No. 15-4071, No. 15-4071, No. 15-4072

In the

United States Court of Appeals

FOR THE TENTH CIRCUIT

JOHNSON & JOHNSON VISION CARE, INC.

Plaintiff-Appellant,

– v. –

SEAN D. REYES
in his official capacity as Attorney General of Utah

Defendant-Appellee,

– and –

1-800 CONTACTS, INC.; COSTCO WHOLESALE CORPORATION

Intervenors-Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

BRIEF OF LD VISION GROUP AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae LD Vision Group makes the following disclosure under Federal Rule of Appellate Procedure 26.1:

No publicly held corporation owns ten percent or more of LD Vision Group's stock. LD Vision Group does not have a parent corporation.

Respectfully submitted,

Dated: July 23, 2015

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INTERESTS OF *AMICUS CURIAE*[1]

Amicus curiae LD Vision Group is a rapidly growing direct marketer of replacement contact lenses that operates websites such as OptiContacts.com and LensDiscounters.com. Through its websites, LD Vision Group sells substantially all of the most popular brands of contact lenses—particularly those produced by the four dominant manufacturers: Johnson & Johnson (Acuvue), Alcon Laboratories, Bausch & Lomb, and CooperVision. The company's proprietary high-volume, low-margin business model provides contact-lens wearers with the most competitive price while maintaining high-quality customer service that attracts and retains these price-sensitive consumers.

LD Vision Group is one of the largest contact-lens retailers in the nation, and for good reason: over one million users have ordered replacement contact lenses from LD Vision Group's websites. The company offers replacement contact lenses to consumers

[1] No counsel for any party authored this brief in whole or in part, and no person other than *amicus curiae*, its representatives, or its counsel has made any monetary contribution intended to fund the preparation or submission of this brief.

throughout the United States at prices as much as 30% to 50% less than 1-800-Contacts and 75% less than independent optometrists' pricing. Its prices are consistently lower than any other online retailer, the big-box stores, and wholesale clubs. LD Vision Group's websites have more published, verifiable reviews among third-party internet review platforms than any of its competitors.

Unilateral Pricing Policies (UPP) and Resale-Price Maintenance (RPM) in the contact-lens market harms competition and costs consumers.[2] As the lowest-cost competitor, UPPs affect LD Vision Group's ability to compete on price with both eye-care professionals and other internet retailers. As an out-of-state retailer with Utah customers, LD Vision Group thus has a substantial interest in this case. Moreover, the district court and the parties have extensively debated whether Utah Code § 58-16a-905.1 [hereinafter "Section

[2] The term "Resale Price Maintenance" typically designates an actual agreement between a manufacturer and distributor or retailer, even though Intervenor-Appellees 1-800-Contacts and Costco ("1-800/Costco") are not using it as such. 1-800/Costco Br. 1. The term "Unilateral Pricing Policy" typically describes a similar policy, but without an actual agreement. Because LD Vision does not have a pricing agreement with the contact-lens manufacturers, it will refer to the policy prohibited by the Utah statute as UPP, even though the statute actually prohibits both UPP and RPM.

905.1"] discriminates against out-of-state retailers and whether any such discrimination affects its constitutionality. *See, e.g.*, J&J Br. at 30. Those out-of-state retailers have thus far been uninvolved in that debate. LD Vision's brief will assist this Court by providing that crucial perspective.

All parties to this appeal have consented in writing to the filing of this *amicus curiae* brief.

QUESTION PRESENTED

One interpretation of Section 905.1 would only prohibit UPP for transactions in which the ultimate consumer is a Utah resident. Should a federal court enjoin this statute under a facial constitutional challenge where it could be applied equally to all retailers and manufacturers?

SUMMARY OF ARGUMENT

The contact lens industry is unique. Its history is distinctively anticompetitive because of the role that optometrists play in the market—both doctor and pharmacist. Contact lens prescriptions are brand-specific, placing optometrists in an unusual gatekeeping

role—and they have frequently taken advantage of it, resulting in substantial antitrust litigation and even congressional action. Because optometrists want to remain profitable as retailers on top of their professional role, they will prescribe lenses that they sell and do everything they can as a group to avoid price competition by wholesale clubs and internet retailers. Thus came UPPs, which the manufacturers implement as an opportunity to gain market share.

UPPs are by definition non-collusive and thus do not violate Section 1 of the Sherman Act. But they raise significant antitrust concerns: the unique nature of the contact lens industry makes UPPs likely to cause significant anticompetitive harm without the usual procompetitive benefits to justify them. Utah properly exercised its police power to implement Section 905.1 as an antitrust measure to ensure competition for the benefit of Utah consumers.

