IN THE MISSOURI SUPREME COURT

NO. SC87316

UNITED PHARMACAL COMPANY OF MISSOURI, INC.,

Appellant,

VS.

MISSOURI BOARD OF PHARMACY,

Respondent.

APPEAL FROM THE COLE COUNTY CIRCUIT COURT
NINETEENTH JUDICIAL CIRCUIT
THE HONORABLE RICHARD G. CALLAHAN

APPELLANT'S REPLY BRIEF

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STATEMENT OF FACTS

Plaintiff-Appellant United Pharmacal Company of Missouri, Inc. ("UPCO") disagrees with Defendant-Respondent Missouri Board of Pharmacy's (the "Pharmacy Board") suggestion that the trial court made no ruling on UPCO's constitutional challenge. It is true that the court's August 19, 2005, Final Order and Judgment did not mention UPCO's void-for-vagueness argument. L.F. 453-58. But the court implicitly held that the Pharmacy Practices Act was not unconstitutionally vague when it overruled UPCO's motion for rehearing. Indeed, UPCO moved for rehearing for two reasons, one of which was to expressly draw the court's attention to the fact that it had overlooked the constitutional issue. *See* UPCO's Motion for Rehearing, L.F. 459, 469-70. And UPCO asserted that issue during oral argument on its Motion for Rehearing. Tr. 11/28/2005, at 10. Thus, when the trial court denied UPCO's Motion for Rehearing on December 2, 2005, it necessarily denied UPCO's contention that Chapter 338 is unconstitutionally vague.

POINTS RELIED ON

I. Reply in Support of Point I

Bifulco v. United States, 447 U.S. 381 (1980)

Director, Missouri Dep't of Public Safety v. Murr, 11 S.W.3d 91 (Mo. App. W.D. 2000)

St. Louis County v. State Highway Comm'n, 409 S.W.2d 149 (Mo. 1966).

State ex rel. Kelsey v. Smith, 75 S.W.2d 832 (Mo. banc 1934)

RSMo § 195.010 (2000)

RSMo § 195.070 (2000)

RSMo § 195.400 (2000)

RSMo § 196.010 (2000)

RSMo § 338.010 (2000)

RSMo § 338.015 (2000)

RSMo § 338.195 (2000)

RSMo § 338.056 (2000)

RSMo § 340.200 (2000)

4 CSR § 270-6.011

II. Reply in Support of Point II

State v. Armour Pharmacy, 152 S.W.2d 67 (Mo. 1941)

State v. Entertainment Ventures I, Inc., 44 S.W.3d 383 (Mo. banc 2001)

U.S. Const. 14th Amendment

Missouri Const. Art. I, § 10

RSMo § 338.365 (2000)

ARGUMENT

I. Reply in Support of Point I

A. The Legislature Did Not Grant the Pharmacy Board Authority to Regulate Veterinary Drug Sales

Incredulously, the Pharmacy Board asserts that the Pharmacy Practices Act plainly requires UPCO to be licensed as a pharmacist to dispense veterinary prescription drugs -- despite the fact that for at least twenty years the Board itself never believed the Act gave it authority to regulate the conduct of UPCO or any other veterinary drug retailer. Surely if its authority were as clear and plain as the Pharmacy Board contends it is and always has been, it would not have twice determined that UPCO's sale of veterinary drugs was not in violation of the Act, as it did in 1994, and again in 1997. L.F. 108; L.F. 299, ¶ 5; L.F. 300, ¶¶ 8-11; L.F. 444, ¶ 6. The Pharmacy Board could not have stated it any more definitively than when it judicially admitted that it "does not assert . . . authority for dispensing of veterinary legend drugs." L.F. 344, ¶¶ 15.

Moreover, if the Pharmacy Practices Act already grants the Pharmacy Board authority to govern veterinary drug sales, there would be no need to amend the definition of the "practice of pharmacy" to include veterinary drug sales, or to add a separate license classification for veterinary drug dispensers, as the Missouri House of Representatives sought to do this Session. *See* H.B. 1700, 93rd Gen. Assem., 2d Sess.

