MINNESOTA STATE LAW LIBRARY

NO. A09-847

State of Minnesota
In Court of Appeals

Studor, Inc.,

Appellant,

v.

State of Minnesota,
Governor Tim Pawlenty and Attorney General Lori Swanson,
in their official capacities,

Respondents.

APPELLANT'S REPLY BRIEF

Jon S. Swierzewski (#108017)
John E. Diehl (#22718)
Julie N. Nagorski (#389212)
LARKIN HOFFMAN DALY &
LINDGREN LTD.
1500 Wells Fargo Plaza
7900 Xerxes Avenue South
Minneapolis, Minnesota 55431-1194
(952) 835-3800

Attorneys for Appellant

Christopher M. Kaisershot (#268665)
Assistant Attorney General
445 Minnesota Street
Suite 1200
St. Paul, Minnesota 55101-2127
(651) 282-9992

Attorneys for Respondents

2009 – BACHMAN LEGAL PRINTING – FAX (612) 337-8053 – PHONE (612) 339-9518 or 1-800-715-3582

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 1

I. THE STATE VIOLATED THE MINNESOTA EQUAL PROTECTION CLAUSE WHEN IT ENACTED A LAW IN IGNORANCE OF ITS CONTENTS AND WITHOUT A RATIONAL BASIS. 2

A. The Court Cannot Hypothesize a Rational Basis to Fill the Void Created by the Legislature. 2

B. The Actual Effect of the AAV Ban is Not Connected to Any Hypothesized Legislative Goal. 7

II. THE STATE VIOLATED THE DUE PROCESS CLAUSES WHEN IT ENACTED A STATUTORY BAN PROHIBITING A HEARING ON THE MERITS OF AAVS. 10

III. THE AAV BAN VIOLATES THE COMMERCE CLAUSE BECAUSE THE STATE'S ACTUAL INTEREST IS ILLEGITIMATE AND ANY LEGITIMATE INTEREST IS INSUFFICIENT TO SUPPORT THE BURDEN ON INTERSTATE COMMERCE. 13

CONCLUSION 14

TABLE OF AUTHORITIES

Cases

C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994) 13

Coffee-Rich, Inc. v. Wisconsin Dep't of Agric., 234 N.W.2d 270 (Wis. 1975) 13

Contos v. Herbst, 278 N.W.2d 732 (Minn. 1979) 10

Fairview Hosp. & Health Care Servs. v. St. Paul Fire & Marine Ins. Co., 535 N.W.2d 337 (Minn. 1995) 9

FCC v. Beach Commc'ns, Inc., 508 U.S. 307 (1993) 8

H. P. Hood & Sons v. Du Mond, 336 U.S. 525 (1949) 13

Heller v. Doe, 509 U.S. 312 (1993) 3

Hoyt Props., Inc. v. Production Res. Group, LLC, 736 N.W.2d 313 (Minn. 2007) 9

Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) 8

Nordlinger v. Hahn, 505 U.S. 1 (1992) 3

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) 13

Randy's Sanitation, Inc. v. Wright County, Minn., 65 F. Supp. 1017 (D. Minn. 1999) 13

Star Tribune Co. v. University of Minn. Bd. of Regents, 683 N.W.2d 274 (Minn. 2004) 6

State v. Behl, 564 N.W.2d 560 (Minn. 1997) 10

State v. Garcia, 683 N.W.2d 294 (Minn. 2004) 3, 7, 8

State v. Russell, 477 N.W.2d 886 (Minn. 1991) 7, 8

Thiele v. Stich, 425 N.W.2d 580 (Minn. 1988) 12

United States R.R. Ret. Bd. v. Fritz, 449 U.S. 166 (1980) 3

West Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994) 13

Statutes

Minn. Stat. § 645.16 6

INTRODUCTION

The legislature enacted the legislation containing the air admittance valve ("AAV") ban without discussion, and in apparent ignorance of its provisions. Because the legislature did not have a reason for the AAV ban when it passed the legislation,[1] it violates the Equal Protection Clause of the Minnesota Constitution. Furthermore, the law arbitrarily and capriciously prevents Studor from exercising its right to obtain an evidentiary hearing on the merits of AAVs in front of the Plumbing Board, in violation of the Due Process Clause of both the Minnesota and the United States Constitutions. Finally, the AAV ban violates the Commerce Clause because its burden on interstate commerce is excessive in relation to the legislature's true intent and in comparison to the State's post-enactment purported interest. To affirm the District Court, this Court must accept the State's arguments, contrary to the evidence, that the AAV ban complies with all of these constitutional protections. The District Court erred by granting the State's motion to dismiss and should be reversed.

