IN THE SUPREME COURT OF FLORIDA

ALBERTSON'S INC., et al.,

Petitioners,

vs.

Case No. 86,247
(DCA No. 94-1592)

THE FLORIDA DEPARTMENT OF PROFESSIONAL REGULATION, et al.,

Respondents.
_____/

ANSWER BRIEF OF APPELLEES

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PRELIMINARY STATEMENT

In the instant appeal, Petitioners shall be referred to as Petitioners, Plaintiffs (the party appellation they held in the Circuit Court below), or by their proper names, where appropriate. Respondents shall be referred to as Respondents, Defendants, the "State," or by proper name, where appropriate.

References to the Appendix filed by Petitioners shall be made by use of the abbreviation "A" followed by the document number in the Appendix, and, where applicable, the page number (e.g., A-3-2) References to the record below shall be made by use of the abbreviation "R" followed by the volume number and appropriate page number in the record. (R-I-33)

References to Petitioner's Initial Brief shall be made by the use of the abbreviation "IB" followed by the applicable page number (e.g., IB-4)

References to any provision of Chapter 408, Florida Statutes (1993), shall be made by reference to the statute section number only (e.g., §408.706).

STATEMENT OF THE CASE AND FACTS

Petitioner's Statement of the Case and Facts is inadequate to apprise this Honorable Court of the facts necessary to review the opinion below. Accordingly, Respondents offer the following Statement of the Case and Facts.

A. Statement of Facts

In 1993, the Florida Legislature passed the Health Care and Insurance Reform Act of 1993 (Act). As part of the Act, the Legislature enacted laws relating to "Community Health Purchasing," by which small business employers and the State of Florida could provide health care to their employees and to Medicaid recipients in a cost efficient manner. *See* § 408.706.

In enacting these statutory provisions, the Legislature expressly stated its finding that "the current health care system in this state does not provide access to affordable health care for all persons in this state." *See* § 408.70(1). Further, the Legislature stated that "[i]t is the intent of the Legislature that a structured health care competition model, known as 'managed competition,' be

implemented throughout the state to improve the efficiency of health care markets in this state." *See* § 408.70(2).

Pursuant to §§ 408.70 through 408.706, eleven state-chartered nonprofit private purchasing organizations, known as CHPAs, were established. These CHPAs are responsible for assisting CHPA members[1] in securing the highest quality health care based on current standards, at the lowest possible price. The health care services are provided through designated accountable health partnerships (AHPs), which are described further below. *See* §§ 408.70(3) and 408.702.

As noted above, § 408.70(2) expressly describes the legislative intent that §§ 408.70 through 408.706 create a structured health care competition model known as "managed competition." This managed competition, among other things, is designed to ensure informed cost-conscious consumer choice of *managed care* plans. *See* § 408.70(2).

§ 408.701(17) defines "managed care" as:

> . . . [S]ystems or techniques generally used by third-party payers or their agents to affect access to and control payments for health care

[1]/CHPA members include small business employers, or the state (for the purposes of providing health benefits to state employees and to Medicaid recipients). § 408.701(4).

> services. Managed-care techniques most often include one or more of the following: prior, concurrent, and retrospective review of the medical necessity and appropriateness of services or site of services; *contracts with selected health care providers* . . .

The term "health care providers" is defined to include pharmacy facilities like the Plaintiffs in the instant case. *See* § 408.701(13) and Chapter 465, Florida Statutes.

Pursuant to § 408.706(1), the AHPs provide health care to CHPA members. An AHP may be created by health care providers, health maintenance organizations, and health insurers. Pursuant to § 408.706(2), each AHP seeking to offer services to CHPA members must first obtain "designation" from the Agency for Health Care Administration (AHCA). Among the criteria to be considered in determining whether designation is appropriate, is the ability of the AHP to ensure enrollees adequate access to providers of health care. This access requirement includes both geographic availability and adequate numbers and types of health care providers. § 408.706(2)(f).

Clearly, the purpose of the access provision contained in § 408.706(2)(f) is to ensure that the health care providers utilized by the AHP are geographically located in

a manner such that they are convenient to the participants of the plan, and that there are sufficient providers so that access is afforded to members of the plan without an undue delay.

Sections 408.70 through 408.706 change the structure for providing health care services in the State of Florida. In each of the CHPA districts, health care services are provided to CHPA members only by practitioners or facilities which have contracts with AHPs. An AHP may contract with, for example, one pharmacy chain store in its district area to provide all pharmacy services to CHPA members, or the AHP may contract with more than one pharmacy chain store within its district area to provide all pharmacy services to CHPA members. However, as a general rule (and unless an exemption applies), any entity or practitioner which does not competitively bid for and win the contract in a particular area will not be able to provide health care services to CHPA members within the district. §§ 408.70 - 408.706.

As noted above, the goal of §§ 408.70 through 408.706 is to provide high quality health care at the lowest possible price. § 408.70(3). This goal is achieved, under the statutes, by promoting strong competition among the potential

health care providers in the AHP contracting process, so that the contractor ultimately chosen to provide the services will do so at the lowest price. Common sense dictates that the lowest possible price is best achieved where the contractor can be guaranteed the largest portion of the market (i.e., where there is a guarantee that the contractor will receive virtually all of the business in that area). The contractor can then spread his costs over a large number of goods or services.

