of the relationship between the  
10 parties.

11 JUSTICE ALITO: Well, what is -- what is the  
12 difference between your understanding of an implicit  
13 termination, which is what I take it you have just been  
14 describing, and a constructive termination?

15 MR. LAMKEN: I think an implicit termination  
16 is one that's objectively viewed as ending the nature of  
17 the relationship of the parties. The contract's over.  
18 You no longer have the right. Fuel will not be coming.  
19 You may not use our trademark, or you may no longer use  
20 our premises.

21 A constructive termination, as I understand  
22 the concept, could be something -- and this is the  
23 difficulty with the concept -- something like charging  
24 too much, an excessive price, which is a breach of  
25 contract, which would prevent a reasonable franchisee



1 from continuing to accept that element.

2 JUSTICE ALITO: So if the franchisor  
3 completely refuses to supply gas, that's an implicit  
4 termination?

5 MR. LAMKEN: That's as good as --

6 JUSTICE ALITO: But if he charges \$1,000 a  
7 gallon, that's not a termination?

8 MR. LAMKEN: Right. That's correct. And the  
9 difficulty is -- that would be a breach of contract  
10 remediable under State law. And the difficulty is, the  
11 moment you move this into the issue of price, suddenly  
12 the issue of price -- how much the franchisor can charge  
13 is a question of Federal law, in a statute that just  
14 talks about termination and non-renewal.

15 CHIEF JUSTICE ROBERTS: Well, you -- you put  
16 forth this dichotomy between breach of contract and  
17 constructive termination. I don't know why something  
18 can't be both.

19 MR. LAMKEN: Oh, in fact, in order to be  
20 constructive termination, something would have to be a  
21 breach of contract. I think the government would  
22 concede that. It has to be wrongful. For example,  
23 insisting on your ordinary contractual rights cannot be  
24 a constructive termination. It must also be a breach of  
25 contract, which is precisely why it doesn't add very

1 much to -- it's unlikely that Congress intended to  
2 incorporate it, because those things that already  
3 breached the contract were already addressed by State  
4 law. There was no --

5 JUSTICE GINSBURG: And could you, Mr. Lamken,  
6 straighten out what happened in the district court?  
7 Because I take it there was an award for breach of  
8 contract as well as one for termination and they were in  
9 an identical amount. So what happened to the breach of  
10 contract?

11 MR. LAMKEN: Right.

12 JUSTICE GINSBURG: The award?

13 MR. LAMKEN: The actual damages here -- the  
14 amounts were overlapping. And so everything that they  
15 will recover, the amounts of compensation recovered for  
16 termination, are covered by the breach of contract  
17 claim. The difference between the two is about  
18 \$1.4 million worth of attorney's fees and expert costs  
19 that are covered by the PMPA, but would not be provided  
20 under contract law.

21 JUSTICE GINSBURG: That's a rather significant  
22 difference.

23 JUSTICE SCALIA: What does the company have to  
24 do in your view to effect a genuine termination and not  
25 a constructive termination?

1           MR. LAMKEN: It may do -- one, issue the  
2 notice that's required, say that they are terminating,  
3 that this is -- in the words of contract, we are  
4 extinguishing the future operations; or they can engage  
5 in conduct which an objectively reasonable observer  
6 would have to understand gives that exact same message.

7           JUSTICE SCALIA: Why isn't that constructive  
8 termination?

9           MR. LAMKEN: No, it's --

10          JUSTICE SCALIA: I mean, the conduct is you  
11 stopped sending me the gas you are supposed to send me.

12          MR. LAMKEN: It's an actual termination. And  
13 the problem is, once you get into -- you get into  
14 constructive termination, you get the question of:  
15 Well, is it a constructive termination to raise the  
16 price by 1 percent or, as the case entirely involves  
17 market --

18          JUSTICE SCALIA: Well, I don't understand what  
19 your number two consists of unless it consists of an act  
20 that the other side would call constructive -- or the  
21 government would call constructive termination.

22          MR. LAMKEN: I think sometimes there is an  
23 unclear line between what some people call an implicit  
24 or informal actual termination --

25          JUSTICE SCALIA: Yes.

1           MR. LAMKEN:  -- and what other people would  
2   call a constructive termination.

3           JUSTICE SCALIA:  I think there's always an  
4   unclear line between those two.

5           MR. LAMKEN:  But I don't think -- in the  
6   highly unusual case of \$1,000 per gallon or things like  
7   that, that might be the case.  But in the ordinary cases  
8   you see a 1 percent increase in gas prices in highly  
9   volatile petroleum markets.  For example, in this case,  
10   where Shell raised its prices considerably but was still  
11   charging less than Exxon and Chevron, as the joint  
12   appendix 225 and 237 made clear, that's what you end up  
13   with as claims for constructive termination, if you  
14   recognize constructive termination.

15           But Congress was worried about actual  
16   terminations, the exercise of contractual rights, broad  
17   contractual rights, to terminate that were formerly not  
18   regulated, not breaches of contract that were already  
19   regulated by -- comprehensively, by State law.

20           If I may reserve the remainder of my time for  
21   rebuttal.  Thank you.

22           CHIEF JUSTICE ROBERTS:  Thank you, counsel.

23           Mr. O'Neil.

24           ORAL ARGUMENT OF DAVID O'NEIL

25           ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

1           SUPPORTING SHELL OIL PRODUCTS COMPANY, LLC, ET AL.

2           MR. O'NEIL: Thank you, Mr. Chief Justice, and  
3 may it please the Court:

4           The government agrees with Shell that, because  
5 there was no termination or non-renewal in any  
6 meaningful sense of the word, the dealers failed to  
7 state a claim under the PMPA. But, Justice Ginsburg,  
8 you are correct: The government parts company with  
9 Shell about what the term -- word "termination," does  
10 cover. Shell would limit the --

11           JUSTICE SOTOMAYOR: When would you -- when  
12 would you measure your constructive termination? At  
13 what point would the statute of limitations begin to run  
14 or stop under your definition?

15           MR. O'NEIL: When the franchisee is actually  
16 forced to end one of the statutory elements of the  
17 franchise in response to the franchisor's conduct. And  
18 that's the same test that would be applied in the  
19 constructive discharge or constructive eviction context.

