IN THE ARKANSAS SUPREME COURT

LARRY HOBBS FARM EQUIPMENT, INC.
d/b/a HOBBS FARM IMPLEMENT AND
HOBBS FARM EQUIPMENT, PETITIONER

Vs. NO. 08-1056

CNH AMERICA, LLC
d/b/a CASE IH, RESPONDENT

UPON CERTIFICATION OF QUESTIONS OF LAW
FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
THE HONORABLE J. LEON HOLMES
DISTRICT JUDGE

BRIEF *AMICUS CURIAE* OF THE ASSOCIATION OF EQUIPMENT MANUFACTURERS AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF RESPONDENTS

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I. THE ARKANSAS FRANCHISE PRACTICES ACT DOES NOT PROHIBIT A GOOD FAITH, COMMERCIALLY REASONABLE AND NONDISCRIMINATORY WITHDRAWAL OF THE TRADEMARKED PRODUCT FROM THE MARKET.

Among the three questions accepted from the United States District Court for the Eastern District of Arkansas, this Court agreed to decide "[u]nder the facts of this case, whether market withdrawal of a product or of a trademark and tradename for the product constitutes 'good cause' to terminate a franchise under Arkansas Code Annotated §4-72-204(a)(1)." *Amici curiae*, the National Association of Manufacturers and the Association of Equipment Manufacturers, submit that the correct answer is "yes."

Amici are nationwide organizations whose members routinely sell their trademarked products through franchises or similar distribution arrangements. Consequently, *amici* are quite familiar with the franchise laws of the several states and are uniquely situated to supply this Court information of "legal significance," to its decision. *Ferguson v. Brick*, 279 Ark. 168, 173, 649 S.W.2d 397, 399 (1983) (*per curiam*). Based on its examination of the purposes of state franchise laws, the historical background against which Arkansas enacted its own law, and the judicial decisions of other states interpreting their own laws, *amici* submit that the Arkansas Franchise Practices Act ("AFPA") does not prohibit a good faith, commercially reasonable, and nondiscriminatory market withdrawal. In this brief, *amici* offer three reasons to support this view.

First, this construction of the AFPA best advances the statute's purposes. Like many state franchise laws, the AFPA serves two complementary goals – it both promotes the development of franchises and protects franchisees from exploitation after they develop a local market for a trademarked product. Construing the AFPA to permit a good faith, commercially

reasonable and nondiscriminatory market withdrawal properly balances these twin goals. By contrast, the reading offered by Hobbs, which would exclude any consideration of the franchisor's economic circumstances, subverts the AFPA's economic-promotion goal and stretches its franchisee-protection goal far beyond what the Arkansas legislature intended.

Second, this construction of the AFPA comports with the reading given to comparable statutes in other states. Several other states with general franchise protection laws, including the very first jurisdiction to enact such a law (Puerto Rico), have recognized some form of a market withdrawal defense through judicial interpretation. The reading offered by Hobbs would make the Arkansas Supreme Court the only highest tribunal of a state explicitly to reject a market withdrawal defense entirely and, thereby, deter the development of franchises in Arkansas, directly contrary to the AFPA's stated purpose.

Third, this construction of the AFPA avoids calling the statute into constitutional doubt. Prior to the AFPA's enactment, an earlier Arkansas law capped royalty payments paid by franchisees, and this Court declared that law unconstitutional on the ground that it exceeded the Arkansas legislature's police power. *Hand v. H&R Block, Inc.*, 258 Ark. 774, 528 S.W.2d 916, 923 (1975). The law's fatal flaw was that it conferred a unilateral economic benefit on franchisees bearing no relation to the "public safety, health, moral or general welfare." The reading offered by Hobbs likewise confers a unilateral benefit on franchisees to obligate franchisors in perpetuity, regardless of the franchisor's economic circumstances, unless the franchisor pays the franchisee an "exit toll." By contrast, construing the statute to permit a good faith, commercially reasonable and nondiscriminatory market withdrawal balances both parties' interests and thereby avoids the defect that doomed the AFPA's predecessor.

A. The History Of Franchise Laws Suggests The Desire Was to "Level The Playing Field" Between Franchisors and Franchisees, Not To Immunize Such Agreements From Economic Reality.

