STATE OF WISCONSIN CIRCUIT COURT VILAS COUNTY

KRIST OIL COMPANY

and

ROBERT LOTTO,

Plaintiffs,

-vs-

Case No. 16-CV-117
Case Code: 30701

STATE OF WISCONSIN

and

BEN BRANCEL, Secretary,
Wisconsin Department of Agriculture,
Trade and Consumer Protection,

Defendants.

WISCONSIN PETROLEUM MARKETERS AND CONVENIENCE STORE ASSOCIATION'S BRIEF IN SUPPORT OF ITS MOTION TO INTERVENE

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INTRODUCTION

The Wisconsin Petroleum Marketers and Convenience Store Association, or WPMCA, is an organization of more than 500 businesses involved in the petroleum sales and service industry in this State. That industry employs over 50,000 people and operates more than 3,000 service stations statewide. Since the passage of the Unfair Sales Act in 1939, WPMCA members have operated under the Act, Wis. Stat. § 100.30, including its provisions regulating fuel pricing practices. As a result of that long experience, WPMCA is uniquely well-suited to offer extensive evidence, economic data, and insight regarding the effects of the law, the public benefits, and other grounds supporting the Legislature's rational decision to enact—and repeatedly reject proposals to repeal—the Unfair Sales Act.

Having failed many times to persuade legislators to change or repeal the law in recent years,[1] Plaintiffs are now pursuing the same generalized arguments regarding markets, competition, and the hypothetical effects of repealing the law in this Court. WPMCA seeks to intervene in this matter to ensure that this Court has the opportunity to consider the highly probative evidence regarding the law's actual, *real-world* effects based on data and studies accumulated over several decades. WPMCA's intervention will not interfere with the State's defense of the Unfair Sales Act, but will rather assist the State in supplementing general arguments with hard evidence and experience operating under the law. Indeed, the State does not oppose WPMCA's intervention in this case.

WPMCA's evidence and perspective is especially crucial here, because the implications of this case extend far beyond the Unfair Sales Act or the petroleum industry. The Plaintiffs—

[1] The Legislature rejected bills to repeal or modify the fuel markup provisions of the Act in 2004 (AB 415), 2005 (twice, AB 505/SB 215 and SB 648), 2007 (AB 820), and 2015 (AB 452/SB 371).

represented by an ideologically motivated legal foundation[2]— intend this to be a "test case" with an ambitious agenda: to establish minimal government regulation in Wisconsin not as a matter of *policy*, but as a *fundamental constitutional right*. If successful, Plaintiffs would effectively render all state government action regulating commerce unconstitutional, unless that action satisfies the high hurdle of strict scrutiny.

That is a significant constitutional question, one with far-reaching consequences for the future of government in Wisconsin. Principles of judicial restraint and stare decisis dictate that this question be handled with caution, and WPMCA believes it can be avoided altogether. Through overwhelming factual and expert evidence derived from decades of operating under the statute in question, WPMCA believes that it can provide ample support for the statute under any standard of review—and thus enable this Court (and reviewing courts) to avoid the significant constitutional issue underlying Plaintiffs' complaint.

ARGUMENT

The fuel markup provisions of the Unfair Sales Act have faced challenges for years, both in the courts and the Legislature, and they have survived every one. Just last year, a few legislators sharing Plaintiffs' views of the Unfair Sales Act championed a bill that sought its total repeal. They were unsuccessful. Indeed, due to overwhelming support for the Unfair Sales Act,[3] the repeal bill died in committee without a hearing being held in either the Senate or Assembly.

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[2] The website for the Wisconsin Institute for Law and Liberty's ("WILL") "Center for Competitive Federalism" states that WILL "engage[s] in strategic litigation . . . to advance the 'competitive' federalism established by the Constitution." www.ccf-law.org.

[3] Of the twenty four groups who registered lobbying efforts on the bill, only one (Wal-Mart) came out in favor of repeal. *See* http://docs.legis.wisconsin.gov/2015/proposals/reg/sen/bill/sb371; http://docs.legis.wisconsin.gov/2015/proposals/ab452.

Plaintiffs now seek the relief from this Court that they could not obtain from the Legislature, and ask the Court to legislate from the bench by finding the Unfair Sales Act unconstitutional.