ARGUMENT

The State repeatedly suggests that Studor has an insurmountable hurdle to overcome to establish the unconstitutionality of the AAV ban, citing the presumption of constitutionality. The State's arguments miss the point. The constitutional provisions here do exist, and provide protection against arbitrary, irrational, and illegal governmental actions. The presumptions are neither absolute nor irrebuttable. Rather,

when the record of legislative action shows a complete absence of rational thought, and reflects governmental abuse of power or violations of cherished and long-standing rights, a statute must be declared unconstitutional. The facts here present such a case. The statutory AAV ban is unconstitutional.

I. THE STATE VIOLATED THE MINNESOTA EQUAL PROTECTION CLAUSE WHEN IT ENACTED A LAW IN IGNORANCE OF ITS CONTENTS AND WITHOUT A RATIONAL BASIS.

The Minnesota Constitution requires more of its legislature than does the federal Constitution. Pursuant to Minnesota's more rigorous protections, (1) the legislature must have a reason for a law at the time of enactment, (2) that reason must be rationally connected to the actual effect of the law, and (3) a reviewing court must actually evaluate the challenged law for each of these components. The AAV ban violates the Equal Protection Clause of the Minnesota Constitution because the legislature enacted the AAV ban without a rational reason at the relevant time in 2007. There is no evidence that the legislature had a reason. Rather, the evidence indicates that the legislature did not even know it was banning a widely approved product and prohibiting the manufacturers and distributors of that product from conducting business in Minnesota.

A. The Court Cannot Hypothesize a Rational Basis to Fill the Void Created by the Legislature.

The State acknowledges that judicial review of legislative activities is "more stringent" under the Equal Protection Clause of the Minnesota Constitution than under

---

[1] Even if the legislature enacted the AAV ban for the reasons the State now hypothesizes, it still violates the Equal Protection Clause because those reasons are not rationally connected to the effect of the AAV ban.

the federal clause, and then promptly ignored this heightened level of protection for personal rights and liberties. (Respondents' Brief ("State's Brief"), pp. 29-30). As the courts have repeatedly noted, the "key distinction" of rational basis review under the Minnesota Constitution as compared to the federal Constitution is the courts' unwillingness to hypothesize a rational basis that might justify a statutory distinction. *State v. Garcia*, 683 N.W.2d 294, 299 (Minn. 2004). This requirement stands in contrast to the federal standard which allows legislation to be based on any "conceivable" basis. *See, e.g., United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980).[2] The State's citations to federal precedents under the federal equal protection clause are therefore inapplicable and misleading. The Court must, instead, review the constitutionality of the AAV ban under the Minnesota Equal Protection Clause, which clearly prohibits the Court from hypothesizing a basis for this law.

The AAV ban was enacted without any legislative discussion. The undisputed evidence shows that the legislature enacted the AAV ban in 2007 without ever discussing the AAV ban (unless laughter about the other banned product, waterless urinals, qualifies as discussion) or the merits of AAVs. After the delete-all amendments that, unknown to all but a few, contained the ban against Studor and its products, there were 16 committee hearings and 11 discussions on the floor of the House and Senate, but never did anyone

---

2 Similarly, the more stringent Minnesota review eliminates the possibility of resting legislation on a merely "plausible" governmental objective, *Heller v. Doe*, 509 U.S. 312, 324 (1993), and obliterates the federal judicial allowance of a legislature enacting a statute without even articulating its reasons, *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992).

explain or even mention these provisions. , In hundreds of pages of submissions to the District Court by the State, the State failed to point to any instance in which the legislature discussed the merits of AAVs before enacting the ban. Indeed, the State's Brief here glossed over the events of 2007 precisely because no legislative history exists. The District Court accepted that "there was little discussion on the AAV prohibition." (Appellant's Appendix ("AA") 7). Actually, there was no discussion. Furthermore, the undisputed evidence shows that the legislature enacted the AAV ban without identifying any purpose – rational and legitimate or otherwise – for it. Finally, the undisputed evidence shows that the legislature enacted the AAV ban without articulating any interest served by it. The Minnesota Constitution requires far more of the legislature. Minnesota provides a greater guarantee for equal protection.

