

Supreme Court of the United States

NORTH DAKOTA STATE BOARD
OF PHARMACY,

Petitioner,

VS

SNYDER'S DRUG STORES, INC.,

Respondent

Docket No. 72-1176

Washington, D.C.

November 6, 1973

Pages 1 thru 44

Duplication or copying of this transcript by photographic, electrostatic or other facsimile means is prohibited under the order form agreement.

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE
NOV 20 4 15 PM '73

HOOVER REPORTING COMPANY, INC.

Official Reporters
Washington, D. C.

546-6666

IN THE SUPREME COURT OF THE UNITED STATES

-----:
:
NORTH DAKOTA STATE BOARD :
OF PHARMACY :
Petitioner, :
:
v. : No. 72-1176
:
SNYDER'S DRUG STORES, INC. :
:
Respondent. :
-----:

Washington, D. C.
Tuesday, November 6, 1973

The above entitled matter came on for argument at
10:51 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

A. WILLIAM LUCAS, 411 North Fourth Street, Bismark,
North Dakota; for the Petitioner.
MART R. VOGEL, 609-1/2 First Avenue North, Fargo,
North Dakota; for the Respondent.

C O N T E N T S

<u>ORAL ARGUMENT OF:</u>	<u>PAGE</u>
A. William Lucas, Esq., For the Petitioner	3
Continuation	44
Mart R. Vogel, Esq., For the Respondent	27

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 72-1176, North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.

Mr. Lucas, you may proceed whenever you are ready.

ORAL ARGUMENT OF A. WILLIAM LUCAS, ESQ.,

ON BEHALF OF THE PETITIONER

MR. LUCAS: Mr. Chief Justice, and may it please the Court:

I am William Lucas, representing the petitioner in this action.

In North Dakota, we have a statute which provides that if a corporation applies for a pharmacy permit, that a majority of the stock in that corporation must be owned by a registered pharmacist in good standing, actively and regularly employed in and responsible for the actual management, operation and supervision of that pharmacy. Now, the respondent in this action applied for a pharmacy permit, and in their application they disclosed that all of the stock in their corporation was owned by Red Owl Stores, which is a large supermarket chain in the midwest, and that it was not known if any of the shareholders of Red Owl were registered pharmacist.

The State Board of Pharmacy in North Dakota then denied this application, based upon the reason that they did not comply with the ownership law that I have mentioned.

The respondent then appealed to the District Court, and raised various Constitutional questions -- mainly, the due process clause of the Fourteenth Amendment, the equal protection clause, and various Constitutional issues in the North Dakota Constitution. And, on a motion for summary judgement, District Court relied on the Liggett v. Baldrige decision of this case, and declared that this statute was a violation of the due process clause, and also a violation of the equal protection clause and unconstitutional.

The petitioner then appealed to the North Dakota Supreme Court, and the North Dakota Supreme Court basically relied entirely on the Liggett v. Baldrige decision of this Court in 1928, and stated, "Being bound by the decision in Liggett v. Baldrige, and seeing insufficient reason to distinguish that decision from this case, we sustain the trial Court's conclusion."

Liggett's decision was based upon a Pennsylvania statute which --

Q Mr. Lucas, before you go any further, my understanding of the procedural history of the case may be a little bit different than yours -- let me check it with you.

As I understand, the North Dakota District Court, your Trial Court, gave summary judgement for the -- for Snyder's

MR. LUCAS: That is correct.

Q And that was on the basis that the constitutional

provision that the North Dakota law violated the constitutional provision, and that the Pharmacy Board's conclusion that the drug store didn't meet the space requirements was also invalid, for some reason. I take it the Pharmacy Board had two reasons for turning down Snyder.

MR. LUCAS: Well, there is the ownership compliance problem, and then the physical safeguard problem.

Q And then, when that was appealed by you to the Supreme Court of North Dakota, the Supreme Court of North Dakota affirmed on the constitutional issue, but reversed the District Court, didn't it, on the space issue, saying that the Board should have further proceedings?

MR. LUCAS: That is correct, your Honor. They decided there was a fact question in regard to the physical safeguards.

Q Do you think this is a final judgement, then, for purposes of our jurisdiction?

MR. LUCAS: Well, it was final in regard to the constitutional question. It was remanded back down for an additional hearing in regard to the physical safeguard problem of the facility.

Q And I suppose the Pharmacy Board could find against Snyder's on that issue, and they could lose -- they could be denied the license, and there would be no more case, would there?

MR. LUCAS: Well, it would be appealed, I imagine, by the respondent again, if it was adverse on the physical safeguards feature.

Q But very likely not on a constitutional basis.

MR. LUCAS: No, I think that -- the decision was final in regard to the constitutional questions presented. Now in the Liggett decision, that involved a Pennsylvania statute which required 100 percent ownership by a pharmacist. And both North Dakota Supreme Court and the Liggett decision were based entirely on the due process clause of the Fourteenth Amendment.

We feel the basic issue here is whether the Liggett v. Baldridge decision is proper authority for the North Dakota Supreme Court to rely on. Or, if it has been reversed, or if it should be reversed.

Now, there has been a large change in the philosophy of the Supreme Court in regard to what legal writers have referred to as economic due process since the Liggett v. Baldridge decision. In our brief we've traced this history, citing the Lochner, the Adkins, and Coppage cases, and the later cases, which have rejected those cases. In examining the later cases, such as Griswold v. Connecticut, Ferguson v. Skrupa, Williamson v. Lee Optical, Daniel v. Family Security, Seagram v. Hostetter, it's very clear, in my examination at least, that the doctrine that prevailed in the Coppage, Adkins, Lochner cases has been abandoned by this Court. This Court has stated, "We

emphatically refuse to go back to the time when we used the due process clause to strike down State laws, regulatory of business and economic affairs, because we feel they are unwise, imprudent, or out of harmony with some particular school of thought."