There are good reasons for the Legislature's longstanding support of the Unfair Sales Act: the evidence will show that there are legitimate reasons to protect the public by preventing large retailers such as Wal-Mart from using fuel as a "loss leader" to drive business to their stores. That practice would risk driving out of business smaller companies that cannot afford to sell below cost, and create the conditions for monopolistic behavior by larger retailers once they have cleared the field of competition. (Not to mention the loss of convenience to State residents in reducing the number of locations to fill their tanks.) The potential for monopolies or oligopolies is less of a concern for non-essential products, many of which can now be purchased online from retailers anywhere in the world. But fuel is not such a product. Most families in Wisconsin must purchase fuel to meaningfully participate in the economy, and they cannot avoid buying it locally. Maintaining a stable, widely available market for fuel in this State is a legitimate interest for Wisconsin citizens—an interest that is reflected in their legislators' actions in passing the Act and consistently resisting large retailers' efforts to repeal it.

This brief, in Section II below, highlights some of the evidence WPMCA would elicit to demonstrate the Legislature's wisdom in enacting the Unfair Sales Act. WPMCA's presentation of that evidence will not interfere with the State's defense of the Unfair Sales Act, but rather complement it and relieve the State of some of the expense of compiling and presenting economic data and expert analysis on the Act's real-world effects. Granting the motion carries no downside for the State, and the State does not oppose it. Nor would granting this motion change Plaintiffs' burden. WPMCA's intervention merely promotes the marshalling of all

evidence relevant to the effects of this important and longstanding law in a manner that is efficient, thorough, and clear for the Court and the parties.

That factual evidence and expert analysis is especially important here, because Plaintiffs' particular constitutional challenge is different—and more far-reaching—than prior attacks on the Unfair Sales Act. Therefore, WPMCA believes it is appropriate at the outset of this brief (and this case) to explain the magnitude of the constitutional issue Plaintiffs have posed: namely, whether the Wisconsin Constitution establishes a fundamental right to "economic" liberty, and thus requires heightened scrutiny of any laws that may infringe upon it. (Compl. ¶¶ 51-57.)

I. THE SIGNIFICANT CONSTITUTIONAL QUESTION RAISED IN THIS CASE

Plaintiffs challenge the Unfair Sales Act as a violation of the substantive due process and equal protection rights established by Article I, Section 1 of the Wisconsin Constitution. (Compl. ¶¶ 51-62.) Under that provision, all laws in this State are presumptively subject to rational basis review, under which legislation will be upheld "unless it is patently arbitrary and bears no rational relationship to a legitimate government interest." *In re Mental Commitment of Christopher S.*, 2016 WI 1, ¶¶ 35-36, 366 Wis. 2d 1, 878 N.W.2d 109 (internal quotation omitted). Strict scrutiny applies only when the challenged law "discriminates against a suspect class" or "implicates a fundamental right." *Id.* ¶ 36 (internal quotation omitted).

Plaintiffs do not and cannot claim to be members of a suspect class, or that the Unfair Sales Act discriminates against them on that basis. But they do claim that the rights they purport to assert—which they describe as the rights to "earn a living" and "engage in lawful commerce"—are fundamental ones, and therefore strict scrutiny should apply. (Compl. ¶¶ 52, 57.)

That is a seismic, government-altering proposition. If there is a fundamental, individual right to "economic liberty" under the Wisconsin Constitution, then every law or regulation that

arguably regulates economic activity—from zoning maps to environmental regulations to employment law to the Uniform Commercial Code—becomes subject to the same heightened scrutiny that applies to laws infringing freedom of speech or freedom of religion. Assigning that often insurmountable standard to laws affecting purely economic interests, rather than the rational basis review they presently receive, would dramatically limit the power of legislators to regulate commerce in this State and enshrine minimalist economic policy as a matter of constitutional law.

