THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2014-CP-02-00259

Appellate Case No. 2014-002728

Retail Services & Systems, Inc., dba Total Wine & More .....Appellant,

v.

South Carolina Department of Revenue and
ABC Stores of South Carolina.....Respondents.

FINAL BRIEF OF RESPONDENT

Burnet R. Maybank III
James P. Rourke
Nexsen Pruet, LLC
1230 Main Street, 7th Floor
Columbia, SC 29201
803-771-8900

Attorneys for Respondent ABC Stores of South Carolina

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STATEMENT OF ISSUES ON APPEAL

Respondent ABC Stores of South Carolina agrees with Appellant's statement of issues on appeal, to wit:

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II. **WHETHER THE CIRCUIT COURT ERRED IN HOLDING THAT S.C. CODE ANN. SECTIONS 61-6-140 AND -150 DO NOT VIOLATE SOUTH CAROLINA'S EQUAL PROTECTION CLAUSE?**

III. **WHETHER THE CIRCUIT COURT ERRED IN HOLDING THAT S.C. CODE ANN. SECTIONS 61-6-140 AND -150 DO NOT VIOLATE SOUTH CAROLINA'S DUE PROCESS CLAUSE?**

STATEMENT OF THE CASE

Respondent ABC Stores largely agrees with Appellant's Statement of the Case.

On February 5, 2014, appellant Retail Services & Systems, Inc. dba Total Wine & More ("Retail Services") commenced this action seeking a declaration that S.C. Code Ann. sections 61-6-140 and -150 (the "Statutes") are unconstitutional. (Compl. ¶ 4; R. p. 32). The Statutes are part of the Alcoholic Beverage Control Act (the "ABC Act"), and they limit the number of retail dealer licenses that the respondent South Carolina Department of Revenue ("DOR") can issue to an individual or corporation. (Id. ¶ 5; R. p. 32).

Retail Services' Complaint alleges that, in violation of Article VIII-A of the Constitution of the State of South Carolina (the "Constitution"), the General Assembly did not act within the scope of its police powers when it enacted the Statutes, and therefore, they are unconstitutional. (Id. at ¶¶ 21-32; R. pp. 35-36). The Complaint also alleges that the Statutes violate South Carolina's Equal Protection and Due Process Clauses because they arbitrarily treat Retail Services differently from similarly situated individuals and deprive it of a cognizable property interest. (Id. at ¶¶ 40-51; R. pp. 38-39). Retail Services alleges it has been injured by these Statutes because they have prevented it from opening a retail liquor store in Aiken County, South Carolina. (Id. at ¶¶ 5& 8; R. pp. 32 and 33).

Respondent ABC Stores of South Carolina ("ABC Stores") filed an answer opposing the Complaint on March 14, 2014. (ABC Stores' Answer; R. pp. 41-48). The DOR filed its answer on March 20, 2014. (DOR Answer; R. pp. 49-58).

On April 10, 2014, Retail Services filed a motion for summary judgment. (Retail Services' Mot. for Summary Judgment; R. pp. 59-61). On May 30, 2014, ABC Stores filed a cross-motion for summary judgment. (ABC Stores' Cross-Mot. for Summary Judgment; R. pp. 101-105). The DOR also filed a cross-motion for summary judgment on June 9, 2014. (DOR's Cross-Mot. for Summary Judgment; R. pp. 121-122).

On August 5, 2014, Judge Early heard all three motions for summary judgment filed by the parties. (Tr. p. 4; R. p. 225). On November 21, 2014, Judge Early denied Retail Services' motion for summary judgment and granted the DOR and ABC Stores' cross-motions for summary judgment. (11/21/14 Order; R. pp. 9-22). Judge Early denied Retail Services' Rule 59 motion to reconsider on December 22, 2014. (Mot. to Reconsider; R. pp. 214-221; 12/22/14 Order; R. pp. 25-26). Retail Services now appeals the November 21, 2014 and December 22, 2014 orders.