The Court has stated, "We do not sit as a superlegislature to judge the wisdom, need, reasonableness or merits of State laws that touch economic problems or business affairs, or social conditions." That under our system of government, these issues are properly left to the legislative branch of government.

Now, in the Daniel v. Family Security Life case, specific reference was made to the Liggett case, and it said that the rationale followed in that case did not find expression in the Liggett v. Baldridge decision; and that there has been a pronounced shift of emphasis since the Liggett v. Baldridge decision.

Also, I've cited various State Court decisions that have said that the holding in Liggett has been seriously limited, if not completely undermined.

Now, based on these decisions, we feel there is an extreme presumption of constitutionality and validity of State Court -- of State legislation -- in this particular area, that if the North Dakota Legislature determined that there was an evil present, and this was a rational way to prevent this evil,

or to correct the exposure to this evil, that this is sufficient to sustain the constitutionality and validity of this statute. That if any set of facts can reasonably justify this statute, we feel that it's efficient.

Now, the respondent, in their brief, have raised also the equal protection clause; and the amicus brief of the National Association of Chain Drug Stores devoted more time to this. And I think this, basically, is governed by the same standard of review as the due process clause; that only invidious discrimination is prohibited, and the States have wide latitude in this regard. I think it's got the same standard as the due process clause, and, in effect, it should be also left up to the States in their own wisdom and judgement, as far as the passage of such legislation.

Now, the amicus, National Association of Chain Drug Stores, also raised the commerce clause issue. And this was raised for the first time on appeal, and I don't think it's properly raised, or should be under consideration here, when it is raised for the first time on appeal. However, the cases they cite had to do mainly with a state's attempt to protect local industry at the exclusion of national industry, or some outside national commerce vehicle; and the cases they cite, such as *Dean v. City of Madison*, were cases where the state attempted to protect a local industry, such as requiring that milk processed within five miles had to be processed within

five miles of the City of Madison. And this particular statute applies that we have in this case equally to local corporations, local chain stores -- we have local chain stores within the State of North Dakota, and this law applies equally to those, as well as any national chain stores that they might refer to.

Also, we do not feel that this statute has anything to do with interstate commerce. I think it's safe to say that there are no prescription drugs manufactured in the State of North Dakota; and I think I can also say that all prescription drugs that are properly approved by the Federal government are available in North Dakota. And the volume and sale for prescription drugs, of course, is governed by prescriptions from doctors; and if, for example, we let a hundred more chain stores -- or if a hundred more stores open in the state, theoretically there would be no greater sale of prescription drugs, because they are limited to prescriptions, and I think they would have to point out that there are -- there's a demand for prescription drugs which are not being filled in the state. And there is no evidence, of course, in that regard.

Q Mr. Lucas, what is, in your opinion, is the real purpose behind this statute?

MR. LUCAS: Well, we feel it is related to the public health and welfare. Do you want me to cover that point, I would do it at this time --

Q Well, historically, do you know what the impetus was in this enactment in North Dakota, or Minnesota, or South Dakota?

MR. LUCAS: Well, the primary purpose at the time, I think, or one of the main purposes, was to prohibit physician ownership of drug stores.

Q Precisely. And what has that, therefore, to do with public health?

MR. LUCAS: Well,--

Q I think you're quite correct when you made that statement, and I --

MR. LUCAS: In California, there was a Megan Medical Clinic case, and they had hearings in there, and in the decision it's documented, and there is an inherent conflict of interest in physicians owning a pharmacy. I can't imagine a more attractive situation --

Q But it's an ethical, not a public health, approach, is it not?

MR. LUCAS: Well, it's related to the public health. A physician, of course, can code the prescriptions -- they all have to go through his store -- he can charge higher prices -- he can carry a lower inventory of items, and he can limit his prescription to certain items which it more profitable for him. The public may end up using more drugs--

Q On this approach, however, what justifies, then,

the hospital exemption in the statute?

MR. LUCAS: Well, mainly because there a physician can write or dispense his own prescriptions, and I suppose, in a hospital, they feel it will be supervised properly by physicians in the hospital. They wouldn't --

Q Well, presumably a physician-owned pharmacy would be supervised by a physician --

MR. LUCAS: Well, in the hospital it won't be owned by the physician, it will be owned by the hospital.

Q Well, some hospitals are owned by physicians --

MR. LUCAS: Apparently isn't that -- That is correct. I don't know that there are any in North Dakota, but apparently the position is that it will be properly supervised and will not result in a danger to the public health.

Q I have one last question. Suppose a pharmacist owning a drug store sells his stock down to 49 percent, what happens, as a practical matter? Does he have to go out of business? Does the place have to go out of business?

MR. LUCAS: If a pharmacist sells his stock down to 49 percent?

Q Yes, to a nonpharmacist.

MR. LUCAS: Yes, he would not be in compliance, then, with the statute. That's correct. He could not do that and still--

Q Would your Board then put them out of business?

MR. LUCAS: That has never happened, to my knowledge. I suppose it would have to be a determination of the Board at that time, but that is the way the statute reads. I might add that Pennsylvania and Maryland also that anti-physician prohibition of ownership of pharmacy. And, also in the United States Senate, there is a Hart Bill, and they had various hearings in the Senate, and I think it was determined that abuses were shown in that record as well as the California case.