(2006) (Reply A7)[1]; H.B. 1517, 93rd Gen. Assem., 2d Sess. (2006) (A11); *see also* House Committee Substitute ("HCS") for S.B. 1124, 93rd Gen. Assem., 2d Sess. (2006) (pertinent portions) (Reply A16). House Bill 1700 proposed to change the definition of the "practice of pharmacy" to specifically include veterinary drug sales. That amendment was incorporated into Senate Bill 1124. *See* HCS for S.B. 1124 (pertinent portions) (Reply A16). The bill passed the House of Representatives by an overwhelming majority. (Reply A25). It was then sent back to the Senate, where it eventually died, at least for this Session. (Reply A24). But the fact remains that a majority of the House of Representatives agreed to language that would include veterinary drug sales in the definition of "practice of pharmacy." These proposed amendments to the Act – no doubt in direct response to this lawsuit -- are strong evidence that the legislature, too, does not believe that the existing Act gave the Board authority to regulate veterinary drug sales.

Before turning to the rest of the Pharmacy Board's arguments, it is important to dispel its contention that it is UPCO's position that veterinary drug sales should be "wholly unregulated." *See* Respondent's Brief, p. 22. That is not so. UPCO does not dispute that its conduct and the conduct of other veterinary drug retailers *should* be

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[1] References to the Appendix to Appellant's Reply Brief are denominated "Reply A__." All other Appendix references are to Appellant's Opening Brief.

regulated. But that is not the question. Just because it is agreed that veterinary prescription drug sales *should* be regulated does not mean that the legislature actually *did* grant such authority to any entity, let alone to the Pharmacy Board. The question here is whether the legislature, by the words that it used, actually granted such authority to the Pharmacy Board. It did not. In effect, what the Pharmacy Board is asking this Court to do is to legislate that which the legislature failed to do, under the guise of "construing" a statute. That is not the function of a court. A court's function is to construe what the legislature actually said, not what it failed to say or what it might have been provident to do. *Missouri Div. of Employment Sec. v. Labor and Indus. Relations Comm'n of Missouri,* 637 S.W.2d 315, 318 (Mo. App. W.D. 1982).

1. The Pharmacy Board's Strained Interpretations Cannot Overcome the Plain and Ordinary Statutory Language.

The Pharmacy Board concedes that there are no disputed issues of fact in this case. And one of those undisputed facts is that there is no express language in Chapter 338 stating that an entity must be licensed as a pharmacy to sell veterinary drugs for use in animals. The Pharmacy Board admitted precisely that, under oath, during discovery in this case. L.F. 333-34; L.F. 395; L.F. 309, ¶¶ 62, 64; L.F. 446, ¶ 19. Notwithstanding these admissions, the Pharmacy Board nevertheless proceeds to argue on appeal that the Act does indeed contain language authorizing it to license and regulate retail veterinary drug sellers.

Specifically, the Pharmacy Board argues that the words "patient" and "physician" can both be interpreted to refer to animals. Perhaps one can, in other contexts or with great effort and machination, stretch the word "patient" beyond its plain meaning to include an animal, and the word "physician" to include "veterinarian,"[2] as the Pharmacy Board urges. But that most certainly is not how an ordinary person understands and uses the words "patient" and "physician." "[W]ords

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[2] The Pharmacy Board asserts, without authority, that a veterinarian is a subset of "physicians" because they, like medical doctors, are skilled in the art of healing. UPCO disagrees. Not every person skilled in the art of healing is a "physician." Applying the Board's logic, a dentist -- a professional that also engages in the art of healing -- would be a subset of "physicians." But *Webster's Unabridged Dictionary* does not treat it so. Among its definitions of "patient," *Webster's* states: "(2) a client for medical service (as of a physician or dentist)." *Webster's Third International Dictionary of the English Language Unabridged*, p. 1655. The word "dentist" would be superfluous if a dentist were a physician. And, notably, *Webster's* definition of "patient" refers to a client of a doctor or dentist, not the client of a veterinarian. This further supports UPCO's position that a "patient" is commonly understood to refer to a human, not an animal.

of common use," such as these, are to be construed "in accordance with their natural and ordinary meaning." *See St. Louis County v. State Highway Comm'n*, 409 S.W.2d 149, 152 (Mo. 1966). The Pharmacy Board contravenes this maxim, proposing absurd definitions that go far afield of the plain, common sense meaning of "patient" and "physician."