20           JUSTICE SOTOMAYOR: So you -- you would say  
21 that the franchisee in this situation would have had to  
22 say: I can't pay the increased amount of rent without  
23 the subsidy; I'm going to stop.

24           MR. O'NEIL: That's correct.

25           JUSTICE SOTOMAYOR: I'm going to leave the

1 premises.

2 MR. O'NEIL: That's correct. And that is the  
3 same rule that -- that would apply to any other --

4 JUSTICE SOTOMAYOR: And what about the  
5 statutory right for a preliminary injunction? When  
6 would that right kick in, in this situation?

7 MR. O'NEIL: It --

8 JUSTICE SOTOMAYOR: Because the preliminary  
9 injunction stops the change of a contract price -- of a  
10 contract term, obviously, or it continues it. So when  
11 -- at what point would --

12 MR. O'NEIL: If a franchisee is faced with  
13 franchisor conduct that will leave the franchisee with  
14 no alternative but to abandon a statutory element, then  
15 the franchisee in that situation can go in and say that  
16 he is in the equivalent position to someone who has  
17 received a piece of paper saying: You are hereby  
18 terminated. And we would say that for purposes of  
19 seeking preliminary injunctive relief, that the  
20 franchisee can claim that he has been terminated for  
21 those purposes.

22 JUSTICE SOTOMAYOR: And for -- if for whatever  
23 reason the judge says no at the preliminary injunction  
24 stage, that's the end of it; the franchisee just has to  
25 leave the premises?

1           MR. O'NEIL: Well, a judge would only deny a  
2 preliminary injunction if either there were no serious  
3 question going to the merits on the termination question  
4 or if the balance of hardships did not tip in the  
5 franchisee's favor. And then the franchisee would be in  
6 a very difficult position to claim that it was in some  
7 kind of catch-22, because by definition the judge would  
8 have found that the franchisor is in a worse condition  
9 by having to continue the relationship.

10           JUSTICE SCALIA: Well, the franchisor stops  
11 delivering gas. There are three -- three different  
12 obligations under the contract. What does the  
13 franchisee have to do to show that he has accepted it as  
14 a termination? Why does he have to leave the premises?  
15 That's another contract, is -- is what the --

16           MR. O'NEIL: Justice Scalia, we -- we agree  
17 with Shell on this. The statute defines "franchise" by  
18 three elements: The supply of fuel, the use of the  
19 leased premises, and the use of the trademark. So  
20 someone who is still on a gas station premises that had  
21 the Shell sign above them but that had no fuel would not  
22 be operating a gas station franchise, and that would be  
23 a termination even if the franchisee did not actually  
24 pick up and leave the premises. So we would call that a  
25 termination.

1 JUSTICE ALITO: If the conduct on the part of  
2 the franchisor is raising the price of gas, how does the  
3 factfinder determine whether it's sufficient to justify  
4 a constructive termination? And assume that the  
5 franchisee leaves -- the price of gas is raised, and  
6 this particular franchisee says: I can't operate if gas  
7 is sold to me at that price. What's the standard for  
8 determining whether there was a constructive  
9 termination?

10 MR. O'NEIL: The test is, first of all,  
11 whether the franchisor's conduct was wrongful -- in  
12 other words, in violation of the agreement between the  
13 parties; and whether a reasonable franchisee in those  
14 circumstances would have no alternative but to do what  
15 that franchisee did and to abandon the premises.

16 JUSTICE ALITO: But what's a reasonable  
17 franchisee in that situation? Presumably some have a  
18 small profit margin; some have a bigger profit margin.  
19 Some could operate if the price of gas is raised; some  
20 could not. How is that to be determined?

21 MR. O'NEIL: Well, it's the same kind of  
22 question that juries ask all the time -- juries answer  
23 all the time in constructive discharge and constructive  
24 eviction cases.

25 Indeed, we think it may be easier to answer



1    that question in this context, because constructive  
2    discharge and constructive eviction will often turn on  
3    intangible psychological factors like the level of  
4    indignity that an employee would suffer before leaving  
5    his job. Gas station franchises are operated for -- to  
6    make money, and if it would be impossible for a  
7    franchisee to do that, then a reasonable franchisee in  
8    those circumstances would have no choice but to --

9                JUSTICE ALITO: You are putting a jury in sort  
10   of the situation of a -- of a rate regulator, aren't  
11   you, if you do that?

12               MR. O'NEIL: No.

13               JUSTICE ALITO: Was it a reasonable rate?

14               MR. O'NEIL: No. The question is whether it  
15   would be so intolerable -- not whether the rate is fair,  
16   but whether it would be so intolerable that a reasonable  
17   franchisee, a rational franchisee who is economically  
18   motivated, would have any alternative but to abandon it.  
19   And if the franchisee could continue in business, then  
20   it is not a constructive termination. The franchisee  
21   might have a claim for breach of contract, but as long  
22   as -- as long as it would not be a fitting response to  
23   actually abandon the premises, then that is not a  
24   constructive termination.

25               JUSTICE SCALIA: Up -- up to that point, which

1 supposedly a jury can find, the tipping point where a  
2 reasonable franchisee would abandon -- up until then, he  
3 has a contract claim, right? And then at that magical  
4 point, the contract claim is converted into a claim  
5 under the statute?

6 MR. O'NEIL: When --

7 JUSTICE SCALIA: Why isn't the contract claim  
8 alone enough?

9 MR. O'NEIL: Well, Justice Scalia, the whole  
10 point of the PMPA was that State law remedies were  
11 inadequate in that narrow context where the franchisee's  
12 very existence was threatened.

13 JUSTICE SCALIA: "In the context of  
14 termination" is what the statute says.

15 MR. O'NEIL: Yes, and under well-established  
16 background principles of the law that Congress was  
17 drawing on when it enacted the PMPA, termination was not  
18 limited solely to explicit termination.

19 JUSTICE ALITO: Well, what are these --

20 JUSTICE SCALIA: What background principles  
21 were they? I don't know about constructive termination.  
22 There was constructive discharge and constructive  
23 eviction. But --

24 MR. O'NEIL: The relationship here is in  
25 essence one of landlord and tenant. And so it was

1 natural for Congress to draw on that body of law, as  
2 well as the body of law governing the termination of  
3 other kinds of relationships like employment, for the  
4 meaning of the -- of "termination" under the PMPA.

