IN THE SUPREME COURT OF FLORIDA

ALBERTSON'S INC., BIG B, INC., HARCO DRUG, INC., ECKERD CORPORATION, KASH N' KARRY, K-MART CORPORATION, PIC N' SAVE DRUG CO., INC., PUBLIX, RITE AID CORPORATION, WALGREEN CO., WALMART STORES, INC., WINN DIXIE,

Petitioners,

v.

THE FLORIDA DEPARTMENT OF PROFESSIONAL REGULATION, AGENCY FOR HEALTH CARE ADMINISTRATION, THE FLORIDA DEPARTMENT OF PROFESSIONAL REGULATION, BOARD OF PHARMACY, AND THE FLORIDA DEPARTMENT OF INSURANCE,

Respondents.
_____/

FILED
SID J. WHITE
NOV 28 1995
CLERK, SUPREME COURT
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CASE NO. 86,247
(DCA No. 94-1592)

Discretionary Proceeding to Review
a Decision of the First District Court of Appeal

PETITIONERS' INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioners Albertson's, Inc., Big B, Inc., Harco Drug, Inc., Eckerd Corporation, Kash n' Karry, K-Mart Corporation, Pic n' Save Drug Co., Inc., Publix, Rite Aid Corporation, Walgreen Co., Walmart Stores, Inc., and Winn Dixie will be referred to as "petitioners." Where one petitioner is referred to individually, an abbreviated form of the petitioner's name will be used: e.g., petitioner Eckerd Corporation will be referred to as "Eckerd."

Respondent The Florida Department of Professional Regulation, Agency for Health Care Administration, will be generally referred to as "respondent" or "the State," except where the reference is made to a particular statutory obligation of that agency. In the latter case, respondent will be referred to as "AHCA." The Florida Health Care and Insurance Reform Act of 1993, Chap. 93-129, Laws of Florida (Florida Statutes, Sections 408.70-408.706), will be referred to as "the Act."

The basis form of record citations will be "[R. ___, p. ___.]" The number following "R." will represent the volume assigned by the clerk of court in the index to the record on appeal. The number following "p." will be the page number(s) of or within the item to which the citation is made.

The statutory provision at issue, Section 408.706(10), Florida Statutes, is included in the appendix to Petitioners' Initial Brief On The Merits at tab "1." The trial court's Final Summary Judgement and the decision of the First District Court of

Appeal are included in the appendix at tabs "2" and "3," respectively.

Where petitioners have referred to the "Supreme Court" in their brief, the references will be to the United States Supreme Court. References to the Florida Supreme Court will be so designated in the brief.

Unless otherwise indicated, all emphasis in quoted material is added.

STATEMENT OF FACTS

Introduction

Petitioners have challenged the constitutionality of a single provision of the Florida Health Care and Insurance Reform Act of 1993 (the "Act") under the Commerce Clause of the United States Constitution. (R. I, pp. 1-12). The provision, Section 408.706(10), Florida Statutes, created a specific market for prescribed medicines but then limited access to that market to certain Florida based pharmacy companies defined as "independent pharmacies." All out-of-state pharmacy companies were excluded from this market by this statutory definition. In particular, the definition of an "independent pharmacy" barred from the market (1) all pharmacies licensed under another state's laws and (2) all pharmacies with more than 12 Florida stores.

The trial court struck the first bar to competition by out-of-state companies as violative of the Commerce Clause and severed it from Section 408.706(10). (R. II, pp. 219-20). The trial court refused, however, to invalidate the second bar to competition by pharmacies with more than 12 stores in Florida, (R. II, pp. 209-216), and the district court affirmed that ruling, over the strong dissent of Judge Miner. Albertson's, Inc., et al. v. The Florida Dept. of Professional Regulation, 658 So. 2d 134, 140-44 (Fla. 2d DCA 1995). As he correctly pointed out in dissent, that statutory provision creates a patently unconstitutional burden on interstate commerce because it excludes virtually all of the out-of-state pharmacy companies

from the market created by Section 408.706(10), while excluding only three of the 45 Florida companies. (R. I, pp. 92-96).

This disproportionate restraint on interstate commerce is precluded by the Commerce Clause, as is made clear by decisions of this Court and the United States Supreme Court. The decision of the district court conflicts with those controlling precedents and should accordingly be reversed.

A. Statement of the Undisputed Facts.

Under the Act, state-chartered, non-profit community health purchasing alliances ("CHPAs") are established in eleven geographic districts to pool resources for purchasing health care services and to gather health care information on behalf of CHPA members. § 408.702(1), Fla. Stat. (1993). Initial CHPA constituents include small business employers, as well as the State of Florida for purposes of providing health benefits to state employees and Medicaid recipients. § 408.701(4), Fla. Stat. (1993).

In each of these districts, the AHCA licenses and designates Accountable Health Partnerships (AHPs) which provide the required health care services to CHPA members through contracts with health care providers. § 408.706, Fla. Stat. (1993). Under the Act, health care providers include pharmacies like petitioners. Id.

In passing the Act, the Florida legislature intended to promote increased access to low cost health care services for State and small business employees, and Medicaid recipients

through the creation of a "structured health care competition model." The promotion of competition in the various health care markets, including the prescribed medicine market, was central to this model. In fact, the stated purpose of the Act was to obtain the expected benefits of "managed competition." § 408.70(2), Fla. Stat. (1993).

To promote competition among as many providers as possible, the Legislature provided that: (1) AHCA must conduct an antitrust study to include "a methodology to prevent . . . anticompetitive activities such as . . . market allocation by . . . providers for the purpose of forcing providers out of business or to unfairly gain market share," [Section 79(3)(c)]; (2) CHPAs must develop a "plan to facilitate participation of providers in the district" in an AHP, [§ 408.702(6)(n)]; and (3) AHPs must demonstrate to AHCA for purposes of designation that it "[h]as the ability to assure enrollees adequate access to providers of health care, including geographic availability and adequate number and types." § 408.706(2)(f), Fla. Stat. (1993).

Each of those legislative requirements is intended to <u>increase</u> the number of providers available to CHPA members and thereby <u>promote</u> <u>competition</u>, which will lower the cost of health care services such as prescribed medicines. However, in sharp contrast to, and in derogation of, the stated goal of promoting competition in all health care markets, Section 408.706(10) -- which was added to the Act in the final hours of the 1993 legislative session -- singles out the prescribed medicine market

among all health care markets in Florida and bars competition in that market between independent pharmacies and (1) all pharmacies that do business in states other than the State of Florida and (2) all pharmacies having more than 12 stores within the State:

> (10) Notwithstanding any provision of this Act to the contrary, if an [AHP] has entered into a contract with ... [a licensed pharmacy], an individual may use an independent pharmacy which is not a party to the contract, if such independent pharmacy selected agrees to provide the services at a rate equal to or less than the rate set forth in the contract negotiated by the [AHP] with parties to the contract and such independent pharmacy meets all the qualifications for participation in the [AHP] . . . . For the purposes of this subsection, the term "independent pharmacy" means a pharmacy facility which is not part of a group of affiliated pharmacy facilities which are under common ownership directly or indirectly in which the group has greater than 12 pharmacy facilities in the state or has directly or indirectly any interest in any facilities licensed under another state's laws for the purpose of providing prescribed medicine services....

