THE STATE OF SOUTH CAROLINA
In the Supreme Court

Doyet A. Early, III
Circuit Court Judge

Case No. 2014-CP-02-00259
Appellate Case No. 2014-002728
Op. No. 27709 (S.C. Sup. Ct. filed March 29, 2017)

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

v.

South Carolina Department of Revenue and
ABC Stores of South Carolina, ... Petitioners.

PETITION FOR REHEARING

Pursuant to Rules 221 and 240, SCACR, ABC Stores of South Carolina petition this Court for rehearing regarding the Court's decision in this matter. Petitioner asserts that the Court overlooked or misapprehended the following points in reversing the circuit court's order:

1. In reversing the trial court's ruling in favor of Respondents, the Court misapplied its limited scope of judicial review in cases involving constitutional challenges to legislative enactments. Specifically, the law requires the Court to apply a presumption in favor of constitutionality, that is, to apply *every* presumption in favor of the validity of the statute; repugnance to the constitution must be clear and beyond a reasonable doubt. *In re Stephen W.*, 409 S.C. 73, 761 S.E.2d 231 (2014).

In fact, the presumption of validity attaches *especially* to legislation relating to

police powers. *Casey v. Richland County Council*, 282 S.C. 387, 320 S.E.2d 443 (1984). The exercise of police power is subject to judicial correction only if the action is arbitrary and has *no reasonable relation* to a lawful purpose. *Atlantic Coast Line Railroad Co. v. S.C. Public Service Comm.*, 245 S.C. 229, 139 S.E.2d 911 (1965). This means the Court should accept *any* reason that is not offensive to the Constitution for upholding the provision.

The Court, however, failed to follow this settled standard of appellate review and declined to presume the statute's constitutional validity. Instead, the Court broadened its review and focused on a single justification for upholding the provision to the exclusion of any other lawful explanation against the backdrop of the powerful presumption of validity. The Court then found that lone justification (deemed economic protectionism) to be invalid under the State's police powers. The correct standard of judicial review, however, mandates deference to the legislature where there are other, non-offensive reasons to uphold the statute. This is true even if the Court discovers another reason that the Court finds offends the Constitution.

2. The Court stated "counsel for Respondents repeatedly stated to this Court during oral arguments that the *only* justification for these provisions is that they support small businesses. The record does not contain any evidence of the alleged safety concerns incumbent in regulating liquor sales in this way." Slip at 5 (Emphasis by the Court). In so holding, the Court overlooked that counsel for each Respondent stated at several points during the arguments that support of small businesses was *not* the only justification for the provisions. Rather, the statutes served goals of health, safety, welfare and even

temperance. Respondent points the Court to the following statements by each counsel for Respondents at oral argument:

Time on Video	
16:00	The Court acknowledged each Respondent had "different points of view" as to reasons to uphold the restriction, citing SCDOR's argument as the "purest" of the arguments
	David Crocker, counsel for SCDOR
16:45	Alcohol is inherently dangerous and the legislature may control it under the police powers
17:38	the statute is a valid assertion of police powers
18:30	protection of the citizenry is the purpose, and protectionism is not the predominant goal
23:00	avoiding "rock bottom prices" may be a reason, but temperance and the dangerous nature of alcohol are legitimate reasons under the police powers
25:00	the number of licenses is a red herring; the real question is whether there can be any limitation
25:50	economic consideration is not the "driver" of the act, and not the predominant purpose
28:27	the legislature's attempt to promote the public interest does not always insure the public interest
29:01	the statute should be construed in light of the ABC Act as a whole
29:50 30:35	the General Assembly chose to act, and had a rational basis tied to the nature of alcohol as an inherently dangerous item
	Burnet Maybank, counsel for ABC Stores
31:04 36:14 37:30	the people do not want to turn Pickens County into New Orleans
34:20	alcohol is a dangerous product subject to legislative regulation

Therefore, the Court's limited characterization of the arguments by Respondent is mistaken.

Even so, although lawyers at oral argument may at times stipulate to facts or may abandon arguments resulting in an *affirmance*, the Court should not use this perceived waiver as a basis to *reverse* the judgment below. Instead, apart from the strong presumption of constitutionality, the Court should apply another presumption: That the findings below and the judgment on appeal is correct. *E.g.*, *Weaver v. Recreation Dist.*, 328 S.C. 83, 492 S.E.2d 79 (1997) (trial court's findings come to the appellate court with a presumption of correctness; burden is on appellant to demonstrate reversible error)

South Carolina Constitution article VIII-A establishes the General Assembly's plenary power with respect to prohibiting or regulating the manufacture, sale, and retail of alcoholic liquors or beverages with the State. In fact, the Twenty-First Amendment grants broad powers to the States, unless in the exercise of those powers the State law transgresses some other provision of the Constitution. *E.g.*, *Granholm v. Heald*, 544 U.S. 460 (2005) (States have broad power to regulate liquor under § 2 of the Twenty-first Amendment). Even if this Court decides that there are better ways to accomplish these goals, or believes that the legislature's attempt to address these concerns in this manner is unwise or even foolish, that decision is not one the Court should make, for to do so violates basic notions of separation of powers doctrine.