5 JUSTICE GINSBURG: Mr. O'Neil, I thought that  
6 there were some cases, landlord-tenant cases, where the  
7 tenant is not required to leave the premises because, as  
8 awful as the situation is, the tenant has no place to  
9 go.

10 MR. O'NEIL: Justice Ginsburg, I am not aware  
11 of those cases, and I think the general rule is the one  
12 that -- that is -- is broadly stated in the cases, which  
13 is that if the franchisee -- excuse me, if the tenant  
14 wants to claim constructive eviction, they need to leave  
15 the premises. That is a bedrock principle of the law,  
16 that in order to claim constructive eviction, you  
17 actually have to leave.

18 JUSTICE BREYER: So what happens -- in other  
19 words, suppose the landlord here really wants the guy to  
20 clear out, so he puts thumbtacks on the ground and  
21 horrible-smelling things all over. And then the  
22 franchisee leaves, but the franchisor says: Hey, I  
23 didn't want you to leave; that's your problem. I mean,  
24 that's constructive eviction or constructive  
25 termination?

1           MR. O'NEIL: That's exactly right, Justice  
2 Breyer.

3           JUSTICE BREYER: Now suppose it's the same  
4 situation, but this person, the franchisee, being quite  
5 indefatigable and daring, finds a way of sneaking  
6 through the barbed wire that has been put up. And  
7 there's one pump they forgot, and there's a car that  
8 comes up, and he serves that person. Now is it  
9 constructive eviction?

10          MR. O'NEIL: No, and that's where --

11          JUSTICE BREYER: No?

12          MR. O'NEIL: That's where an objective  
13 standard is important, because we don't look to the  
14 particularly clever --

15          JUSTICE BREYER: Objective? You'd say any  
16 sensible person would clear out immediately. There are  
17 lions and tigers roaming the gas station.

18          (Laughter.)

19          MR. O'NEIL: That's exactly right, and that's  
20 why --

21          JUSTICE BREYER: And suppose he doesn't,  
22 though, that he doesn't clear out because he's not  
23 sensible, and he just desperately needs the money.

24          MR. O'NEIL: If the franchisee does not leave,  
25 then he does not state a claim for constructive

1 termination. And that is how the law operates in every  
2 other area in which this doctrine applies. So if a  
3 civil rights plaintiff claims discrimination on the  
4 basis of race or gender, she cannot stay in her job and  
5 at the same time claim that she was fired. I mean  
6 that's --

7 JUSTICE SCALIA: What do you do about the  
8 claim of -- of the -- the Petitioners that only one of  
9 the three contracts has been terminated?

10 MR. O'NEIL: Well, as I said --

11 JUSTICE SCALIA: The other two continue --  
12 continue in effect?

13 MR. O'NEIL: As I said, if one of the three  
14 elements of the -- of the statutory franchise has been  
15 terminated, then that is a termination under the Act.  
16 And that's how the Act defines franchise. It defines it  
17 by all three elements of the franchise, and so if one of  
18 them is terminated, that is a termination.

19 JUSTICE STEVENS: May I ask you -- we often  
20 talk about price adjustments as causing the disputes  
21 between the franchisee and the franchisor. To what  
22 extent in these sets of contracts is the right of the  
23 franchisor to adjust the price controlled by terms of  
24 the contract?

25 MR. O'NEIL: In general, these are open --

1 open-term price contracts, so that in these -- in these  
2 leases, for example, Shell had the right to set the  
3 price of fuel using a formula that it formulated in its  
4 discretion.

5 JUSTICE STEVENS: But is the formula required  
6 by the contract, or it's just its own discretion to use  
7 the formula?

8 MR. O'NEIL: It's just in its discretion to  
9 use the formula.

10 JUSTICE STEVENS: I see.

11 MR. O'NEIL: It's an open price term. But  
12 U.C.C. 2305 would imply in most contracts a -- a  
13 requirement that, where there is an open price term,  
14 there can't be unreasonable increases in the -- in the  
15 price.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.

17 MR. O'NEIL: Thank you, Mr. Chief Justice.

18 CHIEF JUSTICE ROBERTS: Mr. Farraher.

19 ORAL ARGUMENT OF JOHN F. FARRAHER, JR.,

20 ON BEHALF OF MAC'S SHELL SERVICE, INC., ET AL.

21 MR. FARRAHER: Thank you, Mr. Chief Justice,  
22 and may it please the Court:

23 In this case, the jury determined that Shell  
24 and Motiva engaged in conduct designed -- prohibited by  
25 the PMPA when they raised rent to force dealers out of

1 business and convert their stations to direct  
2 operations. Nevertheless, Shell and Motiva argue that  
3 conduct designed to force the dealers out of business is  
4 insufficient to invoke statutory protection because the  
5 dealers were not deprived of any of the statutory  
6 elements of the franchise, and they remained in business  
7 for some period following the rental increase.

8 If accepted, the practical effect of Shell and  
9 Motiva's position will allow franchisors to circumvent  
10 the PMPA and terminate franchises at any time, at any  
11 reason, by simply increasing the burden on their  
12 operations.

13 JUSTICE ALITO: Now, these Petitioners  
14 remained in -- in business, is -- that's right?

15 MR. FARRAHER: Your Honor --

16 JUSTICE ALITO: Did they make money during  
17 this period?

18 MR. FARRAHER: Your Honor, some of the  
19 Petitioners --

20 JUSTICE ALITO: All but one remained in  
21 business, isn't that correct?

22 MR. FARRAHER: Some of the Petitioners  
23 remained in business, certainly, post-elimination of the  
24 subsidy. The amount of time varied from person to  
25 person.

1 JUSTICE BREYER: But if they do something  
2 reasonably designed -- a reasonable person would clear  
3 out, then why not clear out?