§ 408.706(10), Fla. Stat. (1993).

Thus, Section 408.706(10) allows an individual CHPA member to use an "independent pharmacy," even though the AHP providing the member's benefits has a contract for prescription medicines with another pharmacy, if the "independent pharmacy" offers the medicine at or below the contract price negotiated by the AHP for the medicine. However, not all pharmacies are given that right to compete for prescriptions from CHPA members under contract with another pharmacy for such services. All pharmacies "licensed under another state's laws" and pharmacies with "greater than 12 pharmacy facilities in the state" -- which are almost entirely interstate companies -- are expressly excluded from that market by the restrictive definition of an "independent

pharmacy." Hence, they are barred from doing business with any such individual CHPA member -- even if that member wants to use them and they offer the same medicine at or below the contract price, thereby meeting the legislature's goal of increasing availability of services and reducing health care costs.

Petitioners fall outside the provision's restrictive definition of an "independent pharmacy." (R. I, pp. 31-96). All but Kash N' Karry operate pharmacy stores both in the State of Florida and outside of it. Id. All have or may have more than 12 stores in Florida. (R. I, pp. 31-91).

In fact, the vast majority of the pharmacy companies that do business both in the State of Florida and elsewhere operate more than 12 pharmacy stores in Florida. (R. I, pp. 92-96). There are 16 pharmacy companies doing business in the State of Florida that have more than 12 stores in the state. (R. I, p. 95). Of these companies, 13 have stores in states other than Florida, and only 3 are doing business exclusively in the State of Florida. (R. I, pp. 92-96). These 13 interstate pharmacy companies operate 1,752 pharmacy stores in the state, or 87% of the total stores in Florida. (R. I, pp. 95-96).[1/] More to the point -- as Judge

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[1/] These numbers are derived from the records of The National Association of Chain Drug Stores. (R. I, pp. 92-96). Those records slightly vary from petitioners' individual records. (R. I, pp. 31-91). Petitioners' records reflect additions or reductions in the number of Florida stores by some petitioners, with a net reduction in the total stores operated by the 13 interstate pharmacy companies. (Id.) However, the difference is inconsequential because both the number of petitioners' stores and the total number of Florida stores change by the same amount. As demonstrated by petitioners' records, the 13 interstate

(continued...)

Miner correctly noted -- these same 13 interstate pharmacies represent 98.7% of the interstate pharmacy stores that, but for the numerical limitation remaining in the definition of "independent pharmacy," could compete with intrastate pharmacy stores for CHPA members' prescriptions in the market created by Section 408.706(10). Id.; Albertson's, 658 So. 2d at 142. Thus, all but a mere 1.3% of the interstate pharmacy stores are precluded from competing in that market as a result of the numerical limitation. (R.I, pp. 92-96).

In contrast, the 3 intrastate pharmacy companies with more than 12 Florida stores represent a mere 4% of the total stores in Florida and only about 3 out of 10 stores operated by pharmacies doing business solely in Florida. Id. At the same time, 42 intrastate pharmacy companies, representing close to 7 out of 10 stores operated by intrastate companies, may compete in the Section 408.706(10) market for CHPA members' prescriptions. Id.

The practical effect of the provision's numerical bar, then, is to heavily burden interstate pharmacy companies, with only the most negligible impact on intrastate pharmacies. The provision's skewed impact on interstate pharmacies is graphic:

[1/](...continued)
pharmacy companies operate 1,687 out of 1,948 pharmacy stores in the state, or again 87% of the total number of stores in Florida. (Id.)

SECTION 408.706(10) PRESCRIPTION DRUG MARKET

	MAY PARTICIPATE	MAY NOT PARTICIPATE
INTRASTATE PHARMACY COMPANIES (number of stores)	42 (160 stores -- 8% of total Florida stores and 66.9% of intrastate pharmacy company stores)	3 (79 stores -- 4% of total Florida stores and 33.1% of intrastate pharmacy company stores)
INTERSTATE PHARMACY COMPANIES (number of stores)	5 (23 stores -- 1% of total Florida stores and 1.3% of interstate pharmacy company stores)	13 (1752 stores -- 87% of total Florida stores and 98.7% of interstate pharmacy company stores)

(R. I, pp. 92-96).

As a result of the statute's numerical limitation for an "independent pharmacy," petitioners cannot fill prescriptions for CHPA members under contract with another pharmacy, however competitive they are willing to be. Yet, if petitioners obtain a contract with an AHP to provide prescribed medicines to its constituent CHPA members, virtually all intrastate pharmacy companies have been granted the statutory right to serve these contractual customers of petitioners by filling their prescriptions. The sole basis for the bar to the petitioners' participation in this secondary market for CHPA members under contract with another provider of prescription medicines is their operation of pharmacies in other states or their operation of more than 12 stores in Florida. Both of these tests exclude the vast majority of interstate pharmacies from this statutorily created market.

As illustrated by the chart above, the pharmacies benefitted by this statute are almost entirely intrastate companies: 42 of the 47 pharmacy companies which have 12 or fewer stores in the state are Florida companies. (R. I, pp. 92-96). By virtue of the numerical bar imposed under Section 408.706(10), these intrastate companies have nearly exclusive access to the prescription market created by that provision.

The resulting burden on interstate commerce is established by the record evidence. Petitioners' exclusion from this market for CHPA members under contract with another pharmacy will adversely impact their prescription medicine sales in Florida. (R. I, pp. 31-91). Moreover, the adverse impact will not be limited to such sales, but will extend to the sales of other goods attendant to purchases of prescription medicines by petitioners' customers. Id.

This potential loss of business is exacerbated by the likely severance of many customer relationships as a result of the numerical limitation of Section 408.706(10). Id. Many loyal customers, with whom petitioners spent time and money cultivating a relationship, will be forced to stop using petitioners' stores, once their AHP contracts with another pharmacy. They will have to go to that pharmacy or to an "independent pharmacy" for their prescription drug needs. Id. This effect will be most prevalent at petitioners' stores (such as Eckerd) where pharmacy sales predominate. Id. However, even where pharmacy sales are primarily attendant to the sale of other products, like

groceries, petitioners (such as Publix) still stand to lose pharmaceutical sales from such customers, as well as grocery sales made at the time prescription medicines are purchased. Id.

B. Statement of Proceedings.

Petitioners filed a declaratory judgment action seeking a determination of the constitutionality of Section 408.706(10) under the United States Constitution, and for permanent injunctive relief against the enforcement of that provision. (R. I, pp. 1-12). They asserted that this provision violated the Commerce Clause and the Equal Protection clause of the United States Constitution because it singles out the market for prescribed medicine services and then precludes petitioners from competing for certain customers in that market while, at the same time, granting that right to certain protected Florida-based pharmacies. Id.

Both parties moved for summary judgment. (R. I, pp. 97-104, 105-125). Petitioners argued that they are statutorily prohibited from providing prescribed medicines at competitive prices to certain Florida residents who may want to use their pharmacies, merely because they also sell such medicines to the residents of states other than Florida or because they sell such medicines to Florida residents through more than 12 stores. (R. I, pp. 97-104). They pointed out that the undisputed record evidence established that the restrictive definitions of an "independent pharmacy" resulted in "economic protectionism." Id.