As noted above, in order to obtain designation by AHCA, AHPs must be able to demonstrate adequate access to CHPA members. § 408.706(2)(f). In the action below, Plaintiffs conceded that small local pharmacies (like the independent pharmacies at issue in this case) cannot provide the "adequate access" necessary to obtain AHP designation. Plaintiffs' stated:

> As defendants themselves have acknowledged, however, ***Section 77(10) [§ 408.706(10)] allows access to CHPA members to Florida-based pharmacies who would otherwise have difficulty meeting the statutory criteria for providing prescribed medicine services to CHPA members***; this is so because AHPs must ensure its CHPA members "adequate access to [pharmacies], including geographic availability, and adequate number and types." (Id., at 6-9). *See* Section 77(2)(f), Chap. 93-129, Laws of Florida [§408.706(2)(f)].

This is something that small local pharmacies simply cannot do. (Emphasis supplied)

(R-I-154)

It is within this framework that the Florida Legislature enacted the independent pharmacy exemption, which is the subject of the instant appeal. § 408.706(10)[2] provides:

> Notwithstanding any provision of this act to the contrary, if an accountable health partnership has entered into a contract with providers or facilities licensed or permitted under chapter 465 for the purpose of providing prescribed medicine services, an individual may use an independent pharmacy which is not a party to the contract, if such independent pharmacy selected agrees to provide the service at a rate equal to or less than the rate set forth in the contract negotiated by the accountable health partnership with parties to the contract and such independent pharmacy meets all of the qualifications for participation in the accountable health partnership. . . *For the purpose of this subsection, the term "independent pharmacy" means a pharmacy facility which is not part of a group of affiliated pharmacies which are under common ownership directly or indirectly in which the group has greater than 12 pharmacy facilities in the state* . . . and the term "pharmacy facility" means a pharmacy facility which is permitted by the Board of Pharmacy in accordance with chapter 465, Florida Statutes. (Emphasis supplied)

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[2]/ As noted below, by the final summary judgment order, the Circuit Court severed that portion of § 408.706(10) which defined the exemption to exclude all pharmacy businesses which had affiliated ownership (whether directly or indirectly) in out-of-state pharmacies. No appeal was taken of this action. Accordingly, the independent pharmacy exemption is now defined solely in terms of the numbers of businesses operated in Florida. To benefit from the exemption, one need only operate fewer than 13 pharmacies in the State of Florida.

The independent pharmacies have no "bargaining power." They cannot ensure sufficient geographical locations or ability to handle sufficient quantities of patients and requests to justify their inclusion in an AHP through the contracting process. As conceded by Petitioners' below, it is very doubtful that an independent pharmacy would be of assistance in meeting the criteria for designation of an AHP as set forth in § 408.706(2)(f). (R-I-154)

Therefore, it is doubtful that the independent pharmacies would be able to contract for the provisions of pharmacy services at all under other portions of the statute. (R-I-154) Accordingly, absent some action, they would be driven out of business by operation of §§ 408.70 through 408.706, to the extent that the market consists of State employees, Medicaid recipients and small employers.

It is important to note that the independent pharmacies, but for §408.706(10), would not be able to compete for pharmacy services provided to CHPA members - not due to any fault of their own, but because of a legislatively restructured market. §§ 408.70 - 408.706. But for the provisions of § 408.706(10), these statutory provisions legislatively shift pharmacy services from a mix of

interstate and intrastate providers, to provision of such services almost exclusively by interstate providers.

Plaintiffs in the action below are all chain drug stores, that provide pharmacy services in the State of Florida. Of the different Plaintiffs, all but one Plaintiff, Kash N' Karry, operate pharmacy stores both within and outside of this state. Kash 'N Karry operates pharmacy stores solely within the State of Florida.(R-I-31 - 96 and R-II-313 - 326) Of the different Plaintiffs, all but one Plaintiff , Harco Drugs, Inc., operate more than 12 pharmacy stores in the State of Florida. (R-I-31 - 91)

The evidence presented below establishes that there are five interstate pharmacy stores which own and operate twelve or fewer pharmacy stores in the State of Florida. (R-I-95 - 96) Because these interstate pharmacy stores own and operate twelve or fewer pharmacy stores in the State of Florida, they are "independent pharmacies" within the meaning of § 408.706(10), and can provide pharmacy services to CHPA members, even in the absence of a contract, if they agree to comply with the contract price established for the services and if they agree to comply with the other requirements set forth in § 408.706(2).

There are three intrastate pharmacy stores which own and operate more than 12 pharmacy stores in the State of Florida. (R-I-95, 96) These intrastate pharmacy stores must bid through the contracting process in order to provide pharmacy services to CHPA members. § 408.706.

Because of their size and geographical locations, chain drug stores (like almost all of the Plaintiffs) should be better able to obtain contracts through AHPs to provide pharmacy services. They are useful in ensuring adequate access to services, as required by § 408.706(10).

At page 7 of Petitioners' Initial Brief, Petitioners have included a "chart" which they assert demonstrates the numbers of interstate and intrastate providers who may and may not provide pharmacy services under § 408.706(10). Implicit in Petitioner's argument is the notion that § 408.706(10) may be considered in isolation, and not in conjunction with the other statutory provisions of which it is a part. If one looks at the numbers provided by Petitioners, they also tell a different story.