Q Well, it was a distinct ethical problem at one time, and perhaps still is. You refer to the California situation --

MR. LUCAS: I think it is. Also, we feel that non-pharmacist ownership results in a subordination of professional responsibility and professional service to commercial motives. Now, we feel they might emphasize profit, and there's a lot of ways that they can emphasize profit, and the investors in non-pharmacist owned stores, of course, are looking for a return on their investment. And they can do such thing as using drugs for loss leaders to bring traffic in to sell their other products -- furnace filters and grass seeds, and those other things -- They can keep their inventory down and only carry fast moving items. They can understaff a pharmacy so that the pharmacist has to work long hours, very little break or rest or time off for lunch, which results in mental fatigue, and the possibility of error in filling a prescription --

Q But isn't all of that equally true with a pharmacist-owned pharmacy?

MR. LUCAS: Well, we feel that a pharmacist would -- a professional would have to be more sensitive to these problems, and more -- realize the public service and public responsibility -- more of a policing within a profession, similar to perhaps the law profession, that there -- we have laws that may protect these problems in some areas, but it's an enforcement problem. And in North Dakota we have only one inspector, and he is president of the State Board, and he has got all of these other duties, and he simply can't enforce these problems, and we feel that this, in some way, would result in a internal policing of the profession, if pharmacists have control.

Q Let me be sure of one fact. If your opponents prevail here, I take it they do not object to any provision that the pharmacy itself shall be run by a registered pharmacist.

MR. LUCAS: No, they have no objection in that regard. In their briefs they have admitted that prohibition on physician ownership is a valid purpose -- they recognize that in their briefs. The other thing we're concerned --

Q Going back just a moment to the proposition that Mr. Justice Blackmun was inquiring about: even if it isn't demonstrable, or provable, that the premises on which the legislation was enacted are actually true, isn't the constitu-

tional question whether a State legislature has the right to think that they have an impact on public health?

MR. LUCAS: I think that's the point I'm trying to make is that if they believe, and if they voted it in, they did believe it to be a rational basis, that statute for protection. And I think if this is true, that is all that is required. That the Courts are not going to try to second guess the legislature on why they did this. That it's a presumption that it's a valid purpose and a valid statute.

Q Mr. Lucas, how many states have statutes as rigorous as this, requiring that only pharmacists may own drug stores?

MR. LUCAS: North Dakota is the only one with majority requirement. Michigan has a 25 percent requirement -- it's gone to the Supreme Court three times, and it has not, to date, by a majority decision, been declared unconstitutional. It's a very unusual situation there, and two or three of the Justices wrote that they thought it was unconstitutional; one wrote that was his opinion at first, and every Judge wrote his own opinion -- Justice wrote his own opinion, and there is no majority decision in that Court. And New York, I understand, passed this legislation at a recent session, and that it was vetoed by the government -- or the governor -- based upon the *Liggett v. Baldrige* decision. And Alaska, I believe, passed this recently, which doesn't mean --

Q You're saying that the State of New York does not allow chain drug stores?

MR. LUCAS: They do.

Q Oh.

MR. LUCAS: This prohibition was -- or a statute similar to ours was passed recently and was vetoed, as I understand it.

Q Vetoed. Oh.

Q Well, the arguments you make in support of a rational basis for this statute are not in the record, are they?

MR. LUCAS: They're not in the record because this was decided on a motion for summary judgement. We didn't have the opportunity to present evidence in this regard. In Michigan they had various hearings, and this is well documented testimony from pharmacologists and practicing pharmacists in Michigan, and various other individuals.

Q In --

MR. LUCAS: We wanted that opportunity but we did not have it.

Q You think you could produce evidence?

MR. LUCAS: Yes. Certainly.

Q Despite the experience in 48 other states?

MR. LUCAS: I'm certain that we can present the evidence. I'm sure there will be contrary evidence, too, but certainly it will be very debatable question. Yes?

Q When was this statute enacted?

MR. LUCAS: 1963.

Q Is there any documentary legislative history that one can get from your State Legislature, Mr. -- ?

MR. LUCAS: I think that all is in the respondent's brief -- they have a short synopsis of reasons given at that time, --

Q At that time --

MR. LUCAS: But it's just in one branch, that either the Senate or the House -- it doesn't cover both hearings. But I believe hearings were held in both houses, and this is -- was their judgement after the hearings. I think one of the --

Q Are the hearings transcribed, and -- ?

MR. LUCAS: No, they're not.

Q Not.

MR. LUCAS: Just shorthand notes, or notes by whoever is employed at the time.

Q How far back does this kind of law go in your State?

MR. LUCAS: Well, 1963 is when it was passed.

Q Wasn't -- I thought there was one in 1920 or --

MR. LUCAS: Not in North Dakota. The Pennsylvania and New York statute were 1928 and '29.

Q Mr. Lucas, I'm not sure I could hear Mr. Justice Powell's question, and I may be repetitious here. If you should

prevail, would you wish to have the case remanded for the development of the record on the issue of public health?

MR. LUCAS: Well, we had asked for that before, and that would be fine. Basically, we'd just like to have Liggett v. Baldridge, if it is to be reversed, clearly reversed at this time, and the North Dakota Supreme Court relied completely on Liggett v. Baldridge, so that would result in a reversal of North Dakota Supreme Court, we believe.

Q Wouldn't an early -- the way that the rational basis test is applied isn't by testimony and hearings in the lower court, is it? It's if any state of facts can be conceived --

MR. LUCAS: Conceived, right.

Q -- by the court. You don't generally rely on live witnesses and that sort of thing.

MR. LUCAS: No, that's true. That's why I'm throwing out these arguments as relating it to the public health.

Q I thought you said earlier that the constitutional question was closed.

MR. LUCAS: If it was reversed -- it was, in the North Dakota Supreme Court, and that's why we appealed here. And if this Court would reverse that decision, that would close it.

