No. 12-6056, 12-6057 and 12-6182

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MAXWELL'S PIC-PAC, INC.; FOOD WITH WINE COALITION, INC.
Plaintiffs-Appellees-Cross-Appellants,

v.

TONY DEHNER, in his official capacity as Commissioner of the Kentucky Department of Alcoholic Beverage Control; DANNY REED in his official capacity as the Distilled Spirits Administrator of the Kentucky Department of Alcoholic Beverage Control,
Defendants-Appellants-Cross Appellees,

and

LIQUOR OUTLET, LLC, d/b/a The Party Source,
Intervenor-Appellant-Cross-Appellee

Appeal from the United States District Court
for the Western District of Kentucky
Case No. 3:11-CV-00018-JGH
Honorable, John G. Heyburn, II, United States District Judge

AMICUS CURIAE BRIEF OF AMERICAN BEVERAGE LICENSEES IN SUPPORT OF DEFENDANTS-APPELLANTS, ET AL, FOR REVERSAL

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Corporate Disclosure Statement

The American Beverage Licensees is a New York non-profit corporation. It does not have any parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

INTERESTS OF AMICUS CURIAE[1]

American Beverage Licensees (ABL) was created in 2002 after the merger of the National Association of Beverage Retailers (NABR) and the National Licensed Beverage Association (NLBA).

The ABL is an association representing licensed off-premises retailers (such as package liquor stores) and on-premises retailers (such as bars, taverns, restaurants) across the nation.

ABL has nearly 20,000 members in 34 states (some of which are within the jurisdiction of the Sixth Circuit Court of Appeals). Many of ABL's members are independent family owned operations who assure that beverage alcohol is sold and consumed responsibly by adults in conformity with the laws of the state in which each member does business.

ABL monitors federal legislation, judicial decisions and trends of concern to beverage alcohol retailers. ABL is strongly committed to working with others under effective regulation toward the responsible sale of beverage alcohol products.

[1] No counsel for any party authored this brief in whole or in part. No party or party's counsel contributed money for the preparation or submission of this brief. No person other than amicus curiae (or its members) contributed money that was intended to fund the preparation or submission of this brief.

ABL believes that state laws concerning the structure of a state's beverage alcohol distribution system are entitled to judicial deference.

ABL supports the defendants-appellants and urges reversal of the District Court decision.

AUTHORITY FOR FILING BRIEF

Authority for filing this brief is pursuant to Rule 29(b) of the Federal Rules of Appellate Procedure.

SUMMARY OF ARGUMENT

Rational basis review is deferential. The State has no obligation to produce evidence to support the rationality of its statutory classifications and may rely entirely on rational speculation unsupported by any evidence or empirical data.

Special deference should be given to the legislative judgment at issue here because Kentucky's right to determine the structure of its beverage alcohol distribution system is sanctioned by the Twenty-first Amendment which is just as much a part of the Constitution as is the Equal Protection clause.

When the seminal version of the challenged law was first enacted in 1938, it evidenced rational legislative line drawing in allowing pharmacies to sell spirits and wine while withholding that privilege from grocery stores and gasoline stations. This is because during the preceding era of National Prohibition pharmacies had been permitted to sell medicinal, while neither grocery stores nor gasoline stations had that experience.

The challenged law remains rational. The Kentucky Legislature could rationally conclude that an expansion of entities permitted to sell spirits and wine would be detrimental to the public policy of promoting temperance and that it should, however continue to permit those already selling to continue to sell, thereby recognizing their experience with regulation and their reliance interests.

The decision of the trial court should be reversed.

ARGUMENT

THE CHALLENGED LAW WAS A RATIONAL EXERCISE OF KENTUCKY'S RIGHT TO STRUCTURE ITS BEVERAGE ALCOHOL DISTRIBUTION SYSTEM WHEN ENACTED IN 1938 AND CONTINUES TO SERVE A RATIONAL PURPOSE TODAY. THE DISTRICT COURT SHOULD BE REVERSED.

A. Introduction.

It has long been recognized that "liquor" is "a lawlessness unto itself" [2] and that the Twenty-first Amendment, U.S. Const. Amed. XXI, gives states the primary responsibility for regulating traffic in wine, beer and spirits for use within their borders. Being able to determine who may be licensed to sell beverage alcohol and the number and types of outlets remains central to a State's ability to regulate.