According to the figures provided by Petitioner, there are a total of 239 intrastate pharmacy stores operated in the State of Florida by 45 companies. Further, there are a total

of 1,775 interstate pharmacy stores operated in the State of Florida by 18 companies. If the Legislature had not passed §§ 408.70 through 408.706, then all of these pharmacy stores, whether intrastate or interstate could freely provide pharmacy services to anyone in Florida. Thus, without the passage of this statutory framework, roughly 13.5% of the pharmacy market would consist of intrastate providers, and about 86.5% of the pharmacy market would consist of interstate providers. (IB-7, and R-I-92 - 96) (See Figure 1, at attached Exhibit A)

If §§ 408.70 through 408.706 remained effective without § 408.706(10), given Plaintiffs' own concessions, the pharmacy market would change. Only the larger pharmacy chains, like Plaintiffs, would be able to obtain contracts for pharmacy services. There are 49 intrastate pharmacy stores, operated by one company, and 1,752 interstate pharmacy stores, operated by 13 companies, which would be sufficiently large to ensure adequate access to CHPA members. Accordingly, only these pharmacy stores would be able to competitively bid for contracts in the market created under §§ 408.70 through 408.706. Therefore, about 3% of the new market, as structured by the Legislature, would consist of

intrastate pharmacy facilities. Moreover, the remaining 97% of the new market would consist of interstate pharmacy facilities. (R-I-92 - 96, R-I-313 - 326, and IB-7) (See Figure 2, Exhibit A)

When one considers all of the provisions of §§ 408.70 through 408.706 [including §408.706(10)], then the market is structured more equitably. Under this scheme 209 intrastate pharmacy stores will be able to provide pharmacy services, whether by contract or by exemption.[3] On the other hand, 1,775 interstate pharmacy stores will be able to provide pharmacy services under the new provisions. The percentage of intrastate pharmacy business under the new statutes will amount to about 11.7% of the entire pharmacy market. In contrast, interstate pharmacy business will amount to about 88.3% of the entire pharmacy market. (IB-7, R-I-92 - 96, and R-II-313 - 326). When one considers the statutory scheme as a whole, there is no shift from intrastate commerce to interstate commerce effected by the statute. (Figure 3,

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[3]/Defendants assume that there will be approximately 30 intrastate pharmacy facilities which are too numerous to benefit from the exemption contained in § 408.706(10), and yet lack sufficient facilities to competitively bid for a contract with an AHP. However, if every intrastate pharmacy was able to either benefit from the exemption or contract to provide services, then the overall percentage of intrastate pharmacy participation in the market would be 13.5%. The overall percentage of interstate pharmacy participation in the market would be 86.5%,

Exhibit A)

Because the case below presented a facial challenge, the instant matter is about access to the market. Plaintiffs may hypothesize about the effects of the statutory scheme, and may suggest that there may be a shift from interstate commerce to intrastate commerce. However, because the statutes have not been applied to Plaintiffs, no data can be presented to establish any actual shifts between interstate and intrastate commerce. Further, no data can be presented to establish any actual burden on interstate commerce. (See Record)

Nothing in the record presented by Plaintiffs below suggests that there will be any impediment to Plaintiffs in competing for contracts with AHPs to provide pharmacy services to CHPAs. Depending on the geographical concentrations of the various pharmacy stores operated by Plaintiffs, it would appear that all of the Plaintiffs, with the exception of Harco Drugs, Inc. [which is covered by the exemption contained in §408.706(10)], has a sufficient number of stores that they can provide adequate access by CHPA members to pharmacy services. (R-I-95 - 96)

In contrast, it appears unlikely that the pharmacy

companies with fewer stores (i.e., 12 or fewer) will be able to effectively compete for contracts to provide pharmacy services to CHPA members, because they cannot provide sufficient pharmacy store locations to assure adequate access. (R-I-95 - 96) Plaintiffs have conceded as much. (R-I-154)

Accordingly, § 408.706(10), when considered in the context of the Act of which it is a part, simply preserves the status quo. Plaintiffs have failed to prove that the subsection either facially or in practical effect shifts any business from intrastate to interstate commerce. (See Record)

B. THE COURSE OF PROCEEDINGS BELOW

On October 12, 1993, Plaintiffs filed a three-count complaint in the Second Judicial Circuit in and for Leon County, Florida, under the style, Albertson's, Inc., et al. v. Fla. Dept. of Prof. Regulation, et al., Case number 93-4340. (R-I-1 - 12)

By the Complaint, Plaintiffs presented a facial attack[4] to the constitutionality of § 408.706(10). Plaintiffs

[4]/Plaintiffs did not allege and presented no proof to establish that this statute has been applied to them to date. (R-I-1 - 12)

alleged that this subsection directly and indirectly violated the Commerce Clause, and that it also violated the Equal Protection Clause of the United States Constitution. (R-I-1 through 12) Thereafter, the Defendants filed responses to the Complaint. (R-I-13 through 25)

After engaging in discovery, the Plaintiffs filed a motion for summary judgment, along with supporting affidavits. By the motion for summary judgment, Plaintiffs argued that § 408.706(10) directly violated the Commerce Clause of the United States Constitution (the Commerce Clause), because it facially discriminated against pharmacy companies engaging in interstate commerce. (R-I-101) Plaintiffs also argued that the numerical limitation contained in § 408.706(10), discriminated against interstate commerce, and, therefore, violated the Commerce Clause. (R-I-101, 102) Additionally, Plaintiffs argued that the numerical limitation in § 408.706(10) indirectly discriminated against interstate commerce, in violation of the Commerce Clause, and deprived Plaintiffs of equal protection of the laws. (R-I-102, 103)

On March 14, 1994, Defendants (Respondents) filed a Cross-Motion for Summary Judgment and Reply to Plaintiffs'