4 MR. FARRAHER: Well, Your Honor, we have to  
5 take this in context. This is a -- these are small  
6 business owners who have invested their livelihoods in  
7 operating these franchises. They are trying to keep the  
8 business operational against perhaps all odds and  
9 perhaps --

10 JUSTICE BREYER: So what's the test?

11 MR. FARRAHER: Pardon me, Your Honor.

12 JUSTICE BREYER: What's the test? Because if  
13 you say we are going to give an action to a person who  
14 didn't clear out, although the franchisor was trying to  
15 get him to clear out, you are then going to convert into  
16 a Federal action every single breach of contract or  
17 serious breach of contract that there is, which is the  
18 precise opposite of what Congress wanted when it passed  
19 this statute.

20 So, what is your test as to we know that your  
21 case is the lions and tigers case?

22 MR. FARRAHER: Justice Breyer, I believe that  
23 you hit on two points: First off, what is the test  
24 sufficient to invoke a constructive termination? And  
25 then, secondly, a point that the panel has addressed is



1     whether or not abandonment of the franchise is required  
2     by the statute.

3             JUSTICE BREYER:  I wouldn't put it that way.  
4     I'd say constructive termination means you didn't  
5     terminate.  Okay?  That's what "constructive" means.  It  
6     means you didn't do it.  But sometimes a franchisor  
7     could act in such a way that the law should treat it as  
8     if he really did.  All right?  I can imagine a test for  
9     that.

10            But we have the second problem here, is that  
11     even if the conduct was designed -- it's equal to  
12     terminating it -- this individual didn't leave.

13            MR. FARRAHER:  Well, Your Honor --

14            JUSTICE BREYER:  So he was still there running  
15     the business.  That's the part I would like to test for.

16            MR. FARRAHER:  The test, Your Honor -- first  
17     off, with respect to whether the conduct is sufficient  
18     to force a termination, we believe the First Circuit's  
19     standard of materiality, which is effective to end one  
20     of the components of the statutorily defined franchise,  
21     is sufficient.

22            With respect to the second part of your  
23     question, which is why didn't these dealers leave the  
24     station, and --

25            JUSTICE BREYER:  No.  I want to know your test

1 for deciding -- even though the first part is met, how  
2 you apply it when the person didn't leave? I understand  
3 a person who left. He left.

4 MR. FARRAHER: Right.

5 JUSTICE BREYER: The franchisor says: I  
6 didn't tell him to leave. And then you go look to see  
7 if the franchisor's conduct was so bad, it was the same  
8 as if you told him to leave. I've got that part.

9 The part I don't have is what happens if he  
10 doesn't leave? Because one thing we know, the conduct  
11 wasn't so bad that this person left, because he didn't  
12 leave. That's that second part that's bothering me.

13 MR. FARRAHER: And Your Honor, I'm not sure  
14 there's a test for that, but certainly the statute  
15 doesn't contemplate that the dealer would have to leave.  
16 For example, the injunctive remedy in the statute would  
17 allow a dealer to come in --

18 JUSTICE BREYER: I need -- the injunctive  
19 remedies in the State court?

20 MR. FARRAHER: They are different, Your Honor.

21 JUSTICE BREYER: Yes, all right. But the  
22 reason I need a test is because the other side is  
23 saying: I know what the test is; the test is he has to  
24 leave.

25 MR. FARRAHER: But that --

1 JUSTICE BREYER: So if you -- if you can show  
2 me some cases or a test or something where he didn't  
3 have to leave, even though the franchisor's conduct was  
4 so bad that a reasonable person would have left, then  
5 I'm on to something and I know where to go.

6 MR. FARRAHER: Your Honor -- and the point is  
7 that I don't think the franchisee need necessarily leave  
8 as contemplated by the statute.

9 JUSTICE KENNEDY: But Justice Breyer asked you  
10 for a test. Maybe this would help you. If you are the  
11 trial judge, how do you instruct the jury to determine  
12 when there has been a constructive termination? You  
13 have to have an instruction.

14 MR. FARRAHER: And that --

15 JUSTICE KENNEDY: I'm quite frankly amazed  
16 that you say you don't have a test.

17 MR. FARRAHER: Well --

18 JUSTICE KENNEDY: You're coming up here and  
19 telling us that there's such a thing as a constructive  
20 termination, I mean -- but then you don't have a test  
21 for it?

22 MR. FARRAHER: We do have a test, Your Honor,  
23 and the test is whether or not the conduct has  
24 effectively eliminated an essential component of one of  
25 the three elements of the franchise. In this case, the

1 First Circuit used a materiality standard that said that  
2 the lease was effectively ended. And in the context of  
3 the statute, the franchise as defined by the three  
4 elements, what the judge asked the jury to determine  
5 was, was the agreement that Shell entered into with  
6 these franchisees, with the essential component being  
7 the subsidy, was that effectively eliminated --

8 JUSTICE ALITO: What does that mean,  
9 "effectively eliminated"? The -- the First Circuit  
10 said, if "the breach of the lease was such a material  
11 change that it effectively ended the lease, even though  
12 the plaintiffs continued to operate the business" -- I  
13 have no idea what that means. What does it mean to  
14 effectively end the lease even though the lease  
15 continues?

16 MR. FARRAHER: Yes, Your Honor, Justice Alito.  
17 The statute contemplates a distinction in the  
18 relationship between a franchise, which is a set of  
19 contracts, and a franchise relationship. A franchise  
20 relationship continues after the expiration of the -- of  
21 the franchise.

22 In this case here what the judge was charging  
23 the jury was -- what the question was, was the breach of  
24 the lease so material that it effectively ended the --  
25 the agreement that Shell had entered into with its

1 dealers, regardless of the fact that there was some  
2 relationship that continued with the parties afterwards?  
3 In other words --

4 JUSTICE ALITO: I know, but could you put that  
5 in somewhat more concrete terms, or can you not get any  
6 more specific than to say the lease is effectively  
7 ended?

8 MR. FARRAHER: We -- we think that that  
9 certainly was a sufficient standard. The circuit courts  
10 that have decided the issue have arguably employed a  
11 lower standard. They have talked about a breach of one  
12 of the franchise agreements being sufficient. But  
13 certainly we believe the First Circuit set an  
14 appropriate standard here with the materiality being --

15 JUSTICE GINSBURG: Is there -- is there any  
16 area of the law, other than this one, if you are right,  
17 in which a termination includes a non-termination; that  
18 is, where a constructive termination includes situations  
19 where the operation continues?