The last seven decades have demonstrated the utility and effectiveness of state-based regulation of beverage alcohol. Before and during National Prohibition, abuse of beverage alcohol was an acute problem generating constant public outcry. Because of effective state regulation, since repeal of National Prohibition it has been no more than a chronic problem.

Regulation, while no longer the constant subject of debate, remains necessary. Public concern with both intemperate and underage consumption is

[2] *Duckworth v. Arkansas*, 314 U.S. 390, 398-399 (1941) (Jackson, J., concurring in result). (In the words of Justice Jackson: "The people of the United States knew that liquor is lawlessness unto itself. They determined that it should be governed by a specific and particular Constitutional provision.")

obvious and justified. State enforcement powers are needed to curb excessive sales, to avoid disorderly market conditions and to ensure compliance with state regulatory schemes.

State laws, especially long standing laws, dealing with who is allowed to traffic in beverage alcohol should not be set aside lightly. Otherwise, there is great danger that the balance struck by a State's legislature – furthering temperance by restricting selling while not endangering temperance by over-restricting and thereby inciting unregulated sales – will be severely compromised.

This case involves a challenge to a long standing law enacted pursuant to Kentucky's police power and implicates the interplay between the Twenty-first Amendment and the Equal Protection clause.

State laws regulating beverage alcohol must survive some form of Equal Protection rationality review. See, *Craig v. Boren*, 429 U.S. 190, 205 (1976) ("Our view is, and we hold, that the Twenty-first Amendment does not save the invidious gender-based discrimination from invalidation as a denial of equal protection of the laws in violation of the Fourteenth Amendment."). But, it is noteworthy that the Supreme Court has never held that the Twenty-first Amendment is irrelevant in a judicial review of mere economic classification involving regulation of beverage alcohol. Since the Equal Protection clause and the Twenty-first Amendment are parts of the same Constitution the interests sought

to be achieved by both provisions should be considered, with due deference to a State's Twenty-first Amendment recognized authority to determine how it wishes to structure its beverage alcohol distribution system.

The Twenty-first Amendment authority granted states over how to structure their beverage alcohol distribution systems has been confirmed in numerous Supreme Court decisions going back to the repeal of National Prohibition through the recent decision in *Granholm v. Heald*, 544 U.S. 460, 488-489, 125 S. Ct. 1985, 161 L.Ed2d 796 (2005). [3]

The broad reach of state regulation of beverage alcohol is recognized and confirmed by numerous Acts of Congress. For example, the Webb-Kenyon Act, 27 U.S.C. § 122 was first enacted in 1913 and then re-enacted in 1935 after the repeal of National Prohibition. The 1935 re-enactment serves as explicit post-Twenty-first Amendment Congressional recognition that states are the primary regulators of beverage alcohol within their borders and that state law must be respected.

More recently, in 2000 Congress enacted the "Twenty-first Amendment Enforcement Act", 27 U.S.C. § 122a (b) giving state Attorneys General the ability

[3] See, e.g., *Capitol Cities Cable, Inc. v. Crist*, 467 U.S. 691, 712, 715 (1983) ("The States enjoy broad powers under Section 2 of the Twenty-first Amendment to regulate the importation and use of intoxicating liquor within their borders") and *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980) ("The Twenty-first Amendment grants the States virtually complete control over…how to structure the liquor distribution system.").

to avail themselves of federal court jurisdiction and injunctive relief to enforce state laws dealing with alcohol. In 2006, Congress passed the "Sober Truth in Preventing Underage Drinking Act", 42 U.S.C. § 290bb-25b. In that Act, Congress recognized that "alcohol is a unique product and should be regulated differently than other products" and that "states have primary authority to regulate alcohol distribution and sale, and the Federal Government should supplement and support these efforts." 42 U.S.C. at § 290bb-25b (b) (7).

The foregoing should inform any analysis of the constitutionality of a state law dealing with the structure of a beverage alcohol distribution system.

B. The Rational Basis Test

Under the Equal Protection clause's "rational basis" test for economic legislation, a statute will be afforded a strong presumption of validity and must be upheld as long as there is a rational relationship between the disparity of treatment and some legitimate government purpose. *Hadix v. Johnson*, 230 F.3d 840, 843 (6th Cir. 2000).

