



INSTITUTE FOR JUSTICE

**Testimony in Support of House File 1726  
Minnesota House Commerce Finance & Policy Committee**

February 20, 2023

Dear Chairman Stephenson and Members of the Committee:

Thank you for the opportunity to submit testimony in support of House File 1726, which will remove anticompetitive restraints on trade and ensure that Minnesota’s consumers are receiving the true benefits of an uncaptured competitive marketplace. My name is Meagan Forbes, and I am Senior Legislative Counsel at the Institute for Justice. We are a nonprofit, public-interest law firm that works to defend civil liberties. For more than 30 years, we have worked to protect the rights of small business owners and others striving to make their lives, and the lives of those around them, better. We have also studied the burdens of economic protectionism and the dangers that come from insulating special interests at the expense of small business owners, consumers, and the public at large.

Economic protectionism imposes immense costs on consumers, entrepreneurs, and the U.S. economy. Government-granted privileges raise prices, lower the quality of goods and services, and discourage innovation, all to the detriment of the American consumer.<sup>1</sup> Even worse, this type of cronyism erodes social trust and diminishes the legitimacy of both public and private institutions.<sup>2</sup>

Unfortunately, this is exactly what is at play when it comes to Minnesota’s minimum markup law for gas. This law is the result of outsized influence from corporate interests with a direct financial stake in keeping a minimum markup on gasoline, regardless of the negative impact it has on consumers. As the FTC has recognized, the existence of minimum markup laws on gasoline “protects individual competitors, not competition, and discourages pro-competitive price cutting.”<sup>3</sup> Not only do “[t]he negative consequences of below-cost prohibition statutes outweigh the benefits by far,” these costs are “astronomically increased by the fact that they are routinely found to be unconstitutional.”<sup>4</sup>

Legislatures often adopt minimum markup laws with the best of intentions, in an effort to prevent “predatory pricing” and protect small mom-and-pop retailers. But empirical research on the effects of these laws paints a very different picture. After examining data from all 50 states, researchers found that “there is no causal relationship between minimum-markup laws and the number of small businesses. Mom-and-pop retailers are doing just fine in states that do not have

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<sup>1</sup> Mitchell, M., *The Pathology of Privilege: The Economic Consequences of Government Favoritism* (Sept. 2016), <https://www.mercatus.org/research/books/pathology-privilege-economic-consequences-government-favoritism>.

<sup>2</sup> Rauch, J., *Government’s End: Why Washington Stopped Working* (New York: Public Affairs, 1999); Zingales, L., *Capitalism After the Crisis*, National Affairs (Fall 2009).

<sup>3</sup> Federal Trade Commission, *FTC Staff: Wisconsin’s Unfair Sales Act Likely Raises Gas Prices* (Oct. 16, 2003), <https://www.ftc.gov/news-events/news/press-releases/2003/10/ftc-staff-wisconsins-unfair-sales-act-likely-raises-gas-prices>.

<sup>4</sup> Offei-Danso, K., *The Case Against Below-Cost Prohibition Statutes*, *Journal of Consumer & Commercial Law* (Spring 2011).



INSTITUTE FOR JUSTICE

these laws on the books.”<sup>5</sup> This is unsurprising, as examples of successful predatory pricing schemes “are rare—so rare, in fact, that observing real-life anticompetitive price predation has become the holy grail of industrial organization economists.”<sup>6</sup> As the FTC has observed, specifically in the context of gasoline retailing, “it is unlikely that one company could price below cost long enough to drive out a significant number of rivals and attain a dominant position.”<sup>7</sup>

But while these laws do not deliver the benefits that they promise, they “do hurt consumers, since they act as a hidden tax that disproportionately harms poor and middle-income households.”<sup>8</sup> The FTC notes that minimum markup laws likely lead “to significantly higher prices for consumers.”<sup>9</sup> Even more, these laws are “unnecessary,” as state law and federal antitrust laws already prohibit anticompetitive below-cost pricing.<sup>10</sup> Minimum markup laws are not just a solution in search of a problem, research shows that they create new, costly problems of their own.

HF 1726 addresses these problems by repealing Minnesota’s existing below-cost pricing prohibition on gasoline sales. If Minnesota were to adopt this reform, it would go a long way in combating government favoritism while protecting Minnesota’s consumers at a time when many are struggling with the rising costs of goods and services. I encourage the committee to support this important reform. Thank you.

Sincerely,

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<sup>5</sup> Szafir, C. & Gleason, P., *These Prices Are a Steal—and in Some States, That’s Illegal*, Wall Street Journal (Jan. 26, 2018), <https://www.wsj.com/articles/these-prices-are-a-stealand-in-some-states-thats-illegal-1517007867>.

<sup>6</sup> Wright, J. & Stone II, J., *Still Rare Like a Unicorn? The Case of Behavioral Predatory Pricing*, Journal of Law, Economics & Policy (2012).

<sup>7</sup> Federal Trade Commission, *Predatory or Below-Cost Pricing*, <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/single-firm-conduct/predatory-or-below-cost-pricing>.

<sup>8</sup> Szafir, C. & Gleason, P., *These Prices Are a Steal—and in Some States, That’s Illegal*, Wall Street Journal (Jan. 26, 2018), <https://www.wsj.com/articles/these-prices-are-a-stealand-in-some-states-thats-illegal-1517007867>.

<sup>9</sup> Federal Trade Commission, *FTC Staff: Wisconsin’s Unfair Sales Act Likely Raises Gas Prices* (Oct. 16, 2003), <https://www.ftc.gov/news-events/news/press-releases/2003/10/ftc-staff-wisconsins-unfair-sales-act-likely-raises-gas-prices>.

<sup>10</sup> *Id.*; Minnesota Statutes 2022, section 325D.04.