20 MR. FARRAHER: Your Honor, certainly in our --  
21 in our briefs we have referred to cases where  
22 constructive evictions in some settings will allow a  
23 tenant to stay in a premises. Certainly, the -- the  
24 majority of the cases decided in the discharge context  
25 or an eviction setting do require what you have

1 suggested, which is an end in that the person leaves  
2 their employment or leaves their --

3 JUSTICE KENNEDY: I may be incorrect. I -- I  
4 thought your friends for the Petitioners said there is  
5 no case in which there's a constructive eviction but  
6 where the lessee remains on the premises. Maybe I  
7 misheard.

8 What is -- what is your principal case where  
9 the lessee remains on the premises, but there is a  
10 constructive eviction?

11 MR. FARRAHER: Justice Kennedy, on page 38 of  
12 the main brief in the footnote, we've cited two cases in  
13 New Jersey that allow for that proposition. Certainly,  
14 conceding that the majority of the courts have held that  
15 an -- the tenant leaving the premise in a constructive  
16 eviction setting is a necessary prerequisite to the  
17 claim. But we also recognize that --

18 JUSTICE SOTOMAYOR: Can we -- can -- perhaps  
19 to bring this to more practical terms, you can walk  
20 through with me. I'm going to assume that if a  
21 franchisor changes a rent term and the franchisee  
22 refuses to pay, wouldn't the franchisor at some point  
23 give a notice of termination? What franchisor is going  
24 to sit through months and months and years of waiting  
25 for payment before kicking someone out? Is it -- is

1 that rationally going to happen in any situation?

2 MR. FARRAHER: Your Honor, I would -- I would  
3 concede that in all likelihood, a franchisor would take  
4 some affirmative conduct, whether that be through a  
5 notice of termination or other step. But, yes, that  
6 would happen.

7 JUSTICE SOTOMAYOR: Or -- or, so that in  
8 almost all situations, at least with respect to the  
9 leased premises, in a breach of the leased premises, the  
10 termination would be -- would have to happen.

11 MR. FARRAHER: Well --

12 JUSTICE SOTOMAYOR: So why do we need to make  
13 a constructive eviction theory when, on a practical  
14 basis, there always in this situation has to be a notice  
15 of termination, at least with respect to the premises  
16 part?

17 MR. FARRAHER: Well, Your Honor, I -- I  
18 respectfully disagree. And I think the government and  
19 Shell would both concede that written notification,  
20 although required by the statute, is not necessarily  
21 always going to be given.

22 JUSTICE SOTOMAYOR: I know. But at some point  
23 the franchisor is going to have to take over the  
24 premises, either by trying to evict the person or  
25 locking them out. No -- no rational franchisor is going

1 to raise rent, not have the franchisee pay, and fail to  
2 terminate the agreement.

3 MR. FARRAHER: That -- that may be true, Your  
4 Honor. But in this case here what Shell's position is  
5 that they can -- they can -- and -- and put such  
6 intolerable conduct at issue, for example, raising the  
7 rent by several hundred percent, and that doesn't  
8 constitute a termination in any respect, even if -- even  
9 if the dealer were to leave.

10 They argue that they must affirmatively  
11 withhold one of the statutory elements of the franchise  
12 from the dealer.

13 JUSTICE SOTOMAYOR: But the franchisee could  
14 always just stop paying the rent. He doesn't have to  
15 leave the premises.

16 MR. FARRAHER: That's right, Your Honor. And  
17 again -- again the statute doesn't contemplate -- and --  
18 and we have to, again, go back to the statute to  
19 recognize what the word "termination" means in the  
20 context of the Petroleum Marketing Practices Act.  
21 Certainly, Shell envisions that it means that there must  
22 be an end to the relationship.

23 The Solicitor would concede, I believe, that  
24 the dealer could remain on the premises if there was  
25 such sufficient conduct to force them out of business



1     that a reasonable person would think they have no  
2     ability to continue in business. But then the Solicitor  
3     imposes a condition that that franchisee must seek an  
4     injunction in order to have a claim under the Act.

5             Our position is that the injunction is a form  
6     of a relief to protect the franchisee, to maintain the  
7     status quo. But the existence of a claim under the  
8     statute does not depend upon whether or not the  
9     franchisee seeks the injunction.

10            JUSTICE GINSBURG: And you didn't -- you  
11     didn't -- well, you sought an injunction, but Judge  
12     Zobel thought it was -- it came much too late.

13            MR. FARRAHER: Your Honor, this -- this case  
14     has had a -- a long history to it. The case was  
15     initially filed as In the matter of Tsanikilides in the  
16     U.S. district court and assigned to Judge Zobel. Our  
17     prior counsel did seek an injunction. It's not clear on  
18     the record why that injunction was withdrawn at the time  
19     that the Tsanikilides case was dismissed.

20            But then when the Marcoux or the Mac's Shell  
21     case was re-filed, it's correct that the dealers did not  
22     initially move for injunctive relief. And I think there  
23     were two reasons for that. Number one, it was always  
24     contemplated with Judge Zobel that this matter would  
25     proceed on an expedited basis, that discovery would lead

1 to trial within a very short period of time.

2 And, number two, even though there is a  
3 relaxed standard for injunctive relief, it was not clear  
4 that the dealers would be able to sufficiently meet  
5 their burden of proof to demonstrate to the court that  
6 an injunction should be issued.

7 Again, we are dealing here in a practical  
8 effect of asking an oil company on a national basis to  
9 be enjoined from implementing this change in rent that  
10 they had brought about.

11 JUSTICE GINSBURG: Can you explain to me --  
12 the question I brought up before -- what was the  
13 difference of the elements between the recovery that the  
14 jury gave for constructive termination and for breach of  
15 contract?

16 MR. FARRAHER: The damages awarded were  
17 precisely the same, and the judge instructed the jury  
18 that, in fact, there would be no double recovery for  
19 the -- for the dealers here, that they would only  
20 recover once. The breach of contract was pled as an  
21 alternative theory. And the difference being that under  
22 the PMPA the dealers were also awarded their attorneys'  
23 fees and expert witness fees as well, which was a -- a  
24 number north of a million dollars.