As petitioners' motion demonstrated, all of the pharmacies "licensed under another state's laws," as well as the vast majority of the pharmacy companies with "greater than 12 pharmacy facilities in the state" do business in states other than Florida. (R. I, pp. 92-96). By this statute, these interstate pharmacies are precluded from competing in the market created by Section 408.706(10). On the other hand, the vast majority of the pharmacies protected from competition by that provision do business solely in Florida. Id. The practical effect of the challenged provision is clear: those in-state pharmacies receive preferential access to the market for CHPA members under contract with another pharmacy. Id. Since such economic favoritism is precluded by the United States Constitution, petitioners sought to enjoin the State's enforcement of this provision.

The trial court granted petitioners' motion in part and denied it in part.[2/] (R. II, pp. 202-220). The court found that the second part of Section 408.706(10) -- which prohibited pharmacies licensed under another state's laws from competing in the prescribed medicine market created by that provision -- violated the Commerce Clause. (R. II, pp. 208-209, 219-220). There was "no valid purpose, unrelated to economic protectionism," for limiting the protections afforded by Section 408.706(10) to "pharmacy businesses who have no ownership

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[2/] Consistent with that ruling, AHCA's motion for summary judgment asserting that Section 408.706(10) did not violate the United States Constitution was granted in part and denied in part. (R. II, pp. 219-20).

interest of any type in an out-of-state pharmacy." (R. II, p. 209). "Such a measure amounts to economic protectionism" and is therefore, invalid under the Commerce Clause. Id.

However, with respect to the numerical bar in Section 408.706(10), the trial court held, without addressing the disproportionate impact of that limitation on interstate pharmacies, that it was not "clearly discriminatory." (R. II, p. 210). The court concluded that (1) a few intrastate pharmacies were also excluded from the Section 408.706(10) market and, hence, the provision burdened both intrastate and interstate commerce and (2) the Act "as a whole" did not discriminate against interstate pharmacies. Petitioners appealed this ruling.[3/] (R. II, pp. 211-212, 215, n.2).

In a divided decision, the First District affirmed. Albertson's, 658 So. 2d at 134-144. The majority adopted the trial court's opinion as its own. 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 intrastate commerce. Id. at 138. The majority also agreed that the statutory framework should be examined "as a whole" to determine if Section 408.706(10) placed an impermissible burden on interstate commerce. Id. at 136. The majority sought in this regard to distinguish Associated Industries of Missouri v.

[3/] No cross-appeal was taken by the State from the judgment invalidating the bar to competition by pharmacies licensed under another state's laws.

Lohman, ___ U.S. ____, 114 S. Ct. 1815 (1994), stating that it permitted the weighing of the benefit provided in one part of a statutory scheme against the burdens imposed on interstate commerce in another part of that statutory scheme, in order to determine if the challenged provision violates the Commerce Clause. Id. at 136, n. 2.

In dissent, Judge Miner pointed out that the Lohman Court had in fact specifically held that advantages provided interstate companies in part of a statute could not be used to legitimize discrimination against interstate commerce in other parts of the same statute. Id. at 143. Judge Miner made clear that the Commerce Clause requires an examination of the challenged statutory language to determine if it offends the principles of a national marketplace. As he put it, "[i]t is the right to compete that is determinative ... ." Id. [emphasis in original]. He further noted that the "numerical cap imposed by this subsection eliminates not all but 98.7% of all interstate competition from the 'equal to/less than' prescription medicine market," which he concluded "is hardly the type of even-handed application required by" the Commerce Clause. Id. at 142.

Petitioners filed a notice to invoke discretionary jurisdiction. This Court accepted jurisdiction by order dated November 3, 1995.

SUMMARY OF ARGUMENT

The decision of the First District, which expressly declares a state statutory provision valid under the Commerce Clause, directly conflicts with long established precedent of this Court and the United States Supreme Court. That precedent makes clear that a state's efforts to protect its local commerce will not pass constitutional muster under the Commerce Clause. A state may not carve out a particular part of a local market for local business, even if out-of-state businesses can compete with local business in other parts of the market. Associated Industries of Missouri v. Lohman, ___ U.S. ____, 114 S. Ct. 1815 (1994). Rather, legislation that effectively operates as a restraint upon competition by out-of-state companies for the benefit of in-state companies is unconstitutional.

Moreover, for that violation to occur, the economic benefit afforded local companies does not have to be significant -- the Constitution does not concern itself with the size of the market that is hoarded. Nor can a state appease the courts which must enforce this constitutional principle by barring a few in-state businesses, or by granting a few out-of-state businesses access to that market, so that both interstate and intrastate commerce are affected to some extent or another. If the state legislation disproportionately burdens interstate businesses for the benefit of local businesses it is unconstitutional.

The disproportionate effect of Section 408.706(10)'s numerical limitation is patent: 98.7% of all interstate pharmacy

stores are prohibited from competing in the market created by that provision, while 66.9% of the wholly Florida pharmacy stores are permitted to compete in this market. As such, this is not "legislation that visits its effect equally upon both interstate and local business [and hence] may survive constitutional scrutiny if it is narrowly drawn." Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 36 (1980).

Simply put, the numerical cap in Section 408.706(10) serves a constitutionally impermissible purpose: it creates an economic opportunity for certain protected intrastate pharmacies, largely at the expense of their interstate competitors. Indeed, it effectively accomplishes the same discriminatory effect that the trial court correctly recognized could not be accomplished by the provision's direct ban against pharmacies licensed in states other than Florida. Such legislative action to favor and benefit certain protected local businesses is flatly prohibited under the United States Constitution.

There is nothing in the legislative history or in the record to demonstrate that this numerical limitation serves any purpose other than economic protection of local businesses against their interstate competitors, much less that non-discriminatory alternatives are unavailable to achieve the purposes posited by the court below. Hence, the numerical limitation in Section 408.706(10) cannot pass constitutional muster. Consistent with this Court's long tradition of protecting the rights of interstate businesses to compete in local markets, it should

invalidate this section's numerical bar as violative of the Commerce Clause, just as that section's more direct ban on interstate pharmacies was stricken.

STANDARD OF REVIEW

This Court makes a de novo determination whether the challenged statutory provision violates the Constitution. Hughes v. Oklahoma, 441 U.S. 322, 336 (1979). It is not bound by the trial court's characterization of the provision, which was adopted by the district court, but must instead make its own assessment of the practical impact of the numerical limitation in Section 408.706(10) upon interstate commerce. See, e.g., Division of Alcoholic Beverages and Tobacco v. McKesson Corp., 524 So. 2d 1000, 1008 (Fla. 1988), reversed on other grounds, McKesson Corp. v. Division of Alcoholic Beverages, 496 U.S. 18 (1990); Brown-Foreman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573, 583 (1986). When that review is made, this provision cannot withstand constitutional scrutiny.

ARGUMENT

The Challenged Statutory Cap Discriminates Against Interstate Pharmacies in Violation of the United States Constitution.

The Supreme Court has long recognized that the Commerce Clause of the United States Constitution limits the "power of the States to erect barriers against interstate trade." Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 34 (1980); Wyoming v. Oklahoma, 502 U.S. 437, 112 S. Ct. 789, 799 (1992). "The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent." C & A Carbone, Inc. v. Town of Clarkstown, ___ U.S. ___, 114 S. Ct. 1677, 1682 (1994).

