CASE NUMBERS 12-6056/12-6057/12-6182
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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

v.

TONY DEHNER and DANNY REED,
Defendants/Appellants/Cross-Appellees

and

LIQUOR OUTLET, LLC, DBA THE PARTY SOURCE,
Intervening Defendant/Appellant/Cross-Appellee

On Appeal from the United States District Court,
Western District of Kentucky, Case No. 3:11-cv-00018

PRINCIPAL BRIEF OF THE INTERVENING DEFENDANT/APPELLANT/CROSS-APPELLEE LIQUOR OUTLET, LLC, DBA THE PARTY SOURCE

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ORAL ARGUMENT REQUESTED

LIQUOR OUTLET, LLC, DBA THE PARTY SOURCE'S STATEMENT OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, Intervening Defendant/Appellant/Cross-Appellee Liquor Outlet, LLC, dba The Party Source makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

NO.

If the answer is YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

N/A.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome?

NO.

If the answer is YES, list below the identity of the corporation and the nature of the financial interest:

N/A.

TABLE OF CONTENTS

CORPORATE DISCLOSURE i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES v

STATEMENT IN SUPPORT OF ORAL ARGUMENT xi

JURISDICTIONAL STATEMENT 1

STATEMENT OF THE ISSUES FOR REVIEW 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 3

A. Kentucky's Alcohol Regulation System Arose Out Of The Failure Of Prohibition 4

B. Kentucky Conducted Its Own Study Of Alcohol Regulation 8

C. Kentucky Has Not Changed Its Desire To Prohibit Wine And Distilled Spirits From Being Sold By Grocery Stores And Gas Stations 13

SUMMARY OF ARGUMENT 17

STANDARD OF REVIEW 19

ARGUMENT 20

I. THE DISTRICT COURT ERRED BY IGNORING THE TWENTY-FIRST AMENDMENT AND IN FAILING TO BALANCE ITS IMPORTANCE AGAINST THE EQUAL PROTECTION CLAUSE 20

II. THE DISTRICT COURT'S OPINION VIOLATES THE SEPARATION OF POWERS DOCTRINE AND KY. CONST. §§ 27 AND 28 26

III. KRS 243.230(5) AND ITS ACCOMPANYING REGULATION, 804 KAR 4:270, ARE CONSTITUTIONAL AND DO NOT VIOLATE THE EQUAL PROTECTION CLAUSE 31

A. The District Court Erroneously Conducted Its Rational Basis Analysis In The Present Day Context Instead Of At The Time KRS 243.230(5) Was Enacted 31

B. In Addition To Its Improper Temporal Analysis, The District Court Erroneously Applied The Rational Basis Test To KRS 243.230(5) 39

1. The District Court Failed To Consider That KRS 243.230 Had Already Withstood A Rational Basis Analysis 39

2. *Simms'* Determination Aside, KRS 243.230(5) Does Satisfy The Rational Basis Test 45

3. There Is More Than Enough Available Historical Background And Reasoning From Which To Determine The Rational Basis For KRS 243.230 48

4. The District Court Also Ignored The Record Of Success Of Kentucky's Alcohol Regulation System 48

IV. THE PRACTICAL EFFECTS OF ELIMINATING KRS 243.230(5) AND 804 KAR 4:270 WERE IGNORED BY THE DISTRICT COURT 49

A. Kentucky's Alcohol Regulation System Is A Rational, Well-Reasoned Approach To Alcohol Control 50

B. The District Court Holding That KRS 243.230(5) And 804 KAR 4:270 Violate The Equal Protection Clause Discriminates Against Intervening Defendant And All Similarly Situated Retailers Issues 53

CONCLUSION AND REQUEST FOR RELIEF 56

CERTIFICATE OF COMPLIANCE 58

CERTIFICATE OF SERVICE 59

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS 60

ADDENDUM A1-A25

TABLE OF AUTHORITIES

Cases

37712, Inc. v. Ohio Dept. of Liquor Control,
113 F.3d 614 (6th Cir. 1997) 45

Am. Beverage Ass'n v. Snyder,
700 F.3d 796 (6th Cir. 2012) 19

Authentic Beverages Co., Inc. v. Tex. Alcoholic Beverage Comm'n,
835 F. Supp. 2d 227 (W.D. Tex. 2011) 47

Bacchus Imports, Ltd. v. Dias,
468 U.S. 263 (1984)... 23, 24

Beacon Liquors v. Martin,
279 Ky. 468, 131 S.W.2d 446 (1939).. 42

Blue Movies, Inc. v. Louisville/Jefferson County Metro Gov't,
317 S.W.3d 23 (Ky. 2010)... 24, 25

Borman's, Inc. v. Mich. Prop. & Cas. Guar. Ass'n,
925 F.2d 160 (6th Cir. 1991) 45

Buckley v. Valeo,
424 U.S. 1 (1976)... 27

Cherry Hill Vineyards, LLC v. Baldacci,
505 F.3d 28 (1st Cir. 2007).. 22

Cherry Hill Vineyards, LLC v. Lilly,
553 F.3d 423 (6th Cir. 2008) 21

City of Cleburne, Tex. v. Cleburne Living Ctr.,
473 U.S. 432 (1985)... 34

City of Dallas v. Stanglin,
490 U.S. 19 (1989)... 34

City of Newport v. Iacobucci,
479 U.S. 92 (1986) 26

Clinton v. Jones,
520 U.S. 681 (1997) 27

Com. v. Associated Ind. of Ky.,
370 S.W.2d 584 (Ky. 1963) 28

Cmtys. for Equity v. Mich. High School Athletic Ass'n,
459 F.3d 676 (6th Cir. 2006) 19

Dandridge v. Williams,
397 U.S. 471 (1970) 34

Dept. of Alcoholic Beverage Control v. Liquor Outlet, Inc.,
734 S.W.2d 816 (Ky. App. 1987) 32

E. Ky. Coal Lands Corp. v. Com.,
127 Ky. 667, 106 S.W. 260 (1907) 29

Elk Horn Coal Corp. v. Cheyenne Res., Inc.,
163 S.W.3d 408 (Ky. 2005) 29

FCC v. Beach Communications, Inc.,
508 U.S. 307 (1993) 33, 46

Fed. Distillers, Inc. v. Minn.,
229 N.W.2d 144 (Minn. 1975) 44

Flemming v. Nester,
363 U.S. 603 (1960) 33

Fuson v. Howard,
305 Ky. 843, 205 S.W.2d 1018 (1947) 22, 23

George Wiedemann Brewing Co. v. City of Newport,
321 S.W.2d 404 (Ky. 1959) 25

Granholm v. Heald,
544 U.S. 460 (2005) ..... passim

Harris v. Cannon,
304 Ky. 3, 199 S.W.2d 429 (1946) 25

Hartford Fire Ins. Co. v. Lawrence, Dykes, Goodenberger, Bower & Clancy,
740 F.2d 1362 (6th Cir. 1984) 45

Haves v. City of Miami,
52 F.3d 918 (11th Cir. 1995) 35

Heaven Hill Distillers, Inc. v. Novak,
423 U.S. 908 (1975) 44

Heller v. Doe by Doe,
509 U.S. 312 (1993) 46

Indianapolis Brewing Co. v. Liquor Control Comm'n of State of Mich.,
305 U.S. 391, 394 (1939) 21, 22

Innes v. Howell Corp.,
76 F.3d 702 (6th Cir. 1996) 35

Jelovsek v. Bredesen,
545 F.3d 431 (6th Cir. 2008) 21, 22

Legislative Research Comm'n By and Through Prather v. Brown,
664 S.W.2d 907 (Ky. 1984) 28

New Orleans v. Dukes,
427 U.S. 297 (1976) 34

N.Y. State Liquor Auth. v. Bellanca,
452 U.S. 714 (1981) 24, 26

N.D. v. U.S.,
495 U.S. 423 (1990) 26

Northland Family Planning Clinic, Inc. v. Cox,
487 F.3d 323 (6th Cir. 2007) 45

Sibert v. Garrett,
197 Ky.17, 246 S.W. 455 (1922) 27

Simms v. Farris,
657 F. Supp. 119 (E.D. Ky. 1987) .... passim

Smith Setzer & Sons, Inc. v. S.C. Procurement Review Panel,
20 F.3d 1311 (4th Cir. 1994) 35

Temperance League of Ky. v. Perry,
74 S.W.3d 730 (Ky. 2002) 42, 43

U.S. v. Green,
654 F.3d 637 (6th Cir. 2011) 27

U.S. R.R. Retirement Bd. v. Fritz,
449 U.S. 166 (1980) 33

Vance v. Bradley,
440 U.S. 93 (1979) 33

Williamson v. Lee Optical of Okla.,
348 U.S. 483 (U.S. 1955) 34

Ziffrin, Inc. v. Reeves,
308 U.S. 132 (1939) 21, 22

Constitution

U.S. CONST. amend. XVIII, § 1 37

U.S. CONST. amend. XXI .... passim

U.S. CONST. amend. XXI, § 2 20

KY. CONST. § 27 .... 26, 27, 29

KY. CONST. § 28 ....26, 28, 29

KY. CONST. § 61 ....11, 22

KY. CONST. § 226. ....9, 10, 11

Statutes

28 U.S.C. § 1291 1

28 U.S.C. § 1331 1

28 U.S.C. § 1343(a)(3) 1

Ky. Stat. §§ 2554a-1 to 2554a-47 (Rash-Gullion Act) 9

Ky. Stat. § 2554b-1(5) 11

Ky. Stat. § 2554b-16 11

Ky. Stat. § 2554b-17 11

Ky. Stat. § 2554b-20 11

Ky. Stat. § 2554b-154 37

Ky. Stat. § 2554b-154(8) 2, 12

Ky. Stat. § 2554b-197 13

KRS 243.085(7) 52, 53

KRS 243.230 ....passim

KRS 243.230(3)(c) (1942) 37

KRS 243.230(4) 40, 41, 54

KRS 243.230(4)(b)..41, 54

KRS 243.230(5)..passim

KRS 244.300..32

Administrative Regulations

804 KAR 4:270 ....passim

Secondary Sources

Raymond B. Fosdick and Albert L. Scott, *Toward Liquor Control*, (The Center for Alcohol Policy 2011) (1933)..6-8, 16, 38

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Intervening Defendant/Appellant/Cross-Appellee Liquor Outlet, LLC, dba The Party Source ("Party Source" or "Appellant") respectfully requests oral argument because it will assist the Court in reaching a full understanding of the issues and will allow the parties to address any outstanding factual or legal issues before the Court. Accordingly, Party Source respectfully requests that the Court schedule oral argument for this appeal.