25 JUSTICE BREYER: The problem that -- that I

1 see here is that if in fact you are right, that the --  
2 the franchisor -- he breached the contract in your view.  
3 Did that breach rise to a termination? Did it rise to  
4 that level?

5 Now, it's simply a question, since he breached  
6 the contract, of what court you are going to sue in, in  
7 your view. If this isn't a termination, you sue in  
8 State court; if it is a termination, you sue in Federal  
9 court.

10 So, why -- why wouldn't we say, well, let him  
11 sue in State court, because if the person stays on the  
12 premises, everything becomes blurred. If you require  
13 him to leave the premises, then it's clear. If you were  
14 to let him stay on the premises and also argue it's a  
15 termination, we are going to have people coming into  
16 Federal court because they think there are more damages  
17 or something, I guess, or whatever reason. There will  
18 be a whole lot of unclear cases. So it's better to have  
19 a clear line.

20 MR. FARRAHER: Well, Your Honor, again, the --  
21 the reason that the dealers are coming to Federal court  
22 is because Congress enacted a statute to protect them --

23 JUSTICE BREYER: You are going to say they  
24 have a right to, but the other side thinks they don't.  
25 So it doesn't answer my question to just refer to the

1 fact that you have a right to. My question is a  
2 practical question: What's the harm of sticking to the  
3 clear line that is normally there in other cases, in  
4 this case not depriving your client of a remedy at all?

5 MR. FARRAHER: Well, Your Honor --

6 JUSTICE BREYER: Just saying he goes to State  
7 court to get it.

8 MR. FARRAHER: I disagree with the Court that  
9 the client is not being deprived of a remedy. The  
10 remedy available in the statute in one part is  
11 injunctive relief. And while the dealers did not avail  
12 themselves of that in this particular case, the lesser  
13 standard and the lack of a need to show irreparable harm  
14 protects the franchisee under a Federal cause of action  
15 as distinguished from a contractual-based cause of  
16 action.

17 CHIEF JUSTICE ROBERTS: It's a million  
18 dollars, right? That's the difference. You get  
19 attorneys' fees and expert fees in the Federal action,  
20 and presumably you don't in the State action.

21 MR. FARRAHER: We -- we -- we do in this case,  
22 Mr. Chief Justice. But in a case where a dealer comes  
23 to the court for relief and they have available to them  
24 the injunctive remedy, which does not require the  
25 irreparable harm component be demonstrated, it keeps the

1 dealer in business. Certainly Congress intended to  
2 protect franchisees. They intended for competition in  
3 the marketplace to continue. And --

4 CHIEF JUSTICE ROBERTS: Well, you have the  
5 option, right? If you accept the idea that there's a  
6 constructive termination under your view, even if you  
7 don't leave, I guess you have the option to stay in  
8 business or to leave at any time.

9 MR. FARRAHER: They certainly do, Your Honor.  
10 And -- and what happened here, obviously, is that the  
11 oil company imposed such onerous conditions that they  
12 expected dealers would leave. And, in fact, in  
13 Massachusetts within the time period of the  
14 elimination -- the formation of Motiva, within a 5-year  
15 period thereafter, the numbers dropped almost by 50  
16 percent.

17 JUSTICE BREYER: Well, you have a choice, you  
18 know. So, here's your choice, dealer: Stay there and  
19 sue in State court, and by the way, if they are charging  
20 you too much money under the contract and you are really  
21 hurting doing -- putting lions and tigers, whatever they  
22 are doing, go get an injunction in State court. See?  
23 They have injunctions in State courts. That exists.

24 MR. FARRAHER: They certainly do.

25 JUSTICE BREYER: Or, you have the other

1 choice. Move out.

2 MR. FARRAHER: Your Honor --

3 JUSTICE BREYER: Then if you move out, you can  
4 sue under Federal law, and you will get all these other  
5 things like the extra million dollars or something. So,  
6 move out and get the extra money, or stay there and sue  
7 under State court. Why is that a bad choice?

8 MR. FARRAHER: It's -- it's a bad choice, Your  
9 Honor, because it puts the dealer in a position of  
10 having to determine whether they should abandon their  
11 lives' works in order to benefit from a -- from a  
12 Federal cause of action. It's a bad idea because in the  
13 oil company's view, we don't get to make that choice,  
14 even despite their bad conduct unless they affirmatively  
15 stop providing us with one of the -- one of the  
16 statutory elements of the franchise.

17 JUSTICE SCALIA: Of course, your -- your  
18 approach puts -- puts the company -- the oil company in  
19 a very strange position. It doesn't know whether it has  
20 a contract or not. It -- the contract is terminated if  
21 your client says it's terminated. If he doesn't say  
22 it's terminated, it's not terminated. I mean, a very  
23 weird contract where you -- you're subject to the whim  
24 of the other party as to whether the contract continues  
25 or not.

1           MR. FARRAHER: Your Honor, I think in the --  
2 with -- again, with the injunctive relief available, a  
3 court could in the initial stages without the aid of  
4 discovery determine whether -- what the parties'  
5 obligations are during the course of the litigation.  
6 Here the dealers continued to pay the exorbitant rents  
7 that were being charged. So I would argue that the oil  
8 company was at no point in time harmed by virtue of the  
9 claim and then the proceedings that ensued.

10           JUSTICE SCALIA: Well, I don't know. They --  
11 you know, if they knew that they were pulling out and --  
12 and were claiming a termination, they might have been  
13 looking for somebody else to take over the franchise.

14           MR. FARRAHER: Well, Your Honor, I think, as a  
15 practical matter, that would not have happened during  
16 the pendency of the litigation. So, again, to the  
17 extent that the -- an injunction had been sought, it  
18 would have helped to preserve the status quo, and in  
19 this case, again, here, the oil company was not in any  
20 way, shape, or form harmed by the dealers' pursuit of  
21 their claim because they continued to pay their rent,  
22 for those that remained in business, and those that went  
23 out of business obviously stopped.

24           Your Honors, if I may turn to the other claim,  
25 which is also present in this case here, the claim of

1 the non-renewal, both the government and Shell have  
2 suggested that the statute imposes some sort of a  
3 mandatory mechanism requiring the franchisor to give  
4 notice and then the dealer seeking an injunction within  
5 90 days in order -- in connection with the non-renewal  
6 claim.