STATEMENT OF THE FACTS

Retail Services owns the following three retail liquor stores in South Carolina: Columbia Fine Wine, Inc., Charleston Fine Wine, Inc., and Greenville Fine Wine, Inc. (Trone Aff. ¶¶ 5-6; R. p. 82; 11/21/14 Order p. 2; R. p. 10). Pursuant to the ABC Act, each of Retail Services' stores has a retail dealer license issued by the DOR to sell alcoholic liquors. (Trone Aff. ¶ 7; R. p. 82; 11/21/14 Order p. 2; R. p. 10). Retail Services would like to expand its business in South Carolina by opening more retail liquor stores. (Trone Aff. ¶¶ 8-9; R. p. 82; 11/21/14 Order p. 2; R. p. 10). Retail Services alleged it intends to open a store in Aiken County. (Trone Aff. ¶¶ 8 & 12, R. p. 82; R. 11/21/14 Order; R. p. 10). Because Retail Services already has an interest in three

licenses, however, the Statutes prohibit it from obtaining another retail dealer license. (11/21/14 Order p. 2; R. p. 10).

S.C. Code Ann. section 61-6-140 limits the number of retail dealer licenses that can be issued to a licensee or issued for the use of a corporation to "no more than three." Current day S.C. Code Ann. section 61-6-150 prohibits any person from directly or indirectly having "any interest whatsoever" in more than three retail liquor stores.

ARGUMENT

Standard of Review

Rule 56(c) of the South Carolina Rules of Civil Procedure provides that a circuit court may grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP.

I. THE STATUTES ARE WITHIN THE SCOPE OF THE GENERAL ASSEMBLY'S POLICE POWER.

Article VIII–A of the South Carolina Constitution provides:

> *In the exercise of the police power, the General Assembly has the right to* prohibit and to *regulate* the manufacture, *sale, and retail of alcoholic liquors or beverages within the State.* The General Assembly may license persons or corporations to manufacture, sell, and retail alcoholic liquors or beverages within the State under the rules and restrictions as it considers proper. The General Assembly may prohibit the manufacture, sale, and retail of alcoholic liquors and beverages within the State, and may authorize and empower state, county, and municipal officers, all or either, under the authority and in the name of the State, to buy in any market and retail within the State liquors and

> beverages in such packages and quantities, under such rules and regulations, as it considers expedient. (Emp. added.)

Pursuant to the police power referenced above, the General Assembly in Section 61-6-140 provided that "No more than three retail dealer licenses may be issued to one licensee...."

In Hon. John D. Geathers, *The Regulation of Alcoholic Beverages in South Carolina* (S.C. Bar) at page 135, the authors describe the regulation of the sale of alcoholic Liquors as follows:

> In South Carolina, the retail sale of alcoholic liquors for off-premises consumption may only be made from stand-alone liquor stores. That is, bottles of liquor may not be sold from grocery stores, convenience stores, or other retail food and beverage outlets, but may only be sold from specialized liquor stores. And, perhaps somewhat unfairly, these liquor stores are subject to the most stringent regulations of South Carolina's alcoholic beverage laws.

The authors at pages 137-38 describe the no more than three license statutes as follows:

> The ABC Act also places strict restrictions on how many liquor stores a single licensee may own and operate. Specifically, a single retail liquor licensee, whether an individual or a corporation, may not be issued more than three retail dealer licenses, and these retail licenses may only be issued to one member of a single household. Beyond these restrictions upon formal licensure, the Act also prohibits a retail liquor license from holding a financial interest, either directly or indirectly, in more than three liquors stores. This type of regulation of the number of licenses that may be issued to one person is aimed at "controlling the tendency toward concentration of power in the liquor industry[,] preventing monopolies[,] avoiding practices such as indiscriminate price cutting and excessive advertising[,] and preserving the right of small, independent liquor dealers to do business," and *these restrictions have been held not to violate the due process or equal protection rights of liquor licensees.* (Emp. added.)

The authors at page 7 also note:

> Laws regulating the manufacture, sale, and consumption of alcoholic beverages have been with South Carolina for as long as the states have had laws. Within the first four recorded acts of the colonial government, enacted on May 26, 1682, was "An Act for the suppression of Idle, Drunken and Swearing Persons, inhabiting within this Province," and, just over one year later, on September 25, 1683, South Carolina would enact its first law directly regulating the sale of alcoholic beverages in an act requiring licenses for taverns and "punch houses."