Franchises represent a voluntary business undertaking, wherein both the franchisor and the franchisee contribute resources in an attempt to achieve a mutually beneficial economic result. The franchisor contributes a trademark and set of products associated with that trademark. The trademark carries a brand identity and a reputation for quality and service that the franchisor cultivates and protects across markets. The franchisee contributes capital and knowledge of the local market. The ensuing relationship enables both parties to combine their respective assets (the value that the franchisor has developed around the mark, the franchisee's knowledge of the local market) in order to generate a mutually beneficial economic opportunity. *See generally* M. Mendelsohn, The Guide to Franchising 17-24 (1970).

The essence of the franchise relationship is the franchise agreement. This agreement is simply a contract: the franchisor grants a license to sell the trademarked goods, and the franchisee agrees both to pay various fees and not to damage or destroy the value of the trademark. For much of our nation's history, such business relationships, like contracts generally, were either terminable at will or subject only to a general duty of good faith. *See generally* W. Michael Garner, Franchise Distribution Law and Practice 1:08 (cum. Supp. 1991) (citing cases on general rule of at-will terminability); *Greenspan v. Miller*, 111 Ark. 190, 163 S.W. 776 (1914) (applying good faith standard to agency agreement).

As the franchise form became more popular, policymakers identified a potential risk in this business arrangement. *See Westfield Centre Service, Inc. v. Cities Service Oil Co.*, 432 A.2d 48, 52 (N.J. 1981). In some industries, notably the automotive and fast-food industries, after the franchisee built the local market, the franchisor would terminate the franchise and then sell the

trademarked product directly to the local customer base that the franchisee had developed. *See, e.g., East Bay Running Store, Inc. v. Nike, Inc.*, 890 F.2d 996, 1000 (7th Cir. 1989).

Franchise protection laws were enacted to combat this perceived abuse. Initially, such laws were industry-specific. *See, e.g.* Automobile Dealers Franchise Act of 1956, Pub. L. No. 1026, 70 Stat. 1125. Soon thereafter, local legislatures, beginning with Puerto Rico, enacted broader laws that regulated franchise relationships generally. *See* Thomas M. Pitegoff & W. Michael Garner, *Franchise Relationship Laws*, in Fundamentals of Franchising 187 (Barkoff and Selden, eds., 3d ed. 2008). Other states followed suit, and currently eighteen states, including Arkansas, have such general franchise protection laws (several others have less extensive laws and require, for example, certain disclosures). *See id.*

Such laws serve two complementary purposes. First, they aim to prevent the above-described exploitation of the market for the trademarked good that the franchisee has developed. *Medina & Medina v. Country Pride Foods, Ltd*, 858 F.2d 817 (1st Cir. 1988) (*per curiam*) (reprinting decision of the Puerto Rico Supreme Court answering certified question whether its distribution law permits market withdrawal). To this end, state franchise laws erect an exception to the prior at-will terminability of franchises, typically by requiring "good cause" to terminate or alter the terms of the distribution arrangement. Second, and equally importantly, such laws recognize the importance of franchises to the state's economic development. *See generally* International Franchise Association, Building Opportunity at 30 Table S-7, *available at* http://www.buildingopportunity.com/download/Full/Arkansas.pdf (describing impact of franchises on job creation and economic growth in Arkansas). To this end, these laws do not compel perpetuation of the franchise relationship until the franchisee makes some material misstep. To do so would turn the statute on its head by allowing franchisees to dictate the good

faith, commercially reasonable, and nondiscriminatory business decisions of franchisors and thereby discouraging franchise formation in the state. *See, e.g., St. Joseph Equipment v. Massey-Ferguson, Inc.*, 546 F. Supp. 1245, 1248 (W.D. Wis. 1982); *Carolina Truck & Body Co., Inc. v. General Motors Corp.*, 402 S.E.2d 135, 138 (N.C. App. 1991).

Since the enactment of the first general franchise law in Puerto Rico, the challenge for courts has been to balance these complementary purposes. As we explain below, courts consistently have responded to this challenge by interpreting their franchise protection laws to permit consideration of the franchisor's economic circumstances and, specifically, to permit market withdrawal at least under some circumstances.

B. Interpreting The AFPA To Permit Market Withdrawal Based On Good Faith, Commercially Reasonable and Nondiscriminatory Business Decisions By The Franchisor Better Fits With Purposes Of Franchise Law, Aligns Arkansas With Other States, And Avoiding Calling The Law Into Constitutional Doubt.