Q Well, I don't understand whether it's open or closed as of right now --

MR. LUCAS: Well, the question on the physical facilities is still open, whether they have proper receiving areas, so we don't have the cabbage and drugs coming down the same conveyor belt, and things of this type. And the security measures around the facility is open. The constitutional question is closed. Against the --

Q Would you also stop the drug store from selling tractors, too, while you're at it?

MR. LUCAS: Well, that's what's happened. They've gotten into all these other areas.

Q If the Snyder tort prevails here -- in other words, if the Supreme Court's of North Dakota decision remains standing, under your North Dakota statute, could the Red Owl supermarket have one side of the market for groceries and all the other things they sell, and the other side of the same room for the drug store? Or are there prohibitions against that?

MR. LUCAS: It could. We require certain physical safeguards, such as a chain door or a barrier of some kind, which can secure the area from the rest of the area, so when the stock boys are stocking shelves they are not walking in and out of the pharmacy, too. But they could chain off an area of some type, as long as it was secured. Now --

Q Let's assume that the District -- the Supreme Court of your State had affirmed on both grounds that these people were entitled -- instead of reversing, assume they had

affirmed on both grounds. Could you have come here?

MR. LUCAS: That they would have declared our cons- -- our statute unconstitutional, you mean?

Q Yes. But they had also said that they were not entitled on other reasons --

MR. LUCAS: No, I don't believe we could have come here.

Q Well, the -- why can you come here now, then?

MR. LUCAS: Well, I think --

Q Because those grounds were before the -- before your Supreme Court.

MR. LUCAS: Well, basically, I think because they relied entirely on Liggett v. Baldridge, and subsequent decision of this Court, I think -- we think have reversed that --

Q I know, but the -- but they still may not be entitled to the license.

MR. LUCAS: Because of physical safeguards --

Q Yes.

MR. LUCAS: Right. But it would still mean that our statute was constitutional -- the ownership statute.

Q Well, that may be so, but let's as- -- if the Supreme Court had said (1) the statute's unconstitutional but these people aren't entitled to it any way, for another reason, based on State law, you couldn't have come here just because they declared your statute unconstitutional -- ?

MR. LUCAS: Well, we think that raises a constitutional question which would allow us to come here.

Q But there is an adequate State ground for the kind of decision that Justice White is talking about. That whether they win or lose on the constitutional question here, they'll still be barred by a decision that's adequately based on State grounds.

MR. LUCAS: Right. Right.

Q So I don't see that difference in the -- than the case -- that the case comes to us now? It doesn't seem to me to be very much different.

MR. LUCAS: Well, I think it's basically just whether this is a proper decision of the Court in Liggett v. Baldridge, since they relied entirely on Liggett v. Baldridge.

Q We're talking about our jurisdiction --

MR. LUCAS: Right.

Q That's what we're talking about, isn't it?

MR. LUCAS: Yes, sir.

Q Well, isn't this just another way of uttering Mr. Justice Rehnquist's question about the finality of your judgement? And it's obvious that the Justices on either side of me have some questions about it.

MR. LUCAS: Well, our statute was declared a violation of the due process clause of the U.S. Constitution, and that, I believe, gives the jurisdiction to be here.

Q I would like to --

Q That wouldn't forever bar you from getting here on the constitutional question, would it? If the next time around with another drug operation they found them qualified, and then rested on this prior holding, you could come up -- presumably you could try to come up here again, couldn't you?

MR. LUCAS: Well, if our statute was still determined to be constitutional, and still in effect, I guess we could use it again, but I don't think we would be --

Q What you have to do in the meantime would be to try to enforce the statute in the face of the adverse decision of the Supreme Court of your own State.

MR. LUCAS: Which we can't do at this point.

Q Or, in this particular case, I take it, that if the thing went back to the Pharmacy Board, and the Pharmacy Board decides that the space requirements are met, you could still appeal that through the North Dakota Supreme Court system -- you may lose on that issue -- you'll certainly lose on the constitutional issue, because there is no indication the Supreme Court of North Dakota will change its mind. But then you would have a genuinely final judgement, where the issuance or denial of the license turns on the constitutional question and nothing else.

MR. LUCAS: That is correct, your Honor.

Q Of course, you also have a final judgement in the

sense that if you conceded -- if the Board now conceded that otherwise these people were entitled to -- aside from the stock ownership, that these people were entitled to the license.

MR. LUCAS: That is correct.

Q Do you -- I guess you don't, though, do you?

MR. LUCAS: No, we don't. We think there is still a physical safeguard problem, but I don't think it's as serious as the constitutional problem.

Now, we feel that professional pharmacies are going to offer certain services that nonprofessional pharmacies may not. A lot of these services don't result in any volume or profit or anything to the pharmacy -- drug consultation is one item which we feel that professionals will give -- counseling patients on interaction of drugs, or incompatibilities, or abuse of this type. A new area -- it's not too very new, but in New Jersey they require the medication profile monitor, and a pharmacy then keeps track of all drugs prescribed and dispensed to a particular patient, and if he sees two or three or four different doctors, the pharmacist has a record of all items dispensed that that patient is receiving, and he can monitor these prescriptions and then tell if there are any incompatibilities or abuse or out-of-date prescriptions -- things of this type. He also offers delivery, emergency hours, and open charge accounts which a lot of these larger, chain-

store drugs don't. And we feel that these are professional services that are related to public health and welfare and should be offered.

Now, we feel that pharmacy is a profession -- it's been decided by case law and statute, and we don't feel it should be treated any differently than the profession of law, medicine, optometry or dentistry -- that we have two cases in the U. S. Supreme Court on optometry and dentistry which state that a corporation cannot practice through licensed individuals those particular professions. And we feel that the profession of pharmacy should be treated the same way.