Simply put, the State may not favor local businesses by prohibiting the patronage of out-of-state businesses. This is true even if, as the State urged to the district court, the predominantly local pharmacies would otherwise be effectively eliminated from participation in the prescription medicine market in Florida -- a contention which is not even remotely supported by the record. The Supreme Court recently explained that "[w]hether a State is attempting to enhance thriving and substantial business enterprises or to subsidize ... financially troubled ones is irrelevant" under the Commerce Clause. West Lynn Creamery, Inc. v. Healy, _____ U.S. _____, 114 S. Ct. 2205, 2217 (1994). Accepting the argument that an effort to "save" a

local industry from collapse is not protectionism "would make a virtue of the vice that the rule against discrimination condemns." Id. As the Court held, the "preservation of local industry by protecting it from the rigors of interstate competition is the hallmark of the economic protectionism that the Commerce Clause prohibits." Id.

To protect against such "economic protectionism," the Supreme Court has "routinely struck down" state laws "that clearly discriminate against interstate commerce." New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 274 (1988). Discrimination "simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." Oregon Waste Systems, Inc. v. Dept. of Environmental Quality, ___ U.S. ____, 114 S. Ct. 1345, 1350 (1994). Where such discrimination exists, the restriction is "virtually per se" invalid. Id. See also City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978); C & A Carbone, Inc., 114 S. Ct. at 1683.

This Court has likewise strictly scrutinized state statutes that place a discriminatory burden on interstate commerce. Division of Alcoholic Beverages, 524 So. 2d at 1003; Delta Air Lines, Inc. v. Department of Revenue, 455 So. 2d 317, 321 (Fla. 1984), appeal dismissed, 474 U.S. 892 (1985). And, consistent with the Supreme Court's decisions, this Court has held that when statutes provide "a direct commercial advantage to local

commerce," they violate the Commerce Clause. Delta Air Lines, 455 So. 2d at 321. As we now show, that is exactly the case here.

I. The numerical limitation disproportionately discriminates against interstate pharmacies in violation of the Commerce Clause of the United States Constitution.

To determine if discrimination exists against interstate commerce, this Court must look beyond the mere words of the statute itself and determine its practical effect. C & A Carbone, Inc., 114 S. Ct. at 1684 (regulation is per se invalid if it regulates interstate commerce "by its practical effect and design."); Lewis, 447 U.S. at 37 ("the principal focus of inquiry must be the practical operation of the statute . . . ."). When a statute's "effect is to favor in-state economic interests over out-of-state interests, [the Supreme Court has] generally struck down the statute without further inquiry." Brown-Foreman Distillers Corp., 476 U.S. at 579.

Contrary to the district court's view, the discriminatory effect need not be absolute; rather, legislation is invalid if it provides an unequal or preferential advantage to in-state interests over out-of-state interests. The district court's erroneous view resulted from its misreading of the Supreme Court's controlling precedent.

In concluding that this statutory cap did not impermissibly burden interstate commerce, the district court incorrectly cited Lewis for the proposition that "[l]egislation that visits its effects upon both interstate and local business may survive constitutional scrutiny if it is narrowly drawn." Albertson's,

658 So. 2d at 138. As Judge Miner correctly pointed out, Lewis does not support that proposition at all. Id. at 142. Lewis did not hold that any effect upon both interstate and intrastate commerce -- whether disproportionate or not -- establishes the absence of any unconstitutional burden on interstate commerce. Instead, the Lewis court actually held that "legislation that visits its effects equally upon both interstate and local business may survive constitutional scrutiny if it is narrowly drawn." Lewis, 447 U.S. at 36. In citing Lewis, the district court omitted that critical element of the Lewis holding.

As this language of Lewis makes clear, the district court misconstrued Lewis in concluding that Section 408.706(10) did not impermissibly burden interstate commerce since it affected both interstate and local commerce, albeit to a greatly different extent. Under Lewis, the effect on interstate and intrastate commerce must be "equal" to survive constitutional scrutiny. See also Delta Air Lines, 455 So. 2d at 320 (Commerce Clause demands "substantially evenhanded treatment" of in-state and out-of-state interests), quoting Boston Stock Exchange v. State Tax Comm'n., 429 U.S. 318, 332 (1977). Contrary to the district court's erroneous conclusion, then, legislation is unconstitutional if it provides an unequal or preferential advantage to in-state interests.

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." Accordingly, where a statute provides a commercial advantage to in-state businesses over their out-of-state competitors, it is discriminatory and invalid under the Commerce Clause.

Supreme Court decisions other than these have made this point as well. See, e.g., C & A Carbone, 114 S. Ct. at 1682 (ordinance was no less discriminatory because in-state or even in-town processors were also prohibited from competing with the favored processor); Oregon Waste Systems, Inc., 114 S. Ct. at 1350 (discrimination "simply means different treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter"); Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources, 504 U.S. 353, 112 S. Ct. 2019, 2025 (1992) (statute that barred waste disposal from other counties of state as well as other states merely reduced the scope of discrimination and did not eliminate it); Dean Milk Co. v. Madison, 340 U.S. 349, 354 (1951) ("immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce").

This Court held to this same effect in Division of Alcoholic Beverages and Tobacco v. McKesson Corp., 524 So. 2d 1000 (Fla. 1988), rev'd on other grounds, McKesson Corp. v. Division of Alcoholic Beverages, 496 U.S. 18 (1990). There, the Court declared that "the mere fact that not all out-of-state

competitors are disadvantaged by a state statute does not preclude a finding that the statute places a discriminatory burden on interstate commerce." Id. at 1007. The Court concluded that the Legislature's preferential treatment of beverages made from crops found in Florida rendered the statute unconstitutional.

The First District's decision below directly conflicts with this Court's decision in McKesson, as well as with Commerce Clause decisions of the Supreme Court cited above. As these decisions establish, the numerical limitation imposed by Section 408.706(10) is not saved merely because 3 intrastate pharmacies are also precluded -- along with virtually all of the interstate pharmacies -- from competing for the business of individual CHPA members. To the contrary, an impermissible burden on interstate commerce is established once a barrier to competition from out-of-state businesses is erected.

That was the case in C & A Carbone, even though the ordinance there also barred competition from other in-town and in-state processors, and that was also the case in Dean Milk Co., even though certain in-state milk producers there were also barred from competing against the local producers. C & A Carbone, 114 S. Ct. at 1683; Dean Milk Co., 340 U.S. at 354. The numerical restraint imposed by this statute similarly erects an economic barrier which protects local pharmacy businesses against competition from out-of-state businesses. Consequently, the fact that this provision also discriminates against 3 of Florida's 45

intrastate pharmacies with more than 12 stores does not negate the burden of its substantial and disproportionate discrimination against interstate pharmacies.[4/]

By the same token, this restraint is not any less discriminatory merely because a few interstate pharmacies may benefit from it. On this exact issue, this Court has held that "the mere fact that not all out-of-state competitors are disadvantaged by a state statute does not preclude a finding that the statute places a discriminatory burden on interstate commerce." Division of Alcoholic Beverages, 524 So. 2d at 1007. See also Lewis, 447 U.S. at 42 (rejecting similar argument that statute was not discriminatory because certain interstate companies were allowed in the Florida investment market); Hunt v. Washington State Apple Advertising Comm'n., 432 U.S. 333, 349 (1977) (statute burdening sales of apples from some but not all other states still invalid).