Rational basis review is deferential. *Breck v. State of Michigan,* 203 F.3d 392, 395 (6th Cir. 2000). And, "[a]s a general rule, 'legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality.'" *Nordlinger v. Hahn,* 505 U.S. 1, 10; 112 S. Ct. 2326; 120 L.Ed2d 1 (1992).

As noted by this Court in *Hadix*, 230 F3d at 843[4], "[t]he government has no obligation to produce evidence to support the rationality of its statutory classifications and may rely entirely on rational speculation unsupported by any evidence or empirical data." Indeed, "[t]he legislature is not even required to articulate any purpose or rationale in support of its legislation." *Id.*

As this Court pointed out in *Breck*, 203 F.3d at 396[5], "'the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible nor necessary.'"

The District Court acknowledged but misapplied the foregoing principles.

C. There Was in 1938 a Rational Basis for the Classification That Has Been Carried Forward to Ky. Rev. Stat. Ann. § 243.230(5).[6]

In reaching the conclusion that the Equal Protection clause renders the challenged statute invalid, the District Court spends considerable time addressing the fact that drugstores/pharmacies are permitted to sell spirits and wine, while grocery stores (which also may have a pharmacy) are not permitted to do so. So the rationality of that distinction will be a major focus of this brief.

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[4] Citing *FCC v. Beach Comm., Inc.*, 508 U.S. 307, 315; 113 S. Ct. 2096; 124 L.Ed 211 (1993).

[5] Quoting *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 314; 96 S. Ct. 2562; 49 L.Ed 2d 520 (1976).

[6] Arguments made as to Ky. Rev. Stat. Section 243.230 (5) are equally applicable to its accompanying regulation, 804 Ky. Admin. Regs. 4:270 (1982), which is also being challenged.

After the repeal of National Prohibition, the Kentucky Legislature was faced with the task of structuring a regulatory system which would allow for the sale of beverage alcohol but, at the same time, limit access (and thus promote temperance) and retain regulatory control. The Legislature had to draw a line as to who would (and who would not) be permitted to sell spirits and wine. In devising its distribution system, it was rational for the Legislature to consider persons who had recent experience with regulated beverage alcohol. Pharmacies were obvious candidates.

As noted in Last Call, The Rise and Fall of Prohibition, Daniel Okrent, Scribner (2010), the "legal distribution of alcoholic beverages for medicinal purposes was the third of the main exceptions enumerated in the Volstead Act. But unlike the stipulation allowing sacramental uses and the farmer-friendly waiver exonerating cider and homemade wine, it was the one exception that authorized the legal distribution of hard liquor." *Id.* at 193. Sales of medicinal alcohol were permitted in most states (*Id.* at 200), including Kentucky, and many pharmacies did such a lucrative business in medicinal alcohol during National Prohibition that "[a]lmost from the start individual pharmacists devised practices appropriate to their clientele." *Id.* at 196. Attached as Exhibit A is a copy of a 1924 prescription (plate 36 of Last Call) filled by a Covington, Kentucky pharmacist for "Spiritus Frumenti". See also, National Prohibition: The Volstead Act Annotated, Arthur

W. Blakemore, Mathew Bender & Company (2d Ed. 1925), pp. 858-861 (discussing sales at retail and use by pharmacists).

So when the Kentucky Legislature determined in 1938 to allow pharmacies to sell spirits and wine it was clearly engaging in rational line drawing, given that pharmacies had been allowed to fill prescriptions for medicinal alcohol even during National Prohibition. In 1938 pharmacies were not similarly situated to groceries and gasoline stations since neither had been allowed to sell beverage alcohol during National Prohibition.

The District Court recognized that one plausible reason for the line drawn by the Kentucky Legislature in 1938 was that pharmacies were already experienced in selling alcohol products: "Perhaps the General Assembly sought to extend the status quo under which drugstores had sold alcohol ostensibly only for medicinal purposes throughout Prohibition." Document 62, Memorandum Opinion, p. 5. The recognition of that potential reason (i.e., maintaining the "status quo" by licensing entities with experience) for a classification should have ended the Equal Protection inquiry as to the initial enactment of the statute.

Since it is possible to conjecture a rational basis for why in 1938 the Kentucky Legislature would decide to allow pharmacies to traffic in spirits and wine while not allowing other entities who lacked similar experience to do so, the challenged law as initially enacted passes Equal Protection scrutiny. That the

Kentucky Legislature engaged in rational line drawing in 1938 is buttressed by the fact that for more than 70 years no one challenged on Equal Protection grounds the rationality of the line drawn by the Kentucky Legislature.