Motion for Summary Judgment. (R-I-105 - 125) By the Cross-Motion and Reply, Defendants argued that, when § 408.706(10) was viewed in the context of the larger statutory scheme, the section did not violate either the Commerce Clause or the Equal Protection Clause. (R-I-105 - 125) Alternatively, Defendants argued that, to the extent that the court might find that the independent pharmacy exemption violated the Commerce Clause because it excluded any pharmacy which operated out of state pharmacies, then limited severability of that portion of the exemption was appropriate. (R-I-105 - 125) Thereafter, Plaintiffs filed a Memorandum of Law in support of their Motion for Summary Judgment, and in opposition to Defendants' Cross-Motion for Summary Judgment. (R-I-140 - 176)

On March 30, 1994, the Circuit Court held a hearing on the pending motions for summary judgment. (R-II-244 - 312) Thereafter, on April 14, 1994, the Circuit Court entered an order which granted in part and denied in part the motions for summary judgment filed by both Plaintiffs and Defendants. (R-II-202 - 220) By the Final Summary Judgment Order, the Court found that §408.706(10) violated the Commerce Clause to the extent that it limited the "independent pharmacy"

exemption, by definition, to pharmacy facilities which had no direct or indirect ownership interest in any pharmacy facilities licensed under another state's laws. However, the Court found that the constitutional infirmity could be remedied by severing that portion of § 408.706(10) which so limited the application of the independent pharmacy exemption. The court rejected Plaintiffs' arguments that the numerical limitation contained in § 408.706(10) directly or indirectly violated the Commerce Clause or the Equal Protection Clause. In this regard, the Court found that Plantiffs had not demonstrated that the numerical limitation actually burdened interstate commerce. The court also noted that the exemption, when viewed in the context of the statute as a whole, did not appear to discriminate against interstate commerce, and that the statute as a whole would not shift commerce from interstate providers to intrastate providers. Finally, the Court concluded that § 408.706(10) did not violate the Equal Protection Clause. (R-II-202 - 220)

On May 13, 1994, Appellants filed their notice of appeal seeking review of the Final Summary Judgment order entered below. (R-II-221 - 241) On July 11, 1995, the First District Court of Appeal issued an opinion affirming the Final Summary

Judgment order entered by the Circuit Court. Albertson's, Inc. v. Dept. of Prof. Reg., 658 So.2d 134 (Fla. 1st DCA 1995).[5]

In Albertson's, Inc., the First District adopted the reasoning of the Circuit Court below, in determining that Plaintiffs had not demonstrated that the numerical limitation contained in § 408.706(10) violated the Commerce Clause. In this regard, the Court noted that Plaintiffs filed a facial challenge to this subsection only. Id., at 136, 138. Plaintiffs did not allege that the provision was unconstitutional as applied to Plaintiffs. In fact, no evidence was presented that § 408.706(10) had been applied to Plaintiffs. Id., at 138.

The District Court noted that Plaintiffs had not clearly demonstrated that the exemption actually operated to burden interstate commerce in any way. Id., at 139 fn. 4. The District Court further noted that the numerical limitation set forth in § 408.706(10) was not clearly discriminatory. Id., at 138.

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[5]/As noted by Petitioner's in their Initial Brief, the opinion of the District Court of Appeal was not unanimous. Judge Miner dissented with a written opinion. Id., 139-144.

On August 10, 1995, Petitioners filed a Notice to Invoke Discretionary Jurisdiction, seeking review of the above decision of the First District Court of Appeals.

SUMMARY OF ARGUMENT

Petitioners present no clear conflict between the decision of the District Court below and any opinion of this Court or the United States Supreme Court. In fact, no conflict exists. In the case below, Petitioners failed to demonstrate clear evidence that the challenged statute discriminated against interstate commerce. Petitioners also failed to demonstrate clear evidence that the challenged statute burdened interstate commerce.

The statute, when viewed in the context of the statute of which it is a part, does not discriminate against interstate commerce. Petitioners have presented no nonspeculative proof that this exemption will effect a shift of business from interstate to intrastate commerce. In fact, it appears that the market will have roughly the same composition after the passage of § 408.706(10) as it did prior to the passage of the subsection.

This case presents a facial challenge to the statute only. Petitioners do not allege that the statute has been applied to them to date. Petitioners have presented no nonspeculative proof that the challenged exemption will result in any burden on interstate commerce. Accordingly,

the action below was properly dismissed.

Assuming arguendo that Petitioners could somehow demonstrate discrimination or a burden on interstate commerce, a legitimate state interest exists to support the exemption: protection of small (as opposed to local) business. This interest has previously been recognized to be a valid interest in Commerce Clause Challenges. There are no adequate alternatives available to protect this interest. Further, any burden on interstate commerce is not as weighty as the State's interest in protecting small business and promoting adequate access to healthcare.

Accordingly, the action of the Court below should be affirmed.

ARGUMENT

I. THE NUMERICAL LIMITATION DOES NOT DISCRIMINATE AGAINST INTERSTATE PHARMACIES IN VIOLATION OF THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

In this action, where Petitioners challenge the constitutionality of a statute, the statute is presumed to be valid, and will not be declared to be unconstitutional, unless Plaintiffs demonstrate beyond a reasonable doubt that the challenged statute conflicts with specified provisions of the Constitution. *See* Metropolitan Dade County v. Bridges, 402 So.2d 411 (Fla. 1981). Petitioners did not meet this burden below, with regard to their arguments that the numerical limitation contained in § 408.706(10) violated the United States Constitution.