This Court should uphold Section 905.1 because the Appellants have not—and cannot—meet their heavy burden to negate the constitutionality of all plausible interpretations of the statute in this facial challenge. The most reasonable interpretation of the

statute would prohibit discrimination by a manufacturer against any retailer for pricing below UPP against Utah consumers (and only Utah consumers).

One interpretation, however, is unconstitutional: the one that protects Utah's favored son, 1-800-Contacts, in sales to out-of-state consumers to the disadvantage of all out-of-state retailers who must still abide UPP in those transactions. LD Vision urges this Court to affirm the district court's order without blessing the interpretation that would discriminate against companies that don't happen to have headquarters in Utah.

ARGUMENT

I. THE UNIQUE ASPECTS OF THE CONTACT LENS INDUSTRY

The contact lens industry has an anticompetitive composition and history owing to the optometrist,[3] who is both gatekeeper and retailer. Optometrists—rather than their patients—decide what brands to prescribe, and their patients must live with it because

[3] Ophthalmologists also prescribe contact lenses. For brevity we refer to all eye-care providers as optometrists.

those prescriptions are brand-specific. That wouldn't be a problem, except optometrists also sell the products they prescribe. All else being equal, they will each prescribe the brands that maximize their profits. *See* Gary Gerber, *What's UPP, Doc?*, Rev. Cornea & Contact Lenses, June 15, 2014 ("[I]f you have a patient with astigmatism and they can wear a UPP lens, and a non-UPP lens is clinically equivalent, a smart doctor will choose the UPP option.").[4]

Optometrists started selling lenses before they were a commodity capable of an independent retail sale. They've aggressively fought to hold onto those profits ever since. Without anticompetitive advantages, optometrists cannot effectively compete with high-volume, low-margin retailers that offer the convenience of shipping to the consumer's front door. They are inefficient distributors who remain in the lens retail business simply because they combine the prescription service with the retail sale—the equivalent of a doctor also serving as a pharmacist (which

[4] *Available at* http://www.reviewofcontactlenses.com/content/d/out_of_the_box/i/2891/c/48867/.

is prohibited). Their business models are not based on volume, price, or quality, but on captivity.

Over the years, antitrust lawsuits and responsive state and federal legislation have diminished the optometrists' ability to exercise their power in anticompetitive ways. But they still maintain their distribution role because they are the gatekeepers for all competition among contact-lens manufacturers through their prescription authority. A-759. Because of the power optometrists wield, manufacturers capitulate to their desires to reduce intrabrand competition through UPPs. And it has a substantial effect on the forty million Americans who wear contact lenses.[5] This is an antitrust problem that calls for state action.

A. The History and Nature of the Contact Lens Industry

Contact lenses started as a specialty item that customers had to purchase from a local optometrist. With the advent of disposable lenses in the 1980s they became a commodity. No longer would the

[5] Statement of R. Joe Zeidner, General Counsel, 1-800, Hearing Before the S. Comm. on the Judiciary Subcomm. on Antitrust, Competition Policy and Consumer Rights 1 (July 30, 2014)).

wearer require frequent examinations, prescriptions, and fittings. This development allowed for innovation and competition by non-optometrist retailers. *See* Federal Trade Comm'n, *Possible Anticompetitive Barriers to E-Commerce: Contact Lenses* 1 (2004).

Engaging their powerful trade association, optometrists have been fighting this innovation and the resulting competition ever since. The American Optometrist Association first pressured manufacturers to limit distribution to optometrists and coached its members to withhold prescriptions from release to patients so that they could not be filled elsewhere.[6] AOA lobbying activities successfully blocked legislation in several states that would have required its members to give the prescription to the patient. *Id.* at 3. It was also successful in some states at making it harder for patients to take their prescriptions elsewhere. *Id.*

As a result of these anticompetitive conditions, Congress passed the Fairness to Contact Lens Consumers Act in 2003. Pub. L. 108-

[6] Statement of Robert Atkinson, President, Information Technology and Innovation Foundation, Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights, S. Comm. on the Judiciary, on Why UPP Pricing in the Contact Lens Industry Hurts Consumers and Competition 2 (July 31, 2014).

164, 15 U.S.C. §§ 7601–7610. The Act gave consumers the right to obtain their prescription from their optometrist for filling by any contact lens retailer, regardless of whether the patient requests it. *See* 15 U.S.C. § 7601.