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3) which rest original jurisdiction in federal district courts for all civil actions alleging the violation of rights and privileges under the United States Constitution.

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291. A Final Order granting summary judgment to Plaintiffs/Appellees/Cross-Appellants Maxwell's Pic-Pac ("Maxwell's") and Food with Wine Coalition ("FWWC") (together the "Plaintiffs" or "Appellees") and denying summary judgment to Party Source and Appellants Tony Dehner and Danny Reed (together the "State") was entered by the district court on August 21, 2012. (Order, RE 67, Page ID #1328-1329). Party Source timely filed a Notice of Appeal with this Court on September 5, 2012. (Notice of Appeal, RE 75, Page ID #1480-1481).

STATEMENT OF THE ISSUES FOR REVIEW

1. Did the district court err in holding KRS 243.230(5) and its accompanying regulation, 804 KAR 4:270, unconstitutional, and in striking and enjoining enforcement of said statute and regulation?

2. Did the district court err by failing to consider application of the Twenty-first Amendment in this case and its balancing with the Equal Protection Clause of the Fourteenth Amendment?

3. Did the district court err by violating the separation of powers doctrine in holding KRS 243.230(5) and its accompanying regulation, 804 KAR 4:270, unconstitutional, and in striking and enjoining enforcement of said statute and regulation?

4. Did the district court err in determining that there was no rational basis for KRS 243.230(5) and its accompanying regulation, 804 KAR 4:270, and in striking and enjoining enforcement of said statute and regulation?

5. Did the district court err in failing to consider the serious implications and questions for Kentucky's alcohol regulation system by holding KRS 243.230(5) and its accompanying regulation, 804 KAR 4:270, unconstitutional, and in striking and enjoining enforcement of said statute and regulation?

STATEMENT OF THE CASE

In 1938, the Kentucky General Assembly enacted the Alcohol Beverage Control Law establishing Kentucky's alcohol regulation system following the end of Prohibition after repeal of the Eighteenth Amendment. The Law included the precursor to KRS 243.230(5), in much the same form as it is today, which prohibited a package liquor license being issued to "any premises used as or in connection with the operation of a grocery store or filling station." Ky. Stat. § 2554b-154(8). KRS 243.230(5) contains the same prohibition.

On January 10, 2011, Plaintiffs filed a Complaint claiming that KRS 243.230(5) and its accompanying regulation, 804 KAR 4:270, were unconstitutional. (Compl., RE 1, Page ID #1-9). On November 18, 2011, Plaintiffs filed an Amended Complaint containing essentially the same allegations. (Am. Compl., RE 37, Page ID #308-320). The State filed its respective answers in opposition. (Am. Answer, RE 14, Page ID #113-116; Answer, RE 38, Page ID #321-325). Party Source intervened in the case in opposition. (Motion to Intervene, RE 7, Page ID #41-51; Answer, RE 8, Page ID #53-59; Mem. Order, RE 17, Page ID #122-124; RE 39, Answer, Page ID #326-335).

The parties submitted the constitutionality issues raised by Plaintiffs upon cross-motions for summary judgment, along with the allowable responses and replies. Party Source now appeals from the district court's August 14, 2012 Memorandum Opinion and August 21, 2012 Final Order. (Mem. Op., RE 62, Page ID #1295-1323; Order, RE 63, Page ID #1324; Order, RE 67, Page ID #1328-1329).

STATEMENT OF FACTS

KRS 243.230(5) and 804 KAR 4:270 are both integral components of Kentucky's alcohol regulation system. The statute and regulation state as follows:

> No retail package or drink license for the sale of distilled spirits or wine shall be issued for any premises used as or in connection with the operation of any business in which a substantial part of the commercial transaction consists of selling

> at retail staple groceries or gasoline and lubricating oil.

KRS 243.230(5) (most recently amended and effective as of July 15, 1998).

> Section 1. For the purpose of enforcing KRS 243.230(5) "substantial part of the commercial transaction" shall mean ten (10) percent or greater of the gross sales receipts as determined on a monthly basis.
>
> Section 2. For the purpose of enforcing KRS 243.230(5) staple groceries shall be defined as any food or food product intended for human consumption except alcoholic beverages, tobacco, soft drinks, candy, hot foods and food products prepared for immediate consumption.

804 KAR 4:270 (effective February 12, 1985). The district court ruled that KRS 243.230(5) and 804 KAR 4:270 unconstitutionally prohibit the sale of wine and distilled spirits by grocery stores and gas stations (which in today's context includes convenience stores). To understand the errors made by the court in its ruling, one has to understand the basic history of Kentucky alcohol regulation.

A. Kentucky's Alcohol Regulation System Arose Out Of The Failure Of Prohibition.

After the district court provided a very brief recitation of the history behind Kentucky's alcohol regulation system it concluded that "[t]he existing legislative records contain no hint whatsoever of the rationale behind the [KRS 243.230(5)] classification." (Mem. Op., RE 62, Page ID #1299). But that conclusion is patently inaccurate. Available historical records and this case's record establish that there is more than enough of a factual basis to determine that the General

Assembly had a clear rationale behind enacting KRS 243.230(5) as part of Kentucky's alcohol regulation system: controlling access, distribution, sale, and consumption of alcoholic beverages pursuant to Kentucky's police powers under the Twenty-first Amendment.

A proper fact analysis starts with Prohibition. Pamela Erickson (Party Source's expert) described Prohibition's beginnings, failures, and the states' challenge to develop alcohol regulation after Prohibition. (Erickson Exp. Rep., RE 40-19, Page ID #678-682). Prohibition was an extreme response to years of societal problems associated with easy alcohol access and the resulting heavy alcohol consumption:

> Prior to Prohibition alcohol was sold in a free-market scenario with little regulation. National manufacturers controlled the industry and owned retail saloons - called "tied houses" – where almost all alcohol was consumed. To compete, each national company saturated neighborhoods with multiple outlets which were often located near factories to attract workers. Aggressive promotions encouraged high volume consumption and money was used to dissuade politicians from crack-downs.

(*Id.*, Page ID #678). While Prohibition curbed consumption and ended the tied-house problems, it did not stop drinking, was very unpopular, and gave rise to rampant bootlegging, lawlessness, and violent organized crime (famously associated with Al Capone and the Untouchables). (*Id.*). Prohibition's problems became to be seen as worse than those eliminated, and it was ended by repeal of

the Eighteenth Amendment through ratification of the Twenty-first Amendment. U.S. Const. amend. XXI.

After Prohibition each state was faced with having to create its own alcohol regulation system. The genesis of every state's system was the seminal study of alcohol regulation by Raymond Fosdick and Albert Scott, "Toward Liquor Control," published in 1933 ("Fosdick and Scott Study").[1] (Erickson Exp. Rep., RE 40-19, Page ID #679). Every state relied in some degree or another on the influential Fosdick and Scott Study to craft their alcohol regulation systems. (*Id.*).

The principal, still relevant themes of the Fosdick and Scott Study included: (1) strong advocation for a regulation system to prevent "the gradual erosion of alcohol controls by those with economic interest in the alcohol business"; (2) the use of regulation systems to steer society towards consumption of lower alcohol content products; and (3) acknowledgement that the chosen regulation system had to have political support from the citizenry.[2] Fosdick and Scott Study, p. ix. The Fosdick and Scott Study recognized that the profit motive for retail alcohol sales

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[1] In 2011, The Center for Alcohol Policy reprinted the original book, adding a new introduction. For the Court's convenience, Party Source includes the Fosdick and Scott references cited herein as part of its Addendum.

[2] "Forty eight states are attempting to set up a new method of control. In the last analysis, there is but one fundamental rule to be followed-and all other rules are corollaries: If the new system is not rooted in what the people of each state sincerely desire at this moment, it makes no difference how logical and complete it may appear as a statute – it cannot succeed." Fosdick and Scott Study, p. ix.

always creates significant problems for alcohol control. Fosdick and Scott Study, p. 11.

Other observations/recommendations from the Fosdick and Scott Study that were relevant to Kentucky's alcohol regulation system included the following:

- Fosdick and Scott observed that "[p]ublic opinion is gratified by the record of sobriety that has attended the return of beer. <u>It is distinctly apprehensive over the prospective legalized return of spirits</u>." (p. 10) (emphasis added).

- One of the Study's conclusions was that "[w]hile many states will doubtless follow the license method in the control of beverages of higher alcohol content, this method contains a fundamental flaw in that it retains the <u>private profit motive which makes inevitable the stimulation of sales</u>." (p. 11) (emphasis added).

