

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM AIKEN COUNTY  
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

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Case No. 2014-CP-02-00259

Appellate Case No. 2014-002728

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

v.

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

**RECEIVED**

**MAY 22 2017**

**S.C. SUPREME COURT**

Appellant,

Respondents.

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**APPELLANT'S RETURN TO PETITION FOR REHEARING**

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Respondent ABC Stores of South Carolina ("ABC Stores") petitions this Court for a rehearing. As the Court noted in its decision, ABC Stores lobbied before the General Assembly on behalf of its members who are retail liquor store owners. It argues that the Court overlooked something in the record showing that the statutes at issue, S.C. Code Ann. §§ 61-6-140 and -150 (the "Statutes"), exist for a purpose other than providing economic protectionism for small retail liquor store owners. Tellingly, the South Carolina Department of Revenue ("DOR"),<sup>1</sup> the agency

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<sup>1</sup> As noted by the Court at oral argument, the DOR had the "purest approach" to defending this lawsuit while ABC Stores was motivated by its member's business interest. (Oral Arg. Audio at mins. 15:48—16:14.)

charged with the administration of the Statutes throughout the State, did not join in ABC Stores' petition.<sup>2</sup>

ABC Stores' petition should be denied because it has not identified anything in the record that this Court overlooked or misapprehended. The Court's decision dated March 29, 2017, should stand as written. Retail Services & Systems, Inc. d/b/a Total Wine & More v. South Carolina Department of Revenue, et al. Op. No. 27709 (S.C. filed March 29, 2017 (Shearhouse Adv. She. No. 13 at 50) (the "Opinion").

### ARGUMENT

**I. The Court did not overlook or misapprehend anything in holding that the Statutes were not a valid exercise of the police powers.**

The Opinion correctly held that the Statutes were not a valid exercise of the General Assembly's police powers because the sole justification for them is economic protectionism. ABC Stores' first point argues that the Court failed to follow the appropriate standard of review in reaching its decision. ABC Stores is incorrect.

The Opinion applied the correct standard: "This Court has a limited scope of review in cases involving a constitutional challenge to a statute because all statutes are presumed constitutional and, if possible, will be construed to render them valid." (Op. p.52 (quoting Curtis v. State, 345 S.C. 557, 569, 549, S.E.2d 591, 597 (2001)).) After carefully considering the record on appeal, the briefing, and the parties' oral argument, the Court correctly concluded that the Statutes' only purpose was economic protectionism, which is not a valid exercise of the police powers. (Id. at p.55.)

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<sup>2</sup> Pursuant to S.C. Code Ann. § 15-53-80, the South Carolina Attorney General was also served with Retail Services & Systems, Inc., dba Total Wine & More's ("Retail Services") lawsuit but declined to participate in it from the start. (Retail Services Br. p.3.)

Points two through second point three<sup>3</sup> in ABC Stores' petition rehash various aspects of the parties' oral argument and the record on appeal but fail to identify any other justification supported by the record that could render the Statutes valid. Indeed, the only justification advanced by the Respondents at oral argument was economic protectionism. (Id. at p.52-55.) Therefore, there was no basis for holding that the Statutes are constitutional, and the Court properly applied its limited scope of review. The petition should be denied.

**A. The only justification relied on by Respondents at oral argument was economic protectionism.**

In points two and four, ABC Stores argues that Respondents advanced a justification other than economic protectionism during oral argument. ABC Stores is incorrect. The Court repeatedly asked Respondents to identify a legitimate government interest promoted by the Statutes. The only answer Respondents gave was that it protects small businesses by fixing prices:

- Chief Justice Toal: Is that a legitimate, if part of the reason why this is enacted is to protect the independent small liquor store owners is that a proper exercise of the police power?

DOR Counsel: Yes, ma'am. (Oral Arg. Audio at mins. 18:47—19:01.)

- Chief Justice Toal: We have really very much departed from allowing the government to purely on protection of the interest of individual small businesses price fixing. We have really gotten away from that and if what you've been arguing there is that part of is that they don't want rock bottom prices and want to protect or arbitrarily put a floor on pricing, haven't we gotten away from that jurisprudence in this state and all over the country?

DOR Counsel: Well hopefully not with the sale of liquor. . . .

Chief Justice Toal: So we have a legitimate governmental interest in setting a floor on liquor prices?

DOR Counsel: Yes, ma'am, as long as . . . the citizenry is protected, as long as there is some rational basis and . . .

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<sup>3</sup> The petition's points are incorrectly numbered with a second point three following the first point four.

Chief Justice Toal: What is the protection of the citizenry that is accomplished by setting an arbitrary floor, or supported floor or whatever, on liquor prices?