Plaintiff contends that the 3 store limit statute is not a valid exercise of police power. In *The Regulation of Alcoholic Beverages in South Carolina, supra*, current Court of Appeals Judge Geathers states:

> The regulation of alcoholic beverages in South Carolina is principally a matter reserved to state government, under the licensing system imposed by state law and administered by the South Carolina Department of Revenue. *This licensing system has been characterized as a "typical exercise of the police power of the State...designed for the comprehensive system of regulation that closely polices the commerce in alcoholic beverages. Id* at pg 11. (Emp. added.)

Judge Geathers also states:

> By constitutional provision and by statute, the state holds nearly exclusive power over the regulation of the manufacture and sale of alcoholic beverages in South Carolina. Article VIII-A of the South Carolina Constitution authorizes the General Assembly, "[i]n the exercise of the police power," to address the sale of alcoholic liquors and beverages in one of three ways: it may (1) absolutely prohibit the manufacture and sale of alcoholic liquors and beverages within the state, (2) license persons or corporations to manufacture and retail such liquors and beverages "under such rules and restrictions it deems proper," or (3) restrict the sale of liquor to sales by designated governmental entities, as under the Dispensary system of the late-nineteenth and early-twentieth centuries. This Article further makes it clear that *however this police power is exercised*, licensing authority must remain with

> the state and may not be delegated to municipal governments. *Id* at 25. (Emp. added.)

In 48 C.J.S. Intoxicating Liquors §62, the authors state, "A state legislature may provide for a licensing system for the granting or revocation of licenses for the sale of liquor and may limit the number of licenses which may be granted.... *The licensing of persons to sell liquor is not an exercise of the taxing power of the state to raise revenue, but rather of the police power.*" (Emp. added.)

The authors go on to state that "The legislature may limit the number of licenses, or the number of licenses for a particular species of liquor business which may be owned by the same person, group or organization, where the statutes are reasonable and not unduly discriminatory." *Id.*

The statutes in question were clearly enacted as part of the General Assembly's police power. The South Carolina Supreme Court has addressed a predecessor statute in *Pendarvis v. Berry*, 214 S.C. 363, 52 S.E.2d 705 (1949). At issue was the enforceability of a contract designed to circumvent or violate subsection (c)(9) of Section 4 of the ABC Act of 1945, which limited ownership to a single license. The action was brought for an accounting of a claimed partnership which was formed for the operation of a presumably illegal second liquor store. The Supreme Court held that the contract was unenforceable as it was designed to violate the single license requirement. The Court noted the Appellant's argument that the contract was nevertheless enforceable as follows:

> The excellent brief of appellant is principally upon the contention that in view of the fact that the Act of 1945 contains no declaration that a contract in evasion of its terms is void and unenforceable and *the Act is not designed to protect the public health and morals* or to protect the public from imposition and fraud, a contract of evasion is not void but is enforceable in such a case as this. 52 S.E.2d at 706. (Emp. added.)

The Court rejected the argument stating:

> A further obstacle to appellant's attempted distinction is that it overlooks or ignores the consideration that the Alcoholic Beverage Control Act of 1945 *is a typical exercise of the police power of the State and is designed for the protection of the morals and welfare of the public.* The universality of this conception of legislation looking to control of the liquor traffic was pointed out in *Davis v. Query*, 209 S.C. 41, 39 S.E.2d 117. It cannot be gainsaid that, *while the Act of 1945 is also a revenue law, its principal purpose is the protection of the public health and morals.* Liquor control legislation is generally of such purpose. *Id.* (Emp. added).

In *State ex rel. George*, the court addressed a challenge to the entire Dispensary Act of 1893. 42 S.C. at 230, 20 S.E.2d at 224. The court upheld the act as a valid exercise of the State's police power.

II. THE STATUTES DO NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

A. Equal Protection Standard of Review

Plaintiff's Complaint alleges that the statutes violate the Equal Protection clauses found in the South Carolina and United States Constitutions, S.C. Const. Art. I, § 3, U.S. Const. Amend. XIV.

In *Fraternal Order of Police v. S.C. Department of Revenue*, 352 S.C. 420, 574 S.E.2d 717 (2002) the Supreme Court declared the Equal Protection test as follows:

> The requirements of equal protection are satisfied as long as (1) the classification bears a reasonable relation to the legislative purpose sought to be effected; (2) the members of the class are treated alike under similar circumstances and conditions; and (3) the classification rests on some reasonable basis. *Id.* According to the United States Supreme Court, [u]nless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. 574 S.E.2d at 722.

