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,

vs.

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.
_____/

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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' REPLY BRIEF

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## PRELIMINARY STATEMENT

Petitioners, Albertsons, Inc., Big B, Inc., Harco Drug, Inc., Eckerd Corporation, Kash n' Karry, K-Mart Corporation, Pick 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 "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."

As explained in Petitioners' Initial Brief on the Merits, the Florida Health Care and Insurance Reform Act of 1993 will be referred to as the "Act." The state-chartered, non-profit community health purchasing alliances under the Act will be referred to as "CHPAs" and the accountable health partnerships under the Act will be referred to as "AHPs."

The basic 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. Where reference is made to the appendix, the citation form will also include "(A._)" Additionally, Petitioners' Initial Brief on the Merits and

Respondents' Answer Brief will be cited as "(IB, p. ___)" and "(AB, p. ___)," 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

The State's "statement of facts" include statements that are inaccurate or unsupported by the record. For example, the State asserts that absent the enactment of Section 408.706(10), the independent pharmacies "would be driven out of business." (AB, p. 8). No evidence in the record supports this statement. Likewise, there is no evidence that: (1) independent pharmacies are unable to compete because of the "legislatively restructured market," (AB, p. 8); or (2) that but for Section 408.706(10), the Act would shift pharmacy services from a mix of interstate and intrastate providers to predominantly interstate providers. (AB, pp. 8-9). The lack of evidence is made clear by the absence of any record citation for these statements. In point of fact, the State failed to introduce any evidence of the prescription medicine market in Florida before or after the Act was passed. Hence, there is no evidence supporting the State's claim that the enactment of Section 408.706(10) leads to a "more equitable" market structure. (AB, p. 12).

The State further asserts that there is nothing in the record which suggests that "there will be any impediment to [petitioners] competing for contracts with AHPs to provide pharmacy services to CHPAs." (AB, p. 13). On the contrary, the record reflects that petitioners presented unrefuted evidence that they will suffer an appreciable loss in business as a result of the enactment of Section 408.706(10). (R. I, pp. 31-91). The State simply ignores this evidence.

## ARGUMENT

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

In our initial brief, petitioners demonstrated that the numerical limitation unevenly discriminates against interstate pharmacies in contravention of the Commerce Clause. The State argues that this discrimination exists "in part" because "[petitioners] persisted in treating § 408.706(10) as if it was passed by the Legislature in a vacuum." (AB, pp. 26-7). The State contends there is no violation of the Commerce Clause if the Act "as a whole" does not unevenly discriminate against interstate pharmacies in light of their supposed competitive advantage under other sections of the Act. (AB, pp. 27-9). This argument is wholly without merit.

To begin with, the record is devoid of any evidentiary support for the State's arguments regarding the "effect" of the Act "as a whole." The State argues that discrimination in one market can be offset by allowing the right to compete in another market where, in the State's view, interstate companies have a competitive advantage. Thus, the State assumes -- without record support -- that the predominantly intrastate pharmacies which operate only a few stores in Florida will be unable to obtain contracts for pharmacy services under the Act because such pharmacies cannot provide the prerequisite adequate access to prescription services for CHPA members. (AB, pp. 8, 11-2). The State contends that the "likely" shift in commerce under the Act "as a whole" will accordingly be among interstate pharmacies and

not from interstate to intrastate pharmacies. (Id., pp. 8-9, 29-30).

However, the State submitted no evidence of (1) the existing conditions in the prescribed medicine market in Florida prior to enactment of the Act or (2) as to the likely effect of the Act on that market. There is, then, no evidence that the interstate pharmacies will receive any competitive advantages over their intrastate competitors. Accordingly, the State's argument is, at best, mere conjecture which should be rejected.

Second, and more fundamentally, the effect of the Act "as a whole" is immaterial to the determination of whether Section 408.706(10) unevenly discriminates against interstate commerce. Petitioners do not challenge the constitutionality of the Act as a whole. They assert only that Section 408.706(10) is unconstitutional. That provision creates a separate market for the prescriptions of CHPA members under contract with another pharmacy that is completely independent from the original contract market for such services. However, only certain, favored Florida-based pharmacies are permitted to compete for the prescription business in that statutorily created market. As a result, the State effectively hoards that particular market for the benefit of favored local businesses. That renders Section 408.706(10) unconstitutional. C & A Carbone v. Town of Clarkstown, 511 U.S. __, 114 S. Ct. 1677 (1994).