We submit that the philosophy of Liggett has been abandoned, and we ask that it be clearly reversed at this time, and that, therefore, the North Dakota Supreme Court also be reversed, subject to questions that, I would presume --

Q Mr. Lucas, may I ask you just one question? I think we'd all agree that practicing the profession of pharmacy could be accomplished only by a licensed pharmacist. But here we're talking about ownership. Now, they do not accomplish their essential objectives of your law -- ?

MR. LUCAS: We don't think so. We want the people in the position of making policies to be professionals. A pharmacist has to yield to a nonprofessional if that nonprofessional owns the place. He just says, "You do this, or you lose your job." And we don't want a professional yielding, and being in

that position. And we want the policy makers to be professionals, so that they will offer all these services that we think are necessary.

Q Well, is the pharmacist, himself, bound by the rules of the Pharmacists Association of the State?

MR. LUCAS: He is --

Q And this prevents him from doing such things?

MR. LUCAS: He is, your Honor, but if a nonowner said, "You do this or you lose your job," what are you going to do?

Q Well, you'd have a choice of losing your license or your job.

MR. LUCAS: Right, but --

Q That's your choice.

MR. LUCAS: We feel that the professionals would be more sensitive --

Q It's an essential choice to make --

MR. LUCAS: Right. We feel that the professional pharmacist would be more sensitive in this area of professional responsibility and professional service. And we will not subordinate these objectives to commercial motives.

Q And the pharmacists in North Dakota -- they have enough money to run this thing?

MR. LUCAS: Well, they're doing it, yes, sir. Yes, your Honor.

Q Your point on that score must be that if a pharmacist was subordinate to a manager of the establishment, and someone tried to get a prescription illegally, or to use an expired prescription, and he was put under the pressure that you speak of, (1) he -- if he committed the illegal act, he wouldn't be likely to report it to anybody --

MR. LUCAS: That's correct --

Q I assume that's reasonable.

MR. LUCAS: That's correct, your Honor.

Q If he refused to commit the illegal act, someone not a pharmacist might carry out the illegal act, give a prescription that should not be given -- give a medicine without a prescription, which should not have been done, and thereby the public health is injured.

MR. LUCAS: We feel it is, your Honor. Also, on placement of responsibility -- a nonpharmacist is not competent to really determine the competency of a particular pharmacist. And if he is incompetent and there is a misconduct, he'll say, "Well, how could I know; I'm not a pharmacist."

Q I've got a great problem about these stockholders running the pharmacy. I would think the stockholder wants a return on his money, and he's not there to deny the -- whether you sell this prescription or not. The stockholders are not going to supervise the pharmacist, are they?

MR. LUCAS: Well, majority ownership means control.

That gives you the majority on the board of directors which determine policy, and this policy --

Q That's the way you buy a new counter or a new bottle washer, or what have you? But I would assume that the average stockholder wouldn't even know what a drug was -- right?

MR. LUCAS: Well, we think that if they're pharmacists they're going to know. If they're --

Q How many pharmacists do you have in North Dakota?

MR. LUCAS: I'm not sure, your Honor. I imagine it might be 200.

Q I was wondering whether you don't limit the number of pharmacies that way.

MR. LUCAS: Well, they would be limited to -- well, one pharmacist could own more than one pharmacy, under this law, if he has majority of control of each pharmacy. We have a local chain which probably has six locations in the six major cities, and it could be owned by one individual if he had majority ownership. We want policy determined by the --

Q And it could be that the pharmacist who is the owner has given up his pharmacy -- he just collects his money -- couldn't it be?

MR. LUCAS: Well, it could be, but at least this law would ensure that he would have some understanding of the pro-

fession and --

Q But it wouldn't ensure that he practiced it, would it?

MR. LUCAS: No, but it would be more likely that he would watch it and understand the professional objectives.

Q Again, does it not come back to whether it is rational for the North Dakota Legislature to believe that it's more likely -- not whether you can prove that it's more likely.

MR. LUCAS: That's our point, that if any state of facts can be conceived that that it justifies it. And if they voted it, they must have thought that there were facts --

MR. CHIEF JUSTICE BURGER: Very well, Mr. Lucas.

MR. LUCAS: Thank you, your Honor.

MR. CHIEF JUSTICE BURGER: Mr. Vogel?

ORAL ARGUMENT OF MART R. VOGEL, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. VOGEL: Mr. Chief Justice, and may it please the Court:

In response to the several questions that were raised on the jurisdictional issue, this is not a final judgement. The judgement entered in the case on remittitur by the trial judge specified or directed the Pharmacy Board to hold a hearing on the issues raised by the Board in connection with the space for the pharmacy within 60 days.

Q That was in response to the Supreme Court's order?

MR. VOGEL: Yes, your Honor.

Q Yes.

MR. VOGEL: If I may, I would like to take off a few minutes to discuss the chronology of what took place --

Q Well, by that are you suggesting there is no jurisdictional question, in light of what you just said?

MR. VOGEL: I'm merely answering the question that Mr. Justice Rehnquist first raised, and that is whether or not it was a final judgement. I don't believe that it is.

Q Well, if it is not, do we have any jurisdiction?

MR. VOGEL: Well, it's -- it is questionable.

Q I notice in your response to the petitioners, on jurisdiction you simply have a sentence: "Respondent does not question the jurisdiction as set forth..."

MR. VOGEL: That is correct. We did not in our briefs -- my own opinion is, I would like to see a final decision out of this Court on the constitutional issue.

Q Even though -- I know everyone who comes here would like us to do that, but we do have limitations of jurisdiction, of course.