In any event, it is clear that when the legislature used the word "patient" in Chapter 338, it was referring only to a human, not to an animal. The word "patient" appears in several sections. For example, Section 338.010.1 section defines the "practice of pharmacy," as including "*consultation with patients* . . . about the safe and effective use of drugs and devices." RSMo § 338.010.1 (2000) (A30) (emphasis added). It is highly unlikely that a pharmacist would consult with a dog or cat about the safe and effective use of drugs. Section 338.015.1 states that the Act "shall not be construed to inhibit a patient's freedom of choice to obtain prescription services from any licensed pharmacist;" and that a patient may waive that freedom of choice by contract. RSMo § 338.015.1 (2000) (Reply A1). Obviously, animals do not have "choices" as to where their prescriptions are filled, let alone the ability to waive any such right. Section 338.056.1 allows a pharmacist to substitute a generic drug for the name brand drug prescribed as long as it "costs the patient less than the prescribed product." Animals do not pay for prescriptions. RSMo § 338.056.1 (2000) (Reply A2). As is apparent by these usages of the word, the legislature was referring only to

human patients. And, as a general rule of construction, the same words appearing in several sections of a chapter are to be given the same definition. *A.M.G. v. Missouri Div. of Family Services*, 660 S.W.2d 370, 372 (Mo. App. E.D. 1983). So, "patient" should consistently be construed as referring to a human each place the term appears in the Act.

For these reasons, it cannot reasonably be inferred either from the use of the generic words "patient" or "physician" that the legislature intended to grant the Pharmacy Board authority to regulate veterinary drug sales.

2. Retail Veterinary Stores are not "Community Pharmacies"

UPCO argued in its opening brief that the fact that the legislature did not create a pharmacy license classification for retail veterinary sales shows that it did not intend to grant the Pharmacy Board authority to govern such sales. In response to that argument, the Pharmacy Board counters that UPCO would fall within Classification (A), a "community" pharmacy. In support, the Pharmacy Board asserts that community pharmacies fill veterinary prescriptions "all the time." But there is no authority in the record to support that contention. Appellant's Counsel would be extremely surprised if Walgreen's or CVS even carries Heartguard, Frontline or equine vaccines, for example, let alone fills such veterinary prescriptions "all the time." Indeed, it is doubtful that stores such as UPCO would even exist if a person could simply pick up their pet's prescription at the corner drugstore.

Moreover, if a veterinary drug retailer already fell within the classification of a "community pharmacy," then it would not be necessary for the legislature to amend the Pharmacy Practices Act to create a specific classification for those dispensing veterinary drugs, as the Missouri House of Representatives proposed this Session. *See* H.B. 1517 (Reply A11).

3. "Drugs" Cannot Be Given the Same Definition as in Chapters 195 or 196

The Pharmacy Board also argues that the word "drugs" as used in the Pharmacy Practices Act should be interpreted to include both human and animal drugs. It argues that because veterinary drugs are not expressly excluded from the Act, it therefore means that they are included. But the maxim, "*expressio unius est exclusio alterius*" teaches otherwise: "omissions shall be understood as exclusions." *See Six Flags Theme Parks, Inc. v. Director of Revenue*, 179 S.W.3d 266, 269-70 (Mo. 2005). Having excluded any reference to animals in Chapter 338, the legislature is presumed to have excluded veterinary drugs from its purview.

In enacting the Pharmacy Practices Act, the legislature omitted any definition of "drugs," let alone one that included animals. This is so, even though in other chapters when the legislature intended for "drugs" to include both human and animal drugs it expressly so stated, as it did in the Controlled Substances Act, RSMo § 196.010(5) (A27), and the Food Drug and Cosmetics Act (FDCA), RSMo § 195.010(14) (A8).

The fact that the legislature did not do the same in enacting the Pharmacy Practices Act – nor when amending the Act in 2001 -- strongly suggests that it did not intend to give "drugs" the same meaning as the Controlled Substances Act and the FDCA.