3. The Court held that there was "*no indication in the record* that these provisions exist for *any other reason* than economic protectionism..." In so ruling, the Court overlooked the following things in the record that indicate otherwise:

A. In the order on appeal, the circuit court judge quoted extensively from Judge Geathers' article, *The Regulation of Alcoholic Beverages in South Carolina.* (R. p. 11, 19, 20). Judge Geathers points out "[t]his 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." (R. p. 11). The circuit court judge noted Judge Geathers pointed out the long history of regulation of the manufacture, sale and consumption of alcoholic beverages "for as long as the states have had laws" (dating back 335 years). (R. p. 11). The circuit court judge also quoted from 48 C.J.S. *Intoxicating Liquors* § 62, which notes that regulation of liquor licenses "is recognized as a legitimate regulation tending to promise public health, safety, and welfare within the police power, as least as long as the limitation is not carried to such an extreme as to amount to an absolute or practical prohibition." (R. p. 15). Although this Court criticized the method the Legislature employed to serve that policy, reversing the circuit court based upon such criticism treads across the boundary separating the powers of government.

B. The circuit court judge noted other jurisdictions that have upheld the same limitation our Legislature enacted. (R. p. 16, citing *Parks v. Allen*, 426 F.2d 610 (5th Cir. 1970) (2 licenses per family); *Peoples Super Liquor Stores, Inc. v. Jenkins*, 432 F.Supp.2d 200 (2006) (3 licenses); *Johnson v. Martignetti*, 375

N.E2d 290 (Mass. 1978) (3 licenses); *Granite State Grocers Assoc. v. State Liquor Commission*, 289 A.2d 399 (N.H. 1972) (2 licenses); and *The Grand Union Co. v. Sills*, 204 A.2d 853 (N.J. 1964) (2 licenses). *Also see Maxwell's Pic-Pac, Inc. v. Dehner*, 739 F.3d 936 (6th Cir. 2013) (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)). The circuit court judge noted other policies discussed in those cases, including "the connection with the public health, safety, morals or general welfare... 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." (R. pp. 17-19).

C. The circuit court judge cited to this Court's decision in *Pendarvis v. Berry*, 214 S.C. 363, 52 S.E.2d 705 (1949), in which the Court noted "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." (R. p. 21).

D. The circuit court judge cited to this Court's decision in *Davis v. Query*, 209 S.C. 41, 39 S.E.2d 117 (1946) in support of the statement that "[i]t 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." (R. p. 21).

E. In its Answer to the Complaint, Respondent ABC Stores asserted the statute was a valid exercise of police power under article VIII-A (R. p. 44, ¶¶ 24-25).

F. In its Motion for Summary Judgment, Respondent ABC Stores contended the statute was valid under the police powers, citing to Judge Geathers article (R. pp. 107-108) and the policy reasons set forth in other jurisdictions (R. pp. 111-117). These included "protection of the public health and morals." (R. p. 117).

G. In its Motion for Summary Judgment, SCDOR also proffered health, safety and morals as policies being served by the Legislature's choice in enacting the statute. (R. pp. 132-136). These included "the goals of temperance, trade stability and fears of excessive advertising leading to increased consumption...." (R. p. 135).

H. In arguments before the circuit court, SCDOR stated "these laws may very well have some economic impact. They may have some private economic benefit. But the fact remains that the enactment of these laws, the basic effect, is for temperance." (R. p. 253, ll. 1-5; see also p. 253, l. 6 - p. 255, l. 8).

I. In arguments before the circuit court, Respondent ABC Stores argued "it is a typical exercise of the police power of the state and designed to protect the morals and welfare of the public." (R. p. 257, ll. 10-13).