7 I think, as a practical matter, we need to  
8 start with the proposition of what the jury found here,  
9 and the jury found that, in this case, the oil company  
10 added new terms to the lease specifically for the  
11 purposes of converting the franchise-operated stations  
12 to direct operations. They wanted the dealers out of  
13 business, and they wanted to take over operations of  
14 their stations.

15 Had the oil company issued a notice of  
16 non-renewal when the parties didn't reach agreement on  
17 the terms of the agreement and this case had proceeded  
18 to a trial, there is no question, but that the result  
19 would have been exactly the same as the result is here.

20 So the question we are facing is whether or  
21 not this mechanism that they have advanced as being  
22 the -- the only way, the exclusive remedy to proceed is,  
23 in fact, such, and we would argue that, in fact, it is  
24 not. Both the government and the Solicitor have  
25 conceded already that, while the statute requires notice



1 in the normal course, that, certainly, notice can be  
2 side-stepped, and that conduct can give rise to notice.

3 The next question then would be whether or not  
4 the dealer must seek injunctive relief as a prerequisite  
5 to maintaining a claim, and we argue that there is  
6 nothing in the language of the statute suggesting that  
7 the injunction is mandatory.

8 JUSTICE BREYER: The theory of it is to  
9 protect the dealer, and the dealer here is faced with a  
10 company that says, we are not going to renew your lease.  
11 And they are unreasonable, and the dealers think. The  
12 statute says: Fine, don't renew it, okay? And, here,  
13 we'll give you a really good deal, so you won't be hurt.  
14 If you really think he's wrong, go sue for an  
15 injunction. And, second, we are going to give you extra  
16 bonus damages and attorneys' fees and all that stuff.  
17 So we protected you a lot.

18 Now, why should there be a third thing that  
19 the statute says nothing about, which nobody's ever  
20 heard of? You just stay there, and you say: I'm going  
21 to just do business every day, just like nothing  
22 happened, and I write the words under protest.

23 I mean, why would Congress have gone to all  
24 that trouble if that's all you have to do?

25 MR. FARRAHER: Well, certainly, Your Honor,

1 the language of the statute itself, while the -- while  
2 Congress provides for injunctive relief, which would be  
3 applicable equally to non-renewal claims as it would to  
4 termination claims, and while the statute speaks to  
5 notice, again, applicable to both, there is absolutely  
6 nothing in the statutory language that says this is a  
7 mandatory exhaustion of remedies.

8           You must seek an injunction --

9           JUSTICE BREYER: No, but there is a purpose,  
10 and the purpose is that this system at least brings a  
11 judge in to see if that dealer really does have enough  
12 of a claim to get this relaxed injunction. But your  
13 system leaves it 100 percent up to that dealer. It  
14 could be heard of that dealer really doesn't have a good  
15 claim, and all he does is write the words "under  
16 protest."

17           MR. FARRAHER: Well, Your Honor --

18           JUSTICE BREYER: But you don't have a judge in  
19 it, at that stage, under your interpretation.

20           MR. FARRAHER: We think that our case,  
21 certainly, is distinguishable from the other two  
22 circuits that have addressed the issue. In our case,  
23 our dealers filed a lawsuit before they were presented  
24 with the leases for signature. They told the oil  
25 company that they were signing under protest, with a

1 reservation of all their rights.

2           It was the oil company that presented the  
3 leases to them on a take-it-or-leave-it basis. They  
4 said, there will be no negotiation of these terms, and  
5 you must sign, and if you don't sign, we are going to  
6 issue a notice of non-renewal. And then that pins the  
7 continuation of the dealers' business on the hopes that,  
8 even with a relaxed standard, a trial court is going to  
9 issue an injunction.

10           And I certainly don't think that the statute  
11 or the Congress intended for the dealers to risk their  
12 businesses on the likelihood of getting the injunctive  
13 relief --

14           JUSTICE SOTOMAYOR: Counsel, can I ask you,  
15 have you accepted the majority's reasoning in the Dersch  
16 case, the Seventh Circuit case, with respect to 2805(f)?  
17 You haven't raised that argument in your brief, so  
18 obviously, you have accepted their view that 2805(f)  
19 doesn't apply to the right to preserve your claims of  
20 improper --

21           MR. FARRAHER: I'm sorry, Your Honor. Are you  
22 -- are you asking whether we accept the proposition that  
23 the -- the waiver of rights --

24           JUSTICE SOTOMAYOR: The Seventh Circuit said  
25 there's no implied right of action under 2805(f).

1           MR. FARRAHER: The Seventh Circuit, if I  
2 understand the case correctly, Your Honor, says that  
3 there's no implied cause of action under 2805(f)  
4 standing alone, that if a franchisor is insisting upon a  
5 term that includes a waiver, as in connection with  
6 non-renewal, then the Dersch decision in the Seventh  
7 Circuit would say that that might be actionable under  
8 2802(b)(3) because they have introduced a term that is  
9 not agreed upon and is designed for the purposes of  
10 forcing the dealers out of business.

11           I don't know that we have taken an opinion,  
12 whether or not there's an independent or implied cause  
13 of action standing alone under 2805(f).

14           JUSTICE SOTOMAYOR: Well, I would have thought  
15 your strongest argument would have been that, if we have  
16 a statutory right not to waive any of our Federal or  
17 State rights, if there has been a non-renewal on  
18 reasonable terms, there has been a breach of that  
19 obligation under the statute, then you had a right to be  
20 renewed under reasonable terms, and if they are giving  
21 you unreasonable terms -- "unreasonable" being defined  
22 within the statutory constraints -- they impose  
23 conditions that were imposed in bad faith to drive you  
24 out; those are the two conditions -- then you had a  
25 right to sue for that, non-renewal, because you had a

1 right to renew on reasonable terms.

2 MR. FARRAHER: Your Honor, I appreciate the --  
3 the argument, and, certainly, I -- I think it is  
4 supportive of the dealers' claims in this case.