Notwithstanding this telling absence of a definition of drugs that includes animals, the Pharmacy Board argues that the trial court properly gave the word "drugs" as used in the Pharmacy Practices Act the same definition as in the Controlled Substances Act because both regulate the conduct of pharmacies. But the Controlled Substances Act has a much broader scope than the Pharmacy Practices Act. The Pharmacy Board regulates only pharmacists and pharmacies. The Controlled Substances Act, in contrast, regulates not only pharmacists and pharmacies, but also veterinarians, as well as a myriad of other health care providers, manufacturers, wholesalers and retailers. *See* RSMo §§ 195.070.2 (A21), 195.400.6 (A23). Since the Controlled Substances Act regulates veterinarians dispensing controlled substances for use in animals, it makes perfect sense for the definition of "drugs" to include both human and animal drugs. But the same cannot be said of the Pharmacy Practices Act. The Pharmacy Board has no authority to regulate the conduct of veterinarians who dispense drugs for animal use. Therefore, it does not follow from the fact that the legislature intended the Controlled Substances Act to regulate controlled substances for both human and animal use, that it likewise intended to give the Pharmacy Board co-extensive authority over both human and animal prescription drugs.

The Pharmacy Board then leaps from the fact that the FDCA shares the same definition of drugs as the Controlled Substances Act, to conclude that the legislature intended to apply the same definition of drugs as defined in § 195.010(14) (A8) to construe the Pharmacy Practices Act. But the test for when a court may construe a word similarly as in another statute is not whether two other, completely separate Chapters share the same definition; it is whether the two statutes are of "one spirit and policy and were intended to be consistent and harmonious." *State ex rel. Cairo Bridge Comm'n v. Mitchell*, 181 S.W.2d 496, 499 (Mo. banc 1944). However, as this Court cautioned, even where the same words appear in "different statutes of somewhat similar character," they "do not necessarily bear the same interpretation.'" *State ex rel. Kelsey v. Smith*, 75 S.W.2d 832, 833 (Mo. banc 1934).

There is no indication that the legislature intended the word "drugs" as used in the Pharmacy Practices Act to be given the same meaning as Chapters 195 or 196. To the contrary, as shown above and in UPCO's opening Brief, no such intent can be gleaned from the statutory language.

The Pharmacy Board also argues that the fact that the legislature exempted veterinarians compounding his or her own prescription drugs from the Act evidences that veterinary drugs are included. The Board argues there would be no reason to exempt veterinarians unless the legislature intended the Act to apply to veterinary drugs. This argument is fallacious. The legislature exempted veterinarians for the

simple reason that it did not intend for the Act to apply to veterinary drugs. The exemption was made as a clarification, nothing more, just as the legislature clarified that "non-prescription drugs," "ordinary household remedies," and "such drugs or medicines as are normally sold by those engaged in the sale of general merchandise," are, like veterinary drugs, not within the purview of the Act. *See* RSMo § 338.010.3 (A30).

Nothing in the language of Chapter 338 evinces a legislative intent to grant the Pharmacy Board authority to regulate veterinary drugs sales. The trial court here exceeded its authority in holding otherwise. Rather than determining whether the legislature had actually granted authority to the Pharmacy Board under the plain and ordinary language of the statute as it is constrained to do, it instead made a policy decision that UPCO's conduct *should* be regulated and therefore engrafted such authority into the Pharmacy Practices Act. *See Director, Missouri Dep't of Public Safety v. Murr*, 11 S.W.3d 91, 96 (Mo. App. W.D. 2000) ("courts are without authority to read into a statute a legislative intent that is contrary to the intent made evident by giving the language employed in the statute its plain and ordinary meaning.").

That policy decision was made without weighing the competing interests involved. Among others, requiring small businesses such as UPCO to incur the extraordinary expense of establishing a pharmacy and maintaining a pharmacist on

staff – at a cost undoubtedly in excess of $100,000 per year – could put such companies out of business. And it would likely raise the cost of veterinary prescription drugs to Missouri consumers. It is the function of the legislature to consider the economic ramifications before making new laws. The trial court had no authority to usurp the province of the legislature, and its judgment should be reversed.

