



Associated Wholesale Grocers, Inc.

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Senate Judiciary Committee Testimony in favor of SB123 and opposed to SB124, Amending the Kansas Restraint of Trade Act

Senator King and members of the Committee, thank you for the opportunity to submit testimony from Associated Wholesale Grocers, Inc. ("AWG") fully supporting SB123, and opposing SB124 which radically changes the Kansas Restraint of Trade Act ("KRTA").

AWG is an 85 year old, member-owned grocery wholesaler headquartered in Kansas City, Kansas. With 590 members operating over 2,900 stores, AWG had over \$7 billion in sales last year alone. AWG currently employs more than 1,000 employees in this State. Seventy-five of AWG's members, operating 186 grocery stores across the State, employ countless more. Many are family-owned businesses operating family-run stores. The KRTA's protections are of vital importance to AWG, its Kansas members and all other Kansas businesses, large and small.

Few disagree that the KRTA needs to be clarified due to the Kansas Supreme Court's decision in *O'Brien v. Leegin Creative Leather Products, Inc.* last year. However, the amendment must be properly measured so that it effectively fixes the issues created by *O'Brien* without improperly opening the door to anti-competitive conduct that has been illegal in this State and nearly all other states for over 100 years.

Since the last legislative session, AWG has worked closely with individuals, companies and lobbying groups to arrive at a solution that is good for all Kansans. In particular, we took an active role in the months of discussions conducted by the Judicial Council.

SB123, which closely mirrors the Option 1 draft bill submitted to the Committee by the Judicial Council on December 7, 2012, is properly tailored to restore Kansas to its pre-*O'Brien* state. Kansas courts have repeatedly and routinely declared that certain practices and arrangements are so anti-competitive that they are condemned as a matter of law without further analysis. These include unlawful bid-rigging, price-fixing, supply-fixing, group boycotts and other anti-competitive activities between or among competitors. SB123 ensures that such abhorrent horizontal conduct remains per se unlawful in the State.

SB123 provides businesses in the State with the opportunity to grow the economy and jobs by allowing all business arrangements of whatever nature so long as they are reasonable restraints of trade. It properly restores the reasonableness standard from *Heckard v. Park* and *Okerberg v. Crable* (cases which *O'Brien* overruled) and is the best option to allow Kansas businesses to expand and thrive.

SB123 provides proper exemptions for business arrangements and practices that actually spur competition and economic growth. For instance, franchise agreements and covenants not to compete are exempt from the KRTA. It further clarifies that it is not

every effect on price that violates the statute but rather “predatory pricing” that is designed to, or actually does, increase price.

Because SB123 ensures that Kansas businesses and other companies within the State are free to pursue economic growth and enjoy a level playing field while doing so, AWG strongly supports this bill. For the same reasons, AWG fully supports HB2275, currently pending before the House Judiciary Committee.

AWG strongly opposes SB124 for two equally important reasons.

First, for over 100 years, Kansas courts have repeatedly and routinely declared that certain practices and arrangements are so anti-competitive that they are condemned as a matter of law without further analysis. These include unlawful bidding-rigging, group boycotts, price-fixing, supply-fixing and other abhorrent activities between or among competitors. As currently written, SB124 provides *only* that price-fixing among competitors is per se unlawful. This prohibition is far too narrow as it does not condemn the broad range of anti-competitive conduct traditionally held unlawful in this State.

Second, while exemptions for business arrangements and practices that actually spur competition and economic growth are entirely proper, the exemptions in SB124 are far too broad. As written, a business would be fully exempt from all reaches of the KRTA, including actions by the Kansas Attorney General, if it is merely “governed by” a particular organizing statute. This exemption is so broad that it even swallows the rule prohibiting “price-fixing” among competitors.

If a company only has to be “governed by” a particular statute for full exemption, it is free to ignore both that statute and the KRTA altogether. For example, a company claiming to be “governed by” any of the listed statutes would not have to take a single good faith action to even attempt to comply with its statutory requirements. At the same time, that company would be free to engage in any activity made illegal by the KRTA yet remain wholly and absolutely beyond its reach. Any company seeking this type of absolution should at least be required to comply with the listed statute itself, particularly since those requirements are minimal.

Consistent with current Kansas law, SB123 requires a company seeking a wholesale exemption from the KRTA to actually “comply” with any such organizing statutes. We should maintain this existing standard in Kansas.

We greatly appreciate the opportunity to provide this testimony fully supporting SB123 and strongly opposing SB124.