Plaintiffs effectively seek a return to a discredited legal philosophy that has been forcefully rejected by the United States Supreme Court for almost 80 years. Between the mid-19th Century and 1937, the Court recognized economic liberty interests as fundamental rights under the Fifth and Fourteenth Amendments, applying strict scrutiny to strike down state laws governing health and safety measures, maximum work hours, minimum wages, a variety of other business regulations, and even zoning ordinances. All of the case authority Plaintiffs cite in support of a "fundamental" right to economic liberty comes from that time period (Compl. ¶ 52), which is often referred to as the "*Lochner* era."[4]

The *Lochner* era's "infamous usurpation of legislative power has been relegated to the ash heap of history." *Ferdon v. Wis. Patients Comp. Fund*, 2005 WI 125, ¶ 215 n.254, 284 Wis. 2d 573, 701 N.W.2d 440 (Prosser, J., dissenting). This section explains the context and

[4] That name comes from *Lochner v. New York*, 198 U.S. 45 (1905), a case that struck down health and safety regulations establishing the maximum work hours for employees in New York's baking industry. *Lochner* is a law school casebook staple because the majority opinion (which characterized individual freedom of contract and economic liberty as fundamental constitutional rights) and Justice Holmes' dissent (which characterized economic policy as a matter for legislative determination) framed the Court's debate on this issue in the decades that followed.

consequences of Plaintiffs' proposal to reinstate the long-discredited *Lochner* line of cases in Wisconsin.

A. Plaintiffs Seek to Return to a Long-Discredited Era of Judicial Overreach

1. Unenumerated Liberties and the United States Supreme Court's Role as a "Super-Legislature" During the *Lochner* Era

Both the federal and state constitutions proclaim the rights and blessings of liberty and freedom as their ultimate objectives. U.S. CONST. preamble, amends. V, XIV; WIS. CONST. preamble, art. I § 1. Both constitutions then proceed to enumerate specific liberties that are protected, such as freedom of speech and religion. *See, e.g.*, U.S. CONST. amend. I; WIS. CONST. art. I §§ 3, 18. Left unanswered, however, is the question of whether judges may recognize constitutional liberties that are not specifically enumerated, but might be implied by the founders' objectives or the nature of our system of government. Whether and what "unenumerated" liberty rights have constitutional protection is the subject of substantive due process.

Those questions of unenumerated liberty rights strike at the core of our constitutional system, because the judicial definition of liberty determines the universe of possible government action. If courts define "liberty" as a purely *individualistic* liberty—the freedom *from* majority will as expressed by legislative and executive action—then courts may strike down virtually any type of law or regulation, because rules (by definition) limit freedom. *See, e.g.*, *Lochner v. New York*, 198 U.S. 45, 57-58 (1905); *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897). In contrast, if they define "liberty" as *organized* liberty—the freedom *of* self-government and the right to participate in a majoritarian political process—then courts will defer to legislative judgment, and uphold laws allegedly affecting liberty interests so long as they have some rational basis. *See, e.g.*, *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937) ("the liberty safeguarded" in the

Constitution is not liberty *from* government regulation, but rather "liberty *in a social organization* which requires the protection of law" to further the general welfare) (emphasis added). The former view of liberty is sometimes characterized as judicial "activism," the latter judicial "restraint." An "in-between" version, which recognizes as fundamental rights a limited subset of "personal choices central to individual dignity and autonomy," such as marriage and procreation, is the law of the land today. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015).

But from the mid-1850s to the late 1930s, the more activist conception of constitutional liberty reigned supreme. Ironically, the Supreme Court's sprawling definition of "liberty" during that era[5] originated in a case upholding the economic rights of slaveholders. "The Court first applied substantive due process to strike down a statute in *Dred Scott v. Sandford*,"[6] 60 U.S. 393 (1857), finding that the Missouri Compromise's prohibition of slavery in northern territories violated slaveholders' economic "liberty" to freely move their "property." *Id.* at 450. That concept of economic liberty—that is, a constitutional right to carry out economic activity free from government regulation—applied to state governments following the 1868 enactment of the Fourteenth Amendment. From *Dred Scott* through the Great Depression, the Court employed heavy skepticism of the alleged purposes of laws affecting businesses and an "absolutist" review of the means to achieve them, in a manner that would now be referred to as strict scrutiny. *Washington v. Glucksberg*, 521 U.S. 702, 761 (1997) (Souter, J., concurring).