A. THE PRACTICAL EFFECT OF THE NUMERICAL LIMITATION IS NOT ECONOMIC PROTECTIONISM, AND, THEREFORE, THE STATUTE IS NOT PER SE INVALID.

Article I, Section 8, Clause 3 of the United States Constitution provides: "[t]he Congress shall have the Power . . . [t]o regulate Commerce . . . among the several states." This provision of the United States Constitution has been interpreted to limit the power of the States to discriminate against interstate commerce. Wyoming v. Oklahoma, 502 U.S. ___, 117 L.Ed.2d 1, 22, 112 S.Ct. 789, 800 (1992). *See also*

Associated Industries of Missouri v. Lohman, __ U.S. __, 114 S.Ct. 1815(1994). The Commerce Clause has been construed to prohibit "economic protectionism - that is regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." Wyoming, 112 S.Ct., at 800, 117 L.Ed.2d, at 22. Unless discrimination can be demonstrably justified by a valid factor unrelated to economic protectionism, then the statute will be stricken if it clearly discriminates against interstate commerce. Wyoming, 112 S.Ct., at 800; and Maine v. Taylor, 477 U.S. 131, 106 S.Ct. 2440, 91 L.Ed.2d 110 (1986).

The United States Supreme Court has adopted a two-tiered approach to analyzing state economic regulation under the Commerce Clause. When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, the Court has generally struck down the statute without further inquiry. C & A Carbone, Inc. v. Town of Clarkstown, N.Y., ___ U.S. ___, 114 S.Ct. 1677 (1994); Philadelphia v. New Jersey, 437 U.S. 617, 623-624, 57 L.Ed.2d 475, 481-482, 98 S.Ct. 2531 (1978); Oregon Waste Systems v. Dept. Of Env. Quality, ___ U.S. ___, 114 S.Ct. 1345 (1994);

Division of Alcoholic Beverages and Tobacco v. McKesson, 524 So.2d 1000 (Fla. 1988);and New Energy Company of Indiana v. Limbach, 486 U.S. 269, 100 L.Ed.2d 302, 108 S.Ct. 1803 (1988).

Under this "per se" rule of invalidity, a statute must be invalidated, if it discriminates facially or in effect, unless the State can "sho[w] that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." Oregon Waste Systems v. Dept. Of Environmental Quality, 114 S.Ct., at 1351 (quoting New Energy Co. Of Indiana, 486 U.S., at 278, 108 S.Ct., at 1810). Further, the justifications for discriminatory restrictions on commerce must pass the strictest scrutiny. Oregon Waste Systems, supra.

Therefore, under this "per se" rule of invalidity, the burden is on the Petitioner or Plaintiff to clearly establish that a statute discriminates against interstate commerce in effect or on its face. Hughes v. Oklahoma, 441 U.S. 322, 336, 60 L.Ed.2d 250, 262, 99 S.Ct. 1727 (1979). If the Petitioner meets this burden, then the burden shifts to the State to establish, under strictest scrutiny, that there exists a legitimate local purpose for the statute, and that

the purpose cannot be adequately served by reasonable nondiscriminatory alternatives.[6] Id.

The second part of the two-tiered approach involves analysis of statutes which have indirect effects on interstate commerce. When a statute has only indirect effects on interstate commerce and regulates evenhandedly, the United States Supreme Court has examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits. Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573, 578-579, 90 L.Ed.2d 552, 559-560, 106 S.Ct. 2080 (1986); Pike v. Bruce Church, Inc., 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1978); and Diamond Waste, Inc. V. Monroe County, Georgia, 939 F.2d 941 (11th Cir. 1991). *See also* Hughes v. Oklahoma, 441 U.S., at 336, 60 L.Ed.2d, at 262; McKesson, supra; and Maine v. Taylor, supra.

Whether addressing a statute which discriminates directly against interstate commerce or one which

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[6]/It follows that, if a Plaintiff cannot demonstrate that a statute is discriminatory in either effect or on its face, then the State is under no burden to prove either legitimate local purpose or that the purpose cannot be adequately served by reasonable nondiscriminatory alternatives.

incidentally burdens interstate commerce, the critical consideration is the **overall effect** of the statute on both local and interstate activity. Brown-Forman Distillers Corp., 476 U.S., at 579, 90 L.Ed.2d, at 560.

In the instant case, Petitioners failed to demonstrate any discrimination against interstate commerce, and failed to demonstrate that the challenged statute, when considered as part of the entire statutory scheme of which it was a part, burdened interstate commerce in any way. Accordingly, the action was properly dismissed below.

The term "discrimination" as used in the context of Commerce Clause challenges means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. Oregon Waste Systems v. Dept. Of Env. Quality, 114 S.Ct., at 1350.

In the instant case, Plaintiffs failed to demonstrate differential or preferential treatment of in-state versus out-of-state interests.[7] In part, this is so because Plaintiffs persisted in treating § 408.706(10) as if it was

[7]/In the instant case, it is important to note that Plaintiffs do not challenge the contracting/bidding process, set forth in §§ 408.70 through 408.706, Florida Statutes (1993), as being violative of the Commerce Clause.

passed by the Legislature in a vacuum. Petitioners presently insist that it is inappropriate to consider other legislation passed contemporaneously with § 408.706(10), in determining the subsection's constitutionality. (IB-27-29) This argument is without support for reasons set forth below.

B. THE DISTRICT COURT CORRECTLY CONCLUDED THAT § 408.706(10) DOES NOT VIOLATE THE COMMERCE CLAUSE, BECAUSE §§ 408.70 THROUGH 408.706, FLORIDA STATUTES, WHEN TAKEN AS A WHOLE, ARE NEITHER BURDENSOME NOR DISCRIMINATORY.