In *American Service Corp. of S.C. v. Hickle*, 312 S.C. 520, 435 S.E.2d 870 (1993) the Court similarly stated:

> "In determining whether a statue violates the equal protection clauses of state and federal constitutions, we must give great deference to the classification passed by the legislature, and the classification will be sustained against constitutional attack if it is not plainly arbitrary and there is 'any reasonable hypothesis' to support it." *Smith v. Smith*, 291 S.C. 420, 424, 354 S.E.2d 36, 39 (1987) [citing *Gary Concrete Products, Inc., v. Riley*, 285 S.C. 498, 331 S.E.2d 335 (1985)]. Equal protection is satisfied if: "(1) the classification bears a reasonable relation to the legislative purpose sought to be effected; (2) the members of the class are treated alike under similar circumstances and conditions; and (3) the classification rests on some reasonable basis." *Samson v. Greenville Hospital System*, 295 S.C. 359, 364, 368 S.E. 2d 665, 667 (1988).
>
> ****
>
> A statute enacted pursuant to the legislature's powers is presumptively constitutional. 435 S.E.2d at 871.

In *Ed Robinson Laundry and Dry Cleaning, Inc. v. SC Department of Revenue*, 356 S.C. 120, 588 S.E. 2d 97, 99 (2003) the Court noted that the Plaintiff "must overcome this Court's mandate to sustain a legislative enactment if there is 'any reasonable hypothesis to support it.'"

Accordingly, for Plaintiff to prevail, this Court would have to find that (1) the three store limit does not bear a reasonable relation to the legislative purpose sought to be effected; (2) the members of the class are not treated alike; and (3) the classification does not rest on some reasonable basis. The Circuit Court found that (1) the three store limit does bear a reasonable relation to the legislative purpose sought to be effected; (2) the members of the class are treated alike; and (3) the classification does rest on some reasonable basis.

III. THE STATUTES DO NOT VIOLATE THE DUE PROCESS CLAUSE.

A. Due Process Standard of Review

Plaintiff's argue the statutory three store maximum violates their due process rights. In *R.L Jordan Company, Inc. v. Boardman Petroleum, Inc.*, 338 S.C. 475, 527 S.E.2d 763 (2000) the South Carolina Supreme Court adopted the current due process standard. The Court stated:

> Until today, we have adhered to the traditional substantive due process analysis developed by the United States Supreme Court during the first third of the 20th century. Under this "Lochner Era" approach, statutes regulating private economic relationships, such as this price control statute, are subject to a unique constitutional test, which most fail to pass. 527 S.E.2d at 764.

The Court then declared the new due process standard as follows:

> Only South Carolina and Georgia have continued to adhere to this traditional approach.
>
> The modern rule gives great deference to legislative judgment on what is reasonable to promote the public welfare when reviewing economic and social welfare legislation. 2 Rotunda & Nowak, *Treatise on Constitutional Law*, § 15.4 (1992). *Legislation is not "overturned unless the law has no rational relationship to any legitimate interest of government.*" Id. At p. 407. This is the same

> standard we apply when reviewing substantive due process challenges to other types of statutes. E.g., *State v. Kiser*, 288 S.C. 441, 343 S.E.2d 292 (1986). (Emp. added.)
>
> Accordingly, we overrule our cases which apply the traditional approach, and adopt this standard for reviewing all substantive due process challenges to state statutes: "*Whether it bears a reasonable relationship to any legitimate interest of government.*" Id at 765. (Emp. added).

In *Treatment and Care of Luckabaugh*, 351 S.C. 122, 568 S.E.2d 338 (2002) the Supreme Court further refined the test:

> When an act is challenged under the due process clause, this "Court only requires the act to be reasonably designed to accomplish its purposes, unless some fundamental right or suspect class is implicated." *State v. Hornsby*, 326 S.C. 121, 125-26, 484 S.E.2d 869, 872 (1997). Legislation restricting or impairing a fundamental right "is subject to 'strict scrutiny' in determining its constitutionality." *Hamilton v. Board of Trustees*, 282 S.C. 519, 523, 319 S.E.2d 717, 720 (Ct. App.1984). *Legislation that does not infringe on fundamental rights is subject only to a rational basis test.* 19 S.C. Juris. *Constitutional Law* § 74 (1993). Under either type of analysis, the one who attacks the law bears the burden of showing it is unconstitutional. *See State v. Hornsby, supra.* 568 S.E.2d at 347. (Emp. added).