The AAV ban was enacted in a vacuum. The AAV ban was offered into the legislation at the last minute, after the legislation had already passed through no less than six substantive policy-making committees.[3] It was offered as three lines of text in delete-all amendments totaling hundreds of pages[4] within bills which aimed to create a knowledgeable body of plumbing experts (the Plumbing Board) to decide on this very issue. It was offered without any notice to Studor or anyone else, despite Studor's

---

[3] The legislative events of 2008 cannot retroactively supply the missing legitimate rational basis of 2007 and cannot validate the unconstitutionality of the 2007 legislation.

[4] For example, the AAV ban appeared on page 96 of the delete-all amendment to HF1208 (Nagorski Aff., Ex. H), with 210 pages and approximately 6,800 lines of text, and page 75 of the delete-all amendment to HF122 (Nagorski Aff., Ex. E), with 131 pages and approximately 4,200 lines of text.

explicit request.[5] It was offered in committees that do not make policy, much less health and safety law. The only plausible explanation for this secretive legislative handling of the AAV ban is that it was offered solely out of concerns of protection of the economic interests of the plumbing industry:

> Further, if AAVs are lawfully permitted to be used throughout Minnesota . . . , our industry will suffer financially. AAVs purport to be an alternative to open pipe, two-way ventilation systems in plumbing fixtures. AAV promotional literature boasts that it will "eliminate" traditional ventilation systems, on which our members' livelihood depends.

(AA137-144). Indeed, the president of the pipe trades acknowledged that the pipe trades approached Representative Rukavina for the AAV ban in 2007:

> Yeah, Mr. Chairman my name is Carl Crimmins, I'm the president of the Minnesota Pipe Trades Association . . . [w]e asked for an [sic] Bill to be put in [sic] representative Rukavino [sic] offered the bill in a Finance Committee, it went through two or three committees so it's not like it's never seen the light of day.

(RA84).

---

5 Studor did not request a "special invitation" to discuss the Act in 2007. Rather, Studor merely responded to rumors of political shenanigans by requesting an opportunity to explain the merits of AAVs in an attempt to educate the legislature if the legislature took the draconian step of enacting a law that bans a safe product, and shuts out a reputable company from Minnesota. Studor's request is a common practice and the usual legislative response is to extend the political courtesy of providing notice to interested individuals. This political courtesy of notice creates an opportunity for a meaningful review of proposed legislation, both by the public and by the legislators. The only plausible conclusion as to why the legislators did not extend this courtesy to Studor is that they were attempting to ban this product without anyone knowing about it, much less fostering legislative awareness.

The AAV ban was enacted in legislative ignorance. It was offered without any explanation, in complex and lengthy bills. It was offered without any discussion of the merits of AAVs.[6] It was enacted without any legislative knowledge or legislative competence regarding plumbing systems. As Representative Mahoney, the author of the legislation freely admitted:

> Two hundred and one part time people should not make code. It should be done by people who understand what's going to happen.

(AA134-136). Indeed, there is no evidence to suggest that the legislature was even aware of any of the false statements and rumors now relied upon by the State in this litigation, including its disputed assertions[7] about the status of AAVs under the Code.[8] There

---

6 As the State acknowledges (*see* State's Brief, p. 27), the only legislative history that is relevant is history that was generated contemporaneous with the enactment of the statute. Minn. Stat. § 645.16. Furthermore, the events of 2008 represent legislative inaction with respect to the AAV ban. On May 13, 2008, the Senate considered an amendment that would have repealed the AAV ban, and the Senate **declined to adopt** that amendment. (*See* RA98-102). The 2008 legislative events constitute a legislative failure to act that for numerous reasons must be disregarded. *Star Tribune Co. v. University of Minn. Bd. of Regents*, 683 N.W.2d 274, 282 n. 2 (Minn. 2004) (disregarding failure to act because there are "myriad reasons and circumstances" for such inactivity). The legislative failure to repeal the AAV ban in 2008 cannot correct the constitutional deficiencies in the 2007 legislation.