Plaintiff argues that it is inappropriate for this Court, or the Circuit Court and District Court of Appeal, to consider the statutory scheme at issue, as a whole, in determining whether or not a Commerce Clause violation exists. In this regard, Petitioners argue that Lohman, supra, is dispositive. Lohman does not provide support for Petitioners' arguments. In Lohman, the United States Supreme Court considered a Commerce Clause challenge to a use tax imposed by statute in Missouri. Pursuant to the statute, the state was authorized to impose a use tax of 1.5% on the privilege of storing, using, or consuming within the state any article of personal property purchased out of state. The State also authorized local jurisdictions to impose a local sales tax. Pursuant to this authority, over 1,000 localities

enacted sales taxes ranging from .5% to 3.5%. At least one county enacted no sales tax at all. Evidence was presented to the trial court, in Lohman, to establish that 93% of the dollar volume of sales in the State occurred in jurisdictions where the local sales tax exceeded the use tax. The trial court looked at the overall effect of the use tax scheme across the State, and concluded that the use tax scheme placed a lighter aggregate tax burden on interstate commerce than on intrastate commerce. Id., at 1820.

In Lohman, the State argued that, in determining whether the use tax was discriminatory, that the Court should look to the overall effect of the tax scheme across the state. In response to that argument, the Court made the statements described by Petitioners in their brief at page 27 of their Initial Brief. These statements cannot be construed as any prohibition against viewing a statutory scheme as a whole in determining whether or not a particular provision of the statute violates the Commerce Clause. In fact, in Lohman, the Court reviewed the use tax scheme at issue, and the local sales tax schemes at issue to determine whether discrimination existed. The Court reviewed separate statutes to determine how they operated together to affect interstate

commerce. In Lohman, the Supreme Court determined that it was appropriate to review the sales taxes adopted by each local jurisdiction, and compare them to the use tax enacted by the State. In any jurisdiction where the use tax was not "compensatory" in nature (i.e., where the use tax exceeded the sales tax), the tax was determined to discriminate against interstate commerce.

Similarly, several of the cases cited by Petitioners in their initial brief suggest that it is crucial to consider the **overall effect** of a statute on interstate commerce, as part of the inquiry into whether a Commerce Clause violation exists. Brown-Forman Distillers Corp.,476 U.S., 579, 90 L.Ed.2d, at 560; and McKesson, supra. In the instant case, to understand the impact which § 408.706(10) is designed to have on commerce, it is important to look to the remainder of the statute.

It is important to note that Petitioners did not demonstrate discrimination against interstate commerce in the action below. There is no evidence that any part of Chapter 408 operates to discriminate against interstate commerce. The charts attached at Exhibit A reflect that there has been no shift from intrastate commerce to interstate commerce, as

a result of the passage of § 408.70(10). Both before the passage of the statute and presently the percentage participation of interstate and intrastate pharmacy facilities are roughly the same. Those percentages overwhelmingly favor interstate participation in Florida's prescription market.

At page 19 of the Initial Brief, Petitioner suggests that the District Court concluded below that "discriminatory effect need not be absolute." Elsewhere in the brief, Petitioner states: "In particular, the majority agreed that some burden on intrastate commerce justified any burden on interstate commerce, no matter how severe the burden on interstate commerce might be in contrast to the negligible burden on interstate commerce." (IB-11) No such findings appear in the opinion of the First District Court, in Albertson's, Inc.. At page 139, in footnote 4 of the opinion, the Court noted that Plaintiffs had not clearly demonstrated that the exemption at issue actually operated to burden interstate commerce. Further, the Court noted that, when the exemption was viewed in the context of the statute as a whole, it did not appear that the numerical exemption had the effect of discriminating against interstate commerce.

Id., at 139, fn. 4.

In the case below, Petitioners did not demonstrate any burden to interstate commerce and did not demonstrate that the exemption, when viewed in the context of the statute as a whole, was discriminatory. Because of this failure of proof, Summary Judgment was entered in Defendants' favor on this issue.

In their Initial Brief, Petitioner's make the following statement:

> For example, the Supreme Court stated in Exxon Corp. V. Governor of Maryland, 437 U.S. 117, 126, n. 16 (1978), that a statute has a discriminatory effect where "the effect of a state regulation is to cause local goods to constitute a larger share, and goods with an out-of-state source to constitute a smaller share of the total sales in the market."

(IB-20-21)

If the above-mentioned statement of law is applied to the instant case, Petitioners have demonstrated no discrimination against interstate commerce in the action below. As reflected in Respondents' Statement of the Case and Facts above, the percentage involvement in the pharmacy market of interstate companies as compared to intrastate companies remains relatively constant with the enactment of

§§ 408.70 through 408.706. Petitioner has not presented and cannot present at this time any evidence of an actual shift of commerce from interstate to intrastate. The statutes at issue had not been applied to Plaintiffs at the time of consideration of the Motions for Summary Judgment below. One can only speculate on the effect that these changes will have on interstate commerce. As noted by the United States Supreme Court: ". . . we have never deemed a hypothetical possibility of favoritism to constitute discrimination that transgresses constitutional commands." Lohman, 114 S.Ct., at 1824.