Obviously the right to own a fourth liquor store in South Carolina is not a fundamental right. Accordingly, the rational basis test is used. The rational basis looks at whether the three store limit bears a reasonable relationship to any legitimate interest of government. The burden is on the Plaintiff to show it does not. The Circuit Court found that the Plaintiff has failed to meet its burden.

See *Davis v. Query*, 209 S.C. 41, 56, 39 S.E.2d 117, 124 (1946) (recognizing the "fundamental fact" that a liquor retailer "is not engaged in an ordinary business and has no vested right to operate, despite his license, in any manner other than that dictated by

the state; his is a perilous business; there is probably no field in which legislative bodies, and the people themselves in referenda, have been more fickle").

IV. DUE PROCESS AND EQUAL PROTECTION CHALLENGES TO ABC LICENSING STATUTES

As the U.S. District Court very recently stated in a similar case, the applicant's "due process and equal protection argument's fly together." *McCurry v. Alcoholic Beverage Control Division*, 4 F. Supp. 3d 1043 (E.D. Ark. 2014).

45 Am.Jur. 2d Intoxicating Liquor §102 states:

> As a general rule, a state may, without impairing constitutional rights, limit the number of liquor licenses that may be issued within a given area or political subdivision when the public good seems to so require. Placing a limitation on the number of licenses which will be issued for the sale of intoxicants within a municipality or within a given area is not in itself prohibitory, and is recognized as a legitimate regulation tending to promise public health, safety, and welfare within the police power, at least as long as the limitation is not carried to such an extreme as to amount to an absolute or practical prohibition. Such statutes have been upheld against attack on the grounds that they deny equal protection of the laws, create an illegal monopoly, discriminate in favor of a limited number of licensees, and amount to class legislation. They work no unlawful discrimination, since all have an equal right to apply for one until the maximum number of licenses are issued, and when the maximum is reached, all are equally excluded from applying. *The regulation of the number of licenses issued having as its aim controlling the tendency towards concentration of power in the liquor industry, preventing monopolies, avoiding practices such as indiscriminate price cutting and excessive advertising, and preserving the right of small, independent liquor dealers to do business is not discriminatory and does not violate equal protection principles.* (Emp. added.)

Virtually every court which has examined limitations on the number of licenses against due process and equal protection claims has upheld them. See *Parks v. Allen,* 426

F.2d 610 (5th Cir. 1970) (2 licenses per family); *McCurry v. Alcoholic Beverage Control Divisions,* 4 F.Supp. 3d 1043 (E.D. Ark. 2014) (1 License); *Peoples Super Liquor Stores, Inc. v. Jenkins*, 432 F.Supp.2nd 200 (2006) (3 licenses); *Johnson v. Martignetti*, 374 Mass. 784, 375 N.E.2d 290 (1978) (3 licenses); *Granite State Grocers Assoc. v. State Liquor Commission*, 112 N.H. 62, 289 A.2d 399 (1972) (2 licenses); and *The Grand Union Co. v. Sills*, 43 N.J. 390, 204 A.2d 853 (1964) (2 licenses). *See also, Maxwell's Pic-Pac, Inc. v. Dehner,* 739 F.3d. 936 (6th Cir. 2014) (Kentucky statute which barred grocery and convenience stores from selling liquor while permitting drug stores and others from doing so did not violate due process); *Manuel v. State of Louisiana,* 982 So.2d 316 (2008) (three tier system didn't violate Sherman Act); *Massachusetts Food Assoc. v. Massachusetts Alcoholic Beverages Control Commission*, 197 F.3d. 560 (1st Cir. 1999) (3 License limitation does not violate Sherman Act.)

Several of the cases cite the public policy reasons for limiting the number of licenses which a person may hold. In *Johnson v. Martignetti, supra*, the Massachusetts Supreme Court stated:

> First, many sound reasons have been advanced to support restrictions on the number of liquor licenses allowed any one business interest. Concentration of retailing in the hands of an economically powerful few has been thought to intensify the dangers of liquor sales stimulations, thereby threatening trade stability and promotion of temperance. Regulation of the number of licenses issued, therefore, aims at controlling the tendency toward concentration of power in the liquor industry; preventing monopolies; avoiding practices such as indiscriminate price cutting and excessive advertising; and preserving the right of small, independent liquor dealers to do business.

