



# Associated Wholesale Grocers, Inc.

Kansas City • Springfield • Oklahoma City • Memphis • Nashville • Ft. Worth • Gulf Coast

5000 Kansas Avenue  
Kansas City, Kansas 66106  
(913) 288-1000 • [www.awginc.com](http://www.awginc.com)

## House Judiciary Committee Testimony in favor of HB2275 and opposed to HB2224 and HB2225, Relating to the Kansas Restraint of Trade Act February 20, 2013

Representative Kinzer and members of the Committee, thank you for the opportunity to submit testimony from Associated Wholesale Grocers, Inc. (“AWG”) supporting HB2275 and opposing HB2224 and HB2225, all of which address 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.

HB2275, 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. HB2275 ensures that such abhorrent horizontal conduct remains per se unlawful in the State.

HB2275 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.

HB2275 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 HB2275 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 SB123, currently pending before the Senate Judiciary Committee.

Two other bills, HB2224 and HB2225, are currently before the Committee. AWG opposes both bills.

HB2225 repeals the entire KRTA. AWG opposes this bill in the strongest possible terms. The harm to Kansas citizens and businesses from the wholesale repeal of the KRTA would be incalculable. This repeal would also eliminate the ability of the Kansas Attorney General to prosecute claims in Kansas state court against individuals and companies that directly harm Kansas. If the State of Kansas is the victim of a bid-rigging scheme from companies bidding on state contracts, the Kansas Attorney General would no longer have the right to prosecute these companies in Kansas state court or to seek statutory damages for these anti-competitive actions.

As for HB2224, if our goal is to restore Kansas to the position before *O'Brien*, that bill does not accomplish these goals and cannot credibly be described as just a clarification to the KRTA. Rather, HB2224 would prevent any meaningful enforcement under the KRTA of anti-competitive conduct that is per se unlawful under all other state and federal antitrust laws. This bill would be a radical departure from the existing KRTA provisions that have protected Kansans.

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, HB2224 provides *only* that price-fixing among competitors is per se unlawful. This prohibition is too narrow as it does not condemn the broad range of anti-competitive conduct traditionally held unlawful in this State.

HB2224 also fails to incorporate the factors historically relied upon by Kansas courts in determining what constitutes reasonable restraints under the KRTA. To eliminate any misunderstandings in the future, the factors historically relied on by Kansas courts need to be properly restored and set forth in the KRTA. As written, HB2224 does not incorporate these factors, which will create unnecessary confusion in the future. We need to ensure that Kansas businesses remain free to pursue economic growth and, at the same time, enjoy a level playing field while doing so.

We greatly appreciate the opportunity to provide this testimony.