Notably, the State cites no authority supporting the proposition that this section can be saved because the Act allows interstate pharmacies to freely compete with local pharmacies in

other markets. Certainly, the decisions in Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573 (1986) and Division of Alcoholic Beverages and Tobacco v. McKesson Corp., 524 So. 2d 1000 (Fla. 1988) do not "suggest" that. (AB, p. 29). In both cases, the courts did not look beyond the challenged tax exemption provisions to determine if they discriminated against interstate commerce. No attempt was made to weigh the adverse impact on interstate businesses under the challenged provision against the benefits afforded those interstate businesses under other parts of the regulatory scheme before deciding if the challenged provision violated the Commerce Clause. Rather, the Court's consideration of the "overall effect" of the statute in Brown-Forman was limited to all impacts of the challenged statutory provision on both local and interstate activity.

That is consistent with the Court's rulings that the State may not preserve part of a market for local business, even if interstate businesses are allowed to compete with local businesses in another part of the market. See e.g., City of Philadelphia v. New Jersey, 437 U.S. 617, 619 (1978); Wyoming v. Oklahoma, __ U.S. __, 112 S.Ct. 789, 800 (1992). Thus, the fact that the statute allows out-of-state businesses entry to some part of the market "merely reduces the scope of the discrimination," and it does not mean that the bar to interstate businesses in other parts of the market is any less discriminatory. Fort Gratiot Sanitary Landfill, Inc. v. Michigan

Dept. of Natural Resources, __ U.S. __, 112 S. Ct. 2019, 2025 (1992).

Indeed, as the State concedes, in Associated Industries of Missouri v. Lohman, __ U.S. __, 114 S. Ct. 1815, 1822 (1994), the Court rejected the State's argument here, 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 purposes by advantages given to interstate commerce in other facets of [the scheme]." (AB, p. 28). Nevertheless, the State incongruously contends that the Supreme Court did not mean what it said, asserting that "[t]hese 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." (Id.). The State notes that the Lohman Court reviewed both tax schemes, comparing the use tax to the local sales taxes adopted in each local jurisdiction.

While this is true, the State misses the point. The Court reviewed the tax schemes to determine the impact of the contested use tax on interstate commerce in each subdivision of the State. When the use tax, combined with local sales taxes, subjected interstate commerce in a particular locale to a higher tax levy than intrastate commerce in that locale the use tax was held to be discriminatory. The State admits that "in any jurisdiction" where the use tax exceeded the sales tax and, hence, imposed a greater tax burden on interstate commerce than intrastate commerce, "the tax was determined to discriminate against

interstate commerce." (AB, p. 29). The point is, of course, this determination was made even though the aggregate impact of the use tax across the State "as a whole" reflected a lower net tax on interstate commerce. The Court's prohibition of that discrimination is dispositive here.

Thus, just as in Lohman, the State argues here that the discrimination against interstate pharmacies in the market created by Section 408.706(10) is offset by the purported advantage those pharmacies have in the original contract market over the Florida-based pharmacies protected by the numerical limitation. (AB, pp. 11-12, 29-30). But the Lohman Court made clear that the Commerce Clause does not sanction such economic tradeoffs. Rather, the "determinative question" is whether discrimination has occurred in some part of a market, and the answer to that question is unaffected by the sum of the advantages and disadvantages afforded the out-of-state businesses. Id. see also Wyoming, 112 S.Ct. at 800. Under these teachings, the answer to that determinative question is clear in this case: the numerical limitation directly discriminates against interstate commerce.

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

The State concedes that the Court must look to the practical "effect" of Section 408.706(10). (AB, p. 24). There is likewise no dispute that the provision must not "favor in-state economic interests over out-of-state interests," and must instead regulate "evenhandedly" to survive constitutional scrutiny. (AB, pp. 23-

24). But here, the practical effect of the numerical limitation is to discriminate against interstate pharmacies in the market created by this Section. Virtually all pharmacies doing business in Florida and other states are barred from the Section 408.706(10) market, while a majority of the pharmacies doing business solely in Florida are granted access to that market, unimpeded by competition from the excluded pharmacies. (IB, p. 7). In fact, 98.7% of all interstate pharmacies doing business in Florida are prohibited from competing in the statutorily created market. (Id.). Manifestly, the provision disproportionately precludes interstate pharmacy companies from competing with Florida-based pharmacies in this market. That the State may not do. C & A Carbone, 114 S. Ct. at 1684.

The State ignores completely the clear discriminatory import of the numerical limitation on interstate commerce. The State argues instead that the percentage participation of interstate and intrastate pharmacies are roughly the same both before and after passage of Section 408.706(10). (AB, pp. 29-30, 31-32). These percentages, the State further contends, favor interstate participation in the original contract market. (Id.). From this, the State erroneously concludes that Section 408.706(10) does not discriminate against interstate commerce.