4. The Pharmacy Board is Only Authorized to Regulate Human Prescription Drugs

The Pharmacy Board argues that the fact that veterinarians and other doctors have separate licensing and regulatory agencies does not affect its authority. It contends, for example, that podiatrists and dentists are authorized to write prescriptions, yet no special language is required in Chapter 338 for a pharmacy to fill their prescriptions. Therefore, the Board's argument goes, no special language should be required to give the Board authority to regulate the dispensing of veterinarian's prescriptions. The Pharmacy Board is comparing apples to oranges. Podiatrists and dentists write prescriptions for *humans*. Veterinarians do not. The Pharmacy Board is only authorized to regulate pharmacists and pharmacies dispensing human drugs. That is why special language is necessary to give the Pharmacy Board authority to regulate the dispensing of veterinary prescription drugs and no special language is required to regulate the dispensing of drugs for patients of podiatrists and dentists.

5. Veterinarians May Dispense Legend Drugs

The Pharmacy Board incorrectly argues that the Veterinary Practices Act, Chapter 340, does not grant veterinarians the authority to dispense legend drugs, but rather such authority is controlled by the Pharmacy Practices Act. To the contrary, Chapter 340 and its implementing regulations authorize veterinarians to dispense prescription drugs.

Section 340.200(28) defines "Veterinary medicine" as:

> the science of diagnosing, treating, changing, alleviating, rectifying, curing or preventing any animal disease, deformity, defect, injury or other physical or mental condition, including, but not limited to the prescription or administration of any drug, medicine, biologic, apparatus, application, anesthesia or other therapeutic or diagnostic substance or technique on any animal . . . or to render service or recommendations with regard to any of the procedures in this paragraph.

RSMo § 340.200(28) (A39).

Obviously, the dispensing of prescription drugs is a service necessarily incidental to the treatment, cure or prevention of an animal's disease or injury.

Moreover, the Veterinary Medical Board's regulations expressly recognize that licensees may dispense prescription drugs. Among its Rules of Professional Conduct, the Veterinary Medical Board states that "[a] licensee shall not dispense or prescribe

any controlled substance or legend drug except in the professional course of his/her practice and only upon the establishment of a bona fide veterinarian-client-patient relationship. 4 CSR 270-6.011(15) (Reply A4). The necessary converse of this rule is that a veterinarian may dispense legend drugs to his/her clients.

Further, the Pharmacy Practices Act specifically recognizes a veterinarian's right to dispense veterinary drugs. Section 338.010 states that the Act shall not "be construed to prohibit or interfere with any legally registered practitioner of . . . veterinary medicine . . . in the compounding or dispensing of his own prescriptions." RSMo § 338.010.1 (A30).

Thus, the Pharmacy Board's contention that it, and only it, is authorized to regulate the dispensing of prescription drugs for both humans and animals is wholly without merit.

6. *Chariton* is Relevant

The Pharmacy Board argues that the *Chariton* case is irrelevant. To the contrary, *Chariton* is critically important because there the Pharmacy Board judicially admitted that it has no authority to regulate veterinary drug sales. L.F. 344, ¶¶ 15 (The Pharmacy Board "does not assert . . . authority for dispensing of veterinary legend drugs."). This admission belies the Pharmacy Board's dubious contention that the reason it failed to take action against UPCO and other retailers for over 20 years

was not because it did not have the authority to do so, but rather because it was merely exercising its discretion not to enforce the Act. *See* Respondent's Brief, p. 24.

It is also interesting that the Pharmacy Board now admits that *Chariton* has no precedential value, when it previously touted *Chariton* as being a judicial determination establishing that it has authority to regulate veterinary drug sales. *See* L.F. 333 ("It is the Board's position *based on the Chariton case* that all entities unless they fall within the exceptions provided by the statute here would be required to be licensed." (emphasis added)). That was precisely the point UPCO was making in its opening brief: *Chariton* was *not* a judicial determination that the Board has authority to regulate veterinary drugs, as the Board was, until now, contending.

Lastly, *Chariton* is relevant because it gives this Court an understanding of how the Board came to its sudden, 180° reversal of its interpretation of the Pharmacy Practices Act, and the arbitrariness and capriciousness of its conduct in enforcing the Pharmacy Practices Act against UPCO and others without legislative or judicial authority.