All of the pharmacy facilities which had access to Florida's pharmacy market prior to the passage of § 408.706(10), presently have access to the market. It is possible, and, in some locations probable, that some interstate providers will take over the business of other interstate providers in the CHPA market (because one provider obtains a contract and others do not). However, this is not a Commerce Clause violation. The Commerce Clause protects the interstate market, not particular interstate firms. Exxon Corp. v. Governor of Maryland, 437 U.S., at 129,98 S.Ct., at 2215. Furthermore, interstate commerce is not

subjected to an impermissible burden simply because an otherwise valid regulation causes some businesses to shift from one interstate supplier to another. Id., 437 U.S., 128, 98 S.Ct., 2214.

Although Petitioners assert the existence of conflict between the McKesson case and the decision of the First District Court of Appeal (IB-22), such conflict cannot be shown in the instant matter. Petitioners suggest that decision of the Court below rested upon a conclusion that § 408.706(10) applies to a few interstate pharmacy providers, and does not apply to 3 intrastate providers. Id. As has already been explained above, the problem in the case below was not that Petitioner did not present evidence of "enough" of a burden on interstate commerce. Rather, the problem was that Petitioner did not present clear evidence of a burden on interstate commerce at all.

Accordingly, for the foregoing reasons, it is clear that § 408.706(10) does not directly violate the Commerce Clause. It is also clear that it is appropriate for this Court to consider the statutory scheme, of which §408.706(10) is a

part, in determining the impact that the provision has on interstate commerce.

C. SINCE PETITIONERS FAILED TO CLEARLY DEMONSTRATE THAT §408.706(10) DISCRIMINATES AGAINST INTERSTATE COMMERCE, THE BURDEN DID NOT SHIFT TO THE STATE TO JUSTIFY THE NUMERICAL LIMITATION CONTAINED IN § 408.706(10).

As noted above, until Petitioners clearly demonstrate that § 408.706(10) discriminates against interstate commerce, the burden does not shift to the State to justify the numerical limitation contained in § 408.706(10). Accordingly, Petitioners' arguments that the action below must be reversed because Respondents have not demonstrated the existence of a legitimate state interest to support the statute are without merit.

In any event, it should be noted that the numerical limitation contained in § 408.706(10) does not operate to exclude Petitioners because they engage in interstate commerce. Rather, the numerical limitation operates to exclude Plaintiffs because of their size (i.e., they operate more than 12 pharmacies in Florida).

§ 408.706(10) operates to encourage all larger pharmacy providers to vigorously compete for the contract for pharmacy services in Florida. If the exemption covered chain

pharmacies owning greater numbers of stores, the exemption would be inconsistent with the purpose of the statute. If everyone can simply use the exemption to provide pharmacy services, what benefits are to be gained in the contracting process. The contracting process, intended to obtain low cost high quality health care, would be a useless endeavor.[8]

§§ 408.70 through 408.706, as a whole, protect an important state interest, access to affordable health care. The exemption contained in § 408.706(10) furthers the state interest in protecting small business. Protection of a small business, as opposed to local business, has been recognized as a legitimate state interest. New Motor Vehicle Bd. Of Cal. v. Orrin W. Fox Co., 439 U.S. 96, 102 n. 7 (1978); and Fireside Nissan, Inc. v. Fanning, 828 F.Supp. 989 (D.R.I. 1993).

§408.706(10) and the provisions of §§ 408.70 through 408.706 represent an accommodation between two competing interests - access to affordable health care, and protection of small business.

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[8]/When the issue of severability was discussed at heaing, Plaintiffs' counsel agreed with this premise. (R-II-266)

Petitioners suggest that there are other alternatives which might promote the purposes of these statutes. Petitioners specifically mention "direct cash subsidies." (IB-38) A review of West Lynn Creamery, Inc. v. Healy, ___ U.S. ___, 114 S.Ct. 2205 (1994), casts considerable doubt on the continued viability of subsidies to protect flagging markets. As noted by the dissent in that case:

> "Direct subsidization of domestic industry does not ordinarily run afoul of the [dormant Commerce Clause]; discriminatory taxation of out-of-state manufacturers does." . . . But today the Court relegates these well-established principles to a footnote and, at the same time, gratuitously casts doubt on the validity of state subsidies, observing that "[w]e have never squarely confronted" their constitutionality.

Id., 114 S.Ct., at 2221.

In the present climate, it is not at all clear that a subsidy would survive a Commerce Clause challenge. Therefore, it cannot reasonably be considered an alternative to the present act.

II. PETITIONERS HAVE FAILED TO CLEARLY PROVE THAT THE NUMERICAL LIMITATION CONTAINED IN § 408.706(10) BURDENS INTERSTATE COMMERCE.

As noted above, there is a second tier of analysis for Commerce Clause cases. When a statute has only indirect effects on interstate commerce and regulates evenhandedly,

the United States Supreme Court has examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits. Wyoming v. Oklahoma, 112 S.Ct., at 800 n. 12; and Brown-Forman Distillers Corp., 476 U.S., at 579, 106 S.Ct., at 2084.

As a preliminary matter, Petitioners have the burden of demonstrating that the statute at issue "incidentally" or indirectly affects or burdens interstate commerce. If they meet this burden, then the State is required to present proof of the legitimacy of the purposes supporting the statute, and the court will weigh the burden against the local benefits. If the burden clearly exceeds the local benefits, then the statute will be declared to be in violation of the Commerce Clause. Id.