- "Any law relating to liquor has a broad incidence; it touches many people directly. Consequently, <u>its popular backing must be strong</u>." (p. 15) (emphasis added).

- "In the stumbling search for a law to cure the drink evil, legislators seldom paused to inquire what drinks should be the main target of attack . . . In most states, under the old regime, a single license permitted the sale of both beer and whiskey. As a result, they were commonly sold over the same counter, and often the chief source of profit of the "beer saloon" was its sale of hard liquor . . . <u>the distilled liquors are thus seen to be in a class by themselves, with an alcoholic strength far in excess of wines and beers. This difference should be made the basis of a radical difference in treatment under the law</u>." (pp. 19-20) (emphasis added).

- Fosdick and Scott analogized the "tied house," saloon-on-every-corner problem <u>to gasoline stations</u>: "The 'tied house' system also involved a multiplicity of outlets, because each manufacturer had to have a sales agency in a given locality. In this respect, the system was not unlike that now used in the sale of gasoline, and with the same

result: a large excess of sales outlets." (p. 29).

- "Suitable restrictions should be established by the license law or by administrative regulation with respect to the number and character of *places* where liquor may be sold." (p. 30) (emphasis in original).

- "Licenses should be classified to recognize the inherent differences between, beer, wine and spirits as problems of control." (p. 30).

- "Under the license system, on the other hand, competing private dealers are under constant temptation to build up their sales and profits . . . Since his livelihood is at stake, the private seller always has been, and always will be, interested in sales, and in nothing but sales." (p. 51) (emphasis added).

- Already recognizing problems with drinking and driving, Fosdick and Scott stated that "every automobile today is an argument against liquor." (p. 86).

As discussed below, Kentucky's alcohol regulation system contains obvious reflections of Fosdick's and Scott's concerns. For example, Kentucky limited the premises selling alcohol, and differentiated the sale of beer from higher proof alcohol (wine and distilled spirits). After almost eighty years, Kentucky's alcohol regulation system continues to enjoy public support. The district court's ruling violates the principles discussed above by greatly expanding alcohol sales outlets and by greatly expanding access to higher content alcohol, neither of which is supported by the public or the General Assembly.

B. Kentucky Conducted Its Own Study Of Alcohol Regulation.

The concerns and recommendations of the seminal Fosdick and Scott Study are also seen in Kentucky's alcohol study commissioned in 1933. Then-Governor

Laffoon appointed the Kentucky Liquor Control Committee ("Committee") after the Twenty-first Amendment was ratified, to study "the conditions resulting from the repeal of the Eighteenth Amendment and of recommending legislation to meet those conditions." (Report of the Ky. Liquor Control Committee ("Committee Rep."), RE 40-12, Page ID #564-565). The Committee first met just four days after the Twenty-first Amendment was ratified nationally on December 5, 1933. As part of its work, the Committee had to consider repealing Kentucky alcohol laws on the books (Kentucky Constitution § 226 and its enforcement statute, the Rash-Gullion Act, Ky. Stat. §§ 2554a-1 to 2554a-47 (1930)) prohibiting the manufacture and sale of alcohol except for certain limited purposes. (*Id.*, Page ID #564-566). The Committee began its assessment recognizing that the Rash-Gullion Act was not enforced in urban areas. (*Id.*, Page ID #566). As a result, "the state was infested with bootleggers and like gentry and suffered all the social ills and fiscal losses that are the inevitable accompaniment of a tolerated, outlaw trade. The results were corruption and crime, no revenue, no control, disrespect for law, and general demoralization." (*Id.*).

The Committee Report included a majority and minority plan each with proposed legislation. While the majority and minority disagreed over the details, they both agreed that alcohol must be strictly regulated and excessive drinking must be curbed to the extent possible. (*Id.*, Page ID #566-567, 575). The majority

plan advocated a system of licensing fees and taxation of retail sales that it believed would "bring the supply of liquor out into the daylight, where it can be properly restricted and watched and policed and taxed." (*Id.*, Page ID #567-569, 575). The majority also recommended the General Assembly undertake "a careful and deliberate study of the whole subject . . . ." in conjunction with repealing the state's alcohol prohibitions. (*Id.*, Page ID #570-571). The majority recognized that its proposed bill simply was a stopgap measure until § 226 was repealed, presumably in November 1935 (the first opportunity for the repeal to be put to a public vote). (*Id.*, Page ID #570). The majority recognized that the delay of enacting permanent alcohol regulations would give Kentucky the "obvious advantage in watching the results of liquor control experiments during the next two years, not only in Kentucky, but in other States, before undertaking to draft a permanent plan which could go into effect until the end of that time." (*Id.*).

Both the majority and minority plans analyzed what businesses should be liquor outlets. Both plans and their proposed bills allowed drug stores to continue to distribute and sell alcohol. (*Id.*, Page ID #577, 581; Committee Rep., RE 40-13, Page ID #602). The minority plan proposed limiting off premise sales to grocery stores and drug stores. (Committee Rep., RE 40-13, Page ID #606). The minority was especially concerned with the dangers of the sale and consumption of distilled spirits. (Committee Rep., RE 40-12, Page ID #575-577). Accordingly, the

minority plan limited such sales to only light alcohol beverages - beer and wine with alcohol percentage caps - and specifically excluded distilled spirit sales of any kind except from a drug store under a "druggist's license." (*Id.*, Page ID #576; Committee Rep., RE 40-13,Page ID #602, 607-610).

In 1934, following the Committee Report, the General Assembly enacted the Kentucky Alcohol Control Act ("1934 Act") as a makeshift measure. The 1934 Act allowed retail sales of "vinous or spirituous liquors" to be made only for medicinal purposes, but without a prescription. Ky. Stat. §§ 2554b-16, 2554b-17. Any intoxicating liquor (heavy beers, wine and distilled spirits), defined as 6.02 percent of alcohol by volume, could only be sold for "medicinal, mechanical, sacramental or scientific purposes," eliminating such businesses as grocery stores and gas stations from selling intoxicating liquor and allowing drug stores to do so. Ky. Stat. §§ 2554b-1(5); 2554b-16. This is completely consistent with the prohibitions that would become KRS 243.230(5). The Act allowed for prescriptions to medical patients for spirituous, vinous or intoxicating liquor. Ky. Stat. § 2554b-20.

In November 1935, as the next step towards a permanent alcohol regulation system, Kentucky voters repealed § 226 of the Constitution and reenacted § 61, allowing local option elections, paving the way for the General Assembly to develop and enact Kentucky's permanent alcohol regulation system. In 1938, the

General Assembly enacted Kentucky's Alcohol Beverage Control Law ("1938 Law"), the basis for Kentucky's liquor laws still today. The 1938 Law contained a continuation of the premises restrictions from the 1934 Act regarding the sale of high content alcohol – no wine or distilled spirits could be sold in grocery stores or filling stations. (1938 Ky. Acts, RE 40-14, Page ID #635-637; Erickson Exp. Rep., RE 40-19, Page ID #681). The original statutory text read as follows:

> No Retailer Package License or Retail Drink License shall be issued for any premises used as or in connection with the operation of a grocery store or filling station. "Grocery Store" shall be construed to mean any business enterprise in which a substantial part of the commercial transaction consists of selling at retail products commonly classified as staple groceries. "Filling Station" shall be construed to mean any business enterprise in which a substantial part of the commercial transaction consists of selling gasoline and lubricating oil at retail.

Ky. Stat. § 2554b-154(8). This same prohibition exists today in KRS 243.230(5), albeit with the statutory language being modernized over the years.

The district court stated that there was no history indicating the reason behind the 1938 prohibition against grocery stores and gas stations selling wine and distilled spirits. The 1938 Law may not have annotations or compiler's notes explaining the prohibition in detail. But looking at the entire history of alcohol regulation in Kentucky going back to Prohibition, considering the influential Fosdick and Scott Study, and reviewing the Committee Report and 1934 Act, it is clear that the prohibition in KRS 243.230(5) was not done on a whim in a vacuum

of alcohol regulation history or study. The 1938 Law was long-thought out (four years after Prohibition ended) and relied upon all of the above named influences as well as Kentucky's observation of other states' systems. For example, both the Fosdick and Scott Study and the Committee Report were highly concerned with controlling consumption and distribution of higher proof alcoholic beverages. Both were in favor of limiting the number and types of retail businesses that could sell alcohol. The 1938 Law's restriction on "grocery stores" and "filling stations" was consistent with prior premises restrictions.[3]

C. Kentucky Has Not Changed Its Desire To Prohibit Wine And Distilled Spirits From Being Sold By Grocery Stores And Gas Stations.

After almost eighty years of alcohol regulation beginning with the 1934 Act, Kentucky's citizens have not changed their desire to control alcohol access, consumption, and sales. That includes keeping the distinction between selling beer as opposed to higher proof alcohol. There has been no change to KRS 243.230(5) despite Plaintiffs' recent legislative attempts. On the other hand, grocery stores have opened separate premises to sell wine and distilled spirits. (Pls.' Supp. Ans. to Inter. Def.'s Disc., RE 40-16, Page ID #647-648; Kroger ABC Lookup, RE 40-17, Page ID #655-669). Not content with selling wine and distilled spirits in

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[3] In 1942, the Malt Beverage License was enacted. Ky. Stat. § 2554b-197. This license was open to grocery stores and gas stations. This was consistent with the Fosdick and Scott Study and the Committee Report recommending sales of low alcohol content products, but restricting high alcohol content products.

separate premises, Plaintiffs brought this suit seeking a judicially-crafted, legislative change.