But the Act is only one step toward contact-lens consumer freedom as it does not: offer consumers the choice of which brand will be fitted and prescribed; prohibit private labeling tactics designed to make equivalent brands hard to find; prohibit optometrists from "inadvertently" failing to provide sufficient prescription information that would allow the consumer to obtain their lenses from another source; prohibit optometrists from prescribing leftover stock of doctors-only lenses with optometrist-exclusive prices; address UPPs. *See* Atkinson 1–3.

Despite this Act, the AOA was unrelenting. It colluded with manufacturers to implement more restrictive practices, such as "doctors' only" or private-label lenses. *See* Federal Trade Comm'n 28. It even went so far as to make claims to consumers that their eye health depended upon purchasing their lenses from optometrists. It took a lawsuit by consumers and thirty-two state

attorneys general to end these practices. *See In re Disposable Contact Lens Antitrust Litig.*, 2001 WL 493244 (M.D. Fla. 2001).

The problem for competition is that optometrists possess the power to prescribe and sell, but are inefficient sellers for this (now) commodity market, which lower-cost higher-volume retailers more productively serve. So optometrists engage this power in anticompetitive ways because they can't effectively compete on the merits. Thus we should expect—absent protections like Section 905.1—that anticompetitive conduct in some form will continue.

B. Avoiding Antitrust Scrutiny with Uniform Pricing Policies

The anticompetitive conduct has indeed continued, this time in the form of UPPs. UPPs are manufacturer policies that prevent retailers from selling below a certain price. Manufacturers know optometrists are more likely to prescribe lenses subject to UPP because they can rest easy knowing their patients won't be able to find a better price elsewhere (especially online). And because prescriptions are brand-specific, *See* Federal Trade Comm'n 10–11, the optometrists can ensure the wearer won't be able to use the

lenses of a manufacturer that does not bow to UPP. A manufacturer is thus likely to gain market share by implementing UPP. *See* Atkinson at 3.

Like the classic prisoner's dilemma, manufacturers as a group might be better off without UPP, but an individual manufacturer who implements UPP will be rewarded with increased market share. *See id.* This leads to a suboptimal result: industry-wide pricing policies controlled by gatekeepers (optometrists) with a strong financial incentive to favor the brands that acquiesce to UPP. Those policies hurt manufacturers because they raise distribution costs; they hurt efficient retailers like LD Vision by preventing them from competing on price; and they hurt consumers who face higher prices. The advent of the internet merely amplifies this market failure and its effect on consumers. *See* Federal Trade Comm'n 12–13 (explaining internet creates unique alternative distribution channel improving competition on convenience and price).

II. UNILATERAL PRICING POLICIES FOR CONTACT LENSES HAVE SIGNIFICANT ANTICOMPETITIVE EFFECTS

The impetus for Section 905.1 is the proliferation of manufacturers' UPPs throughout the contact lens industry. UPPs—a non-collusive form of resale price maintenance—do not violate the Sherman Act, *See United States v. Colgate & Co.*, 250 U.S. 300 (1919), but they do raise significant antitrust concerns.

UPP occurs in the contact lens industry because optometrists have a unique power over manufacturers: contact lens prescriptions are brand-specific, so an optometrist can effectively choose the brand for the consumer—simply by writing the prescription with the noninterchangeable measurements of one brand or another. The contact-lens wearer does not have the choice between brands that she would in other markets.

The primary benefit of RPM cited by the U.S. Supreme Court—to "stimulate interbrand competition"—is thus lacking in the market for disposable contact lenses because brand-specific prescriptions mean optometrists, and not consumers, get to make the choice of brand. *See Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 890 (2007). Because they have this unique

power over the market, they need not conspire with manufacturers to get what they want. They are gatekeepers who may prescribe the lenses of whichever manufacturer offers the greatest incentive. UPPs don't make sense for manufacturers as a whole, but if one manufacturer sets a UPP, it may gain market share over those manufacturers that don't.

Likewise, the free-rider problem that UPP or RPM may address is not present in the contact lens industry. Unlike other industries, where "discounting retailers can free ride on retailers who furnish services and then capture some of the increased demand those services generate," *Id.* at 890, the retailers who furnish those services—optometrists—are paid by the consumer for those services.