But the State fails again to focus on the particular market created by Section 408.706(10). And, the fact that there are more interstate pharmacy stores than intrastate pharmacy stores available to fill prescriptions for CHPA members does not alter the undeniable fact that the vast majority of these interstate

pharmacy stores are precluded by Section 408.706(10) from doing so for CHPA members under contract with another pharmacy. Only certain protected intrastate pharmacies have the right to do that. As such, Section 408.706(10) discriminates against interstate commerce. C & A Carbone, 114 S. Ct. at 1684; Lohman, 114 S.Ct. at 1822.

The State's reliance on Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978) as support for its argument is completely misplaced. That Court did not find, as the State erroneously suggests, that the State may burden interstate commerce so long as the effect of the statute as a whole is to shift business from one interstate supplier to another. (AB, p. 22). Instead, the Exxon Court simply concluded that there was no discrimination against interstate commerce there because there were no local producers to favor and, for the same reason, the flow of interstate goods into the state was not affected. Id. at 125.

Indeed, even the State admits "the instant matter is about access to the market." (AB, p. 13). The article of commerce here is the right to process and fill medical prescriptions in Florida. And, with respect to the market created by Section 408.706(10), that right is reserved for a group of pharmacies composed almost entirely of intrastate companies to the exclusion of nearly all of their interstate competitors. By limiting access to that market to certain protected intrastate pharmacies, the Florida legislature deprived "out-of-state businesses of access to a local market." C & A Carbone, 114 S. Ct. at 1680. As Judge Miner correctly recognized in dissent below, this denial to

interstate pharmacies of the "right to compete" in the local market created by Section 408.706(10) impermissibly discriminates against interstate commerce.

B. The trial court erroneously concluded that the numerical limitation is not unconstitutionally discriminatory.

The State further seeks to justify the numerical limitation by asserting that it operates to exclude petitioners because of their size and not the fact that they do business in other states. (AB, p. 34). However, the test is not what the statute says, but rather what it does as a practical matter. C & A Carbone, Inc., 114 S. Ct. at 1684. The State concedes this point. (AB, p. 24). Yet, the State's argument ignores the practical effect of the limitation, which is to favor certain in-state pharmacies to the exclusion of 98.7% of the out-of-state pharmacies. This disportionate impact is per se invalid. Id.

The State further suggests that elimination of the numerical limitation would impair implementation of the rest of the Act. In the State's view, the purpose of the statute and, more specifically, the contracting process, was to provide access to affordable health care. If the numerical limitation did not exist, or was sufficiently large so that it "covered chain pharmacies owning greater numbers of stores," the State contends "the exemption would be inconsistent with the purpose of the statute" because the contracting process "would be a useless endeavor." (AB, pp. 34-35). This argument is plainly wrong, as is the State's assertion that petitioners' counsel agreed with this premise below. (See R. II, p. 266).

The State submitted no evidence of the impact of Section 408.706(10). The only evidence of its impact was submitted by petitioners, and it showed that the numerical limitation will adversely impact petitioners' sales. (R. I, pp. 31-91). On the basis of the record, it cannot be said, as the State urges, that no incentive for fierce competition in the contract market would exist if the numerical limitation was eliminated. (AB, p. 35). Indeed, that argument defies common sense.

Elimination of the exemption of "independent pharmacies" will actually enhance, not detract from, competition in that market. Petitioners demonstrated that, as a direct result of that exemption, they will suffer substantial lost sales of prescription goods as well as other goods. (R. I, pp. 31-91). That will occur because pharmacies protected under that exemption will siphon off customer sales from the supposedly exclusive contract provider in the contract market. (Id.). On the other hand, if that potential did not exist, competition would be enhanced in the contract market because there would be greater certainty associated with the sales in that market and greater incentive to seek contracts for those sales. Hence, there is no basis for the State's suggestion that elimination of the exemption will have an adverse effect on the original contract market.

Moreover, the State cites no authority holding that a clearly discriminatory provision must be upheld against an unconstitutional challenge if its elimination would disadvantage the operation of other statutory provisions. That kind of result

driven analysis, which seeks to measure the consequences of the discrimination to determine if it is unconstitutional, has been squarely rejected by the Supreme Court. See, e.g., Lohman, 114 S. Ct. at 1822; Wyoming, 112 S. Ct. at 801. The consequences of the discrimination are simply immaterial to the issue of whether impermissible discrimination occurred. Id.