7 Contrary to the State's current arguments, Studor disputed in the District Court the State's contention that AAVs have always been banned in Minnesota. (*See* Appellant's Memorandum in Opposition to State's Motion to Dismiss ("Appellant's Memorandum"), pp. 14, 16). AAVs were approved in Minnesota as an alternate material for over one year. (*See* Kaisershot Aff., Ex. 1 (Hansen Aff., Ex. B)). The Code does not explicitly prohibit AAVs as the State contends; the Code is simply silent with respect to AAVs. (*See* Appellant's Brief, pp. 10-11, n. 5, 6). At the same time, the Code specifically allows amendments, arguably to authorize explicitly the use of new products and technology not addressed by the Code. The Court should not condone the State's attempts now to punish Studor for exercising

certainly is no evidence that the legislature embraced those baseless allegations. The legislature's complete and absolute failure to acknowledge or even know about the existence of the AAV ban, its failure to discuss any reason for the AAV ban, and its failure to identify any interests served by it leave this law constitutionally deficient under the Equal Protection Clause of the Minnesota Constitution.

B. The Actual Effect of the AAV Ban is Not Connected to Any Hypothesized Legislative Goal.

The Minnesota Equal Protection Clause requires that reviewing courts engage in searching scrutiny to ensure that there is an "evident connection" between the effect of a statute and the purposes. *State v. Russell*, 477 N.W.2d 886 (Minn. 1991). Specifically, the "classification must be genuine or relevant to the purpose of the law; that is there must be an evident connection between the distinctive needs peculiar to the class and the prescribed remedy." *Id.* When the legislature enacts a law without sufficient evidence that the distinction furthers the statutory purpose, it violates the Minnesota Equal Protection Clause. *Id.* at 890.

The Minnesota Supreme Court employed this heightened inquiry in both *Russell*, 477 N.W.2d 886, and *State v. Garcia*, 683 N.W.2d 294, 299 (Minn. 2004). In *Russell*,

---

its right to petition the Plumbing Board to obtain a hearing on the merits of AAVs and amend the Code to explicitly permit the use of AAVs.

8 Even if the Code "prohibits" AAVs as claimed by the State, such a "prohibition" does not provide a rational basis for the statutory AAV ban for numerous reasons, as already identified by Studor in its initial brief here. A statutory ban is fundamentally and detrimentally different than a Code prohibition, as illustrated by Studor's 2006 petition for a Code amendment pursuant to Minnesota Statutes,

the court declared that a statute distinguishing between crack and cocaine violated the Equal Protection Clause because the legislature did not have rational evidence linking the distinction to the purported purpose. 477 N.W.2d at 891. Similarly, in *Garcia,* the court declared that a statute distinguishing between extended jurisdiction juveniles and juveniles certified as adults violated the Equal Protection Clause because the legislature did not have rational evidence connecting the distinction to the asserted purpose. 683 N.W.2d at 301.

In this case, the State ignores these heightened requirements for constitutionality under the Minnesota Equal Protection Clause when it cites federal precedents under the less stringent federal clause. With these more rigorous requirements, the Minnesota Constitution distinguishes itself from *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981), and *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307 (1993), which the State erroneously asserts supply the applicable standard. (*See* State's Brief, pp. 30, 33, 34).

Here, as in *Russell* and *Garcia*, the legislature and the State lack rational evidence connecting the AAV ban to any legitimate governmental interest. There is no rational evidence showing that the AAV ban furthers an interest in public health.[9] As the State

---

Chapter 14, which, had the statutory ban not been enacted, would have allowed Studor an evidentiary hearing on the merits of AAVs.