FWWC's stated agenda and founding purpose have nothing to do with distilled spirits or gas stations/convenience stores. FWWC was formed in July 2007 solely to seek legislative change of the prohibition against the sale of wine in grocery stores. (Mason Dep., RE 40-3, Page ID #383-384). FWWC's Articles of Incorporation spell out its purposes:

> 1. To cooperate for the promotion of the Kentucky food and wine industry;
> 2. To educate regulators and legislators worldwide about Kentucky food and wine products, benefits, and practices;
> 3. To study, advise, and recommend action on regulation and legislation that affect the interests of the food and wine industry;
> 4. To educate the media and consumers about Kentucky food and wine products, benefits, and practices;
> 5. To provide a forum of discussion for the members of the food and wine industry, so as to encourage the exchange of ideas between members . . . .

(Art. of Incorp., RE 40-4, Page ID #408). These purposes have not changed. (Mason Dep., RE 40-3, Page ID #385).

Consistent with its stated agenda, FWWC lobbied the General Assembly in the 2008 and 2009 sessions to enact legislation to allow grocery stores to sell wine. (*Id.*, Page ID #386-390; Lentz Aff., RE 40-5, Page ID #415-417; RE 40-6, Lewis Aff., Page ID #469). The materials FWWC used to publicize its legislative

campaign exhibited no interest in the sale of distilled spirits. (FWWC Web Pages, RE 40-8, Page ID #513-525). FWWC did not advocate the sale of distilled spirits in grocery stores. (*Id.*). FWWC's petition campaign only sought support from voters for wine sales, not sales of distilled spirits. (FWWC Pet., RE 40-9, Page ID #526-527).

FWWC's membership had no interest in gas stations or convenience stores selling wine and distilled spirits. FWWC had seven members when this case started: Maxwell's; Kroger; Houchens Industries; Remke Markets; ValuMarkets; K-V-A-T Food Stores; and Foodtown, Inc. (Pls.' Ans. to Inter. Def's. Disc., Interrog. 2, RE 40-10, Page ID #530). Each of them "is engaged in the grocery business in Kentucky," not the gas station business. (*Id.*). Maxwell's had no plans to enter the gasoline/oil business. (Maxwell Dep., RE 40-11, Page ID #550-551. Maxwell's has no interest in seeing gas stations sell wine and distilled spirits since they would be direct competitors. (*Id.*, Page ID #552).

Plaintiffs are well-aware that historically (and currently) there has been little support for the sale of wine and distilled spirits in grocery stores, much less gas stations/convenience stores. Kentuckians' concerns about access to alcohol, especially high content alcohol, have not changed. In an interview about the

lawsuit, Ted Mason, Executive Director of and registered lobbyist for FWWC,[4] acknowledged that:

- Lobbying efforts to enact legislation allowing grocery stores to sell wine have failed: "We've tried to have an initiative for several years to change the law to allow wine in grocery stores, . . . We've taken that to a federal lawsuit now instead of continuing to bang our heads against the legislative walls."

- Kentucky's citizens do not support increased alcohol availability: "I guess there's still a lot of an anti-alcohol (mentality) in the state, even though we're a big bourbon producer . . . **It's hard for people to get out in a positive way and talk about the benefits of alcohol just from the heritage of Kentucky and the history of alcohol in the state, because it's not a very popular thing to do**." (emphasis added).

- The General Assembly is not behind the initiative: "There have been legislators that have been with us and for us, but it's a tough issue for the legislature, as any alcohol bill is."

- Even the author of the article observed that "[t]he lack of community and legislative support led to the grocery industry taking matters into its own hands."

(Shelby Rep. Art., RE 40-15, Page ID #640). FWWC's efforts are clearly not supported by Kentuckians through their elected representatives. Such popular support is critical for the success of any alcohol regulation system. Fosdick and Scott Study, pp. ix, 15. After filing this suit, FWWC ceased lobbying activities. (Mason Dep., RE 40-3, Page ID #391).

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[4] Mr. Mason is also the Executive Director and registered lobbyist for the Kentucky Grocers Association. (Mason Dep., RE 40-3, Page ID #380-381, 386).

SUMMARY OF ARGUMENT

The enactment of KRS 243.230(5) and the promulgation of its accompanying regulation, 804 KAR 4:270, represent a constitutional use of Kentucky's general police powers granted to it under the Twenty-first Amendment and the Kentucky Constitution. The statute and regulation do not violate the Equal Protection Clause, easily passing a rational basis analysis. The district court's opinion to the contrary is error, and it should be vacated.

The district court failed to apply the Twenty-first Amendment to this case and failed to balance that Amendment with the Equal Protection Clause. As recently as *Granholm v. Heald*, 544 U.S. 460 (2005), the importance and validity of the Twenty-first Amendment and the states' power to regulate alcohol has been reaffirmed by the Supreme Court. While the Twenty-first Amendment does not automatically trump other constitutional amendments, the reverse is just as true. In a case such as the present, where the Twenty-first Amendment intersects with another constitutional amendment, the law is clear that both have to be considered and balanced together. The district court failed to conduct any balancing analysis. If it had, the facts and law are clear that KRS 243.230(5) is constitutional.

The district court's opinion is also an unsupportable foray into the legislative arena in violation of the bedrock separation of powers doctrine. The doctrine restrains the three branches of government from encroaching upon one another's

domains. In Kentucky, the doctrine is enshrined in the state constitution. Since the end of Prohibition it is indisputable that the determination of a state's alcohol policy and regulation is solely in the hands of the state legislature. The district court's decision to strike down KRS 243.230(5) (and 804 KAR 4:270) does what the legislature and Kentucky's citizens do not want done – vastly expand the available alcohol sales outlets in the State, while also greatly expanding the types of alcohol products for sale by those outlets. Such a result violates the doctrine and the related principle of judicial restraint.

In response to the Plaintiffs' equal protection challenge, the district court failed to conduct a proper rational basis analysis of KRS 243.230(5). First, the court did not examine the rational basis for the statute at the time it was enacted. Second, the district court's decision stands in direct conflict with that of *Simms v. Farris*, 657 F. Supp. 119, 124 (E.D. Ky. 1987), which already had conducted an equal protection, rational basis review of KRS 243.230 and ruled that the entire statute passed the rational basis test. Third, the district court incorrectly applied the rational basis test – there is more than enough evidence in the record establishing a rational basis for KRS 243.230(5), and Plaintiffs failed to meet their high burden to negate every reasonably conceivable state of facts that could provide a rational basis for KRS 243.230(5).

Finally, despite allowing the intervention of Party Source in this case to

provide it with advice and arguments beyond the constitutional issues, the district court did not consider the practical ramifications of its decision to Kentucky's alcohol regulation system. The potential for greater alcohol problems was ignored. And so was the effect of placing package liquor stores in the position of being subject to greater alcohol sales restrictions than grocery stores and gas stations.

For all of these reasons, which are discussed more fully below, this Court should vacate the decision of the district court and declare that KRS 243.230(5) and 804 KAR 4:270 are constitutional and do not violate the Equal Protection Clause.

STANDARD OF REVIEW

This Court has recognized that "[c]onstitutional and statutory interpretation questions are issues of law, which we review de novo." *Cmtys. for Equity v. Mich. High School Athletic Ass'n*, 459 F.3d 676, 680 (6th Cir. 2006). The Court reviews *de novo* a district court's grant of summary judgment. *Am. Beverage Ass'n v. Snyder*, 700 F.3d 796, 803 (6th Cir. 2012). Here, the basis for appeal is the district court's grant of summary judgment to the Appellees in ruling that KRS 243.230(5) and 804 KAR 4:270 were unconstitutional in violation of the Equal Protection Clause. Accordingly, this Court should review the district court's ruling and the issues presented herein *de novo*.

ARGUMENT

I. THE DISTRICT COURT ERRED BY IGNORING THE TWENTY-FIRST AMENDMENT AND IN FAILING TO BALANCE ITS IMPORTANCE AGAINST THE EQUAL PROTECTION CLAUSE.

In the over two hundred years since the states ratified the United States Constitution, it has been amended but seventeen times, resulting in twenty-seven amendments. Of that number, the sale and transportation of alcoholic beverages has been the subject of two. Constitutionally, intoxicating liquors' concern to the general public was reflected in the prohibition of the manufacture, sale, transportation, and importation of intoxicants through the Eighteenth Amendment in 1919. After nearly fourteen years of lawlessness and corruption during "Prohibition," the states began to ratify the Twenty-first Amendment in April 1933. Kentucky ratified the Amendment on November 27, 1933, and on December 5, 1933, with the positive vote of Utah, national ratification was complete.

When repealing the Eighteenth Amendment and allowing the sale and trafficking of alcoholic beverages within the states, the Twenty-first Amendment simultaneously granted to the states the power to regulate the distribution of intoxicating liquor within their borders. U.S. Const. amend XXI, § 2. Regrettably, the district court ignored the very language of the Amendment, a result that cannot withstand constitutional muster even under its theory.

At the outset, the Supreme Court held the view that adoption of the Twenty-first Amendment meant that the power of the state to regulate intoxicating liquors, even to the point of an absolute prohibition of their manufacture, transportation, sale or use, was unfettered by the Commerce Clause. *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939), abrogated by *Granholm*, 544 U.S. at 460. Thus, on the basis of the Twenty-first Amendment, a state's ability to discriminate between domestic and imported liquors was not prohibited by the Equal Protection Clause. *Indianapolis Brewing Co. v. Liquor Control Comm'n of State of Mich.*, 305 U.S. 391, 394 (1939), abrogated by *Granholm*, 544 U.S. at 460. This also meant that discrimination against an interstate contract carrier for licensing purposes was not contravened by the Due Process Clause. *Ziffrin*, 308 U.S. at 139-40. In its analysis, the Court made clear:

> These conditions are not unreasonable and are clearly appropriate for effectuating the policy of limiting traffic in order to minimize well known evils, and secure payment of revenue. The statute declares whiskey removed from permitted channels contraband subject to immediate seizure. This is within the police power of the state; and property so circumstanced cannot be regarded as a proper article of commerce.