Optometrists obviously benefit from UPPs, but so do certain retailers who would normally *appear* to be discount retailers. Walmart and Costco have an inherent ability to garner consumer trust as low-price leaders. People will shop at those retailers because they think they have the lowest prices, because they generally do. Even some internet retailers benefit from UPP. When

manufacturers started implementing UPP, many of 1-800-Contacts' prices were unaffected because they were *above* the UPP minimum price.[7]

UPP is always damaging to the competitors who have the lowest prices—discounters like LD Vision, who compete effectively on price. LD Vision offers the most competitive prices in the United States compared to other retailers: as much as 75% less than optometrist pricing and 30% to 50% less than 1-800-Contacts. LD Vision and other internet retailers also provide a significant convenience advantage over brick-and-mortar stores. This "combination of price and convenience" is what makes them effective competitors in the market for replacement lenses. *See* Federal Trade Comm'n 12–13.

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[7] *See, e.g.*, Response of Dr. Millicent Knight to Questions for Record, Hearing Before the S. Comm. on the Judiciary Subcomm. on Antitrust, Competition Policy and Consumer Rights, on Pricing Policies and Competition in the Contact Lens Industry: Is What You See What You Get? (July 30, 2014) (stating 1-800-Contacts sold a product with a UPP minimum price of $40.00 for $47.99), *available at* http://www.judiciary.senate.gov/imo/media/doc/Knight%20QFRs%207-30-14.pdf.

UPP may not be illegal under the federal antitrust laws, but it still raises significant competitive concerns in the market for contact lenses. State laws that regulate in accordance with the broad purposes of the federal antitrust laws—to deter anticompetitive conduct—are well within the traditional powers of the states. *See California v. ARC Am. Corp.*, 490 U.S. 93, 102 (1989). Section 905.1 protects distributors from pricing below UPP in sales to Utah consumers. It promotes robust competition where it is badly needed. *See* A-774 ("Utah chose to enact section 905.1 to eliminate price fixing in favor of free competition."). An interpretation of Section 905.1 that protects below-UPP sales to Utah consumers—but does not give special protections to Utah-based retailers when selling outside of Utah—stimulates competition consistent with longheld national policy in favor of competition. *See Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978) ("The heart of our national economic policy long has been faith in the value of competition."). That can hardly restrain interstate commerce.

III. UTAH'S LAW PROMOTES COMPETITION AND DOES NOT RESTRICT INTERSTATE COMMERCE IF INTERPRETED CORRECTLY

This Court should uphold the district court's denial of the lens manufacturers' motion for preliminary injunction because the manufacturers cannot meet their heavy burden of establishing that Utah Code § 58-16a-905.1 is unconstitutional under any set of circumstances. Nevertheless, the statute poses very real dormant Commerce Clause problems if interpreted in a way that protects Utah's "favored son", *see* J&J Br. 6, from competition based on sales outside the state of Utah.

The manufacturer Appellants argue, among other things, that Section 905.1 (1) clearly discriminates against out-of-state actors, (2) fails *Pike* balancing, and (3) is impermissibly extraterritorial in nature. Alcon/B&L Br. 29–48; J&J Br. 21–31. But these arguments depend upon a particular interpretation of the statute—the favored-son interpretation—that is not necessarily compelled and has not yet been applied.

A. The Favored-Son Interpretation Discriminates Against Out-of-State Retailers

The State of Utah's police power does not extend to the favored-son interpretation of Section 905.1 because it discriminates against out-of-state retailers. But even if a parochial purpose is not explicit in the law or its application, that interpretation would frustrate any legitimate state antitrust purpose and thus cannot overcome its discriminatory effects.

The states "may not enact laws that burden out-of-state producers or shippers simply to give a competitive advantage to in-state businesses." *Granholm v. Heald*, 544 U.S. 460, 472 (2005). Even where a law is not *per se* invalid, the purported local benefits must overcome its discriminatory effects. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

Both 1-800-Contacts/Costco and Attorney General Reyes argue that any effect on interstate commerce is not the result of the law, but rather the manufacturers' choice to utilize UPPs. 1-800/Costco Br. 46; Appellee's Br. 33. This argument elevates form over function. *Cf. American Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 196 (2010) (eschewing a formalistic approach in analyzing

how the parties involved in anticompetitive conduct actually operate). Practically speaking, the favored-son interpretation will have national effects either way: it will either result in manufacturers' national decisions to abandon UPP or out-of-state retailers will suffer a significant disadvantage. Those out-of-state retailers—LD Vision included—will face the unfortunate choice of either competing with Utah-based retailers for non-Utah-based customers at a significant price disadvantage or relocate their business to Utah. Either scenario will create outsized effects on interstate commerce far beyond what the dormant Commerce Clause allows.