D. There Remains a Rational Basis for the Kentucky Statute.

Here the District Court determined that the Equal Protection clause requires that the beverage alcohol distribution structure chosen and utilized by Kentucky for the last 70 years must be held invalid and grocery stores (as well as others) must be given the right to be licensed on the premise that there is no longer a rational basis to continue the line drawn by the Kentucky Legislature in 1938.

When enacted the challenged law limited access by limiting the entities who could sell spirits and wine. Limiting access by limiting who may sell is certainly legitimate public policy. It is certainly rational to limit the number of outlets.

Social science research confirms that the number of beverage alcohol outlets in a given area is directly correlated with excessive alcohol consumption and other related harms. *See, e.g.*, The Task Force on Community Preventive Services, *Recommendations for Reducing Excessive Alcohol Consumption and Alcohol-Related Harms by Limiting Alcohol Outlet Density*, Am. J. Prev. Med. 570, 570 (2009). This causal link is supported "by evidence from evaluations of related interventions that affect outlet density (e.g. bans or privatization of alcohol sales)." *Id.* The Task Force concluded that "limiting on-and-off premises alcoholic

beverage outlet density – either by reducing current density levels or limiting density growth – can be an effective means of reducing the harms associated with excessive alcohol consumption." *Id.*

Studies consistently indicate that "more permissive licensing procedures increased the number of on and off-premises alcohol outlets, which in turn led to increases in alcohol consumption." Carla Alexa Campbell, MHSc, *The Effectiveness of Limiting Alcohol Outlet Density As a Means of Reducing Excessive Alcohol Consumption and Alcohol-Related Harms,* Am. J. Prev. Med. 556, 564 (2009). Greater outlet density "is associated with increased alcohol consumption and related harms, including medical harms, injuries, crime, and violence." *Id.* at 566. See also, National Highway Traffic Safety Administration, The Role of Alcohol Beverage Control Agencies in the Enforcement and Adjudication of Alcohol Laws (2003 NHTSA publication), located at www.nhtsa.gov/people/ injury/…/abcroleweb/…/ABCFinal.pdf ("Research conducted over the last three decades demonstrates a connection between alcohol availability and public health outcomes. Within a general population, public health problems will increase as availability increases (through lower prices or increased physical access). . .." *Id.* at p. 1).

It is also rational now to limit the number of outlets by leaving the 1938 enactment in place. Even assuming that there is no longer a difference between

pharmacies which sell groceries and groceries which sell drugs (which is by no means evident and also leaves out the problems of convenience stores and gas stations), this does not mean that there is no rationale for continuing to enforce the law. And the rationale, just like the rationale for the law's initial enactment, need not have been articulated by the Legislature. Legislatures do not usually subject their enactments to periodic review nor does the Equal Protection clause permit the judiciary to require them to do so.

The challenged law is rationale now just as it was at the time of its enactment even if for somewhat different reasons. Limiting access by maintaining the original law is rational. The Legislature could have determined that it did not wish to greatly expand the number of permitted licensees and instead would limit licenses to those entities who already were eligible. This is the equivalent of "grandfathering".

The Supreme Court has held that "grandfathering in" statutory rights or benefits, which always draws lines between those who have already obtained a right or benefit and those seeking to obtain the same, is generally constitutional. "[T]he protection of reasonable reliance interests is not only a legitimate governmental objective: it provides an exceedingly persuasive justification." *Nordlinger*, 505 U.S. at 13.

This Court has also recognized that a legislature's desire to maintain the *status quo* to avoid uncertainty and additional administrative and financial burdens is a reasonable justification for drawing lines. *See TriHealth, Inc. v. Bd. of Comm'rs, Hamilton Cty, Ohio*, 430 F.3d 783 (6th Cir. 2005) (upholding decision to withhold distribution of tax proceeds to several additional hospitals where previously the proceeds had only been distributed to one hospital).