5 JUSTICE SOTOMAYOR: Well, but why didn't you  
6 make the argument in your briefs? That's why I was  
7 asking you whether you agreed with the Seventh Circuit's  
8 reasoning, and that's why you didn't raise it or -- what  
9 am I missing, that's making that argument not --

10 MR. FARRAHER: I think it --

11 JUSTICE SOTOMAYOR: -- one that you relied  
12 upon?

13 MR. FARRAHER: Your Honor, I can't answer, in  
14 hindsight, why we didn't raise it in the brief, but I do  
15 hear the position that you are advocating and think it  
16 is supportive of the -- of the dealers' position here.

17 If there are no additional questions --

18 JUSTICE KENNEDY: Well, just getting back to  
19 the constructive eviction, I took a quick look at the  
20 Marini and Ireland case that you cite, and I think  
21 the -- the Petitioner is correct. There, the tenant  
22 left part of the premises, and it was a constructive  
23 eviction as to that part. And it's a 1970 case.

24 I just don't think you have many cases to help  
25 you in the constructive eviction area. It's kind of

1     like the Holmes -- Sherlock, not Oliver Wendell --

2                     (Laughter.)

3                     JUSTICE KENNEDY:   -- that says the dog doesn't  
4     bark.  I mean, there is this huge body of  
5     landlord/tenant law, and you have just a few cases, and  
6     one of them, at least, doesn't appear to support you.

7                     MR. FARRAHER:  Your Honor, I -- I guess the --  
8     the best response I have to that proposition is that we  
9     are not dealing in a traditional landlord/tenant context  
10    here.  We are dealing under a statutory scheme that  
11    Congress enacted to protect franchisees, and we need to  
12    look within the meaning of the statute as to what  
13    termination means.

14                    I would also say that, in the landlord/tenant  
15    context, while the, perhaps, outdated notion of a  
16    constructive eviction would require the tenant to leave,  
17    cases seem to suggest, in a more modern sense, that the  
18    relationship between the landlord and the tenant is more  
19    of a contractual relationship in nature and, as such,  
20    allows for the traditional remedies available under  
21    contract law, in turning -- including self-help and  
22    rescission, et cetera.

23                    If there are no further questions, thank you  
24    very much.

25                    CHIEF JUSTICE ROBERTS:  Thank you, counsel.

1           Mr. Lamken, you have 5 minutes remaining.

2           REBUTTAL ARGUMENT OF JEFFREY A. LAMKEN

3           ON BEHALF OF SHELL OIL PRODUCTS

4           COMPANY, LLC, ET AL.

5           MR. LAMKEN: Thank you.

6           I believe the debate in this case comes down  
7 to about three issues: The first is what is the  
8 relevant background principle we think Congress was  
9 looking to when it used the words "terminate,"  
10 "non-renew," and "cancel" in the statute. We think the  
11 most analogous background principles they would have  
12 been looking to were contract law and the State  
13 franchise statutes that existed at the time Congress  
14 acted. I --

15           JUSTICE STEVENS: But, Mr. Lamken, isn't it  
16 true that the statute, as a whole, expressed Congress's  
17 feeling that the common law rules were really not  
18 sufficient because, under the common law, of course,  
19 they could just non-renew because they wanted to take  
20 over the franchise themselves. And under the statute,  
21 that is not permissible. So there's a major change  
22 that's created by the statute, which suggests, to me,  
23 that maybe they didn't want to adopt all the preexisting  
24 common law.

25           MR. LAMKEN: Right. There was a deficiency in

1 the common law, but it was limited to one point, and  
2 that was termination and non-renewal. It wasn't that  
3 breaches of contract -- and as the government has  
4 explained, a breach of contract here is a precondition  
5 to a constructive termination claim -- were  
6 insufficiently remedied by State law. That was not the  
7 issue before Congress.

8           The issue before Congress was that there was a  
9 contractual right to terminate at will or for trivial  
10 reasons or to non-renew for no reason or bad reasons  
11 even, and that is what Congress regulated, was  
12 terminations and non-renewals, in that sense, not  
13 breaches of contract that turned out to be really bad.

14           The second thing is that because there was a  
15 comprehensive State remedy, there is particularly little  
16 reason to read this statute, this narrow statute,  
17 expansively, particularly given that this is an  
18 expressly preemptive -- a potentially conflict  
19 preemption statute, which could have the effect of  
20 displacing State law.

21           When you're looking at a statute that's  
22 narrowly looking at termination or non-renewal, you  
23 would not ordinarily expand those terms to include  
24 really bad breaches of contract, because that has the  
25 potential to displace State statutory and potentially



1 State common law under the preemption clause.

2 And, finally, the last piece that comes up is  
3 the problem of evasion. The issue becomes sort of,  
4 well, people can just get around this statute if there  
5 is no constructive termination cause of action. And the  
6 answer to that is: There is no problem with evasion,  
7 because everything that's covered by constructive  
8 termination has to be a breach of contract. State law  
9 has this comprehensively covered. Increasing the price  
10 terms on an open price term? U.C.C. 2-305, under which  
11 plaintiff's recovered here, has that covered. So the --  
12 extending the Federal statute really adds very little.

13 And the second point is that even under the  
14 PMPA today, constructive termination has been rejected  
15 -- every -- except in the narrow area of assignments,  
16 under the theory that an assignment followed by a breach  
17 is somehow a constructive termination, a theory which I  
18 don't think we or the government thinks makes any sense.  
19 But that's where it exists. And yet there's no record  
20 outside the area of assignment of these grand evasions  
21 by boosting up all the prices in violation of the  
22 contract.

23 And the risk of expanding constructive  
24 termination here is it projects Federal law into  
25 deciding whether or not it's going to prohibit

1 particular price terms, particular conditions,  
2 particular things dealing with the rent and the  
3 premises, something that Congress stayed away from and  
4 left to the States. What Congress regulated here were  
5 the narrow issues of termination and non-renewal, not  
6 the substantive content of the franchise relationship.

7 If there are no questions, we ask that the  
8 judgment with respect to termination be reversed and the  
9 judgment with respect to non-renewal be affirmed.

10 Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.

12 So the case is submitted.

13 (Whereupon, at 10:57 a.m., the case in the  
14 above-entitled matter was submitted.)  
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