7. The Rule of Lenity Applies Substantive Provisions

The Pharmacy Board argues that the Rule of Lenity applies only in criminal prosecutions and then only to give a criminal defendant the benefit of a lesser penalty. That is not correct. The United States Supreme Court "has made it clear that this principle of statutory construction applies not only to interpretations of the *substantive*

ambit of criminal prohibitions, but also to the penalties they impose." *Bifulco v. United States*, 447 U.S. 381, 387 (1980) (emphasis added). Thus, as UPCO argued in its opening brief, any ambiguities in the substantive provisions of the Pharmacy Practices Act must be construed against the Pharmacy Board.

And, as is clear from the Supreme Court's definition, the rule applies not just to *prosecutions*, but also to criminal *prohibitions*. The Pharmacy Practices Act contains a criminal prohibition. It makes violation of the Act a Class C Felony. *See* RSMo § 338.195 (A32). Accordingly, the Rule of Lenity applies to this case.

For all of these reasons, the trial court erred in ruling that the sale of veterinary drugs to consumers for use in animals pursuant to a veterinarian's prescription is the "practice of pharmacy" within the meaning of the Pharmacy Practices Act, Chapter 338, and that UPCO must therefore be licensed as a pharmacy to sell such drugs. The trial court's judgment should be reversed.

II. Reply in Support of Point II

A. UPCO Timely Asserted its Constitutional Challenge

In apparent recognition that its argument on the merits is weak, the Pharmacy Board focuses instead on the hypertechnical argument that UPCO failed to preserve its constitutional challenge to the Pharmacy Practices Act. The Board's contention that UPCO did not raise this issue for the first time until appeal is flatly wrong. It was raised first implicitly and then *explicitly* in all courts below. In fact, the Cole County

trial court considered the challenge before entering its ruling denying UPCO's constitutional argument. And most importantly, the challenge was raised at the first opportunity after it became ripe.

As early as the oral arguments on the parties' cross motions for summary judgment before the Buchanan County trial court in 2002, UPCO urged that the Pharmacy Practices Act failed to give citizens clear notice that a pharmacy license is required to dispense veterinary prescription drugs. Tr., 10/17/2002, at 22-24. On appeal of the Buchanan County court's judgment, the Western District agreed that the Act does not "clearly and fully" apprise "those who must abide by the licensure . . . of what types of conduct and business practices are expected." *United Pharmacal,* 2004 WL 913537, *7 (Mo. App. W.D. April 30, 2004) *vacated by* 159 S.W.3d 361 (Mo. banc 2005). It further invited the legislature to amend the statute if it wanted to extend the Board's authority to include such conduct – an invitation the legislature accepted when it initiated House Bills 1700 and 1517, and HCS on S.B. 1124. *United Pharmacal,* 2004 WL 913537, at *7.

In arguing that the constitutional challenge was not raised for the first time until appeal, the Pharmacy Boards neglects to mention that UPCO expressly challenged the Act as being void for vagueness in violation of the Due Process Clause both in its Motion for Rehearing in the court below, and at oral argument on that motion. *See* UPCO's Motion for Rehearing, L.F. 459, 469-70; Tr. 11/28/2005, at 10. Importantly,

the Pharmacy Board filed no opposition to the motion, nor raised any objection at oral argument on the grounds that the constitutional issue was untimely. The trial court therefore necessarily ruled on that question when it denied UPCO's Motion for Rehearing on December 2, 2005. As stated in the court's docket, it "considered" UPCO's Motion for Rehearing – which included the constitutional challenge -- and then denied it. L.F. 488.