In *Granite State Grocers Assoc. v. State Liquor Commission*, *supra*, the New Hampshire Supreme Court stated:

> The obvious purpose of this well-rounded regulatory system is to supervise and to fractionalize the beverage industry....
>
> The belief that concentration of control within the alcoholic beverage industry should be avoided is not unique to New Hampshire. At least twenty states similarly restrict the number of alcoholic beverage permits. Such statutes have been held constitutional as serving a public purpose in the two states where the question has been considered.
>
> The issue here is whether the limitation confers a public benefit, not whether it also incidentally confers a private benefit.
>
> Regulations against concentration in the alcoholic beverage business necessarily discriminate against chain stores.
>
> Moreover, the only evidence suggesting that the limitation was intended as class legislation is that the smaller grocers were pleased with it. That a law is popular is insufficient to make it unconstitutional. 289 A.2d at 402.

In *The Grand Union Company v. Sills*, *supra*, the New Jersey Supreme Court stated:

> In fixing its policy, the Legislature accepted widely held views as to sound liquor control. These include beliefs that the consumption of liquor is elastic rather an inelastic, that price cuttings and their advertisement, along with comparable practices, are undesirable in the liquor field as tending to stimulate consumption, and that absentee ownership or domination of retail establishments by distillers or other economically powerful interests, or the concentration of retaining in the hands of an economically powerful few, would intensify the dangers of sales stimulations and other abuses and would be inimical to temperance and trade stability. 204 A.2d at 859.

The court also stated:

> Similarly, it may not be said as a matter of law that the New Jersey Legislature's conclusion, that restricting multiple retail holdings would serve the interests and

> purposes of sound and effective liquor control, had no connection with the public health, safety, morals or general welfare. It may be that the acknowledged sales stimulating abilities and tendencies of the chain liquor store operation have thus far not been as inimical as in the tied house system. But the Legislature, being aware of the threatened growth of chain liquor stores, including those associated with well-known supermarkets and discount establishments, need not wait until the evils have become flagrant and the State's liquor control policy has been impaired. *Id.* at 862.

In *Parks v. Allen, supra*, the Fifth Circuit Court of Appeals adopted the District Court's Order upholding against due process and equal protection grounds an ordinance limiting two licenses per family. The District Court Order described the rationale for the limitation as follows:

> Evidence produced at the hearing shows that there is no city regulation governing discrimination in pricing and/or brand preferences. But, in spite of state-prohibitions on the subject, there exist preferential pricing in favor of large retailers usually in the form of discounts or 'extras,' i.e. a 13th bottle to the case, etc. Also, scarce preferred brands are often 'paired' with volume purchases of common brands. Moreover, again in spite of state prohibitions to the contrary, 'split deliveries' exist wherein a discount is granted for large purchases delivered to two or more locations. Small single-location licensees have found it difficult to survive under such circumstances and, in some instances, have been driven out of business.
>
> While 'bigness' itself can produce such abuses, the concentration of numbers of licenses in one family can and does create additional opportunities to nullify competition. Thus, volume could be built up by combined purchases between family licensees and 'split deliveries' could easily be arranged under such circumstances. Moreover, such concentration of licenses in one geographical area could itself facilitate retail price-fixing, even under a competitive system. 426 F.2d at 613.

The Court found the ordinance valid, stating:

> Tested on the above principles, there is no hesitancy in concluding that the ordinance in question reasonably relates to the problem sought to be controlled....Certainly, it cannot be said as a matter of law that the ordinances have no rational basis on which to rest. Their enforcement tends to increase competition and lessen the evils described of price discrimination and split deliveries.
>
> Over and beyond such factual determination, however, the plaintiff contends that the ordinances per se are unconstitutional in that they penalize him unjustly. Thus, 'the condition of a man's birth or a matter over which he has no control cannot be made the basis of a rule restricting him from a license unless his condition is something that would make him unfit.' This claim that the ordinances are facially unconstitutional is likewise rejected. The argument presupposes that the sale of liquor is a right, rather than a privilege. And the test is the reasonableness of the ordinance as relates to the business licensed and not the reasonableness as it relates to a particular applicant. As seen, the ordinance is reasonably related to the control of abuses in the industry and plaintiff is on prior notice of its requirements. The mere fact that he does not qualify by virtue of birth is no bar, even though it might create a personal hardship. *Id.* at 614.