[9] Studor contends that the merits of AAVs are best not explored in this litigation, but instead in front of the Plumbing Board, the very entity the legislature created specifically to review and decide on plumbing issues. Studor maintains that AAVs are suitable, safe, and sanitary, as determined by multiple governmental entities (AA118, 122-124, 88, 78-79, 49, 81), and all rational information indicates the foregoing. Nonetheless, Studor asserts that the court need not find that AAVs are safe to find the statute unconstitutional. Rather, the Court need only decide that the

acknowledged, there are no published studies[10] regarding the failure rates of AAVs. (State's Brief, p. 7). The State alludes to discredited[11] consultants' reports, but these were not known to the legislature when it banned AAVs and the various documents created by STS Consultants rely on assumptions , not facts, data, or evidence, and without any showing that those assumptions were correct. None of the information now put forth by the State (which is notably absent from the 2007 legislative history)

---

information suggesting that AAVs are unsafe (a) was not discussed, much less evaluated, by the legislature when it enacted the AAV ban, or (b) is not rational.

10 The State erroneously contends that the Wisconsin affidavits are admissible while, at the same time, asserting that Studor is "unable to introduce facts to dispute the Wisconsin affidavits." (State's Brief, p. 24). The State's argument is misleading and faulty because Studor has repeatedly pointed to the facts disputing those affidavits, including the lack of any published studies regarding the failure rates of AAVs, (Appellant's Memorandum, pp. 20, 29), as the State acknowledges (*see* State's Memorandum in Support of Motion to Dismiss, p. 6; State's Brief, p. 7), and the lack of any documented health problems arising from AAVs (Appellant's Memorandum, p. 14). Furthermore, the State's assertions themselves demonstrate the inadmissibility of the Wisconsin affidavits. The value, if any, of the affidavits to this litigation is entirely dependent on the credibility of the affiants, none of whom submitted sworn affidavits directly in this litigation. The State does not dispute that Studor did not have the opportunity to cross-examine the affiants either here or in the Wisconsin matter, and "[w]eighing the evidence and assessing credibility on summary judgment is error." *Hoyt Props., Inc. v. Production Res. Group, LLC*, 736 N.W.2d 313, 320 (Minn. 2007) (citing *Fairview Hosp. & Health Care Servs. v. St. Paul Fire & Marine Ins. Co.*, 535 N.W.2d 337, 341 (Minn. 1995)). These fundamental evidentiary problems led to the omission of these documents from the Wisconsin proceedings, and those proceedings were ultimately concluded in Studor's favor. The District Court properly disregarded the Wisconsin affidavits in deciding the motion for summary judgment. (*See* AA3-12).

11 See Affidavit of Julius Ballanco and exhibits attached thereto, explaining that the STS reports "use unrealistic predictions of failures of [AAVs] that cannot be verified with facts," that an internal memorandum, attached to the report, is not credible because it evidences a complete lack of factual or scientific basis, and that the STS reports do not provide any technical basis for the State to ban AAVs.

constitutes rational evidence that the AAV ban furthers an interest in health and safety. Rather, the only rational evidence shows that banning AAVs does not promote the public health because AAVs are safe and they solve air pollution problems.[12] Because the State lacks rational evidence establishing a connection between the AAV ban and any hypothesized legitimate interest, the AAV ban thus violates the Minnesota Equal Protection Clause. The District Court erred in granting summary judgment to the State.

II. THE STATE VIOLATED THE DUE PROCESS CLAUSES WHEN IT ENACTED A STATUTORY BAN PROHIBITING A HEARING ON THE MERITS OF AAVS.

The AAV ban is unconstitutionally arbitrary and capricious because the legislature, lacking knowledge of the merits of AAVs, is denying AAV manufacturers, distributors, and plumbers wanting to use these products access to the Plumbing Board for a fair hearing on the merits of AAVs. A statute violates the Due Process Clauses if it is arbitrary or capricious. *State v Behl*, 564 N.W.2d 560, 567 (Minn. 1997); *Contos v. Herbst*, 278 N.W.2d 732, 741 (Minn. 1979).