4. In a footnote, the Court stated, "I note that this argument was exclusively relied upon during oral arguments by Respondents' very experienced counsel, not just as a consequence of the Court's questioning. Counsel was not prohibited from propounding

any other basis for the regulation, and therefore should be held to his statements to the Court that this is a protectionist statute." Slip at note 7. In holding counsel to these statements as a justification for *reversing* the trial court, the Court overlooked that although counsel did mention protection of small businesses, counsel also proffered other reasons, saying things like "Greenville does not want to be New Orleans" and noting temperance as a justification. *Cf. Bowaters Carolina Corp. v. Carolina Pipeline Co.*, 259 S.C. 500, 505, 193 S.E.2d 129, 132 (1972) (holding an appellate court need not pursue an issue appellant conceded during oral arguments; judgment was affirmed)

3. The Court overlooked that even if Respondents had limited their argument in support of affirming the trial court to support of small business, the record contains argument that the provisions do, in fact, serve other important public policies. (Para. 3, above). This Court may *affirm* any ruling, order, decision or judgment upon any ground or grounds appearing in the Record on Appeal. Rule 220(c), SCACR. *See also I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406,526 S.E.2d 716 (2000) (an appellate court may affirm, but may not reverse, for any reason appearing in the record); *Moseley v. All Things Possible, Inc.*, 395 S.C. 492, 719 S.E.2d 656 (2011) (applying Rule 220(c) to affirm a finding where the record supports that finding).

4. If the Court revisits the "police powers" analysis, the Court should also address both the Equal Protection and the Due Process arguments Appellant made below and on appeal. Petitioner raises this point so as not to be deemed to have waived it through this Petition. Should the Court reach these issues, then the analysis set forth in the dissent should prevail: These provisions are not violative of Appellant's equal protection or due process

rights under appropriately applied scrutiny.

In reversing the circuit court's order, this Court abandoned the restrictions on its judicial review, deference accorded to legislative expressions of policy, and the presumption of validity the Court applies to legislative enactments, especially those enacted under the broad police powers applicable to alcohol. These matters are not within this Court's powers. As the Supreme Court of the United States explained:

> There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy. In this manner the Due Process Clause was used, for example, to nullify laws prescribing maximum hours for work in bakeries, *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905), outlawing 'yellow dog' contracts, *Coppage v. Kansas*, 236 U.S. 1, 35 S.Ct. 240, 59 L.Ed. 441 (1915), setting minimum wages for women, *Adkins v. Children's Hospital*, 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed. 785 (1923), and fixing the weight of loaves of bread, *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, 44 S.Ct. 412, 68 L.Ed. 813 (1924). This intrusion by the judiciary into the realm of legislative value judgments was strongly objected to at the time, particularly by Mr. Justice Holmes and Mr. Justice Brandeis. Dissenting from the Court's invalidating a state statute which regulated the resale price of theatre and other tickets, Mr. Justice Holmes said,
>
> > 'I think the proper course is to recognize that a state Legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain.'
>
> [*Tyson & Brother, etc. v. Banton*, 273 U.S. 418, 445, 446 (1927)]
>
> And in an earlier case he had emphasized that, 'The criterion of constitutionality is not whether we believe the law to be for the public good." [*Adkins v. Children's Hospital*, 261 U.S. 525, 567, 570 (1923)]
>
> The doctrine that prevailed in *Lochner*, *Coppage*, *Adkins*, *Burns*, and like cases—that due process authorizes courts to hold laws unconstitutional when they

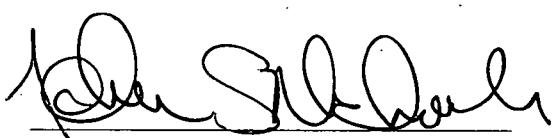
> believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. As this Court stated in a unanimous opinion in 1941, 'We are not concerned * * * with the wisdom, need, or appropriateness of the legislation.'[*Olsen v. Nebraska ex rel. Western Reference & Bond Assn.*, 313 U.S. 236, 246 (1941)] Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to 'subject the state to an intolerable supervision hostile to the basic principles of our government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure.'[*Sproles v. Binford*, 286 U.S. 374, 388 (1932)] It is now settled that States 'have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law.' *Lincoln Federal Labor Union, etc. v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 536 (1949)].

Ferguson v. Skrupa, 372 U.S. 726, 730-731 (1963).

The majority's formulation of rational basis review in this case is in actuality a "rational basis 'plus'" standard, requiring invalidity even when a statute has a legitimate basis if the Court deems the legislature's offered basis as unwise. This test results in a substantial limitation of legislative power and casts doubt on any number of statutes where the Court disagrees with legislative wisdom. It is, as the dissent notes, a full-scale resurrection of *Lochner*.

For these reasons the Court should grant this Petition and permit additional argument. The Court should also withdraw its prior decision and issue a new decision upholding the trial judge's determination that these provisions are not an invalid expression of the State's police powers, especially with regard to regulation of alcohol. The Court should then address Appellant's additional constitutional arguments and uphold the trial judge's determination that these provisions do not violate Appellant's rights under the Equal Protection or Due Process Clauses.

Respectfully submitted,



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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel of record with a copy of the *Petition for Rehearing* by mailing copies of the same by United States Mail with first class postage prepaid to the following addresses:

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