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[5] That broad, now-discredited definition of constitutional liberty is almost identical to the one proposed by Plaintiffs. *Compare Allgeyer*, 165 U.S. at 589 (fundamental liberty includes "the right of the citizen . . . to live and work where he will, . . . to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential" to those purposes) *with* Compl. ¶ 52. *See also West Coast Hotel*, 300 U.S. 379 (renouncing the broad, "activist" conception of constitutional liberty).

[6] *Obergefell v. Hodges*, 135 S. Ct. 2584, 2616 (2015) (Roberts, C.J., dissenting).

By erratically but aggressively applying strict scrutiny to laws regulating economic activity during that time period, the Court later acknowledged that it had assumed the role of "a super-legislature" imposing minimalist economic policies that had been rejected by voters and their representatives. *Ferguson v. Skrupa*, 372 U.S. 726, 729-33. The judicial "super-legislature" struck down a broad array of properly enacted statutes in that "*Lochner* era," many of which would look commonplace in our statute books today. For example, the Court in that era struck down:

> ● A New York law setting the **maximum work hours** for employees in the baking industry due to workplace health and safety concerns. The Court reviewed the statute under a standard of heightened scrutiny: "the mere assertion that the subject relates though but in a remote degree to the public health does not necessarily render the enactment valid. The act must have a more direct relation" in cases where it "interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor." *Lochner v. New York*, 198 U.S. 45, 57-58 (1905).
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> ● A Texas **transportation safety** statute requiring freight train conductors to have at least two years' experience as brakemen or conductors, on the ground that it infringed the constitutional rights of inexperienced but otherwise competent individuals to "earn [a] living" in the occupation of their choice. *Smith v. Texas*, 233 U.S. 630 (1914).
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> ● A District of Columbia law establishing a **minimum wage** for women and children, because it infringed upon their rights "to freely contract" for a lower wage. Such an infringement "can be justified only by the existence of exceptional circumstances." *Adkins v. Children's Hospital of D.C.*, 261 U.S. 525, 559 (1923).
>
> ● A Minnesota statute outlawing **price discrimination** in the dairy industry, holding that the "anticipated evil" of predatory pricing with anti-competitive effects could not justify the "interference with freedom of contract." *Fairmont Creamery Co. v. Minnesota*, 274 U.S. 1, 9, 11 (1927).
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> ● A Pennsylvania **pharmacy regulation** statute that required pharmacies to be owned by licensed pharmacists, on the ground that it created "an unreasonable and unnecessary restriction upon private business." *Louis K. Liggett Co. v. Baldridge*, 278 U.S. 105, 113-14 (1928).

These are merely a handful of the nearly 200[7] examples of regulations that failed to meet the Court's heightened scrutiny during the *Lochner* era. In all cases, the Court's review was far more demanding—and far less deferential to the legislature—than the rational basis test we know today.

2. Wisconsin Supreme Court Decisions During the *Lochner* Era

As it was constitutionally bound to do, the Wisconsin Supreme Court applied the U.S. Supreme Court's heightened scrutiny of economic regulations during the *Lochner* era—at least when those regulations were challenged under the *federal* constitution. But for challenges under Article I, § 1 of the *state* constitution—the only provision Plaintiffs are asserting here—the Wisconsin Supreme Court applied a rational basis standard even during the *Lochner* era.

Plaintiffs' Complaint cites a number of Wisconsin Supreme Court cases from that era (*see* Complaint ¶ 52), but only one[8] references WIS. CONST. art. I, § 1—the provision declaring general rights to "life, liberty, and the pursuit of happiness." That one exception is *Zillmer v. Kreutzberg*, 114 Wis. 530, 90 N.W. 1090 (1902), a challenge to a state anti-discrimination statute.

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[7] *See Obergefell*, 135 S. Ct. at 2617 (Roberts, C.J., dissenting) ("In the decades after *Lochner*, the Court struck down nearly 200 laws as violations of individual liberty, often over strong dissents contending that the criterion of constitutionality is not whether we believe the law to be for the public good. . . . Eventually, the Court recognized its error and vowed not to repeat it.") (internal quotation and brackets omitted).