The certified question is ultimately a matter of statutory interpretation. In all such cases:

> [T]he basic rule of statutory interpretation to which all other interpretive guides must yield is to give effect to the intent of the legislature. In ascertaining an act's intent, the appellate court examines the statute historically, as well as the contemporaneous conditions at the time of the enactment, the object to be accomplished, the remedy to be provided, the consequences of interpretation, and matters of common knowledge within the court's general jurisdiction.

Morrison v. Jennings, 328 Ark. 278, 293, 943 S.W.2d 559, 567 (1997) (citations omitted). In this case, consideration of the AFPA's underlying purpose, the practices in other states, and critical constitutional principles all support the conclusion that the AFPA permits a franchisor to withdraw from the market.

1. Interpreting the AFPA to allow market withdrawal best comports with its underlying purposes and the purposes underlying other state franchise laws.

This Court repeatedly has emphasized the importance of construing the AFPA in light of its underlying purposes. *Stockton v. Sentry Insurance*, 337 Ark. 517, 512, 989 S.W.2d 914, 917 (1999); *Dr. Pepper Bottling Co. of Paragould v. Frantz*, 311 Ark. 136, 142, 842 S.W.2d 37, 41 (1992). Section 13 of the AFPA, now codified in a statutory note, sets forth the legislature's purpose in enacting the law. Section 13 first recognizes that "distribution and sale of franchise agreements in the State of Arkansas vitally affects the general economy of the state, public interest and public welfare." Ark. Code Ann. §4-72-201 (statutory note). Section 13 then goes on to recognize that franchisors have sometimes "collected advertising fees from franchisees which are not expended for advertising purposes [and] ... have, without good cause and to the great prejudice and harm of the citizens in State of Arkansas, canceled existing franchise agreements." *Id.*

Like its companion laws in other states, discussed above, this language thus admits two purposes underpinning the law's enactment. The first part of the legislative declaration recognizes the importance of franchises to the economic development of Arkansas. The second part recognizes the AFPA's purpose to offset franchisor's exploitation of the franchisee's market development effort through wrongful termination. Thus, the basic purposes underpinning the AFPA resemble the same purposes underpinning other state franchise laws described above.

The history surrounding the AFPA's enactment supports this interpretation. Legislative history such as committee reports or floor statements is unavailable. However, secondary accounts strongly suggest that the final version of the AFPA reflected this dual goal. An early version of the AFPA simply defined good cause to mean the franchisee's failure to comply with

"essential and reasonable requirements." Continental Franchise Review at 4 (Feb. 21, 1977). A coalition of franchisors and franchisees objected to this bill and "emphasized how the state would suffer economically by discouraging new and existing franchise expansion." *Id.* In response, the Arkansas House Judiciary Committee deferred consideration of this bill. The final version of the AFPA contained a significantly broader definition of "good cause," supporting the inference that, through this change, the Legislature intended to advance the twin purposes of economic promotion and franchisee protection.

Several other states have construed their own franchise laws to permit market withdrawal even where the statutory language does not expressly mention the concept in its definition of good cause. *See, e.g., Hartford Elec. Supply Co. v. Allen-Bradley Co., Inc.*, 736 A.2d 824 (Conn. 1999); *Ziegler Co., Inc. v. Rexnord, Inc.*, 433 N.W.2d 8 (Wis. 1998); *Medina & Medina*, 858 F.2d 817. For example, in *Ziegler*, the Supreme Court of Wisconsin confronted an issue quite similar to the one currently certified to this Court – namely under what circumstances a grantor's "economic circumstances may constitute good cause to alter its method of doing business with its dealers...." 433 N.W.2d at 11 (Wisconsin law uses the terms grantor and dealer in the same manner that Arkansas law uses the terms franchisor and franchisee). Much like the AFPA, the Wisconsin Fair Dealership Law ("WFDL") prohibited terminations or other changes in a dealership agreement except for "good cause." The WFDL did not expressly mention market withdrawal or, for that matter, changes in the grantor's economic circumstances within the definition of good cause. Its definition of good cause did include the following term, identical to Section 2(g) of the AFPA:

> Failure by a dealer to comply substantially with essential and reasonable requirements imposed upon the dealer by the grantor... which requirements are not discriminatory as compared with requirements imposed on other similarly situated dealers either by their terms or in the manner of their enforcement.