Id. at 138-39.

Fast forward, if you will, to *Granholm*, the case that has sparked a substantial number of lawsuits relative to the direct shipment of wine. *See, e.g.*, *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423 (6th Cir. 2008); *Jelovsek v.*

Bredesen, 545 F.3d 431 (6th Cir. 2008), *cert. denied*, 130 S.Ct. 199 (2009); *Cherry Hill Vineyards, LLC v. Baldacci*, 505 F.3d 28 (1st Cir. 2007). At bar in these wine shipment cases has been the extent to which the dormant Commerce Clause takes precedence over the Twenty-first Amendment. The Commerce Clause, dormant or otherwise, is not the issue before this Court, but Party Source wants it clearly understood that in light of *Granholm*, it is not hiding behind the Twenty-first Amendment. What the Twenty-first Amendment does, however, is to strengthen the power already granted to the General Assembly by KY CONST. § 61. *Fuson v. Howard*, 305 Ky. 843, 205 S.W.2d 1018 (1947), provides a lesson well learned:

> With an ever increasing and persistent prohibitive sentiment growing up among the people, and in order to effectuate local regulations, the matter of regulation and control of intoxicating liquors became a more or less state matter . . . Consequently, the form of liquor control subject to constitutional restrictions is a matter exclusively within the discretion of the State Legislature.

Id. at 1019-20.

In the context of this case, *Granholm* does little else than abrogate the holdings in *Ziffrin* and *Indianapolis Brewing* by acknowledging that:

> The aim of the Twenty-first Amendment was to allow States to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use. The Amendment did not give States the authority to pass nonuniform laws in order to discriminate against out-of-state goods, a privilege they had not enjoyed at any earlier time.

544 U.S. at 484-85.[5]

In large part, *Granholm* relied upon the Court's analysis in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). *Bacchus* involved the constitutionality of the Hawaii Liquor Tax, under which a 20% excise tax was imposed on the sale of liquor at wholesale, but exempted from the tax certain locally produced okolehao and pineapple wine. In holding that the exemption violated the Commerce Clause because it favored local interests, the Court was clear to point out that neither the Commerce Clause (or other constitutional provisions), nor the Twenty-first Amendment trumps the other. Rather,

> [i]t is by now clear that the [Twenty-first] Amendment did not entirely remove state regulation of alcoholic beverages from the ambit of the Commerce Clause . . . . "To draw a conclusion . . . that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever a regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification."

Id. at 275. (citation omitted).

Based upon the foregoing, *Bacchus* teaches that since both the Twenty-first Amendment and the Commerce Clause (or Equal Protection Clause or Due Process Clause) are part of the same Constitution, each must be considered "in light of the other and in the context of the issues and interests at stake in any concrete case."

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[5] That *Granholm* notes that state laws that violate other provisions of the Constitution, including the Equal Protection Clause, are not saved by the Twenty-first Amendment, *Id.* at 486-87, is nothing more than what *Fuson*, *supra*, teaches.

Id. (citation omitted). Nothing in *Granholm* suggests that another amendment trumps the Twenty-first Amendment, yet that is precisely what the district court has done with respect to the Equal Protection Clause. Therefore,

> The question in this case is thus whether the principles underlying the Twenty-first Amendment are sufficiently implicated by the exemption for okolehao and pineapple wine to outweigh the Commerce Clause principles that would otherwise be offended. Or as we recently asked in a slightly different way, "whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies."

Id. at 275-76. *See also*, *Simms*, 657 F. Supp. at 124 ("... **there exists a rational basis for the statute [KRS 243.230], namely the need to regulate establishments serving alcoholic beverages. Therefore, plaintiffs' substantive due process and equal protection attacks fail**.") (emphasis added).

Kentucky recognizes the importance of the Twenty-first Amendment in preserving control over alcoholic beverages within its borders. The Twenty-first Amendment gives states power to regulate the sale of alcohol within those borders. *Blue Movies, Inc. v. Louisville/Jefferson County Metro Gov't*, 317 S.W.3d 23, 33 (Ky. 2010). *Blue Movies* relied, in part, upon *N.Y. State Liquor Auth. v. Bellanca*, 452 U.S. 714, 715 (1981), in recognizing the principle announced therein:

> This Court has long recognized that a State has absolute power under the Twenty-first Amendment to prohibit totally the sale of liquor within its boundaries. It is equally well established

> that a State has broad power under the Twenty-first Amendment to regulate the times, places, and circumstances under which liquor may be sold.

Blue Movies, 317 S.W.3d at 34.

The error of the district court's ways is evident because Kentucky's regulatory scheme survives other constitutional principles that play no active role in these proceedings. Consider, for example, that "the alcoholic beverage business is of such a special character that its treatment as a separate classification for purposes of regulation and license taxation is not subject to question. It has long been recognized as a business that can be singled out for specialized treatment." *George Wiedemann Brewing Co. v. City of Newport*, 321 S.W.2d 404, 408 (Ky. 1959). Consider that Plaintiffs have no property right or liberty interest that gives them the right to greater benefits than those who have opted to seek licensure under the laws as enacted and enforced for decades. As so well expressed in *Harris v. Cannon*, 304 Ky. 3, 199 S.W.2d 429, 432 (1946) (citations omitted):

> the right to regulate the sale of intoxicating liquors to the point of prohibiting is based upon the well-grounded theory that one in the business does so under a highly guarded privilege, and not under an inherent right. Constitutional guarantees of equal protection and due process are not denied by the enforcement of local option laws. Licenses to engage in the business are not contracts vesting rights, but at all times subject to revocation by proper authorities, or the will of the people. The fact that one engaging in the business is deprived of the right of use of his property does not deprive him of such property without due process.

The Supreme Court recognizes that "[g]iven the special protection afforded to state liquor control policies by the Twenty-first Amendment, they are supported by a strong presumption of validity and should not be set aside lightly." *N.D. v. U.S.*, 495 U.S. 423, 433 (1990). In closing this section, the Court should be mindful of that determination, as well as *City of Newport v. Iacobucci*, 479 U.S. 92 (1986), wherein the issue was the challenge to a local ordinance that prohibited nude or nearly nude dancing in establishments licensed to sell liquor for consumption on the premises. The Eastern District of Kentucky upheld the ordinance and the Sixth Circuit reversed. The Supreme Court reversed this Court's decision, holding that "[t]he State's power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where topless dancing occurs." *Id.* at 94, quoting *New York State Liquor Authority*, 452 U.S. at 717. If this is the law, then the Twenty-first Amendment, conferring something more than the normal state authority over public health, welfare and morals, *id.* at 95, can prohibit the sale of alcoholic beverages where "minors fear to tread," including grocery stores and gas stations.

II. THE DISTRICT COURT'S OPINION VIOLATES THE SEPARATION OF POWERS DOCTRINE AND KY. CONST. §§ 27 AND 28.

Separation of powers, one of our country's most respected judicial doctrines, restrains the executive, judicial and legislative branches from encroaching upon

one another's domains. *Clinton v. Jones*, 520 U.S. 681, 691 (1997), citing *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (per curium). As recently explained by this Court:

> The Constitution divides the powers of the federal government into the legislative, executive and judicial branches, and provides safeguards to assure that each branch confine itself to its designated responsibilities. The tripartite federal government includes a system of checks and balances as "a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." Each branch of the government "may not intrude upon the central prerogatives of another."

U.S. v. Green, 654 F.3d 637, 649 (6th Cir. 2011) (internal citations omitted).

The problem in this case is that the district court's breach of the doctrine is not the result of a battle with Congress. Rather, it is the usurpation of the General Assembly's power to act on behalf of its citizens; it is a blatant violation of Kentucky's heightened recognition of the separation of powers through adoption of the doctrine in its Constitution. *Sibert v. Garrett*, 197 Ky.17, 246 S.W. 455, 457 (1922) ("Perhaps no state forming a part of the national government of the United States has a Constitution whose language more emphatically separates and perpetuates what might be termed the American tripod form of government than does our Constitution . . . .).

Specifically, KY. CONST. § 27 created the three branches of Kentucky government thusly: "The powers of the government of the Commonwealth of

Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistry, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another." In turn, "[n]o person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted." KY. CONST. § 28; *Com. v. Associated Ind. of Ky.*, 370 S.W.2d 584, 586 (Ky. 1963) (in order to ensure and maintain that separation, KY. CONST. § 28 "prohibits one department from grabbing power that properly belongs to another . . . .").

The importance of strict adherence to the separation of powers doctrine was made clear in *Legislative Research Comm'n By and Through Prather v. Brown,* 664 S.W.2d 907, 911-12 (Ky. 1984) (emphasis in original):

> The framers of Kentucky's four constitutions obviously were cognizant of the need for the separation of powers. Unlike the federal constitution, the framers of Kentucky's constitution included an express separation of powers provision. They were undoubtedly familiar with the potential damage to the interests of the citizenry if the powers of government were usurped by one or more branches of that government. Our present constitution contains explicit provisions which, on the one hand, *mandate* separation among the three branches of government, and on the other hand, specifically *prohibit* incursion of one branch of government into the powers and functions of the others.