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

If the statute discriminates against interstate commerce "either on its face or in its practical effect," it is undisputed that the burden falls on the State to demonstrate both that the statute serves a legitimate local purpose and that this purpose could not be served by nondiscriminatory means. (AB, p. 24). Maine v. Taylor, 477 U.S. 131, 138 (1986). As the Supreme Court recently explained, such a statute is subject to "rigorous scrutiny" to see that "it has no other means to advance a legitimate local interest." C & A Carbone, Inc., 114 S. Ct. at 1683. When this test is applied to this statutory numerical limitation, it is clear the State has not demonstrated that it has no other means to advance a local interest.

The State's only attempt to suggest a non-protectionist purpose for the numerical limitation is its conclusory statement that the provision furthers the State's interest in protecting "small," "as opposed to local business." (AB, p. 35). But that purpose cannot be advanced by favoring local businesses at the expense of out-of-state businesses. Rather, if the practical effect of the statutory provision demonstrates a discriminatory

purpose, the provision is unconstitional. Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935). If that were not the case, the rule would be eaten up "under the guise of an exception," as the welfare of local industry can always be related to some legitimate State purpose. Id. at 522.

Here, the practical effect of the numerical limitation is unrefuted: it disproportionately favors intrastate pharmacies over out-of-state pharmacies in the Section 408.706(10) market. As a result, the provision is unconstitutional. This is true even if, as the State contends, the predominantly local pharmacies would otherwise be effectively eliminated from participation in the original contract market -- which, once again, is not even suggested by the record. (AB, p. 8).

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 protectionist "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.

For the same reason, the effect of the numerical limitation is no less protectionist even if the State had employed it to save local pharmacies from being "driven out of business." (AB,

p. 8). The Supreme Court is clear that local businesses may not be preserved at the expense of out-of-state businesses.

Furthermore, even if the State could demonstrate a valid non-protectionist purpose for the numerical limitation, which is not the case, the State cannot meet its additional burden of demonstrating that it has no other means to advance that goal. C & A Carbone, Inc., 114 S. Ct. at 1683. As petitioners have demonstrated, nondiscriminatory or less discriminatory alternatives are available to the State. (IB., p. 38).

In response, the State addresses only one of these alternatives, "direct cash subsidies." The State opines that "it is not ... clear that a subsidy would survive a Commerce Clause challenge." (AB, p. 36). Admittedly, the Supreme Court has not addressed the constitutionality of direct cash subsidies, as the dissent relied on by the State recognizes. (AB, p. 36). West Lynn Creamery, Inc., 114 S. Ct. at 2221. But, the Supreme Court has noted that "direct subsidization of domestic industry does not ordinarily run afoul of the negative Commerce Clause." Id., quoting, New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 278 (1988). Moreover, the State ignores the other alternatives that are available to the state if it desires to support Florida-based pharmacies. (IB, p. 38). see also McKesson Corp., 524 So. 2d at 1009. As a result, the state cannot demonstrate that there were no nondiscriminatory alternatives available to achieve its goal.

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

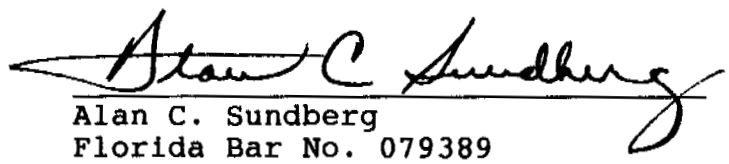
The State declares that petitioners "presented no nonspeculative evidence below of any burden on them or on interstate commerce resulting from the provisions of § 408.706(10)." (AB, p. 37). Not only was this assertion never raised below, it is simply wrong: petitioners have established by unrefuted evidence that the effect of that provision is to burden interstate commerce. (R.I., pp. 31-91).

Furthermore, by the States own admission, the very point of the numerical limitation is that petitioners will not be competing in the local market created by that Section. (AB, p. 12, 14). (R. I, pp. 92-96). By definition, then, they will not be able to get business in that market.

On the other hand, those Florida pharmacies defined as an "independent pharmacy," and granted the exclusive statutory right to compete for the prescription medicine business in the Section 408.706(10) market, will not suffer a loss but instead can be expected to obtain more business, just as the provision clearly intended. Hence, the inexorable effect is that local pharmacies will receive a larger share, and out-of-state pharmacies a smaller share, of the sales in that market. The hoarding of that local market for local pharmacies conclusively demonstrates that interstate commerce has been burdened. C & A Carbone, 114 S. Ct. at 1683. (Commerce Clause violated even though local waste processor challenged flow control ordinance that preferred

another local processor because ordinance hoarded local market for local business at expense of all competitors, including out-of-state businesses).

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to Stephanie A. Daniel, Assistant Attorney General, General Civil Litigation, State Programs Branch, The Capitol - Suite PL 01, Tallahassee, Florida 32399-1050 this 8th day of January, 1996.

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S#73890.1