Q You regretfully acknowledge that you can't confer jurisdiction by stipulation --

MR. VOGEL: Yes, Mr. Chief Justice. While we --

Q You could have -- if there is no jurisdiction here, and we dismiss, you've still got the benefit of your

own State Supreme Court having declared unconstitutional the statute that you want declared unconstitutional.

MR. VOGEL: Indeed, sir. We do have.

Q Is there any question about the rights if that course were followed? The rights of the State to try to get back here again after they resolve the factual issues in your State Court?

MR. VOGEL: I should think that they could, based upon a final judgement, assuming, for example, that the Board's finding with respect to the space requirement were not supported before the trial judge, affirmed on appeal to the Supreme Court -- I don't -- I assume that they could take the appeal then. If you were -- not the appeal, but could apply again for a writ and if you granted it, then we'd be back here.

Q What you want us to do is say your Court was right?

MR. VOGEL: We want you to say our Court was right.

Q Even though you doubt we have the jurisdiction to do it?

MR. VOGEL: I'm merely answering a question, Mr. Justice, about whether or not the judgement was a final one, and, honestly, it isn't.

Q Mr. Vogel, you don't have to testify being here because you didn't come here of your own --

MR. VOGEL: In fact, we were very surprised, to tell

you the truth, when your writ came down.

Q All of these factors are not always disclosed in the petitions and oppositions. Did you -- I don't recall, but did you challenge that in any way?

MR. VOGEL: No, we did not.

Q Mr. Justice Brennan said you rather conceded --

MR. VOGEL: Conceded jurisdiction --

Q -- jurisdiction, which would perhaps lull the further examination into that subject.

MR. VOGEL: Yes, I'm sure that it would lull it, and -- well, we overlooked it, just to be honest about it --

I would like to go into this history a little further than it has already been developed, because it, I think, establishes the real purpose, the object that the Legislature had in passing this Act.

The law in 1963 came into being after an unsuccessful attempt by the Board of Pharmacy was made to eliminate by regulation doctor-owned pharmacies. They attempted to do that by the passing of a somewhat similar statute except by regulation as we have now, aimed at the physicians. And, of course, the expressed purpose of the statute from the minutes of the Senate committee where this law originated established that it was to prevent doctors from taking over pharmacies. And to supply the means, or the legal remedy, to prevent that from being done.

Now, Mr. Lucas made the statement that we agree that doctor-owned pharmacies is or could be an evil. We don't admit that, we don't concede it, and we've never said that. We merely indicated that there might be, assuming that there were evidence to establish it, there might be a legitimate purpose in preventing physicians from also owning or operating pharmacies.

Then, in 1968, the Family Center Drug Store applied for a permit, and this was rejected by the Board of Pharmacy upon the same grounds that the Board utilized in the instant case.

Q It's very difficult for me to sit here and imagine Liggett is still a good law. I've been here quite a while, and there's never been here, as I recall, before, asking for reapplication of it -- reaffirmation of the principle. But it belongs to something I thought had passed into the limbo. Why doesn't the State have the right to control corporations and businesses -- the State?

MR. VOGEL: They do have the right, but if I may --

Q This is the old subject of due process. This is the old cases -- well, you know -- you're familiar with them.

MR. VOGEL: Yes, I'm familiar with the old cases.

Q Counsel for Liggett was Owen J. Roberts. Owen J. Roberts later sat on this Court. Owen J. Roberts was a great advocate of substantive due process, which is all right.

I mean, that's a permissable conviction. But I just can't imagine -- I must shepardize this thing and see if it's actually -- still exists. Have you shepardized it?

MR. VOGEL: Yes, your Honor, we have.

Q Aren't you astounded that it's still around?

MR. VOGEL: No, you've never overruled it, and you've had the opportunity of overruling --

Q You mean I personally have?

MR. VOGEL: I refer to the Court --

Q Yes --

MR. VOGEL: -- in the plural.

In fact, in, I believe it was 1949, that -- Was it Mr. Justice Clark who referred to the Liggett case, indicating that it had been narrowed, but not stating that it had been overruled. And --

Q Why couldn't the State say that corporation can't be used at all in this peddling of drugs?

MR. VOGEL: The State --

Q Beg pardon?

MR. VOGEL: That possibly the State could do that.

Q Just as they do with reference to the practice of medicine, for example; the practice of law.

MR. VOGEL: Perhaps that's right. Corporations -- a foreign corporation coming into the S- --

Q Then what's -- what -- how can you justify this,

in terms of modern points of reference to the constitutions via --

MR. VOGEL: Because, we say that the standard is still the same as it was in Liggett.

Q Well, the due process clause of the Fourteenth Amendment is still in the Constitution.

MR. VOGEL: And so is the equal protection still in the Constitution.

Q Well, Flanders v. Klein -- do you think that lends any support -- ?

MR. VOGEL: Beg pardon, sir?

Q Do you think this Court's decision last term in Flanders v. Klein -- a residency requirement for out of state tuition -- lends some support to your position?

MR. VOGEL: Yes, I think there are several cases from this Court that lend support -- recent cases. Eisenstat -- the Eisenstat case, for example; the Lynch case -- I think they both came down in 1972. I think there is the -- is it the Goldberg case that came down in 1971 --

Q There is Griswold v. Connecticut, and there is Roe, and there is Doe --

MR. VOGEL: Well, I think there are a number --

Q -- or in the last term --

MR. VOGEL: -- of cases that indicate that there could be at least some changing turnaround in the Court's view

of property rights as compared to the Court's view of liberty, in the Fourteenth Amendment.

Q In which category do you put the operation of a pharmacy by a corporation?