In the instant case, Petitioners presented no nonspeculative evidence below of any burden on them or on interstate commerce resulting from the provisions of § 408.706(10). It is interesting that Petitioners do not challenge any other provision of §§ 408.70 through 408.706. Specifically, they do not challenge the requirement that they engage in the contracting process in order to provide

services to CHPA members. (See Record)

Absent some evidence of a burden or affect on interstate commerce (which has not been proven below, as has been described above), Respondents have no burden to present a legitimate local interest. Petitioners devote some time in their Initial Brief to the requirement that Respondents prove up a legitimate purpose to support § 408.706(10). (IB-40-41) In the instant case, such discussion is not appropriate, since no proof of a burden on interstate commerce has been shown.

Assuming Petitioners had somehow demonstrated that the challenged statutory scheme burdened interstate commerce, incidentally or indirectly, Respondents have presented a legitimate interest which is promoted by the statutory scheme, as discussed in Part I(c) above. That interest is in protecting small (as opposed to local) business, while at the same time ensuring that there is still adequate competition in the contracting process. In the instant case, if there are "burdens" on interstate commerce, they cannot be said to be substantial. They certainly are not more weighty than the interest of the State in protecting small businesses and in improving access to health care.

The instant case presents issues which are fundamentally different than the cases which have been considered previously in the Commerce Clause jurisprudence. In the instant case, because of a perceived crisis in obtaining adequate access to health care, the Legislature has restructured a portion of the health care market. As a result of that restructuring effort, certain small businesses which previously provided pharmacy services to other small businesses and the State of Florida would be effectively barred from that market. Only large businesses could effectively compete in the new market. Accordingly, the Legislature included an exemption in its statutory scheme so that small businesses could continue to provide pharmacy services, so long as they met the contract price, and other criteria set forth by statute.

In his dissent, Judge Miner stated: ". . . Additionally, there is nothing in Florida's statutory health delivery plan or implementing rules that would preclude an AHP from entering into multiple contracts with prescription medicine providers, large or small, to serve CHPA members within the several health service planning districts." Albertson's, Inc., at 142. While it is true that the

statutory scheme does not expressly prohibit contracts by AHPs with small prescription medicine providers, Judge Miner's argument ignores two factors presented in the record below. First, the Plaintiffs conceded that small prescription medicine providers would not be able to afford adequate access and, therefore, would not be able to be competitive in the contracting process. (R-I-154) Second, Judge Miner's statement ignores economic reality. From the statute, it is clear that the Legislature is seeking health care services at the lowest possible price. § 408.70. Common sense suggests that these low prices are best achieved through economies of scale. That is to say, the person seeking a contract to provide pharmacy services, for example, will provide the lowest possible price if guaranteed the largest share of the market possible. This enables the contractor to spread costs over a large number of goods. Multiple contracts with pharmacy facilities, both large and small, would not be effective in achieving economies of scale.

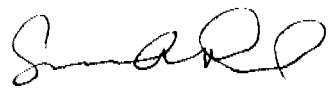
In any event, Petitioners have demonstrated no Commerce Clause violation. For the foregoing reasons, Respondents assert that this Honorable Court should affirm the opinion of

the District Court below.

CONCLUSION

For the foregoing reasons, Respondents assert that the opinion of the District Court of Appeals should be affirmed.

Respectfully submitted,
ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by United States Mail to **ALAN C. SUNDBERG, ESQUIRE, SYLVIA H. WALBOLT, ESQUIRE,** and **J. MICHAEL WALLS, ESQUIRE**, at Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., Post Office Box 190, Tallahassee, Florida 32302, this 18th day of December, 1995.

Stephanie A. Daniel
Assistant Attorney General

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Figure 1: Ratio of Interstate/Intrastate Commerce in delivery of pharmacy services before passage §§408.70 - 408.706.

Code: Shaded gray = intrastate commerce
White = interstate commerce

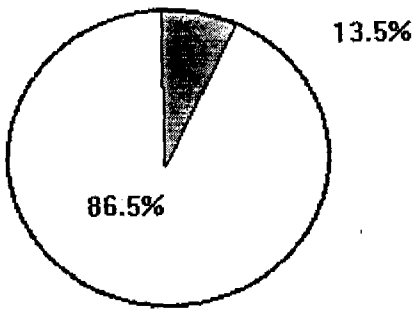

Figure 2: Ratio of Interstate/Intrastate Commerce in delivery of pharmacy services under §§408.70 - 408.706, if §408.706(10) does not exist.

Code: See Figure 1.

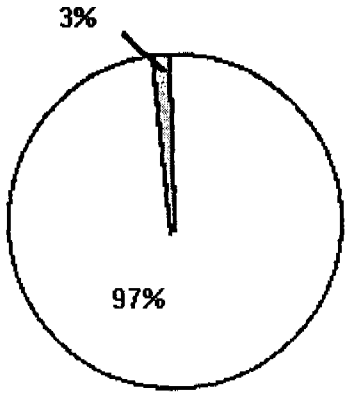

Figure 3: Ratio of Interstate/Intrastate Commerce in delivery of pharmacy services under §408.70 - 408.706, if §408.706(10) does not exist.

Code: See figure 1.

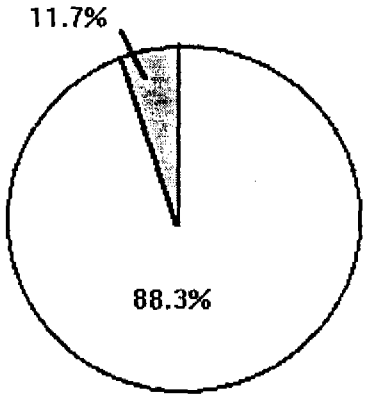

EXHIBIT "A"