The legislature enacted the AAV ban in apparent ignorance, and undisputedly without evaluating, much less discussing, the merits of AAVs. As Representative Mahoney publicly acknowledged, the part time legislature is ill-equipped to make code – instead, it should be done by those who understand the subject. (AA134-136). By contrast, the Plumbing Board is composed of experts, qualified and knowledgeable about

---

[12] Again, Studor contends that the Plumbing Board is the proper forum for an evaluation of the merits of AAVs and, again, asserts that a finding that AAVs are safe is not necessary to resolve this appeal; the Court need only decide that the information suggesting that AAVs are unsafe is not rational.

plumbing systems. (*See, e.g.*, RA100[13]). The State does not dispute that Studor has a statutory right to petition the Plumbing Board and obtain a fair hearing on whether the Code should be amended to permit the use of AAVs. Nor does it dispute in this litigation that the Plumbing Board cannot so amend the Code while the statutory ban is in place.[14] (*See, e.g.*, Nagorski Aff., Ex. Q, Plumbing Board Special Meeting Minutes, p. 5, in which the Plumbing Board recommended that the legislature repeal the AAV ban "and allow the Plumbing Board to review the products according to the Plumbing Board's procedures," and p. 3, explaining that no rule can overrule a statute). At the same time, the State argues that Studor must resolve the statutory ban by addressing the legislature rather than the courts. (State's Brief, p. 34). However, the State's arguments regarding the constitutionality of the AAV ban all indicate that the legislature is not obligated to give Studor any hearing at all, and certainly not a hearing on the basis of rational evidence to

---

13 As Senator Robling stated in 2008 after the AAV ban was in place, "Let me just read to you the composition of this Board, and I want you to think if you meet any of the qualifications of these board members. Two members shall be municipal plumbing inspectors; one member shall be a licensed professional engineer specializing in plumbing designs or systems; two members shall be commercial industrial plumbing contractors; one member shall be a residential plumbing contractor; two members shall be commercial industrial journeymen; one member shall be a residential plumbing journeymen; one member shall be a water conditioning contractor; one member shall be a municipal public water supply system operator or superintendent; and one member shall be a public member. So here we have this whole board and maybe, I don't think we have a plumber in this whole body and yet we're going to try and decide if these are good products to use in our plumbing systems and I simply don't believe that's appropriate."

14 Indeed, under the State's arguments that the Code has always banned AAVs, the only conceivable purpose of the statutory ban would be to prevent the Board from hearing the merits of AAVs to amend the Code.

be weighed under a fair standard and then a determination reached by a neutral decision-maker.

When Studor has been able to obtain a fair hearing[15] by a fair decision-maker, it has succeeded in demonstrating that venting systems in which AAVs are installed are safe and equivalent to open pipe venting systems:

1. The ALJ following the OAH hearing in 2002 determined there is "no evidence that the failure rate for AAVs is greater than the failure rate for traditional methods using vent pipes." (AA118).

2. The MDH approved AAVs as an alternate material on the basis that AAVs are "suitable, safe, and sanitary for the use for which [they are] intended." Minn. R. 4715.0330, subp. 1. (AA122-124).

3. The administrative court in Washington concluded that AAVs are "at least the equivalent of materials prescribed in the code in terms of quality, strength, effectiveness, durability, and safety." (AA88).

4. The Colorado appellate court similarly determined that there was no substantial evidence that AAVs are not equivalent to code-approved products in "quality, strength, effectiveness, durability and safety." (AA78-79).

5. The California appellate court determined that Studor had demonstrated that AAVs are "equivalent in quality, strength, effectiveness, durability and safety." (AA49).

6. The Nevada court determined that there was no substantial evidence not to approve AAVs as an alternate method. (AA81).

---

[15] The State argues for the first time on appeal that Jack Bueschel's affidavit is inadmissible. (State's Brief, pp. 25-26). Because the State failed to raise that issue below, it cannot now be heard to complain about the affidavit. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Accordingly, even if the State's arguments were valid, the affidavit and documents attached thereto are properly before this Court.