The point is, neither this Court nor the Supreme Court have ever required, as the district court has now done, complete discrimination against interstate commerce in order for a Commerce Clause violation to exist. Instead, a statute violates the Commerce Clause if it has the practical effect of

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[4/] Observing as "a case in point" that one petitioner (Kash 'n Karry) was also excluded from competition in this market, the trial court further noted that "10 of the other 11 [petitioners] do not meet this numerical limitation." (R. II, pp. 211-12). But those other ten petitioners are interstate pharmacies and hence the trial court made petitioners' very point: the numerical limitation burdens interstate commerce by unevenly excluding interstate pharmacies from competing in that statutorily created market.

disproportionately favoring local business over out-of-state business. Thus, a statute that burdens interstate businesses cannot be saved by extending the benefits intended for protected local businesses to a few of their interstate competitors.[5/]

In short, a state may not carve out part of a local market for some -- though not all -- of its local businesses, if the probable effect of the statute is that local businesses will receive a larger share, and out-of-state businesses a smaller share, of the sales in that market. See, e.g., C & A Carbone, 114 S. Ct. at 1682-83; Lewis, 447 U.S. at 42. Yet, as shown below, that is the exact effect of this restraint on competition for the business of CHPA members purchasing prescription medicines.

A. The practical effect of the numerical limitation is economic protectionism, rendering it per se invalid under the Commerce Clause.

There are 16 pharmacy companies doing business in the State of Florida that have more than 12 stores in the state. (R. I, pp. 92-96). However, only 3 of these companies are doing business exclusively in the State of Florida. Id. The other 13 companies who do business outside of Florida operate 87% of the pharmacy stores in the State. Id. The practical effect of this statutory numerical limitation is obvious: it directly excludes -- and thereby adversely impacts -- the largest out-of-state pharmacies doing business in Florida from competing in this statutorily

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[5/] In this case, only 5 potential interstate competitors representing a mere 1% of the total stores in the state are allowed to compete in this market. (R. I, pp. 92-96). In contrast, 13 potential interstate competitors comprising 87% of the stores in the state, are denied those same benefits. Id.

created market. On the other hand, the impact is negligible on intrastate pharmacies: Only 3 Florida-based pharmacy companies, representing just 4% of the stores in Florida, are precluded from competing in this market. Id.

The practical impact of this provision is to disproportionately preclude interstate pharmacy companies from competing against Florida-based pharmacies in this particular market. By barring pharmacy companies "with greater than 12 pharmacy facilities in the state" from competing for these CHPA members, the vast majority of interstate pharmacy companies -- 13 out of 18, or 72% -- are excluded from this market. In sharp contrast, the vast majority of intrastate pharmacy companies -- 42 out of 45, or 93% -- are allowed to compete. As can be readily seen, the practical effect of this cap is to discriminate disproportionately against pharmacy companies doing business in states other than Florida and to hoard a local market for the overwhelming benefit of protected Florida-based companies. This statutory discrimination violates the Commerce Clause.

C & A Carbone, Inc. v. Town of Clarkstown, 114 S. Ct. 1677 (1994) is controlling. There, the Supreme Court invalidated a "flow control" ordinance which required all non-hazardous solid waste generated in and outside of the town to be processed at a local transfer station. Id. at 1680. The ordinance further required that waste already sorted by other processors had to be sent to the station and a fee was imposed for handling the material. Moreover, the processors were precluded from shipping

the non-recyclable waste; they instead had to pay the station to ship it. Id. at 1681. The Court held that the ordinance violated the Commerce Clause because it deprived "competitors, including out-of-state firms, of access to a local market." Id. at 1680. The Court specifically rejected the town's argument that the ordinance was constitutional because it did not differentiate solid waste on the basis of its out-of-state or in-state origin.

The Court first held that the article of commerce was not the solid waste itself but rather the right to process and dispose of it. Id. at 1682. With respect to that part of commerce, the ordinance prevented everyone except the favored local operator from performing the initial step in processing the solid waste. As the Court pointed out, that "hoard[s] a local resource ... for the benefit of local businesses that treat it." Id. at 1683. Concurrently, the ordinance "squelch[ed] competition in the waste-processing service altogether, leaving no room for investment from outside." Id. These effects were more than enough to bring the ordinance within the purview of the Commerce Clause. Id.

The Court's reasoning is fully applicable to Section 408.706(10). With respect to the commerce of processing and filling medical prescriptions in the State of Florida, that provision creates a discrete market for prescription medicine business with CHPA members under contract with a pharmacy through their AHP. The statute then grants exclusive access to this market to a group of pharmacies almost entirely composed of

Florida-based companies. By disproportionately limiting access to that market to mostly Florida-based pharmacies, the Florida legislature deprived "out-of-state businesses of access to a local market." C & A Carbone, Inc., 114 S. Ct. at 1680. Hence, just as in Carbone, the effect of the statute is to impermissibly discriminate against interstate commerce.

B. The district court erroneously concluded that Section 408.706(10) is saved because the Act "as a whole" is not discriminatory.

The district court incorrectly held that, even if there is some statutory discrimination against interstate commerce, that is permissible so long as the "Act as a whole" is not discriminatory.[6/] Based on its erroneous reading of Lohman, the district court concluded that the discriminatory impact of the numerical limitation in this statutorily created market was constitutionally permissible because the "Act as a whole" allowed interstate pharmacies to compete with local pharmacies in the broader contract market. Albertson's, 658 So. 2d at 136. In point of fact, the Supreme Court rejected that exact argument in Lohman, declaring "[w]e have never suggested, however, that patent discrimination in part of the operation of [a statutory scheme]... can be rendered inconsequential for Commerce Clause

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[6/] Petitioners do not, of course, challenge the constitutionality of the Act "as a whole." They challenge only the constitutionality of Section 408.706(10), because that provision impermissibly burdens interstate commerce. The evidence of the effect of that particular provision of the Act on interstate commerce was unrefuted, and petitioners clearly demonstrated by that evidence that this sub-section of the Act burdens interstate commerce. (R. I, pp. 31-91).

purposes by advantages given to interstate commerce in other facets of [the scheme]." Lohman, 114 S. Ct. at 1822.

Thus, as Judge Miner correctly recognized in dissent, the majority's decision directly conflicts with Lohman in holding that courts may consider the statutory scheme "as a whole" to determine if discrimination exists in a particular, challenged provision. Albertson's, 658 So. 2d at 143. Lohman makes it clear that the Commerce Clause does not sanction this type of economic tradeoff. Rather, if discrimination has occurred in some part of the market as a result of a statutory provision, that provision is invalid. And, that determination is unaffected by the sum of the advantages and disadvantages afforded out-of-state businesses under the statutory scheme "as a whole."

Lohman does not stand alone in demonstrating that the potential effect of the Act "as a whole" on interstate commerce is immaterial to the assessment of the discriminatory effect of this particular restraint on a specific part of interstate commerce. For example, the Supreme Court found a New Jersey statute that divided the market for the disposal of solid waste in the state, allowing out-of-state generators access to part of that market but denying their access to another part of the market, invalid under the Commerce Clause. City of Philadelphia v. New Jersey, 437 U.S. 617, 619 (1978). As the Court later explained, the fact that the statute allowed out-of-state waste generators entry to dispose of some solid waste in the state "merely reduced the scope of the discrimination; for all

categories of waste not excepted by the regulations, the discriminatory ban remained in place." Fort Gratiot Sanitary Landfill, 112 S. Ct. at 2025. See also Wyoming, 112 S. Ct. at 800 (statute preserving 10% of local coal market for local coal per se invalid, even though out-of-state coal producers were not denied access to other 90% of local market).