Kentucky courts long ago recognized the danger of violating a strict adherence to the separation of powers doctrine: "It is important that the powers of the

Legislature should not 'stand or fall according as they appealed to the approval of the judiciary; else one branch of government, and that the most representative of the people, would be destroyed, or at least completely subverted to the judges.'" *Elk Horn Coal Corp. v. Cheyenne Res., Inc.*, 163 S.W.3d 408, 422 (Ky. 2005), quoting *E. Ky. Coal Lands Corp. v. Com.*, 127 Ky. 667, 106 S.W. 260, 275 (1907).

In violation of the separation of powers doctrine, the district court struck down KRS 243.230(5) (and 804 KAR 4:270) as unconstitutional and unenforceable. Under the U.S. Constitution and the Kentucky Constitution, §§ 27 and 28, the Court is prohibited from engaging in such judicial activism. The power granted to determine what Kentucky's alcohol regulation system shall be is exclusively the General Assembly's. The judicial branch cannot effectively legislate a change to that system, which is exactly what happened below.

What's worse, the district court's record was clear that the General Assembly was not interested in eliminating the prohibition against the sale of wine and distilled spirits under KRS 243.230(5). On February 20, 2008, House Bill 585, which was backed by Plaintiffs, was introduced. (Lentz Aff., RE 40-5, Page ID #416, 422-432). The purpose of HB 585 was to allow grocery stores to sell wine; there was no mention of distilled spirits or convenience stores/gas stations in the proposed legislation. (*Id.*, Page ID #423). The Bill proposed a new section of KRS Chapter 243 to create a nonquota retail food establishment wine license for

retail wine sales by "an owner or lessee of a retail food store or combination retail food store and food service establishment" if:

> (1) The total square footage of the retail food store or combination retail food store and food service establishment shall be at least ten thousand (10,000) square feet; and
>
> (2) The retail food store or combination retail food store and food service establishment shall maintain a minimum inventory of twenty thousand dollars ($20,000) in fresh meat, fresh produce, frozen food, dairy products, or a combination of those items.

(*Id.*). Once HB 585 was introduced, it was assigned to the Standing Committee on Licensing and Occupations. (*Id.*, Page ID #416). HB 585 died in committee. (*Id.*).

For the 2009 legislative session, FWWC found a new sponsor to file the proposed legislation. (*Id.*). Representative Tom Burch agreed to introduce the legislation based on the understanding that there was no opposition to the legislation. (*Id.*). Upon learning of FWWC's new attempt to introduce its proposed legislation, Representative Burch was contacted by the Kentucky Liquor Retailer Coalition to inform him that there was opposition. (*Id.*). Representative Burch withdrew the proposed legislation before it was filed by the legislative clerk's office. (*Id.*). FWWC has not found another sponsor and no other bills have been filed to allow wine to be sold in grocery stores. (*Id.*, Page ID #416-417).

The district court's opinion has firmly placed it in the shoes of the General

Assembly. Except rather than simply granting Plaintiffs the wine license sought from the General Assembly, which it does not have the power to do under the separation of powers doctrine, the district court has greatly expanded access to high proof alcohol and dramatically increased the types of retailers who can sell such alcohol. Such a drastic change to Kentucky's alcohol regulation scheme can only be done by the General Assembly under its Twenty-first Amendment and general police powers. Accordingly, the district court had no basis to violate the separation of powers doctrine to act as the General Assembly, the duly elected representatives of Kentucky citizens, and provide Plaintiffs the legislative relief they seek, but could not get from the General Assembly.

III. KRS 243.230(5) AND ITS ACCOMPANYING REGULATION, 804 KAR 4:270, ARE CONSTITUTIONAL AND DO NOT VIOLATE THE EQUAL PROTECTION CLAUSE.[6]

A. The District Court Erroneously Conducted Its Rational Basis Analysis In The Present Day Context Instead Of At The Time KRS 243.230(5) Was Enacted.

The district court's failure to examine the rational basis of KRS 243.230(5) in the proper temporal context is plain error. The district court's present day analysis is inconsistent with rational basis analyses of equal protection issues by other federal courts. It also is inconsistent with principles of judicial restraint and separation of powers (as discussed above).

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6 Party Source's discussion of the rational basis for KRS 243.230(5) also applies to 804 KAR 4:270.

Even prior to its Memorandum Opinion the district court's rational basis analysis was improperly focused. During the May 23, 2012 Hearing (Order, RE 60, Page ID #1290), the Court asked the parties whether they all agreed that the rational basis for KRS 243.230(5) was to be analyzed in today's context. Party Source's counsel disagreed and referred the Court to the following Kentucky case: *Dept. of Alcoholic Beverage Control v. Liquor Outlet, Inc.*, 734 S.W.2d 816 (Ky. App. 1987) (in considering a challenge to the Kentucky statute prohibiting the purchase of wine and distilled spirits on "credit," the Court of Appeals held that the challenged statute [KRS 244.300] must be enforced as written <u>at the time of its enactment</u>, which would prohibit the use of national or bank credit cards to purchase wine or distilled spirits in Kentucky). That case is consistent with federal jurisprudence establishing that where there is no invidious discrimination or suspect class, <u>and the challenged statute relates solely to economic and social policy</u> (as in this case), courts analyze the rational basis of a challenged statute at the time it was enacted. On May 29, 2012, Party Source filed supplemental authority supporting its summary judgment motion establishing that the courts look to the time a challenged statute was enacted in assessing its rational basis. (Notice of Filing, RE 61, Page ID #1290-1294). This principle is displayed throughout the Supreme Court's equal protection jurisprudence and is consistent with the long recognized principles of judicial restraint and separation of powers.

The Supreme Court has stated that where there are "plausible reasons" for the legislature's action, the reviewing court's equal protection rational basis inquiry ends. *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313-314 (1993). This is because "equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *Id.* at 313. The courts' rational basis review can only occur in the context of when the legislature enacted the challenged law since "[t]he Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." *Id.* at 314, quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

In further deference to legislatures and judicial restraint in the field of economic and social policy, the Supreme Court has recognized that "it is not within our authority to determine whether the [legislative] judgment expressed in that Section is sound or equitable, or whether it comports well or ill with purposes of the Act . . . . The answer to such inquiries must come from [the legislature], not the courts. Our concern here, as often, is with power, not with wisdom." *U.S. R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 175-176 (1980), quoting *Flemming v. Nester*, 363 U.S. 603, 611 (1960). Furthermore, "[t]he Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what

constitutes wise economic or social policy." *City of Dallas v. Stanglin*, 490 U.S. 19, 27 (1989), quoting *Dandridge v. Williams*, 397 U.S. 471, 485-486 (1970). "When social or economic legislation is at issue the Equal Protection Clause allows the States wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

The Supreme Court has also recognized that courts are not to function as legislative bodies:

> In short, the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines; in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment.

New Orleans v. Dukes, 427 U.S. 297, 303-304 (1976) (internal citations omitted).

In other words, so long as the alcohol sales classifications at issue in KRS 243.230(5) are rationally related to a state interest (e.g. Kentucky's alcohol regulation system) at the time they were enacted, then the courts are not authorized to redesign the statute by striking it down under the guise of equal protection. The Supreme Court has recognized this policy of restraint time and again. *See, e.g.*, *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 488 (U.S. 1955) ("The day is gone when this Court uses the [ ] Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise,

improvident, or out of harmony with a particular school of thought.").

Following in the Supreme Court's footsteps, this Court and sister circuits have also recognized that rational basis is examined at the time of enactment. This Court has previously stated that "[o]ur function, however, is not to determine whether we as legislators would ourselves adopt such a rationale **in enacting the exception** . . . ." *Innes v. Howell Corp.*, 76 F.3d 702, 710 (6th Cir. 1996) (emphasis added). Other Courts of Appeal have put it even more clearly. *See, e.g.*, *Smith Setzer & Sons, Inc. v. S.C. Procurement Review Panel*, 20 F.3d 1311, 1323 (4th Cir. 1994) (In a rational basis challenge to an economic policy statute, the burden is on the challenger to show that "**at the time of the enactment of these statutes and regulations** . . . .") (emphasis added); *Haves v. City of Miami*, 52 F.3d 918, 921 (11th Cir. 1995) ("The first step in determining whether legislation survives rational-basis scrutiny is identifying a legitimate government purpose-a goal-which the enacting government body *could* have been pursuing.") (emphasis added; italics in original).

In its review of the parties' summary judgment motions, the district court erroneously conducted its rational basis analysis of KRS 243.230(5) in the context of the reasons for its enactment in today's world, **not** at the time the General Assembly enacted the 1938 Law. For example, in discussing the rational basis for limiting the businesses selling high proof alcohol, the district court facially

compared today's national chain drug stores and national chain grocery stores, and concluded that "it does not explain why a grocery-selling drug store like Walgreens may sell wine and liquor, but a pharmaceutical-selling grocery store like Kroger cannot. This distinction would seem to have no relationship whatsoever to the control of higher-proof alcohol sales or the abuse of these products." (Mem. Op., RE 62, Page ID #1312). Furthermore, the district court wrote that:

> The Court cannot say categorically that seventy years ago the legislature had some different, logical and now obscure reason for enacting the Statute. However, the conclusion that there "were no reasons" seems to fit best. It was, indeed, a likely compromise regarding the regulation of a controversial product.
>
> Perhaps back then grocers were different from other potential alcohol vendors in some manner that rationally related to the sale of liquor and wine. **If so, none of those differences appear today**; most drugstores sell staples and some grocers sell prescription drugs.
>
> *****
>
> **Even if some facts supporting the classification may have once existed, the evolution of commerce** and equal protection jurisprudence now make impermissible the Kentucky legislature's seemingly harmless arbitrary-line drawing in 1938.

(Mem. Op., RE 62, Page ID #1317-1318) (emphasis added).