With the statutory AAV ban in place, Studor is prevented from effectuating the rights granted to other plumbing product manufacturers and distributors to obtain an evidentiary hearing in front of an unbiased and knowledgeable decision-maker. The legislature's denial, without knowledge, of Studor's right to a fair hearing in front of the Plumbing Board is a violation of the Due Process Clauses.

III. THE AAV BAN VIOLATES THE COMMERCE CLAUSE BECAUSE THE STATE'S ACTUAL INTEREST IS ILLEGITIMATE AND ANY LEGITIMATE INTEREST IS INSUFFICIENT TO SUPPORT THE BURDEN ON INTERSTATE COMMERCE.

The AAV ban unreasonably burdens interstate commerce. A law unreasonably burdens interstate commerce in violation of the Commerce Clause if "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Accordingly, an illegitimate state interest violates the Commerce Clause. *Randy's Sanitation, Inc. v. Wright County, Minn.*, 65 F. Supp. 1017, 1025 (D. Minn. 1999). When the "real and not merely professed intent of the legislature" *Coffee-Rich, Inc. v. Wisconsin Dep't of Agric.*, 234 N.W.2d 270 (Wis. 1975), is the suppression of economic competition, the law is unconstitutional. *See, e.g., West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994); *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994); *H. P. Hood & Sons v. Du Mond*, 336 U.S. 525, 538 (1949).

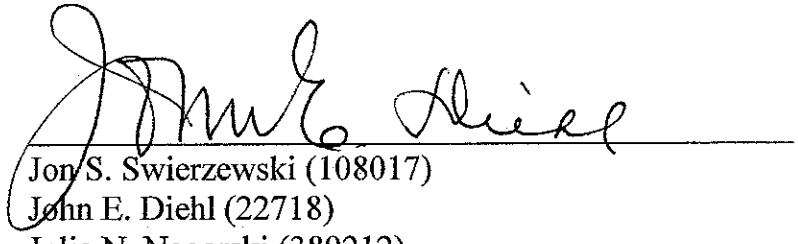
The AAV ban violates the Commerce Clause because the "real and not merely professed intent of the legislature" is to preserve the perceived interests of local pipe trades at the expense of interstate commerce. (AA139-144). Additionally, the AAV ban

violates the Commerce Clause because the State's purported post-enactment interest, protecting public health, does not outweigh the burden on interstate commerce given that there is no rational evidence that the AAV ban furthers this purported goal. The AAV ban is not supported or advanced by any legitimate interest. Rather, it excessively burdens interstate commerce and violates the Commerce Clause.

CONCLUSION

The AAV ban violates the Equal Protection Clause of the Minnesota Constitution, the Due Process Clause of both the Minnesota and the United States Constitutions, and the Commerce Clause. The District Court erred when it granted summary judgment to the State. This Court should reverse the District Court and remand this case for entry of judgment in favor of Studor on its claims that the AAV ban is unconstitutional. Only at that point will Studor be able to obtain a fair hearing and decision by the Plumbing Board regarding AAVs.

Dated: 9/24/09



Jon S. Swierzewski (108017)
John E. Diehl (22718)
Julie N. Nagorski (389212)
Larkin Hoffman Daly & Lindgren, Ltd.
1500 Wells Fargo Plaza
7900 Xerxes Avenue South
Minneapolis, Minnesota 55431-1194
(952) 835-3000

Attorneys for Appellant Studor, Inc.

1272173 1

CERTIFICATION OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the requirements of Rule 132.01 of the MN Rules of Civil Appellate Procedure. Specifically, the brief contains 4,199 words in compliance with the word count limitation contained in Rule 132.01 subd. 3 and conforms with all typeface requirements of Rule 132.01 subd. 1. The brief was prepared using Microsoft Word 2007.

Dated: September 24, 2009

Jon S. Swierzewski (108017)
John E. Diehl (22718)
Julie N. Nagorski (389212)
Larkin Hoffman Daly & Lindgren, Ltd.
1500 Wells Fargo Plaza
7900 Xerxes Avenue South
Minneapolis, Minnesota 55431-1194
(952) 835-3000

Attorneys for Appellant Studor, Inc.

1268921.2