[8] The other cases cited in paragraph 52 of Plaintiffs' Complaint relied upon the U.S. Constitution—specifically, the Fourteenth Amendment—or unrelated state law. They do not mention Article I, § 1 of the Wisconsin Constitution. *See State v. Benzenberg*, 101 Wis. 172 (1898) (striking down law under the Fourteenth Amendment's equal protection clause); *Taylor v. State*, 35 Wis. 298 (1874) (stating in dicta that there are limits on the state police power—presumably under federal law, because there is no reference to the Wisconsin Constitution); *Maxwell v. Reed*, 7 Wis. 582 (1859) (protecting certain property for seizure by creditors under the debtors' rights provision of art. 1, § 17 of the Wisconsin Constitution, not § 1's "liberty" clause).

In that case, while the Wisconsin Supreme Court accepted the U.S. Supreme Court's *Lochner* era premise that constitutional "liberty" encompassed a right to individual economic liberty, it squarely rejected the idea that economic regulations were therefore subject to strict scrutiny. The Court in *Zillmer* noted that legislation may—and commonly does—intrude upon economic liberties, and that such intrusions do not violate the Wisconsin Constitution so long as there was "the existence of a public need, and at least tendency of the statute to provide therefor." *Id.* at 549. The Court further emphasized that it was applying a deferential rational basis test—*not* a strict scrutiny standard: "In search for such need and purpose we must and do concede to the legislative branch of government ***the fullest exercise of discretion within the realm of reason***, and, if a public purpose can be conceived ***which might rationally be deemed to justify the act***, the court cannot further weigh the adequacy of the need or the wisdom of the method." *Id.* (emphasis added).

3. The 1937 Close of the *Lochner* Era, and Its Infamy in the Eight Decades Since

While economic laws and regulations received rational basis scrutiny under the Wisconsin Constitution, they continued to receive heightened scrutiny under the U.S. Constitution throughout the *Lochner* era. After early New Deal laws were invalidated by the judicial "super-legislature" under the theory of protecting economic liberties, in 1937 President Roosevelt proposed to expand the Court's membership and pack it with appointees more inclined to defer to the other branches of government.

Weeks later, Justice Owen Roberts' "switch in time that saved nine" mooted the threat. His majority opinion in *West Coast Hotel* broke with *Lochner* era cases by declaring that "the liberty safeguarded" in the Constitution is not economic liberty or pure individualism, but rather "liberty *in a social organization* which requires the protection of law" to further the general

welfare. 300 U.S. at 391 (emphasis added). The protection of the public good may include economic regulation, and "regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process." *Id.*

West Coast Hotel left no doubt that "reasonable in relation to its subject" was a highly deferential standard, in several respects:

> Deference to the legislature's perception of a **need** for regulation to address a matter affecting health, morals, welfare, or other subjects of the State's police power, *id.* at 400 ("Their relative need in the presence of the evil, no less than the existence of the evil itself, is a matter for the legislative judgment.");
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> Deference to the **degree** of legislative response to a perceived need for regulation, *id.* at 400 ("The legislature is free to recognize degrees of harm and it may confine its restrictions to those classes of cases where the need is deemed to be dearest.") (internal quotation omitted); and
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> Deference to the **wisdom** of the legislature's chosen course of action, *id.* at 399 ("Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment.").

West Coast Hotel's rational-basis principles were almost identical to those announced by the Wisconsin Supreme Court 35 years earlier in *Zillmer*, 114 Wis. at 549. Thus, by 1937, the *Lochner* era of heightened judicial scrutiny for economic regulations was over, regardless of whether those regulations were challenged under the federal or state constitution.

And that has been the case ever since. Not once since *West Coast Hotel* has the state or the federal Supreme Court applied strict scrutiny when weighing constitutional challenges on the basis of economic liberty. Almost without exception over the past eight decades, jurists of all stripes have referenced the *Lochner* era's judicial imposition of economic policy with derision, finding that it represented the "nadir of competence" for the Court. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 166 (Souter, J., dissenting) (1996). When modern jurists cite "economic liberty" cases from the *Lochner* era, they do so as a lesson of the dangers of judicial policymaking. For example:

Justice William O. Douglas: "The liberty of contract argument pressed on us is reminiscent of the philosophy of *Lochner* . . ., and others of that vintage. Our recent decisions make plain that we do not sit as a superlegislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare." *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952).