MR. VOGEL: I would put the operation in under both due process and equal protection, and, as Mr. Lucas --

Q This is property you are talking about -- interference with their property rights.

MR. VOGEL: Yes, with the right to own property. And not only corporations, Mr. Chief Justice, but also this law strikes at an individual. An individual can't, if he's not a pharmacist, own a pharmacy. And not only that, but our law is more restrictive, even, than the Pennsylvania statute was.

Q Well, you can't practice medicine in North Dakota, I assume, without a -- meeting North Dakota standards; isn't that right?

MR. VOGEL: That, of course, is true. And you can't practice pharmacy without meeting North Dakota standards.

Q Well, that's really what it comes down to, is the legislature has said that the -- in effect -- that the operation of a pharmacy establishment is something for pharmacists, primarily. That's the real contention here, isn't it?

MR. VOGEL: Yes. They put it on an ownership basis.

They say that you -- it's not the -- really the operation of the pharmacy -- the pharmacy must still be operated by a licensed pharmacist; it must be run and managed by a licensed pharmacist. And we propose to do that. So that when the State comes in and says that no one except a pharmacist may own a drug store, that's where we say, in view of the showing that we made before the trial court -- and, although Mr. Lucas says he had no opportunity of introducing any evidence to the contrary, he had every opportunity of doing it. He could have presented by deposition, of course, by affidavit -- and he was required to do so under our rule, with respect to summary judgment, and also by the decisions of our Supreme Court.

Q Could it say that no corporation can own a pharmacy?

MR. VOGEL: I beg your pardon?

Q Could North Dakota pass a law saying that pharmacies cannot be owned by corporations? And I'm going to combine that along with the law in Madison right after you answer.

MR. VOGEL: Well, your Honor, given -- given this criterion -- if such a statute bears a real substantial relation to public health, safety and morals, then yes, I say that it can.

Q Well, why can the -- say a lawyer cannot practice as a corporation?

MR. VOGEL: Well, the State does so. I -- my view is

our view, and I think we've suggested it in the brief, is that a lawyer and his client is an entirely, or represents an entirely different relationship.

Q Like physician and --

MR. VOGEL: It is like a physician and patient, but it is not like a physician and pharmacist, or a physician and drug store.

Q Mr. Vogel, your statement a moment ago about Mr. Lucas being under an obligation to supply affidavits under North Dakota summary judgement procedure -- that would be limited, wouldn't it, to the situation where there was a disputed issue of fact?

MR. VOGEL: It would be. And Mr. Lucas, in his return to our motion for summary judgement, flatly stated that with respect to the constitutional issue, it is solely one of law. And he produced no evidence, which he could have.

Q You know, I suppose the ordinary way, under the rational basis test, that you justify a statute isn't by a parade of witnesses, but by arguments as to conceivable states of facts that are really considered by the courts pretty much in the abstract, aren't they?

MR. VOGEL: Well, under our rule, as I remember, there had -- it must be more than mere argument. The --

Q Well, that may be under your law, but under the Federal Constitution Law, as brother Rehnquist says, there is

no need for evidence, if you're just using a rational basis.

MR. VOGEL: Well, perhaps I -- that, I guess, is right. But before the lower court there is no indication whatsoever of any factual situations which could result in upholding this statute as being one bearing substantially upon public health, safety or welfare. There wasn't the slightest indication. And, as the Supreme Court of North Dakota pointed out, there was no assurance that if the Court had sent this back for evidential hearing that evidence would or could be produced. And, reading the briefs submitted by the appellant, and the amicus, these imaginary situations which they call attention to -- I -- tax the credulity -- I would think, of an impartial judge, (I not being one, of course, but) my -- to contend that the chain store drug business is interested only in commercialization -- that the drugs that they put out could be poor drugs --

Q Well, what do you say about the language, I think, in McGovern v. Maryland, and perhaps some other cases, that if any conceivable basis can be imagined by this Court, then we must support -- sustain -- the State action?

MR. VOGEL: Well --

Q You say it's not conceivable that any of these fears could be warranted by the Legislature.

MR. VOGEL: That's what I think. Surely if the recent expressions of this Court in the cases that I quoted from that you handed down last term, are an indication we are still

in the -- on the proposition that the statute cannot be based upon imaginary ills that could be dredged up, but the statute must bear a substantial relationship to the public health, safety and morals; and, furthermore, we have pointed out that this statute -- the object of it -- and I think that's indicated in the appendix to our brief -- the only committee minutes which could be located -- that the object was to prevent doctors from taking over the pharmacy business, and to the detriment of the local drug store owner. If that was --

Q . Wouldn't it almost follow that if they didn't want doctors doing it, they would much less want businessmen doing it? If you reach out a little bit?

MR. VOGEL: Number one, I think the argument is made, and I think it was raised in California, that if a doctor owns a drug store, when a patient comes to him, he's going to see to it that the drug business is funneled into his own drug store. And he may be over-prescribing drugs -- I guess probably that was contended in the California case, too, because he has an interest in the drug store. I --

Q Is your client is hooked up with a chain -- a big chain?

MR. VOGEL: Yes. The Standard Drugs, your Honor, have, I think, something like 35 or 37 drug stores; they operate in five midwestern states: Minnesota, Iowa, and so on, and they've been in the business for a long time -- I think

they employ something like 120 pharmacists. They're a very highly reputable organization, and a very efficient one.

Q Well, does this record not show that Snyder Drug, in turn, is owned by Red Owl?

MR. VOGEL: Oh, yes --

Q The supermarket chain?

MR. VOGEL: Yes, your Honor. All of the stock is --

Q Mr. Vogel, perhaps you've answered this; if so, I missed it. And, of course, this isn't your case, but what would be your position if the Pharmacy Board regulation was merely directed at physicians owning pharmacies?