Wis. Stat. Ann. § 135.02(4) (West 2008).

Seizing upon this definition of good cause, the dealer advanced a position indistinguishable from the one advanced by Hobbs here – namely that because the WFDL did not specifically authorize termination or alteration of a dealer relationship based on changes in the grantor's economic circumstances, grantors were legally obligated to renew their distribution agreements irrespective of their economic condition unless they were prepared to pay damages to the distributor. Rejecting that view as "unjust and unreasonable," the Wisconsin Supreme Court explained that while the purpose of the WFDL was to "afford dealers substantial protections unavailable at common law ... the Wisconsin legislature could not have intended to impose an eternal and unqualified duty of self-sacrifice upon every grantor that enters into a distributor-dealership agreement." *Ziegler*, 433 N.W.2d 8, 11. *See also Medina*, 858 F.2d at 822 (collecting cases that have construed the "cause" requirement in franchise laws to avoid the "difficulties these statutes would run into if construed in such a way that principles would be subjected to live in perpetual symbiosis with distributors under all types of circumstances.").

The Wisconsin Supreme Court's interpretation of the WFDL is especially instructive on the proper interpretation of the AFPA for three reasons. First, the language in the WFDL upon which the Wisconsin Supreme Court relied is identical to language contained within the AFPA's definition of good cause. *Compare* Wis. Stat. Ann. § 135.02(4), with Ark. Code Ann. §4-72-202(7)(A). Second, this Court previously has consulted the Wisconsin Supreme Court's interpretation of the WFDL to inform its construction of the AFPA. *See Stockton*, 337 Ark. at 512, 989 S.W.2d at 917; Frantz, 311, Ark. at 142, 842 S.W.2d at 41. Third, the WFDL predated the enactment of the AFPA, so, particularly in light of the parallel language, it is reasonable to assume that the Arkansas legislature considered the WFDL when drafting the AFPA. James A.

Brickley *et al.*, *The Economic Effect of Franchise Termination Laws*, 34 J.L. & Econ. 101, 113 (1991). *See also* Continental Franchise Review at 7 (Feb.7, 1977) (suggesting that AFPA was partly an "off-shoot of" the WFDL).

Admittedly, *Ziegler* involved a failure to renew a franchise whereas this case involves an alleged termination. Yet that distinction does not affect the interpretation of good cause. Courts interpreting the WFDL and other state franchise laws likewise have extended their market withdrawal defenses to the termination context. *See Morley-Murphy Co. v. Zenith Electronics Corp.*, 142 F.3d 373, 377 (7th Cir. 1998) (extending the *Ziegler* standard to terminations of dealership agreements and declining to limit its rule to mere changes in the terms of the dealership agreement); *Borg Warner Int'l Corp. v. Quasar Co.*, 138 P.R. Dec. 60 (1995) (extending Puerto Rico Supreme Court's decision in *Medina* to encompass situations of market withdrawal in form of transfer of distribution network to another division within company which continued to sell in market); *Hartford Electric Supply Co. v. Allen-Bradley Co., Inc.*, 736 A.2d 824, 841 (Conn. 1999) (interpreting "good cause" term of Connecticut franchise law to permit termination based on franchisor's good faith, legitimate business decision); *American Mart Corp. v. Joseph E. Seagram & Sons, Inc.*, 824 F.2d 733, 734 (9th Cir. 1987) (*per curiam*) (recognizing that nationwide reorganization, including termination of franchises was "warranted by compelling business considerations"). Much like the AFPA, the relevant statutes in these cases do not differentiate between termination and nonrenewal in terms of the "good cause" standard, so the courts appropriately apply the same standard, including the market withdrawal defense, to both types of franchisor actions.