Justice Hugo Black: "We refuse to sit as a super-legislature to weigh the wisdom of legislation, and we emphatically refuse to go back to the time when courts used the Due Process Clause to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. . . . Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours." *Ferguson*, 372 U.S. at 731-32 (internal quotations omitted).

Justice Antonin Scalia: The "discredited" *Lochner* decision "sought to impose a particular economic philosophy upon the Constitution." *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Bd.*, 527 U.S. 666, 690-91 (1999). Since that time, the Court has for decades held "that the 'liberties' protected by the substantive due process clause do not include economic liberties," and rejected arguments that would "propel[] us back to what is referred to (usually deprecatingly) as 'the *Lochner* era.'" *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'l Protection*, 560 U.S. 702, 721 (2010).

Justice Clarence Thomas: "During the *Lochner* era, a period marked by the use of substantive due process to strike down economic regulations, the Court frequently used the vagueness doctrine to invalidate economic regulations penalizing commercial activity. . . . I find this history unsettling. . . . [W]e as a Court have a bad habit of using indefinite concepts—especially ones rooted in 'due process'—to invalidate democratically enacted laws." *Johnson v. United States*, 135 S. Ct. 2551, 2570, 2572 (2015) (concurring).

Justice Stephen Breyer: "No one wants to replay that discredited history" of the *Lochner* era. STEPHEN J. BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 41 (2005).

Chief Justice John Roberts: The "unprincipled tradition of judicial policymaking that characterized discredited decisions such as *Lochner*" is "indefensible as a matter of constitutional law." *Obergefell*, 135 S. Ct. at 2616 (dissenting).

For the past several decades one is hard-pressed to find judicial opinions that describe the *Lochner* era as anything other than a cautionary tale of judicial usurpation of power from the two majoritarian branches of government.

II. WPMCA MEETS THE FLEXIBLE STANDARDS FOR INTERVENTION, AND INTERVENTION IS APPROPRIATE HERE TO ALLOW WPMCA TO PRESENT EVIDENCE THAT COULD RENDER SIGNIFICANT CONSTITUTIONAL QUESTIONS MOOT

The outcome of this case has potentially far-reaching consequences that would extend beyond the current parties and could significantly affect the future of Wisconsin law and basic aspects of Wisconsin's current system of government. As a result, it is in the interest of justice that the case be decided on as complete a record as possible and with the participation of parties who will be most directly affected by the outcome. WPMCA is in the best position to provide the Court with evidence necessary for its analysis and to efficiently represent the interests of the thousands of petroleum retailers who will be directly affected by the outcome of this case.

The Wisconsin Statutes provide for both permissive intervention—available in the Court's discretion whenever the movant asserts a "question of law or fact in common" with the case—and timely intervention "of right," which is mandatory upon a showing of certain factors. Wis. Stat. § 803.09(1, 2). For the reasons set forth below, WPMCA meets the standards for mandatory intervention in this case—and even if it did not, permissive intervention is certainly warranted in this case as a matter of the Court's discretion.

In Wisconsin, a request for intervention "of right" must be granted upon a showing that:

> the movant claims an interest relating to the property or transaction which is the subject of the action and the movant is so situated that the disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest, unless the movant's interest is adequately represented by existing parties.

Wis. Stat. § 803.09(1). The factors governing intervention "of right" are flexible: "Courts have no precise formula for determining whether a potential intervenor meets the requirements," and they are instructed to "evaluate the motion to intervene practically, not technically, with an eye toward disposing of lawsuits by involving as many apparently concerned persons as is

compatible with efficiency and due process." *Wolff v. Town of Jamestown*, 229 Wis. 2d 738, 743, 601 N.W.2d 301 (1999).

WPMCA's members—whose business models were built in reliance on the provisions of the Unfair Sales Act—plainly have a "substantial interest" in litigation that seeks to strike them down. *Id.* at 746. If the Act is found unconstitutional, WPMCA members who have relied upon those provisions have no further recourse, and no "ability to protect that interest." Wis. Stat. § 803.09(1).