MR. VOGEL: From my -- I'm sorry --

Q Go ahead.

MR. VOGEL: From my own knowledge, and I think it's common knowledge in North Dakota, there are a number; in fact, in Fargo I think all three of the large medical groups have their own pharmacies. It's a very efficient way of handling the drug problem, to have physicians, clinics, or individual doctors.

Q So that in your State, then, there is no Pharmacy Board barrier against that kind of thing?

MR. VOGEL: Other than this --

Q Other than the --

MR. VOGEL: Other than this statute --

Q -- the ownership one. If the Board should turn

around and do away with this one, but say that physicians should not own pharmacies, what would be your attitude? Again I say, this isn't your case -- I understand it's an unfair question --

MR. VOGEL: Well, California, as you know, has sustained the constitutionality of such a statute. I very seriously question its constitutionality. Absent -- absence and definite proof that out our way the physician doesn't operate ethically, and would do the kind of act which the -- such a statute would be aimed at. So I still say, that there would have to be some indication, once the statute is attacked, that the -- that it does not -- or rather that it does -- I withdraw that -- rather, that it does bear a real and substantial relationship to the public health, safety and the morals of the public.

Mr. Lucas did not respond to the issue of -- on the commerce clause that was raised by the National Association of Chain Drug Stores in his brief. He now says that it shouldn't be considered because it wasn't raised in the lower court. We hope that you do consider it, because we think that it is applicable -- we're sorry that we did overlook it in the lower court proceedings. But surely where an institution, such as Snyder Drugs, with its large area of operation in these five different states that I mentioned, to be prevented from crossing state lines for the purpose of distributing its products,

in our judgement and in the judgement of the amicus which we adopt, there is a very definite interference with the commerce clause of the Constitution.

And, in fact, in this same note of the committee meetings, I think one of the legislators referred to this statute as "fence legislation" -- to put up a fence around North Dakota so that outsiders -- chain drug stores -- could not enter.

Q Well, that would be a legitimate stand, would it not? If -- I don't know -- I like your state -- very much --

MR. VOGEL: Thank you --

Q I've been there many times. I don't know its problems, but I could see that how, people living there -- you don't have many people -- how North Dakota might become the subject of exploitation by Delaware corporations around the country, using little vacuum cleaners to suck out of North Dakota all the money possible and leaving nothing behind, on which a tax base can be laid, and schools built, and so on. I could see a state saying, "We're going to stop them." I don't see why that wouldn't follow within as good a category as health -- it's certainly welfare -- welfare in the sense of selfare of the people, don't you agree?

MR. VOGEL: No, your Honor, I can't agree. I think that that very definitely could be interfering with interstate commerce. Aside from the drug store business, chains --

Q I'm just not talking about stopping movement of goods -- I'm talking about requiring every druggist in the state -- every merchant in the state -- to be a single entrepreneur.

MR. VOGEL: Well, I can only go back to the --

Q You've had some discussion --

MR. VOGEL: -- to the standard.

Q You've had some big revolutions in North Dakota. Our Court sustained one in 1920 here --

MR. VOGEL: Yes, sir.

Q Remember that?

MR. VOGEL: Yes, I do. We also had a proposal by one legislator during the early thirties that North Dakota secede from the Union.

Q Did they consider that recently?

MR. VOGEL: It honestly was introduced to that effect.

Q That might have solved the Turtle Mountain problem in the last case --

MR. VOGEL: Well, it would have solved this problem, obviously, we wouldn't be here.

Well, I've just several minutes left. I merely want to say that we are not contending that the Fourteenth Amendment was intended to interfere with the reasonable exercise of the police power -- the -- We do contend that the Act here

is unreasonable in that the evidence produced by Snyders at the time of the hearing before the trial court, to the effect that its conduct of the drug business would be under North Dakota pharmacists, strictly for the people's benefit, and that because of the close regulation by Federal, State statutes, and the regulation promulgated under those statutes -- that there just is no reason for this law, because there isn't any evil. And we don't think that you have abandoned entirely the -- and you haven't abandoned this proposition of Liggett -- that the legislation -- legislative means must substantially further legislative ends.

Or, at the very least, we say that there must be a showing made, by the state, of a minimal, rational means and relationship to that -- the object of the statute. We just maintain that this statute makes no sense, insofar as the public health, welfare -- It does make sense, if the purpose was to keep the druggists in business. It could make some sense, assuming proof, again, that the physicians should not own a drug store.

Thank you, sir.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Vogel.

Mr. Lucas, your time was expired, but we took up considerable amount at the end. Do you have anything urgent that you wish to say for a minute or two?

ORAL CONTINUATION OF ARGUMENT BY A. WILLIAM LUCAS,
ESQ., ON BEHALF OF THE PETITIONER

MR. LUCAS: Mr. Chief Justice, and may it please the Court:

I don't have anything real urgent, but I would like to say that in my return to the motion I admitted that there was no question of fact in regard to the basic ownership, as to who owned the stock. I think there's an obvious question of fact whether the statute is related to the public health and safety.

And one point, as far as relating it, that I didn't mention: in North Dakota, of course, we need small town pharmacies, and when you get interstate highways, and ease of trans- -- getting to the bigger cities -- when these chain stores advertise five quarts of motor oil for a dollar, and they all run to Bismark to get their motor oil and pick up their prescriptions, this hurts the small town pharmacies, and as a public health requirement and necessity, I think that the small town's have their pharmacies. And this is another basis that could be used to justify it.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.
The case is submitted.

[Whereupon, at 11:50 o'clock a.m., the case was submitted.]

- - -