UPCO's constitutional challenge was timely even though asserted in its Motion for Rehearing because until the Cole County Court ruled that UPCO must be licensed as a pharmacy to sell veterinary drugs, UPCO had no standing to bring such a challenge. In order to have standing to assert a constitutional challenge, the party's rights "must be directly affected" or about to be affected. *State v. Armour Pharmacy*, 152 S.W.2d 67, 68 (Mo. 1941); *State v. Brown*, 502 S.W.2d 295, 305-06 (Mo. 1973); *State v. Entertainment Ventures I, Inc.*, 44 S.W.3d 383, 387 (Mo. banc 2001). *Entertainment Ventures* is particularly instructive. There, a prosecutor filed a declaratory judgment action seeking to declare that a cabaret operated by Entertainment Ventures was a public nuisance because it did not have a liquor license. The prosecutor moved the trial court for a temporary restraining order and temporary injunction to enjoin the cabaret from operating its business without a liquor license. *Entertainment Ventures*, 152 S.W.2d at 387. The court denied both motions. *Id.* Despite the fact that the prosecutor had filed a declaratory judgment action and

actually sought injunctive relief against the cabaret, this Court held that, because the cabaret had not, in fact, been closed, its rights had not been affected and therefore it lacked standing to challenge the constitutionality of the statute. *Id*.

So, too, UPCO's rights were not affected until the court's August 19, 2005, Judgment ruling that "UPCO may not sell veterinary legend drugs directly to the consumer (animal owner) based on a prescription without being licensed as a pharmacy in the state of Missouri." L.F. 487. It must be remembered that this is a declaratory judgment action, wherein UPCO asked the trial court to construe the Pharmacy Practices Act as to whether or not it applies to veterinary drug sales. Even as of this date, UPCO has never actually been charged with a criminal violation of the Act. And, although the Pharmacy Board stated in its Cease and Desist letter that UPCO's violation of the Act is a Class C felony, the Board denies that such was a threat of criminal action. L.F. 444, ¶ 9. Indeed, it has no authority to prosecute a violation or even bring an administrative action against a non-licensee, such as UPCO. L.F. 305, ¶ 41; L.F. 444, ¶ 10; L.F. 335. The Board's authority is limited to seeking an injunction or restraining order from a court. RSMo 338.365.1 (Reply A3). No such injunction has yet been sought against UPCO. And any criminal prosecution would have to be brought by a local prosecutor. L.F. 335. Because UPCO had not been charged with violating the Pharmacy Practices Act, no action for injunctive relief had been filed, nor, until the court's ruling below, had there been a determination that

UPCO could not dispense veterinary drugs without a pharmacy license, UPCO's rights were not affected and it would have been premature for UPCO to challenge the Act as unconstitutional.

However, once the court below ruled that UPCO must be licensed as a pharmacy, that judicial determination, declaring that UPCO's business practices violate the Pharmacy Practices Act, directly affected UPCO's rights. That ruling places UPCO at a direct and imminent threat of a civil action for injunctive relief or felony prosecution for violation of the Act. It was at that point that UPCO first suffered a constitutional injury and its constitutional claim became ripe. Accordingly, UPCO properly and timely asserted the same at its earliest opportunity after it had standing to do so.

Even if UPCO did not timely preserve its constitutional challenge, this Court should exercise its discretion to review it. None of the policy reasons underlying the rule requiring constitutional challenges to be raised at the first opportunity are implicated here. One of those reasons is to prevent a party from "sandbagging by waiting until the outcome of the proceeding is known before determining whether to

raise the issue." *Laubinger v. Laubinger,* 5 S.W.3d 166, 173 (Mo. App. W.D. 1999).[3] That reason is not implicated because UPCO had no standing to bring its claim until it did. And even before then, UPCO had made clear its position that the Act did not apprise UPCO that its conduct was proscribed, and thus the Pharmacy Board cannot claim to be unfairly surprised by that issue.

The second rationale is that timely raising a constitutional challenge promotes judicial economy by "'giv[ing] the trial court an opportunity to rule on the issue.'" *Id.* at 173. In this case, the trial court did have an opportunity to consider the arguments and, in fact, ruled on the issue. *See* L.F. 488.

The third policy underlying the rule is that "[a]n attack on the constitutionality of a statute or rule is of such importance that a record concerning the issue should be fully developed at trial and should not be raised as an afterthought on appeal." *Laubinger*, 5 S.W.3d at 173. Again, UPCO raised this issue at trial, and as soon as it became ripe – not as an afterthought on appeal.