By advocating this position, *amici* do not urge unexamined acceptance of every assertion of changed economic circumstances by a franchisor. The "commercially reasonable and

nondiscriminatory" test announced in *Ziegler* better comports with the AFPA's language and tracks this Court's decisions on the implied covenant of good faith and fair dealing to ensure that only those grantor decisions attributable to true shifts in economic circumstances may operate as a defense under Section 202(7)(A) of the AFPA. *See Miller Brewing Co. v. Roleson*, 365 Ark. 38, 45, 223 S.W.3d 806, 811 (2006) (discussing good faith provision of AFPA); *TCBY Systems, Inc. v. RSP Co., Inc.*, 33 F.3d 925, 928-29 (8th Cir. 1994) (concluding that Arkansas Supreme Court would read implied duty of good faith and fair dealing into franchise agreement). *See also Petereit v. S.B. Thomas, Inc.*, 63 F.3d 1169, 1185 (2d Cir. 1995) ("When the franchisor demonstrates that its business decision is legitimate and made in good faith ... a court should not replace the grantor's decision with its own."). Such a measured approach appropriately "strik[es] a balance between franchisee protection and attracting and retaining franchisors to do business in the state." *Petereit*, 63 F.3d at 1184. *See also Hartford Elec.*, 736 A.2d at 841 (Connecticut Supreme Court approving of *Petereit's* conception of twin purposes of Connecticut franchise law). Thus, in order to advance the AFPA's underlying twin purposes and in harmony with other states' views, *amici* urge this Court to interpret the AFPA to permit good faith, commercially reasonable and nondiscriminatory market withdrawal by the franchisor.

2. Interpreting The AFPA To Allow Market Withdrawal Aligns Arkansas With The Practice In Other States, Consistent With The Statute's Purposes.

Apart from its fundamental inconsistency with the AFPA's underlying purposes, Hobbs' proposed interpretation of the AFPA would undermine the AFPA's economic-development goal in another respect. Specifically, it would make this Court the only state supreme court to interpret its general franchise protection law to preclude market withdrawal and, more generally, any consideration of the grantor's economic circumstances. This legal isolation of the state

would undoubtedly encourage economic isolation as well and, thereby, directly undercut the AFPA's economic-promotion goal.

Several other courts (along with Puerto Rico's) already have interpreted their state general franchise protection laws to permit market withdrawal. *See Petereit*, 63 F.3d at 1184 (citing "other statutory schemes [that] take into account the economic decisions of the franchisor in the 'good cause' calculus"). By contrast, based on *amici's* research, no state supreme court has explicitly held that its general franchise protection law precludes market withdrawal or, more generally, consideration of the franchisor's economic circumstances.[1] To adopt such an approach, as Hobbs urges, would place Arkansas at the polar extreme of franchise regulation.

Such an interpretation sends the signal to the franchise community that Arkansas is unwilling to take their economic circumstances into consideration, thereby either discouraging franchise location in Arkansas or encouraging corporate forms that avoid the reach of the franchise law. Either result would run directly contrary to the AFPA's twin purposes – it neither recognizes the importance of franchises to economic development nor facilitates the long-term protection of franchise relationships. Thus, interpreting the AFPA to permit good faith,

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[1] In *Westfield Centre Service, Inc. v. Cities Service Oil Co.*, 432 A.2d 48 (N.J. 1981), the New Jersey Supreme Court narrowly interpreted the "good cause" provision of New Jersey's franchise law. *Westfield*, though, did not involve true market withdrawal, and later courts concluded that, despite this narrow construction, the New Jersey Supreme Court would not interpret its franchise law to preclude nondiscriminatory market withdrawal. *See Freedman Truck Center, Inc. v. General Motors Corp.*, 784 F. Supp. 167, 172-173 (D.N.J. 1992).

commercially reasonable and nondiscriminatory market withdrawal avoids isolating Arkansas relative to other states and thereby avoids frustrating the AFPA's economic development aim.

3. Interpreting The AFPA To Allow Market Withdrawal Avoids Calling The Statute Into Constitutional Doubt.

This Court repeatedly has stressed, wherever possible, statutes should be interpreted so as to avoid calling them into constitutional doubt and "[i]f it is possible to construe a statute as constitutional, [this Court] must do so." *Bowker v. State*, 363 Ark. 345, 355, 214 S.W.3d 243, 249 (2005). In this case, construing the AFPA to permit a franchisor to withdraw from the market avoids calling the AFPA into constitutional doubt. Specifically, it avoids running afoul of this Court's prior decision, which invalidated the AFPA's predecessor, on the ground that it exceeded the state legislature's police power by conferring a unilateral economic benefit on franchisees. *See Hand v. H & R Block, Inc.* 258 Ark. 774, 783, 528 S.W.2d 916, 921 (1975). *See also Jegley v. Picado*, 349 Ark. 600, 635, 80 S.W.3d 332, 352 (2002) (reaffirming the *Block* principle and relying on it to invalidate state law as exceeding police power); *Craighead Elec. Co-op v. Craighead County*, 352 Ark. 76, 85, 98 S.W.3d 414, 420 (2003) ("[T]he police power of the state is one founded in public necessity, and this necessity must exist in order to justify its existence.").