Section 905.1 could, however, violate the dormant Commerce Clause if the state interprets it to exempt Utah-based retailers that sell to customers outside of Utah from any manufacturer's UPP. This would provide 1-800-Contacts, a Utah company, with a national price advantage over out-of-state discounters like LD Vision Group, who would not be protected from UPP under that interpretation. But Utah has yet to apply the statute and could—

consistent with the Constitution—enforce the statute so as to apply only where a retailer sells below UPP to a Utah consumer.

1-800-Contacts and Costco argue that even the favored-son interpretation is permissible because "state antitrust law may reach out-of-state conduct that causes in-state effects" and "states may regulate the relationship between out-of-state and in-state entities." 1-800/Costco Br. 31–32. But this argument is problematic for two reasons. First, even where states have affirmative—rather than residual—power, particular exercises of that power may be unconstitutional under the dormant Commerce Clause. *See Comptroller v. Wynne*, 575 U.S. ___, 135 S. Ct. 1787, 1799 (2015). Second, a state's power under the antitrust laws is not implicated by the favored-son interpretation of Section 905.1 because it's nothing more than pure economic protectionism.

Antitrust laws necessarily protect competition, not competitors. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 477-78 (1977). Indeed, Congress has consistently utilized its Commerce Clause power to reaffirm the national policy in favor of competition. *See Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695

(1978) ("The heart of our national economic policy long has been faith in the value of competition."). States may have a legitimate government purpose in regulating competition within their borders, but they do not have an interest in regulating competition in such a way as to advantage in-state interests over out-of-state interests in interstate commerce. *See Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (U.S. 1935) ("Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents.").

The favored-son interpretation of Section 905.1 indisputably favors and advantages in-state retailers over out-of-state retailers in the interstate market for disposable contact lenses (i.e., sales to non-Utah residents). To the extent Section 905.1 is interpreted to protect its favored son, it is not an antitrust statute—it is exactly the sort of parochial legislation that the Commerce Clause was designed to prohibit. *See id.*; *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337–38 (stating dormant commerce clause prohibits economic protectionism by states).

B. The Favored-Son Interpretation Is Unconstitutionally Extraterritorial

A state cannot apply its laws "to commerce that takes place wholly outside of the State's borders," or to have "the practical effect of establishing 'a scale of prices for use in other states,' " for it not only violates the Commerce Clause but exceeds the reach of the state's inherent authority. *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336–37 (1989). The Commerce Clause is designed to "protect[] against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State." *Healy v. Beer Inst., Inc.*, 491 U.S. at 337. It precludes "the kind of competing and interlocking local economic regulation" that plagued the nation under the Articles of Confederation. *See id.*

Competing and interlocking local economic regulation is exactly what would occur if the State of Utah applies the favored-son interpretation of the statute. 1-800-Contacts, as a Utah-based retailer, would have a competitive advantage over LD Vision (and other out-of-state retailers) in other states. Because of that competitive advantage, 1-800-Contacts argues that no extraterritorial regulation occurs even if the statute is applied to

sales between Utah retailers and non-Utah customers. *See* 1-800/Costco Br. 34–41. Rather, they argue, the manufacturer Appellants' "real complaint appears to be the indirect economic effect of competition created by Section 905." *Id.* at 38. Whatever competition Section 905 creates in the state of Utah is far outweighed by its real extraterritorial effect: to insulate powerful in-state interests from UPPs—nationwide—in a way that out-of-state retailers are not.

Johnson & Johnson argues that "the practical effect of Section 905.1 is to regulate the prices that out-of-state consumers, in all [fifty] states, pay for contact lenses made by an out-of-state manufacturer." J&J Br. 27. This is indeed the case if the statute reaches transactions between Utah-based retailers (1-800-Contacts and Costco's brick-and-mortar stores) and non-Utah consumers—that is, it necessarily discriminates against out-of-state retailers to the advantage of its favored son (i.e., 1-800-Contacts).

1-800-Contacts and Costco argue that the statute is not impermissibly extraterritorial because under Utah's version of the uniform commercial code, the situs of a sale is within the state in

which the seller is located. 1-800/Costco Br. 34–35. But this thoughtful argument has nothing to do with the constitutional question: whether the regulation has the practical effect of "control[ling] conduct beyond the boundaries of the state" *Healy*, 491 U.S. at 336. If Utah enforces the statute in the way its most-favored son anticipates, then it certainly does control conduct beyond the boundaries of Utah.