That is exactly the case here. The fact that petitioners can compete for CHPA members in another market under the Act -- namely, the original market for contracts with AHPs to provide prescription medicines to the AHPs' constituent CHPA members -- has no bearing on their exclusion from this secondary market created by Section 408.706(10). With respect to that market, "the discriminatory ban remain[s] in place." Id.

It is telling that the trial court's reliance on the effect of the Act "as a whole" to justify the discriminatory burden placed on interstate commerce -- a ruling specifically approved and accepted by the district court -- is inconsistent with other rulings by the trial court in this case. The trial court specifically invalidated the limitation in Section 408.706(10) barring all pharmacy companies licensed under another state's laws from competing in the secondary market created by the legislature. (R. II, p. 209). Obviously, the court concluded that the effect of the Act "as a whole" did not justify this discriminatory burden on this part of interstate commerce. It likewise does not justify the discriminatory burden imposed on

this same part of interstate commerce by the alternative numerical limitation.

This Court has long been vigilant in its protection of interstate commerce from burdens imposed by the legislature in favor of local interests. See, e.g., McKesson, 524 So. 2d at 1008; Delta Air Lines, Inc., 455 So. 2d at 320 (Commerce Clause demands "substantially evenhanded treatment" of in-state and out-of-state interests). Indeed, as this Court emphasized in McKesson, the tendency of the legislature to favor local businesses is at impermissible odds with the "general principle that the Commerce Clause prohibits a State from using its regulatory power to protect its own citizens from outside competition." Id. This Court's vigilance is required here to ensure that this constitutionally prohibited use of state legislative power does not go unchecked.

The importance of such oversight by this Court cannot be overstated. The district court's erroneous and lenient view of the level of discrimination that is permitted against interstate commerce under the Commerce Clause obviously has a potentially far reaching effect. Instead of serving as a steadfast check on the legislature's power to advance the interests of local businesses at the expense of their out-of-state competitors, the majority's decision stands as an open invitation to the future enactment of equally invidious protectionist measures.

C. The State failed to satisfy the stringent standard for justifying the discriminatory effect of the numerical limitation.

There is no legislative history to suggest that this last minute addition to the Act had any purpose other than what is clear on the face of Section 408.706(10) itself: namely, protecting Florida-based pharmacies against competition from their interstate competitors. (R. I, pp. 92-96). Indeed, that is avowedly the purpose of the second part of the statutory definition, which was correctly invalidated as a direct discriminatory burden on interstate commerce. There is absolutely nothing to suggest any different purpose with respect to the first part of that definition. Moreover, as the record conclusively demonstrates, almost the same discriminatory impact results from that numerical limitation. (R. I, pp. 31-96).

Hence, the numerical limitation on its face and in its practical effect demonstrates that its purpose was nothing more than economic protectionism. And, as shown above, that purpose is invalid under the Commerce Clause. Dean Milk Co., 340 U.S. at 354 (state cannot protect local industry against out-of-state competition "even in the exercise of its unquestioned power to protect the health and safety of its people ..."); C & A Carbone, Inc., 114 S. Ct. at 1682 (discrimination against interstate commerce in favor of local business or investment is per se invalid). See also Limbach, 486 U.S. at 1808; Lewis, 447 U.S. at 44; Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935).

The State's proof in such cases is subject to exacting review by the court: "[a]t a minimum such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives." Wyoming, 112 S. Ct. at 800, quoting, Hughes v. Oklahoma, 441 U.S. 322, 337 (1979). The extent of the State's exacting burden was emphasized in C & A Carbone, Inc.:

> Discrimination against interstate commerce in favor of local business or investment is per se invalid, save in a narrow class of cases in which the [state] can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest.

114 S. Ct. at 1683. If the State fails to carry this heavy burden,[7] the statute must be declared invalid.

That is clearly the case here. The State has wholly failed to carry its burden of justifying the discriminatory effect of this statutory provision. The post-hoc rationalizations urged by the State and accepted by the trial court fail under the

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[7] A purpose unrelated to the protectionism evident in the effect of the statute itself does not exist simply because the State says it does. As the Supreme Court explained,

> A different view, that the [statute] is valid simply because it professes to be a health measure, would mean that the Commerce Clause of itself imposes no limitation on state actions other than those laid down by the Due Process clause, save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate [commerce].

Dean Milk Co., 340 U.S. at 354. Simply put, the determinative factor is not what the State says is the purpose but what is in practical effect the evident purpose of the provision.

"rigorous scrutiny" that must be given any effort to justify this discriminatory impact upon interstate commerce.

For example, accepting the State's contention below, the trial court declared that "the purpose of [the] 'independent pharmacy' exemption is to allow these 'mom and pop' styled pharmacies to continue to provide pharmacy services to [CHPA] members, under the new statutory framework [i.e., the Act]." (R. II, pp. 206-07). However, nothing on the face of this provision or in the legislative history of the Act suggests that the purpose of the numerical limitation was to assist "mom and pop" pharmacies. Furthermore, there is nothing in the record demonstrating any such purpose for the limitation.

In fact, the promotion of "mom and pop" businesses is not suggested by the operation of the numerical limitation at all. Nothing in the record shows that pharmacies with 12 or less Florida stores are "mom and pop" businesses.[8/] Quite to the contrary, the protected Florida pharmacies are not all "mom and pop" stores; instead, they include such substantial businesses as Joel N' Jerry's. (R. I, pp. 95-96). Consequently, the numerical limitation allows pharmacies like petitioner Harco Drug, which

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[8/] There is likewise nothing in the legislative history or in the record demonstrating that pharmacy companies with 12 or less stores within the State are "small businesses" requiring special protection from competition. The legislature has previously defined a "small" business by its net worth and number of full-time employees. § 288.703(1), Fla. Stat. (1993). There is, however, no evidence in this record in this regard for these protected pharmacies. Hence, even under the legislature's own standards, the number of Florida stores alone that a particular pharmacy operates, fails to establish that it is a "small" business.

has only 5 Florida stores but 123 stores in other states, access to the market created by Section 408.706(10). (R. I, p. 49-52). By no definition, however, is petitioner Harco a "mom and pop" pharmacy simply because it does not have more than 12 Florida stores.

The trial court also found that the numerical limitation in Section 408.706(10) served the purpose of promoting access to health care services "to the extent that" it allowed "independent pharmacies located in rural or underserved populations" to provide prescribed medicines without a contract with an AHP to do so. (R. II, p. 214). However, there is no evidence in this record that pharmacies with 12 or fewer Florida stores serve or are even located in rural or underserved areas. Certainly nothing in the legislative history or the record suggests they are located in such areas. Ironically, there is evidence in the record that many of the petitioners who are excluded from this market are in fact located in, and thus serve, rural areas of the state. (R. II, pp. 313-26, Eas. 1-13).

In addition, the Act does not require independent pharmacies with 12 or fewer Florida stores to serve rural or underserved populations in Florida. Clearly, had the Legislature intended that these independent pharmacies should provide their services in rural or underserved areas of the state, the Legislature would have said so. The Legislature did not, even though that would clearly be the less discriminatory way to accomplish such a goal.