In *McCurry v. Alcoholic Beverage Control Division, supra*, the Federal District Court in Arkansas recently stated:

> The State's goal of preventing unfair competition, though, is a legitimate interest.
>
> In essence, the statutes prevent chains of liquor stores. This is apparently a common aspect of many State liquor regimes. *E.g., Wine and Spirits Retailers, Inc. v. State of Rhode Island and Providence Plantations*, 364 F.Supp.2d 172, 174-75 (D.R.I. 2005). These laws' effect on competition, and ultimately on supply and price, is a matter of reasonable debate. *Wine and Spirits Retailers*, 364 F.Suipp.2d at 181-82. A legislator could conclude that requiring very diffuse ownership of liquor permits promotes healthy competition in that market. This may or may not be correct in fact or wise as a matter of economic

policy. But the State's chosen method for preventing unfair competition is not irrational. 4 F.Supp.3d at 104.

CONCLUSION

Based on the foregoing, the Court should: (1) affirm the circuit court and (2) declare the Statutes constitutional because they are a valid exercise of the General Assembly's police powers and because they do not violate South Carolina's Equal Protection and Due Process Clauses.

As the U.S. Supreme Court has repeatedly stated, "The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Grenholm v. Heald*, 544 U.S. 460, 488 (2005).

"Because of its inherent evils, liquor has always been dealt with as a subject apart. ...Its sale may be prohibited entirely or permitted under severe restrictions." *The Grand Union Co. v. Sills, supra*, 204 A.2d at 857.

"The belief that concentration of control within the alcoholic beverage control industry should be avoided is not unique to New Hampshire. At least twenty states similarly restrict the number of alcoholic beverage permits." *Granite State Grocers Association v. State Liquor Commission, supra*, 289 A.2d at 402.

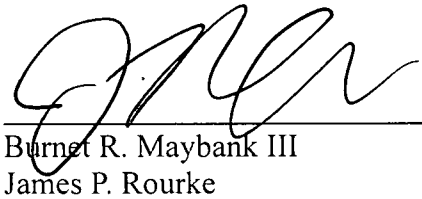
As stated above, many sound reasons have been advanced to support restrictions on the number of liquor licenses allowed any one business interest. Such restrictions have been upheld in virtually every case considering the issue.

The three store limitation bears a reasonable relationship to the legitimate interest of government.

The Court should affirm the Circuit Court decision which found that (1) the three store limit does bear a reasonable relation to the legislative purpose sought to be effected; (2) the members of the class are treated alike; and (3) the classification does rest on some reasonable basis.

Lastly, Sections 61-6-140 and 150 were validly enacted as part of the state's police powers.

NEXSEN PRUET, LLC



Burnet R. Maybank III
James P. Rourke
Nexsen Pruet, LLC
Post Office Drawer 2426
Columbia, South Carolina 29201
803-771-8900
Attorneys for Respondent ABC Stores of South Carolina

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PROOF OF SERVICE

I, the undersigned Paralegal of the law offices of Nexsen Pruet, LLC, attorneys for Respondent ABC Stores of South Carolina, certify that I served all counsel in this action with a copy of the FINAL BRIEF OF RESPONDENT specified by mailing a copy of the same United States Mail, prepaid, to the following addresses:

Counsel served:

Carol I. McMahan, Esquire
State of SC Dept. of Revenue
P.O. Box 12265
Columbia, SC 29211

Dwight F. Drake, Esquire
Brian M. Barnwell, Esquire
Nelson Mullins Riley & Scarborough LLP
P.O. Box 11070
Columbia, SC 29211

Baylen T. Moore, Esquire
Baylen T. Moore Attorney at Law, LLC
7001 Saint Andrews Road, Suite 316
Columbia, SC 29212

NEXSEN PRUET, LLC

Michelle Allies, Paralegal
Nexsen Pruet, LLC
Post Office Drawer 2426
Columbia, SC 29201
803-771-8900

Columbia, South Carolina
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