DOR Counsel: Sure, because they're dealing with like I said a good that is inherently dangerous. (Id. at 19:41—20:50.)

- Justice Kittredge: [T]he driving force you believe that would allow this Court to uphold the statute against this constitutional challenge the rational relationship, the justification, the government interest is because the state does not want rock bottom prices. . . . [I]s that true or not true?

DOR Counsel: No sir. It is true. (Id. at 23:35—24:06.)

In their petition, ABC Stores' cites to other portions of the oral argument where Respondents stated that "alcohol is inherently dangerous," "the statute is a valid assertion of police powers," and temperance is a legitimate government interest. (Pet. p.3) These are conclusory statements that do not answer the relevant question. They do not explain how the Statutes are related to temperance or the prevention of alcohol's inherent dangers. They do not explain why the Statutes are a valid assertion of the police power. The Court gave Respondents numerous opportunities to explain whether the Statutes are related to anything besides economic protectionism, and they could not. They could not because it is apodictic that the Statues do not have any other purpose. Respondents' petition should be denied. (See Op. p.55 n.7.)

**B. The record on appeal does not support any justification other than economic protectionism.**

In points three and second point three, ABC Stores argues that there is evidence in the record showing that the Statutes relate to a legitimate government interest. In support, ABC Stores cites Respondents' pleadings, briefing, and the case law cited in that briefing. (Pet. pp. 5-7.) The Court considered all of this information in reaching its decision. (Op. p.54; Oral Arg. Audio mins. 17:45—18:25; see also Retail Services Br. pp. 15-18.) ABC

Stores attempt to re-litigate these issues does not provide grounds for a rehearing. See Kennedy v. South Carolina Retirement Sys., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) (holding it is not “the purpose of a petition for rehearing to have the case tried in the appellate court a second time”).

Moreover, allegations in pleadings and statements of counsel in briefing are not evidence. See Clark v. Greenville Cnty., 313 S.C. 205, 208, 437 S.E.2d 117, 118 (1993) (holding “counsel’s statement submitted in opposition to the motion for summary judgment” was not evidence); see also George v. Empire Fire & Marine Ins. Co., 344 S.C. 582, 593, 545 S.E.2d 500, 505 (2001) (“The party opposing summary judgment cannot simply rest on mere allegations or denials in the pleadings.”). Further, the case law cited by ABC Stores is irrelevant because the evidence in the records before those courts does not exist in the record before this Court. (Op. p. 54.)

Additionally, ABC Stores does not challenge the Court’s holding that the plain language of the Statutes and the statutory scheme to which they belong supports the conclusion that they serve no purpose other than economic protectionism. (Op. p.54-55.) Rather, ABC Store’s argument, as the Court noted, boils down to “it’s just liquor” so any regulation is justified. That is not the law of this State. See S.C. Const. art. VIII-A, § 1, see also State ex rel. George v. City Council of Aiken, 42 S.C. 222, 20 S.E. 221, 230 (1894) (“[I]f the act is not a police measure, it is unconstitutional.”). The petition should be denied.

## **II. ABC Stores’ Equal Protection and Due Process arguments.**

Because the Statutes are not a valid exercise of the General Assembly’s police powers, the majority Opinion did not address the parties’ Equal Protection and Due Process arguments. (Op. p.56 n.8 (citing Futch v. McCallister Towing of Georgetown, Inc., 335

S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (finding appellate courts need not reach remaining issue when one issue is dispositive). ABC Stores' second point four, however, addresses them. Retail Services hereby states that it believes that no response is necessary to these arguments but it will timely file one should the Court request it. See Rule 240(e), SCACR.

### **CONCLUSION**

The Statutes have no purpose other than to provide economic protectionism for small retail liquor stores. Therefore, they are unconstitutional as violative of the General Assembly's police powers under article VIII-A, section 1 of the South Carolina Constitution. ABC Store's petition should be denied on the briefing and without any further argument.

***[SIGNATURE ON FOLLOWING PAGE]***

Respectfully submitted

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PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellant, Retail Services & Systems, Inc., dba Total Wine & More, do hereby certify that they have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same United States Mail, prepaid, to the following address(es):

Pleadings: **APPELLANT'S RETURN TO PETITION FOR REHEARING**

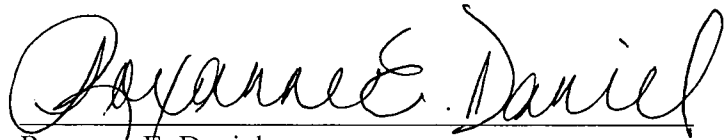
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