In *Hand*, this Court held the AFPA's predecessor to be unconstitutional. That statute capped the royalty payments that franchisees could be obligated to pay franchisors, and this Court held that the law exceeded the legislature's police power. 258 Ark. at 782, 528 S.W.2d at 919. The statute's fatal flaw was that it sought to "regulate the price to be agreed upon by contracting parties *solely for the benefit of one of the parties*." 258 Ark. at 783, 528 S.W. 3d at 921 (emphasis added). This legislative desire to control the purchase price of the franchise

solely for the franchisee's benefit bore no "relation to the public, safety, health, moral or general welfare" and, thus, represented an unconstitutional exercise of the legislature's police power.

Of course, regulating contractual relations is not identical to capping royalty payments. Yet the reading of the AFPA offered by Hobbs replicates the error that doomed the royalty law. Hobbs' proposed interpretation of the AFPA, just like the royalty law, would confer a unilateral economic benefit on the franchisee. It would enable the franchisee to force the franchisor to make a payment in order to terminate a franchise regardless of the franchisor's economic circumstances and without according reciprocal benefit to franchisors. *See Remus v. Amoco Oil Co.*, 794 F.2d 1238, 1241 (7th Cir. 1986) (hesitating to interpret state franchise statute to preclude nondiscriminatory system-wide changes partly because "such a law [would] completely transform the relationship of franchisor and franchisee – *much as a law which said that a company could not alter its prices or products without its employees' consent*) (emphasis added); *Freedman Truck Center*, 784 F Supp. at 172 (declining to interpret New Jersey franchise law to preclude market withdrawal on the grounds that it would "shift[] the risk of economic downturn ... from the franchisee to the franchisor [and] ... would make franchisors insurers for franchisees."). Seen another way, Hobbs' proposed reading entitles franchisee to withdraw from the market unilaterally, Ark Code Ann. §4-72-202(7)(C) (entitling franchisor to terminate if franchisee "abandon[s] ... the franchise"), but accords no corresponding right to the franchisor.

Other courts have recognized serious constitutional concerns of construing a statute to foreclose the market withdrawal defense or, more generally, to exclude any consideration of grantor's economic circumstances. *Medina*, 858 F.2d at 823; *Central GMC, Inc. v. General Motors Corp.*, 946 F.2d 327, 334 (4th Cir. 1991) ("[A state's] ability to restrict the capacity of national business organizations to respond to changing economic circumstances is not a question

that is free of constitutional difficulty."); *Consumers Oil Corp. of Trenton v. Phillips Petroleum Co.*, 488 F.2d 816, 818 (3d Cir. 1973) (noting "substantial constitutional questions" if New Jersey law construed to preclude market withdrawal); *Lee Beverage Co., Inc. v. I.S.C. Wines of California, Inc.*, 623 F Supp. 867, 869 (E.D. Wis. 1985) (describing the "legitimate attack on the basis of constitutional principles" if franchise laws were interpreted without consideration of franchisor's economic circumstances). In *Medina*, the Puerto Rico Supreme Court relied on this reasoning to conclude that Puerto Rico's Dealer's law did not permit a franchisor to withdraw from the market. According to that Court, such a crabbed interpretation of the law would subvert its purpose – going far beyond leveling the playing field and enabling the dealer to "govern – by imposing his conditions – the principal's sales policies." *Medina*, 858 F.2d at 823. *See also V. Suarez & Co., Inc. v. Dow Brands, Inc.*, 337 F.3d 1, 7 (1st Cir. 2003) (Goal of Puerto Rico law was to "encourag[e] a level playing field and not creat[e] new power in the dealer."). Echoing the sentiments expressed by the Arkansas Supreme Court in *Hand*, the Puerto Rico Supreme Court explained that the interpretation urged by the dealer in that case (and reiterated here by Hobbs) "would be contrary to public order because it would place an unreasonable restriction on man's free will." *Medina*, 858 F.2d at 823. Thus, in order to avoid "serious constitutional objections," the Court held that Puerto Rico's Dealer Law allowed a franchisor to withdraw from the market. *Id.*

Construing the AFPA to permit consideration of the franchisor's economic circumstances and to permit market withdrawal likewise avoids the constitutional difficulty and, thus, is the better reading under this Court's interpretive canons.