C. This Court Should Uphold the Statute Because Permissible Alternative Interpretations Exist

Between the arguments of its brief and the recent announcement on its website,[8] 1-800-Contacts has made clear its position that this Court should uphold Section 905.1 in this case as well as in any as-applied challenge to the law. LD Vision urges this Court to consider this unconstitutional application of the statute

[8] "Today we celebrate the banning of [the manufacturers' price-fixing practices] in Utah with an amendment to the Contact Lens Consumer Protection Act. And, of course, the best way to celebrate the ability to lower prices for our customers is to lower prices for our customers!" NEW LOWER PRICES, http://www.1800contacts.com/lens/clariti-1day-90/003165.html (last visited July 14, 2015). The promotion was not limited to Utah customers.

not only for clarity to the benefit of the contact-lens industry, but to ensure other states do not seek to enact similar laws out of pure economic protectionism.

The district court properly rejected the manufacturer Appellants' facial challenge to Section 905.1 because they failed to show that the statute is unconstitutional in all its plausible applications. A-770. But it is not true that the manufacturer Appellants "failed to show . . . that *any* plausible application [of Section 905.1] would do so." 1-800/Costco Br. 26–27. That application is the one from which 1-800-Contacts and Costco would impermissibly benefit by giving them an advantage on price against all out-of-state retailer competitors.

In a facial challenge to a statute, a challenger "must establish that no set of circumstances exists" under which the statute is constitutional. *United States v. Salerno*, 481 U.S. 739, 745 (1987). Intertwined with the presumption that a state will not interpret its laws inconsistent with the Constitution, a challenger must show that the law at issue compels an unconstitutional result; in essence, she must negate every plausible interpretation of the law at issue.

See *Schall v. Martin,* 467 U.S. 253, 264 (1984) (a facial challenge fails where "at least some" constitutional applications exist).

Section 905.1 provides that a contact-lens manufacturer shall not "discriminate against a contact lens retailer based on whether the contact lens retailer . . . sells or advertises contact lenses for a particular price." Utah Code § 58-16a-905.1. The manufacturer Appellants point out that Utah's attorney general "refuses to confirm that it will enforce Section 905.1 when sales are made to consumers outside of Utah." J&J Br. 27. The presumption against extraterritorial application of Utah law makes this speculation unnecessary on a facial challenge, *See* A-766–67 (citing *Nevares v. M.L.S.*, 345 P.3d 719, 727 (Utah 2015)), but the district court, Attorney General Reyes, and 1-800-Contacts and Costco take their reasoning one step too far. A-768; Appellee's Br. 33–34; 1-800/Costco Br. 46–49.

Utah's enforcement of the statute against manufacturers that refuse to deal with Utah-based retailers that violate their UPPs in sales to customers in other states would certainly discriminate against out-of-state commerce and would have an impermissible

extraterritorial effect of controlling prices outside of Utah. Discounters like LD Vision will struggle to compete with in-state retailers such as 1-800-Contacts because Utah law will give them a leg up in their dealings with manufacturers. If Utah applies Section 905.1 to sales with consumers outside of Utah, the congressionally mandated policy in favor of competition throughout interstate commerce becomes subservient to the interests in and of Utah.

This Court should uphold Section 905.1 because the manufacturer Appellants failed to show that all plausible interpretations of the statute are unconstitutional in this facial challenge. But it should clarify in its affirmance of the district court that Utah cannot apply this statute so as to exempt in-state retailers from UPP nationwide. That interpretation would not only be an impermissible regulation of interstate commerce; it would harm the very competition that antitrust laws are designed to protect.

CONCLUSION

Utah Code § 58-16a-905.1 could be interpreted to unconstitutionally advantage Utah-based contact-lens retailers in the interstate market. LD Vision nevertheless urges this Court to affirm the district court's decision to deny a preliminary injunction in this facial challenge because Utah could apply the statute without advantaging in-state retailers in competition for interstate commerce.

Respectfully submitted,

Dated: July 23, 2015

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CERTIFICATE OF COMPLIANCE

I certify that this brief contains 4086 words, as indicated by Microsoft Word, and therefore complies with the type-volume limitation set forth in Fed. R. App. P. 29(d) and 32(a)(7). I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5).

Dated: July 23, 2015

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CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25, I hereby certify that I electronically filed this brief with the Clerk of Court for the U.S. Court of Appeals for the Tenth Circuit by using the CM/ECF system on July 23, 2015. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: July 23, 2015

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