Having given statutory rights previously (and legitimately) to pharmacies, the Equal Protection clause does not require Kentucky to now extend to numerous other entities the same statutory rights because grocery stores now sometimes have pharmacies (and some pharmacies now sometimes sell groceries). Permitting the sales of distilled spirits and wine by grocery stores (and others) would clearly undermine the reliance interests of those pharmacies which structured their businesses around the now challenged law. It would also detrimentally undermine the public policy goal of limiting the number of outlets for the sale of beverage alcohol.[7] A legislature's decision to protect reliance interests and to promote

[7] Although rejecting the chosen method, the District Court conceded that "the State might want to limit accessibility to the general public to avoid abuse of these products. These interests certainly justify tighter control on the sale of these products…." Document 62, Memorandum Opinion, p. 17. The District Court's conclusion that a quota system would better serve the same purpose as the classification at issue here is the type of judicial policy making that is expressly forbidden under the rational basis test. It is not a Court's prerogative to question the wisdom or the manner in which the Legislature attempts to achieve its

temperance by limiting outlets (by maintain the status quo as to license eligibility) are justification for line drawing and defeat an Equal Protection challenge.

In 1938 the Kentucky Legislature permitted pharmacies to sell spirits and wine because they had been regulated in selling during National Prohibition. Since 1938, Kentucky regulators have had experience with spirits and wine sales by pharmacies and pharmacies have had experience being regulated and have relied on their possession of beverage alcohol licenses. While the Legislature is not constitutionally obligated to honor this reliance, it is certainly constitutional for it to do so. It is rational that a legislature would maintain the status quo so as not to extend the right to traffic in beverage alcohol to numerous other entities thereby detrimentally impacting the public policy of fostering temperance by limiting ready availability. The challenged law was rational when passed. It is rational now.

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legitimate purpose as long as there is some conceivable basis for the distinction. *See, Dillinger v. Schweiker*, 762 F.2d 506, 508 (6th Cir. 1985).

CONCLUSION

The decision of the District Court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a) (7) (B) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

I hereby certify pursuant to Fed. R. App. P. 32(a) (7) (C) and Fed. R. App. P. 29(C) that the foregoing *amicus* brief was prepared in 14-point Times New Roman proportionally typeface and contains 3,720 words, according to the count of Microsoft Word Office Suite 2007.

BY: *s/Anthony S. Kogut*
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Dated: February 5, 2013

ANTI-VIRUS CERTIFICATION FORM

Case Name: *Maxwell's Pic-Pac v. Tony Dehner, et al*

Docket Number: 12-6056, 12-6057 ad 12-6182

I, Heather Devereaux, certify that I have scanned for viruses the PDF version of the *Amicus Curiae* Brief of the American Beverage Licensees that was submitted in this case by using Symantec AntiVirus, 10.1.0.394, and found it to be virus free.

BY: *s/Heather Devereaux*

Dated: February 5, 2013 Heather Deveraux

CERTIFICATE OF SERVICE

I certify that the foregoing *amicus curiae* brief was filed with the Clerk using the appellate CM/ECF system on February 6, 2013, all counsel of record are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

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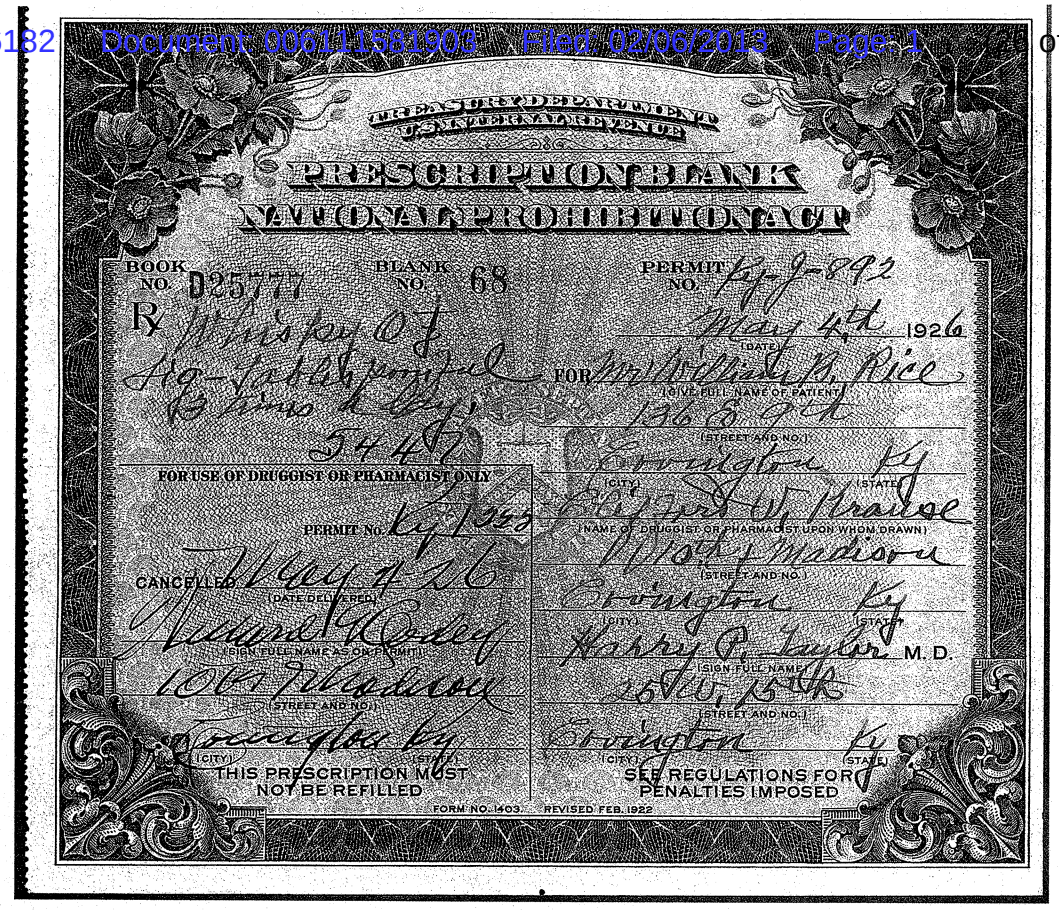