C. The Fourth Circuit's Interpretation Of The AFPA Should Be Rejected.

Hobbs urges this Court to follow the Fourth Circuit's construction of the AFPA in *Volvo Trademark Holding Aktiebolaget v. Clark Machinery Co.*, 510 F.3d 474 (2007). Of course, the Fourth Circuit's construction of the AFPA is not binding on its court. *See Heinemann v. Hallum*, 365 Ark. 600, 607, 232 S.W.3d 420, 425 (2006). Nor are the reasons offered by Hobbs in defense the Fourth Circuit's interpretation persuasive.

The Fourth Circuit relied on two main canons of interpretation to support its conclusion that the AFPA did not permit a market withdrawal defense. First, the Court argued the plain text of the AFPA supported this result. 410 F.3d at 482. But this Court has refused to interpret statutes in a manner that "results in absurdity or injustice, leads to contradiction or defeats the plain purpose of the law." *Ragland v. Alpha Aviation, Inc.*, 285 Ark. 182, 185, 686 S.W.2d 391, 392 (1985). As the preceding two sections illustrate, adopting Hobbs' interpretation of the AFPA would do just that. *See Suarez*, 337 F.3d at 4 ("From a plain reading of the [Puerto Rico] statute, it may appear that only action or inaction on the part of the dealer would provide just cause to allow a principal to terminate the relationship. But a plain reading of [the Act] would produce, in some situations, absurd and constitutionally suspect results."). Moreover, reliance on plain language arguments is inappropriate where the Legislature "did not anticipate" a particular case when it enacted the law. *Helena-West Helena Sch. Dist. v. Fluker*, 371 Ark. 574, 580-81, ____ S.W.3d ____ (2007). In this case, it is far more likely that the Arkansas Legislature simply did not consider the issue of market withdrawal at the time it enacted the AFPA. By that time, ten states had enacted franchise protection laws, and none even mentioned market withdrawal. *See* Brickley, 34 J.L. & Econ. 118. Thus, unreflective resort to plain language canons does not "give effect to the intent of the legislature." *Morrison*, 943 S.W.2d at 566.

Second, the Fourth Circuit relied on the principle of *expressio unius est exclusio alterius*. Yet that canon does not clearly support Hobbs' position. A specific provision of the AFPA's definition of "good cause" does indeed admit the relevance of the grantor's economic circumstances and, as already explained, other state courts have relied on identical language to support a market withdrawal defense even in the absence of explicit language in the statute. *See* Ark. Code Ann. §4-72-202(7)(A); *Ziegler*, 433 N.W.2d at 11. Moreover, even if the *expressio unius* argument does not support amici's position in this case, it merely is one canon among many, and there is no particular "pecking order" among the myriad canons of construction. They are all simply tools geared toward the common goal of ascertaining the Legislature's intent. *See Hartford Fire Ins. Co. v. Sauer*, 358 Ark. 89, 94-95, 186 S.W.3d 229, 233 (2004). Certainly, the canon of constitutional doubt is entitled to at least as much, if not more, weight than the *expressio unius* canon and, as *amici* explain above, that constitutional canon clearly supports construing the AFPA to permit market withdrawal.

Thus, the Fourth Circuit's non-binding interpretation of the AFPA should be rejected.

CONCLUSION

For the foregoing reasons, amici respectfully submit that the Arkansas Franchise Practices Act permits a franchisor to make a good faith, commercially reasonable, nondiscriminatory withdrawal from the market.[2]

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[2] *Amici* recognize the case presents the collateral question whether, on these particular facts, CNH's actions in this context constitute market withdrawal. Mindful of their obligation to limit their brief to legally significant, unique

Respectfully submitted,

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information, *amici* do not independently address that question here but merely refer the Court to CNH's brief on that point.

CERTIFICATE OF SERVICE

I, Kevin A. Crass, do hereby certify that a copy of the foregoing has been served upon the following counsel of record, via regular United States Mail, this 24th day of November, 2008:

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