WPMCA is also uniquely situated to assist the State and the Court to decide Plaintiffs' challenges without the need to reach the significant constitutional questions they raise. WPMCA is the leading trade organization for those businesses that have been regulated by the fuel markup provisions of the Unfair Sales Act for decades. Over that time, WPMCA and its members have accumulated significant evidence demonstrating the wisdom of those provisions, and WPMCA has access to and familiarity with a wealth of relevant economic data and analysis concerning the Act's effects on fuel prices and competition. If permitted to intervene, WPMCA could marshal and clearly present evidence regarding:

- expert analysis addressing the relationship between the Unfair Sales Act's means and its ends;
- evidence rebutting Plaintiffs' erroneous allegation that the Unfair Sales Act has resulted in Wisconsin consumers paying higher prices for gasoline than they would if the Act were repealed, including (1) studies showing that gas prices have increased in states that have overturned minimum markup laws, and (2) studies comparing the average price of gasoline in Wisconsin (or other states with a minimum markup law on gasoline) to states without a minimum markup law;
- studies assessing the "meeting competition" exception in Wis. Stat. § 100.30 and whether retailers, on average, are charging less than the minimum price under the law (average posted terminal price + taxes and fees x 9.18% markup);
- studies discussing the multiple ways that the "meeting competition" exception in Wis. Stat. § 100.30 results in consumers paying lower gasoline prices;

- studies assessing whether minimum markup laws affect market structure, specifically in terms of market concentration (number and types of competing firms);
- studies disputing claims that minimum markup laws help prop up smaller, inefficient retailers and whether minimum markup laws positively affect employment rates;
- evidence regarding the law's effect on WPMCA members who own a single operation, and the geographic markets that are reached by these single operators.
- expert analysis of entry barriers for new convenience store operators to enter the market; and
- other real-world measures of the Unfair Sales Act's effects, including how the Act has allowed WPMCA members to maintain operations, how the existence of the Act has been assumed as part of their business model, personal experiences with predatory pricing by competitors, and the harmful consequences to their operations if the Act were to be repealed or ruled unconstitutional.

WPMCA believes that this evidence will demonstrate that the Unfair Sales Act can survive even the heightened scrutiny Plaintiffs propose, thus turning the potentially explosive constitutional question of whether Wisconsin courts should return to the *Lochner* era into an academic one.

WMPCA members' strong interests in upholding the law they have operated under for decades are not necessarily adverse to those of the State, but the intervention statute does not require them to be. *Wolff*, 229 Wis. 2d at 747-48. Wisconsin courts require only a "minimal showing" that a proposed intervenor's particular interests are not already represented, *Wolff*, 229 Wis. 2d at 748, 749-50, and WPMCA's proposed intervention easily clears that low hurdle. WPMCA members have "more at stake" in upholding this particular statute than the State's non-specific interest in upholding state law generally, *id.* at 749, and WPMCA members' decades of direct experience operating under the law place it "in a better position" than anyone "to provide full ventilation of the legal and factual context of the dispute." *Id.* at 748 (internal quotation omitted). Permitting WPMCA to develop that context will in no way interfere with that task or "unduly complicate" the proceeding. *Wolff*, 229 Wis. 2d at 746. ("The Wolffs have offered no

reason why the Town's intervention would unduly complicate or delay the resolution of their suit, and we see none."). WPMCA will coordinate with the State to avoid redundancy in the presentation of evidence and arguments, and to ensure that evidence in defense of the Act is presented in a way that is organized, direct, and easy to evaluate for the parties and the Court. Thus, rather than adding inefficiencies or creating distractions from the issues, WPMCA's intervention will only aid the Court and the parties in marshalling the full scope of evidence that should be considered when weighing a new constitutional challenge to a longstanding statute.

CONCLUSION

This Court should have all relevant, highly probative evidence available to it when weighing the significant matter of striking down a duly enacted law that has been relied upon for almost 80 years. WPMCA is better-positioned to channel its data and experience to present a more robust evidence-based defense of the law than any other organization, and WPMCA's evidence of the Unfair Sales Act's real-world effects is substantial. Given the importance of the Act to its members, and the unique ability of WPMCA to provide evidentiary completeness and clarity to meet Plaintiffs' challenges to the Act under any level of constitutional scrutiny, WPMCA respectfully requests that this Court grant its motion to intervene as a matter of right under Wis. Stat. § 803.09(1), or alternatively as a matter of this Court's discretion pursuant to Wis. Stat. § 803.09(2).

Dated this 20th day of October, 2016.

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