A response is mandated. First, as discussed above, the General Assembly's treatment of drug stores as a favored alcohol retailer has a long, long history. Drug stores as a favored dispensary of alcohol dates back to before Prohibition. During

Prohibition, drug stores were a legal outlet for alcohol so long as it was obtained for "medicinal purposes." (Committee Rep., RE 40-12, Page ID #568). The Eighteenth Amendment specifically allowed for such an arrangement by only outlawing "the manufacture, sale or transportation of intoxicating liquors . . . for beverage purposes . . . ." U.S. CONST. amend XVIII, § 1 (emphasis added). The Committee Report continued to recommend drug stores as an allowable dispensary. (Committee Rep., RE 40-12, Page ID #577, 581; Committee Rep., RE 40-13, Page ID #602). Such status was continued in the 1938 Law. Ky. Stat. § 2554b-154; *see also*, KRS 243.230(3)(c) (1942) (providing an exception for a drug store to be a licensed package liquor retailer for its premises not within incorporated cities). Such recognition continues today and is consistent with the history of alcohol regulation in Kentucky. There was nothing arbitrary about the General Assembly choosing to allow drug stores to be eligible for a package liquor license over grocery stores and gas stations.

Second, the district court failed to consider the sales restrictions found in 804 KAR 4:270 in its drug store/grocery store analysis. The regulation treats all retailers who sell "staple groceries" alike. Any retailer selling staple groceries above 10% of its sales cannot hold a package liquor license. As a result, drug stores (and package liquor stores) could never compete with grocery stores in the staple grocery business without losing their liquor licenses since 804 KAR 4:270

puts a 10% sales cap on staple groceries. Thus, a drug store is not a "staple grocery store" that gets a statutory exception to sell distilled spirits.

Third, the district court ignores that its ruling is not just about grocery stores versus drug stores. The district court failed to discuss why the prohibition against gas stations selling wine and distilled spirits fails rational basis at any point in time. Striking down KRS 243.230(5) opens up high proof alcohol sales to a business that Kentucky has never considered for such sales – the gas station (and its attached convenience store). The proliferation of gas stations in 1933 was sufficient enough for Fosdick and Scott to analogize the dangers of excess alcohol sales outlets to the rise of the gas station. Fosdick and Scott Study, p. 29. The gas station is just as prominent a corner fixture today. Given Kentucky's historical concerns about not wanting alcohol sales on every corner, prohibiting high proof alcohol sales in every corner gas station is a valid exercise of its police powers, and such a prohibition is valid under a rational basis analysis.

Fourth, the district court ignores that its ruling exponentially increases access to high proof alcohol. The dangers of high proof alcohol and the reasons Kentucky has regulated it are already discussed above. Such regulation has not been in controversy since the Twenty-first Amendment.

Lastly, not all Kentucky grocery stores contain a pharmacy, and not all Kentucky drug stores sell staple groceries, especially those non-national chains

outside of Kentucky's main urban areas. And anyone over the age of thirty can recall that prior to the "invention" of the one-stop, big box supermarket chain, grocery stores were grocery stores and drug stores were drug stores. Historically, and certainly in 1938, there was a clear divide between the business of a drug store and the business of a grocery store. Drug stores were treated differently as alcohol dispensaries from other retail businesses in the 1930s when Kentucky's alcohol regulation system was established – the law recognized that drug stores had been and should continue to be a valid dispenser of high proof alcohol.

Under the legal principles and facts discussed above, the district court's rational basis analysis of KRS 243.230(5) in terms of today's modern grocery store, drug store, convenience store, or other retailer was error. Its opinion should be vacated.

B. In Addition To Its Improper Temporal Analysis, The District Court Erroneously Applied The Rational Basis Test To KRS 243.230(5).

1. The District Court Failed To Consider That KRS 243.230 Had Already Withstood A Rational Basis Analysis.

It cannot be overemphasized that the district court misapplied the rational basis test and erroneously struck down KRS 243.230(5) as unconstitutional. The district court tossed aside the prior rational basis analysis by its sister court in the Eastern District of Kentucky, which concluded that there was a rational basis for the entire statute including KRS 243.230(5):

> The court, therefore, is led to the ineluctable conclusion that this statute [KRS 243.230] is a police matter that implicates the Commonwealth's "core area" powers to regulate intoxicating beverages, guaranteed and reserved to it by the Twenty-First Amendment . . . there exists a rational basis for the statute [KRS 243.230], namely, the need to regulate establishments serving alcoholic beverages. Therefore, plaintiffs' substantive due process and equal protection attacks fail.

Simms, 657 F. Supp. at 123-124. This quote exposes a fatal flaw in the district court's opinion – it already had been determined that there is a rational basis for KRS 243.230 under the Commonwealth's Twenty-first Amendment powers. *Simms'* analysis is just as applicable to this case.

The *Simms* court conducted a thorough analysis of KRS 243.230 as a whole, not just the challenged portion (KRS 243.230(4)) at issue in the case. The *Simms* court recognized that a review of the entire statute "lends great insight into the intent of the legislators." *Id.* at 121 (emphasis added). It found more than enough of a basis for the entire statute to satisfy rational basis analysis:

> **Reading the entire text of the statute, including the sections not directly involved here, it is apparent that the statute is intended as an exercise of the Commonwealth's police power to control the distribution and use of intoxicating beverages**.

Id. at 123.

After its thorough analysis, the *Simms* court concluded that KRS 243.230 was a valid exercise of Kentucky's police powers under the Twenty-first Amendment. *Id.* at 123. The restrictions in KRS 243.230(5) on the retail premises

that can be a licensed package store (retail package license) are consistent with Kentucky's police powers to control the access, distribution, and sale of alcohol, and to ensure adequate policing.

The district court brushed aside *Simms* because it stated that "the opinion is devoted almost entirely to the plaintiffs' argument that § 243.230 gave existing licenses a monopoly, violating federal antitrust statutes." (Mem. Op., RE 62, Page ID # 1307). Party Source respectfully disagrees with that conclusion. The *Simms* court dedicated most of its opinion to discussing KRS 243.230 as a valid exercise of Kentucky's powers under the Twenty-first Amendment. *Simms*, 657 F. Supp. at 120-124. In fact, the *Simms* court did not "find[ ] it necessary to undertake a detailed antitrust analysis." *Id.* at 124.

The district court also failed to recognize that *Simms* did address the question of drug stores' special treatment in KRS 243.230. The statute addresses issuing a package liquor license to premises "not located within any city." KRS 243.230(4). The statute allows such a premises to be a package liquor store so long as it is not used in connection with any other "store" or "commercial enterprise," except as a drug store. KRS 243.230(4)(b). This drug store exception, which like KRS 243.230(5) prohibits grocery stores and gas stations from selling wine and distilled spirits, was upheld by *Simms* after a rational basis analysis of an equal protection challenge. *Simms*, 657 F. Supp. at 123.

In addition to *Simms*, also instructive are the Kentucky state courts' previous equal protection, rational basis analyses relating to Kentucky's classification of retail premises that can sell certain alcoholic beverages and those that cannot. Kentucky courts long ago dealt with the issue of the General Assembly's power to regulate alcoholic beverages by limiting which premises could be licensed to sell at retail, and that regulation included the exclusion of grocery stores from selling wine and distilled spirits:

> We are asked why the legislature did not put restaurants in the same class as hotels, and grocery stores in the same class as drug stores, and permit them to sell liquor. Our answer is, it is within the province of the legislature to make such classification as it deems best under its police power, and we are not concerned with the wisdom of the Act of the legislature, but only with its constitutionality. If that classification is not so arbitrary as to be unreasonable, and is put upon a rational basis which is calculated to accomplish the protection of the public safety, health, or morals, the courts cannot interfere with it.

Beacon Liquors v. Martin, 279 Ky. 468, 131 S.W.2d 446, 449 (1939) (emphasis added).

More recently, the Kentucky Supreme Court reviewed the regulation of the types of premises that can sell alcohol. *Temperance League of Ky. v. Perry*, 74 S.W.3d 730 (Ky. 2002). *Temperance League's* guiding principle can be seen as a direct response to Plaintiffs' equal protection claim and the district court's ruling:

> The "alcoholic beverage business is of such a special character that its treatment as a separate classification for purposes of regulation and license taxation is not subject to question."

> Moreover, the sale of alcoholic beverages is the subject of extensive and detailed regulation within the Commonwealth. Given the unique nature of the regulation and licensing of the sale of alcoholic beverages, almost any content-neutral, legislative classification based on the types of businesses or organizations eligible to sell alcoholic beverages would not constitute special legislation within the meaning of § 59.

Id. at 733 (internal citations omitted).

Moreover, Kentucky has not prevented grocery stores or gas stations from holding a package liquor license in other premises or in premises separated from its main business so long as the business otherwise qualifies for a license. Two of FWWC's members admittedly sell wine and/or distilled spirits: Kroger and Trader Joe's. (Pls.' Supp. Ans. to Inter. Def.'s Disc., RE 40-16, Page ID #648). The front entrance to such premises can literally be within steps of one another (Trader Joe's on Shelbyville Road in St. Matthews) [7] or it can be separated by other store fronts (Kroger on Hubbards Lane in St. Matthews). Kroger has long had numerous package liquor stores in Kentucky. (Kroger ABC Lookup, RE 40-17, Page ID #655-669). Trader Joe's, which recently opened its first Kentucky location in Louisville, also has a retail package liquor license. Much like Kroger and Trader Joe's every other grocery store or gas station in Kentucky could sell wine and distilled spirits if they chose to follow the same legal procedures in place that

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[7] Anyone who has been to the Louisville Trader Joe's knows that you can see into the wine store because the "separating wall" between the grocery store and wine store is glass.

allowed Kroger and Trader Joe's to sell wine and/or distilled spirits. Those legal procedures include the same separate premises requirement that all package liquor stores have to follow.