Additionally, there is little doubt but that if this case terminates in favor of the Pharmacy Board, it will seek injunctive relief and/or the matter will be referred to the

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[3] In *Laubinger,* unlike here, the plaintiff did not raise her constitutional challenge until the case was on appeal. *Laubinger,* 5 S.W.3d at 173. In contrast, UPCO raised its void-for-vagueness claim with the trial court.

local prosecutor for felony prosecution. In that event, UPCO will re-assert its challenge that the Act is unconstitutionally vague. This is already UPCO's second appeal to this Court on this declaratory judgment action. The first was decided on jurisdictional issues. This Court did not reach the merits, which included the Western District's inference that the Act is unconstitutionally vague. Unless this Court addresses the merits of the constitutional challenge on this appeal, UPCO will be forced to re-litigate this matter and bring the issue before the Court again, all at its substantial time and expense. And such would be an unnecessary waste of judicial resources on an already overly crowded docket.

For these reasons, this Court should consider the merits of UPCO's void-for-vagueness constitutional challenge.

B. The Pharmacy Practices Act is Unconstitutionally Vague

Four of the five judges who have reviewed the Pharmacy Practices Act in this case have failed to discern any language granting the Pharmacy Board authority to regulate veterinary drug sales. There can be no stronger support than this that the Act is unconstitutionally vague in violation of the due process clauses of the Missouri Constitution, Art. I, § 10 (A58), and the Fourteenth Amendment to the United States Constitution (A57).

The Pharmacy Board responds that those rulings have been vacated by this Court's prior Opinion in this case. While it is true that, procedurally, those decisions

have no precedential value, it cannot negate the fact that those four persons, learned in the law, found it not merely vague as to whether UPCO must be licensed, but that any such requirement is *non-existent*. If the Act does not give these four judges adequate notice that one must have a pharmacy license to sell veterinary prescription drugs, then an ordinary layperson cannot possibly have constitutionally adequate notice. *See Entertainment Ventures*, 44 S.W.3d at 386 (a statute is void for vagueness if it does not "provide a person of ordinary intelligence a reasonable opportunity to learn what is prohibited.").

Lastly, in an act of desperation, the Pharmacy Board argues that UPCO's brief fails to identify how each and every provision of Chapter 338 is unconstitutional. The Pharmacy Board knows full well that UPCO does not claim that each and every provision of the Act is unconstitutional. In particular, UPCO does not dispute that the Pharmacy Board has authority to license and regulate pharmacists and pharmacies dispensing prescription drugs for human use. But, as is abundantly clear from its Brief and pleadings in the court below, UPCO is rightfully challenging the trial court's erroneous ruling that the Pharmacy Practices Act also regulates the retail sale of veterinary legend drugs for animal use, and that retail businesses, such as UPCO, must obtain a pharmacy license or employ a pharmacist to sell such drugs.

For these reasons and those discussed in Point I, both here and in UPCO's opening brief, this Court should find that the Pharmacy Practices Act, as applied to UPCO and other retail sellers of veterinary drugs, is unconstitutionally vague.

III. CONCLUSION

The trial court's judgment should be reversed. The Pharmacy Practices Act does not grant the Pharmacy Board authority to regulate the retail sale of veterinary prescription drugs to owners of animals upon lawful veterinary prescriptions. To the extent it can now be construed to encompass the regulation of veterinary drugs, it is unconstitutionally vague and therefore void.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I did on this 13th day of July, 2006, cause a copy of the foregoing the **APPELLANT'S REPY BRIEF** to be sent via Federal Express, next business day delivery, postage prepaid, with a copy on floppy disk, to:

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ATTORNEY FOR DEFENDANT-RESPONDENT
MISSOURI BOARD OF PHARMACY

_____
ATTORNEY FOR APPELLANT

RULE 84.06(C) AND (G) CERTIFICATES

I hereby certify that **APPELLANT'S REPLY BRIEF** includes the information required by Rule 55.03, and that the brief complies with the limitations contained in Rule 84.06(b). Appellant's Brief consists of 6,096 words, exclusive of the cover, certificate of service, certificate required by Rule 84.06(g), signature block and appendix, as determined by the word count of the Microsoft Word word-processing system.

I hereby certify that the floppy disk submitted by Appellant in this matter has been scanned for viruses and that it is virus free.

BY: _____
ATTORNEY FOR APPELLANT

APPENDIX

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