The trial court further found the burden on interstate

commerce here to be "completely consistent" with the goal of providing access to affordable health care because the secondary market for certain CHPA members was only made available to approximately 10% of the pharmacies operating in the state. Thus, it would have only a minimally adverse impact on interstate pharmacies in the comparatively larger market for original AHP contracts. (R. II, pp. 212-13). But, there is no evidence whatsoever that the impact of the numerical limitation on the contract market will be minimal.[9/] For example, such substantial businesses as Joel N' Jerry's and Haro Drug are granted access to that secondary market. Their ability to siphon off sales from the contract market cannot be presumed to have a mere minimal impact on the contract market. To the contrary, the unrefuted evidence shows that petitioners will suffer substantial lost sales of not only prescribed medicines but other goods as a direct result of the numerical limitation. (R. I, pp. 31-91).

Moreover, the fact that interstate pharmacies have unrestrained access to the original contract market under the Act does not justify the discriminatory restraint placed on their access to the secondary market created by Section 408.706(10). As explained above at pages 19-24, the Commerce Clause does not

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[9/] The only evidence submitted by the State to the trial court related to the location and number of petitioners' stores in Florida and other states. (R. II, pp. 313-26. Exs. 1-13). The State made no effort whatsoever to present record evidence that would in any way refute petitioners' evidence of the adverse impact of the numerical limitation on them, or show that this bar served some legitimate purpose other than economic protectionism.

sanction the hoarding of any local market for the benefit of preferred local businesses to the exclusion of out-of-state businesses. C & A Carbone, 114 S. Ct. at 1682.

It is the right to compete -- not the degree to which competition is affected in the protected market or any related market -- which is determinative of a Commerce Clause violation. See C & A Carbone, 114 S. Ct. at 1682-1683. As the Supreme Court further explained, "the volume of commerce affected measures only the extent of the discrimination; it is of no relevance to the determination whether a state has discriminated against interstate commerce." Wyoming, 112 S. Ct. at 800. See also Limbach, 486 U.S. at 276 ("where discrimination is patent, ... neither a widespread advantage to in-state interests nor a widespread disadvantage to out-of-state competitors need be shown."). Under these teachings, the discriminatory impact of this statutory provision on interstate competition is unconstitutional.

In short, the trial court's assumptions which underlay its ruling with regard to the numerical limitation are wholly unsupported by the record. The only purpose evident from the record is the protection of certain favored local pharmacy businesses from competition from the vast majority of their out-of-state competitors. See Wyoming, 112 S. Ct. at 789 (rejecting contention urged by Oklahoma to support preservation of 10% of coal market for local coal on the ground that it conserved cleaner out-of-state coal, because neither the record nor the

actual effect of provision showed that would be the case). That purpose is "simple economic protectionism" and is invalid.

In Carbone, the Supreme Court emphasized this very point: "[s]tate and local governments may not use their regulatory power to favor local enterprise by prohibiting patronage of out-of-state competitors or their facilities." C & A Carbone, 114 S. Ct. at 1684. Any such legislative purpose is "at odds with the general principle that the Commerce Clause prohibits a State from using its regulatory power to protect its own citizens from outside competition." Lewis, 447 U.S. at 44; see also, West Lynn Creamery, Inc., _____ U.S. _____, 114 S. Ct. 2205, 2217 (1994). Hence, promoting certain local pharmacies is not a valid local concern justifying discrimination against out-of-state pharmacies.

Furthermore, the type of circumstances that have justified discrimination against interstate trade are simply not present in this case. See, e.g., Baldwin, 294 U.S. at 525-26 (noting cases in which state regulation of interstate commerce was permitted and summarizing that "[n]one of these statutes -- inspection laws, game laws, laws intended to curb fraud or exterminate disease -- approaches in drastic quality the statute" before the court which set minimum prices for the sale of all milk in the state); Maine v. Taylor, 477 U.S. 131, 149, n. 19 (1986) ("overt discrimination may be justified where, as in this case, out-of-state goods or services are particularly likely for some reason to threaten the health and safety of a State's citizens or the

integrity of its natural resources ..."). Absent a showing of such circumstances, and there is none in the record here, the protection of local business by imposing this broad restraint on competition by interstate pharmacies is not a valid local purpose.

Even if protection of supposed "mom and pop" pharmacies -- like Joel N' Jerry's and Haro Drug -- from competition from interstate pharmacies were a valid local concern justifying the burdening of interstate commerce, which it is not, the State has not demonstrated that it has no other means to advance that goal. C & A Carbone, Inc., 114 S. Ct. at 1683. Manifestly, there are nondiscriminatory or less discriminatory alternatives available to the state. For example, in the context of addressing a statute providing tax preferences only to alcoholic beverages derived from produce grown in the State of Florida, the Florida Supreme Court recognized that less discriminatory alternatives, including "direct cash subsidies, state-sponsored research, or state-sponsored promotional campaigns," were available to promote the industry. Division of Alcoholic Beverages v. McKesson, 524 So. 2d 1000, 1009 (Fla. 1988).

Indeed, many of the same less discriminatory alternatives, such as subsidies, low-interest loans, and other such measures, are available if the state desires to support Florida-based pharmacies. A number of such programs are already in place. See, e.g., §§ 408.004, 409.7015, 627.4106, 627.6693 (group health insurance), 288.701-208.705 (Florida Small and Minority Business

Assistance Act), Fla. Stat. (1993). The State has not and cannot satisfy its burden to show a lack of nondiscriminatory alternatives to the outright prohibition on competition from out-of-state pharmacies in Section 408.706(10). C & A Carbone, Inc., 114 S. Ct. at 1684 (town failed to use nondiscriminatory alternatives to justify the ordinance).

The fact of the matter is, Section 408.706(10) facially discriminates against interstate pharmacies by precluding them from competing with intrastate pharmacies for certain customers, while allowing certain, narrowly-defined intrastate pharmacies to compete for those same customers. No legislative history softens the protectionist intent evident in the statutory provision itself and in its demonstrably disproportionate burden on interstate commerce. Even had some valid local purpose been articulated, the legislature failed to consider less intrusive alternatives to the exclusion of 87% of the pharmacy stores in the state from this market. For these reasons, Section 408.706(10) is per se invalid under the Commerce Clause.

II. The numerical limitation, at the very least, indirectly discriminates against interstate pharmacies in contravention of the Commerce Clause.

Even where the courts find that the statute regulates both intrastate and interstate commerce in a substantially evenhanded manner, with only an "incidental" burden on interstate commerce, the statute will only be upheld if the state's interest is legitimate and the burden imposed on interstate commerce does not clearly exceed the local benefits. Pike v. Bruce Church, Inc.,

397 U.S. 137, 142 (1970); Lewis, 447 U.S. at 36-7; Division of Alcoholic Beverages, 524 So. 2d at 1007-08. In determining if the burden imposed on interstate commerce is excessive or merely incidental to achieving a legitimate state interest, the same analysis which is used to determine if a direct discriminatory burden on such commerce is justified is applied.[10/] The critical factor again is the probable overall impact on both local and interstate commercial activity. Lewis, 447 U.S. at 37. See also Division of Alcoholic Beverages, 524 So. 2d at 1003.