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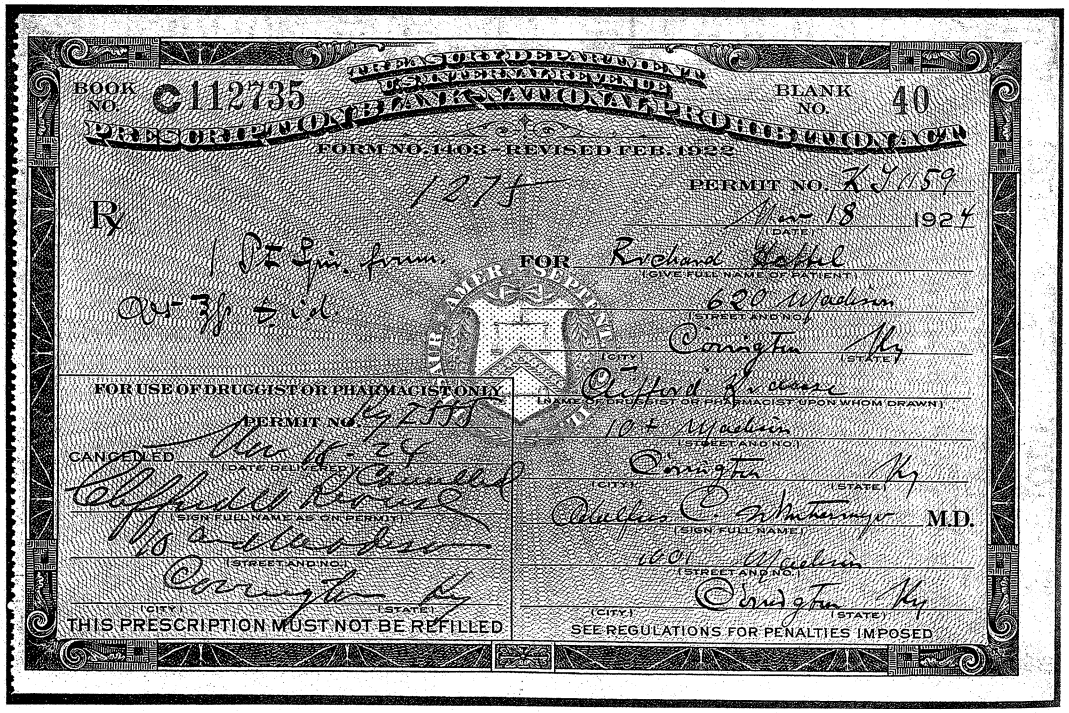

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The going price paid to physicians for a legal liquor prescription was two dollars. "Spiritus Frumenti"—abbreviated by this Kentucky pharmacist as "spir. fru." (36)—is the Latin term for such elixirs; in most cases, it was straight rye.