Thus, when a burden on interstate commerce is demonstrated, the burden again "falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." Hunt, 432 U.S. at 353. Likewise, the statute cannot be saved merely because a few intrastate businesses are burdened or a few interstate businesses receive the same benefits as the protected in-state businesses, if the overall burden on out-of-state businesses is disproportionate to the burden on in-state businesses. Id.; Lewis, 447 U.S. at 41-2; Division of Alcoholic Beverages, 524 So. 2d at 1007-09.

[10/] As the Supreme Court has frequently acknowledged, there is no clear line separating state regulation that directly discriminates against interstate commerce from that which indirectly discriminates against such commerce. "In either situation the critical consideration is the overall effect of the statute on both local and interstate activity." Brown-Foreman, 476 U.S. at 579; Division of Alcoholic Beverages, 524 So. 2d at 1003.

It cannot be doubted that, as to this statute's numerical limitation, petitioners have demonstrated both its discriminatory impact and that its overall effect will substantially burden interstate commerce. (R. I, pp. 31-91). Petitioners' exclusion from this market will adversely impact not only their prescription medicine sales but also the sales of other goods attendant to purchases of prescription medicines by their customers. (R. I, pp. 31-91). Additionally, many customer relationships will inevitably be severed. Id. Many loyal customers, with whom petitioners have spent time and money cultivating a relationship, will be lost once their AHP contracts with another pharmacy and they must go to that pharmacy or to an "independent pharmacy" for their prescription drug needs. This business will be driven away as petitioners are stripped of the advantages achieved by investing in the development of such customer relationships in the neighborhoods in which their pharmacy stores are located. See Hunt, 432 U.S. at 351 (statute precluding use of state grades on apples sold in state stripped away competitive and economic advantages earned by Washington through its expensive inspection and grading system.).

The net effect is an appreciable loss of business to petitioners, but not to those Florida pharmacies defined as an "independent pharmacy" and granted a statutory right to compete for such business. Those protected pharmacies receive a direct commercial advantage over their out-of-state competitors as a result of the numerical limitation's significant bar to

competition by interstate pharmacies. Consequently, Section 408.706(10) establishes, at the very least, an indirect discriminatory "preference" for Florida-based pharmacies over their out-of-state competitors in this market.

This discriminatory preference was clearly indicated on the very face of the provision. And, its practical effect only confirms that intent. In fact, as demonstrated above at pages 31-37, nothing in the legislative history or record permits an inference of any other motive. Because the discrimination effected by the provision is not incidental to any legitimate legislative intent, this statutory provision is invalid under the Commerce Clause.

Contrary to the conclusion of the lower courts, there is accordingly no need to further determine if the burden imposed on interstate commerce by the provision can be promoted by less burdensome measures and, if not, whether it can, nevertheless, be tolerated given the local interests involved.[11/] Pike, 397 U.S. at 142; Division of Alcoholic Beverages, 524 So. 2d at 1008. As discussed above, pages 19-20, supra, the district court's reliance on Lewis v. B.T. Investments Managers, Inc., 447 U.S.

[11/] Even were that the case, which it is not, those courts failed to even consider less discriminatory measures which, as shown above at pages 38 and 39, were plainly available to the Legislature to promote "mom and pop" pharmacies or pharmacies serving rural and underdeveloped areas of the state. Had the State not sought to also protect those pharmacies from competition by virtually all of their interstate competitors, some or all of those measures could have been employed to accomplish that goal.

27, 36 (1980), in this regard, was wholly misplaced. In fact, Lewis fully supports petitioners' position.

In Lewis, the Supreme Court addressed a Florida statute prohibiting the ownership of local investment or trust businesses by bank holding and trust companies having their principal operations located outside Florida. Id. at 37. Florida bank holding and trust companies were not precluded from owning such businesses. The Court held that the statute was "parochial" because it prevented competition in local markets by out-of-state firms with the kinds of resources and business interests that make them likely to attempt de novo entry. Id. at 39. Because of this discrimination against such out-of-state firms, the statute "was not evenhanded," but rather displayed "a local favoritism or protectionism." Id. at 42. The Court specifically held that this "disparate treatment of out-of-state bank holding companies cannot be justified as an incidental burden necessitated by legitimate local concerns."[12/] Id.

A similar result should obtain in this case. The numerical limitation provides in-state pharmacies an unequal advantage over virtually all of their out-of-state competitors in the market created by that provision. Just as in Lewis, the burden that

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[12/] Similarly, in two of the other cases cited by the trial court, Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) and Diamond Waste, Inc. v. Monroe County, 939 F.2d 941 (11th Cir. 1991), the regulation at issue, although not held to be per se invalid, was nevertheless, ruled invalid because the nature of the burden on interstate commerce raised the danger of hoarding business for local residents. That exact same danger is present in the practical operation of this provision.

this imposes on interstate commerce cannot be justified as merely an "incidental burden necessitated by a legitimate local concern."

CONCLUSION

A clearer case of "simple economic protectionism" is hard to imagine. The incontestable purpose of the statute's numerical limitation is to promote certain Florida pharmacies by excluding their interstate competitors. That protectionist purpose is not a legitimate local concern.

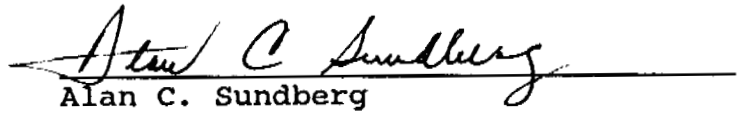
In point of fact, no matter how noble that legislative goal might appear to a state legislature, the United States Supreme Court has long held that where economic protectionism is concerned, the ends do not justify the means. In such cases, the legislative goal is tainted by the attempted economic isolation of the market for local business and, hence, deemed immaterial. When the provision effectively operates to discriminate against interstate commerce -- as is the case with the numerical limitation -- the decisions of this Court and of the Supreme Court make it clear that the provision must be deemed violative of the Commerce Clause.

This Court has always been vigilant in invalidating legislative measures designed to protect local businesses from their out-of-state competitors. It should act in this case to protect the right of interstate business to compete with Florida businesses on a level playing field, consistent with the teachings of Lewis, Lohman, and other precedent. Otherwise, the

district court's decision will serve as a road map for future legislative efforts to discriminate unfairly in favor of local interests contrary to the Commerce Clause of the United States Constitution.

At the core of the constitutional prohibition of discrimination against interstate commerce is the framers' intent that there be one single market in these United States. Hence, individual states cannot erect any barrier in an effort to advantage local interests, because that would destroy the fundamental concept of a national market in this country. If, then, the Legislature creates a market for the direct purchase of drugs by CHPA members from pharmacies who have not contracted with the AHP, interstate pharmacies must be permitted to compete on a "substantially evenhanded" basis with local, intrastate pharmacies in that market. Accordingly, this Court should declare the numerical cap in Section 408.706(10) unconstitutional and enjoin the State from further enforcement of that provision.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioners' Initial Brief on the Merits and accompanying Appendix to Petitioners' Initial Brief on the Merits has been furnished by hand delivery to Stephanie A. Daniel, Assistant Attorney General, General Civil Litigation, State Programs Branch, The Capitol - Suite PL 01, Tallahassee, Florida 32399-1050 this 28th day of November, 1995.

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