Plaintiffs and their grocery store ilk have always been able to sell malt beverages, which demonstrates the nature of the regulation that the General Assembly chose to follow under the Twenty-first Amendment. Other courts have dealt with the distinction between where different types of alcohol can be sold:

> Plaintiffs also urge that the act's exclusion from coverage of wines and malt beverages constitutes an invidious discrimination, rendering the act invalid under equal-protection guarantees. While we recognize that wine, beer, and liquor are similarly distributed and sold, and that liquor may in a broad sense compete with the other two beverages for the consumer dollar, we agree, as the trial court found, that the differences inherent in the products themselves justify the legislative decision to include only distilled spirits within this act. More important is the principle that a law is not to be overthrown because there are other instances to which it might have been applied, and the fact that a statute discriminates does not make the classification invidious if it is founded upon a rational distinction. The Fourteenth Amendment does not compel a legislature to prohibit all the evils or none, and a legislature may hit at an abuse which it has found even though it fails to strike at another.

Fed. Distillers, Inc. v. Minn., 229 N.W.2d 144, 156 (Minn. 1975), *appeal dismissed*, *sub nom*, *Heaven Hill Distillers, Inc. v. Novak*, 423 U.S. 908 (1975). (internal citation omitted).

In the instant case, there is no denial of equal protection of the laws. There

is more than enough record evidence establishing a rational basis for KRS 243.230(5) (and 804 KAR 4:270) as part of Kentucky's regulation of establishments selling wine and distilled spirits. *Simms*, 657 F.Supp. at 124. Accordingly, this Court should vacate the district court's ruling.

2. *Simms'* Determination Aside, KRS 243.230(5) Does Satisfy The Rational Basis Test.

Even if *Simms* did not exist, the district court erred in determining that there is no rational basis for KRS 243.230(5). The district court was required to begin its rational basis analysis of KRS 243.230(5) with the strong presumption of constitutionality. *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 339 (6th Cir. 2007) ("federal courts are required to seek to uphold the constitutionality of state statutes where possible so as to refrain from interfering with the democratic functioning of a state's representative government . . . ."); *Hartford Fire Ins. Co. v. Lawrence, Dykes, Goodenberger, Bower & Clancy*, 740 F.2d 1362, 1366 (6th Cir. 1984) ("state legislatures are presumed by federal courts to have acted constitutionally in making laws."). As a result, "[t]he burden upon a party seeking to overturn a legislative enactment for irrationally discriminating between groups under the equal protection clause is an extremely heavy one." *37712, Inc. v. Ohio Dept. of Liquor Control*, 113 F.3d 614, 622 (6th Cir. 1997), quoting *Borman's, Inc. v. Mich. Prop. & Cas. Guar. Ass'n*, 925 F.2d 160, 162 (6th Cir. 1991). That is true even if such a rational basis is not reflected in the record of

the case: "a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." *Heller v. Doe by Doe*, 509 U.S. 312, 320 (1993), quoting *Beach Communications*, 508 U.S. at 315.

In responding to equal protection rational basis challenge to an economic or social policy statute, the State has no duty to produce any proof of the rationality of the statute. *Id.* at 320 ("A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification.") (citation omitted). This is because "courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends." *Id.* at 321. In fact, the legislature "need not 'actually articulate at any time the purpose or rationale supporting its classification.' Instead, a classification 'must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'" *Id.* at 320. (citations omitted).

Also important for this case, the State is not required to rely on current state officials (including Tony Dehner or Danny Reed) for an articulation of the General Assembly's rational basis for KRS 243.230(5) at the time it was originally enacted:

> However, as noted above, the state need not come forward with any record evidence whatsoever in defense of the Code. Further, just because particular individuals within the Texas government—even those of high rank within the administrative

> agency that enforces the law—may not be able to articulate a reason for the Code's disparate treatment, that does not mean no reason exists. Indeed, although it may well be desirable, there is no constitutional requirement that a person who enforces of a law must also know the legislative purpose behind it.

Authentic Beverages Co., Inc. v. Tex. Alcoholic Beverage Comm'n, 835 F. Supp. 2d 227, 248 (W.D. Tex. 2011). Any reliance by the district court on, for example, Mr. Dehner's deposition answers or the State's answers to interrogatories to find an articulated rational basis for KRS 243.230(5) in 1938 was error.

Nevertheless, the district court had more than enough justifications in the record, much less others that could have been conceivable, to conclude there was a rational basis for KRS 243.230(5). The district court reviewed the following rationales: "(1) stricter regulation of more potent alcoholic beverages; (2) curbing potential abuse by limiting access to the products; (3) keeping pricing among merchants competitive, but not so low as to promote excessive consumption; (4) limiting the potential for underage access; (5) limiting alcohol sales to premises where personal observation of the purchase occurs; and (6) balancing the availability of a controversial product between those who want to purchase it and those who seek to ban it." (Memo. Op., RE 62, Page ID #1309-1310). The district court then claimed that it "can imagine no other interests at work." (Memo. Op., RE 62, Page ID #1309-1310). Of course that statement ignores *Simms'* finding that the entirety of KRS 243.230 was "an exercise of the Commonwealth's police

power to control the distribution and use of intoxicating beverages." *Simms*, 657 F.Supp. at 123. Such a basis for the statute has long been recognized as a rational basis for an alcohol regulation statute.

3. <u>There Is More Than Enough Available Historical Background And Reasoning From Which To Determine The Rational Basis For KRS 243.230</u>.

The Statement of Facts above set forth the history of and influence on Kentucky's alcohol regulation system. There is no need to repeat that here. That presentation conclusively shows that there was more than enough history to support a finding that there was a rational basis for KRS 243.230(5) prior to and at the time it was enacted. The district court's statements to the contrary were error.

4. <u>The District Court Also Ignored The Record Of Success Of Kentucky's Alcohol Regulation System</u>.

The district court completely ignored the expert testimony of Ms. Erickson discussing the positive societal effects of Kentucky's alcohol regulation system are measurable. Kentucky's system has resulted in Kentucky having lower rates of alcohol-related problems than the national average. (Erickson Exp. Rep., RE 40-19, Page ID #682). Kentucky has lower rates of alcohol consumption (39% versus 52%), binge drinking (20% versus 24%), drunk driving (24% versus 27%), and underage binge drinking (16% versus 18%). (*Id.*). Kentucky (and Utah) has the lowest rate of alcohol dependency and abuse in the nation. (*Id.*). Kentucky ranks second in the country for drunk driving prevention. (*Id.*).

Clearly Kentucky's alcohol regulation has an admirable record for curbing the social issues associated with widespread alcohol access. Such a record is consistent with the hoped for outcomes of the Fosdick and Scott Study and the Committee Report:

> All excessive drinking cannot be prevented in this, or in any other, manner. But the greatest temptation to it can be thus removed, the opportunities for it can be diminished and the mercenary encouragement of it can be measurably prevented . . . [majority plan].
>
> *****
>
> The evils accompanying the undue use of alcoholic beverages may not be cured or prevented by legislation' only righteous education and individual self-control will prevent them. Legislation, however, may mitigate them and should be for the benefit of society, not in the interest of those who pursue the traffic. [minority plan].

(Committee Rep., RE 40-12, Page ID #567, 575).

Such results underscore the rational basis for KRS 243.230(5).

IV. THE PRACTICAL EFFECTS OF ELIMINATING KRS 243.230(5) AND 804 KAR 4:270 WERE IGNORED BY THE DISTRICT COURT.

When the district court granted Party Source's intervention it recognized that "Party Source's views could add a dimension to the argument that is missing from the Commonwealth's constitutional focus. When considering a challenge with such broad ramifications, the Court will benefit from the additional advice." (Order, RE 17, Page ID #123-124). Party Source provided exactly this type of information and perspective, which was ignored by the district court's ruling.

The extremes of alcohol regulation systems, outlawing alcohol entirely (Prohibition) or allowing unfettered access and alcohol sales (the current United Kingdom example), are well-documented publicly and in the record of this case. It was also well-documented that Kentucky's alcohol regulation system following Prohibition was well-thought out and aimed for a reasonable middle ground. *See* Statement of Facts, *supra*. Ms. Erickson provided her expert opinions as to Kentucky's regulatory success. That success is based in no small part to limiting the premises that can sell high content alcohol (wine and distilled spirits). Striking down KRS 243.230(5), a vital component of Kentucky's alcohol regulation system that limits premises selling high content alcohol, can only lead to greater alcohol problems. Moreover, the district court's decision has the effect of flipping the equal protection argument on its head and placing package liquor stores in a position of being subject to greater restrictions than grocery stores and gas stations.

A. Kentucky's Alcohol Regulation System Is A Rational, Well-Reasoned Approach To Alcohol Control.

As discussed in both Ms. Erickson's Expert Report and Supplemental Expert Report, Kentucky's alcohol regulation system is well-reasoned and effective. (Erickson Exp. Rep., RE 40-19, Page ID #674-696; Erickson Supp. Rep., RE 40-21, Page ID # 710-717). Ms. Erickson has extensive professional experience in and knowledge of alcohol regulation and the effects of alcohol deregulation, including service as the Executive Director of the Oregon Liquor Control

Commission for seven years. (Erickson Rep., RE 40-19, Page ID #676-677, 690-694). In analyzing the regulatory impact of eliminating KRS 243.230(5) and 804 KAR 4:270, Ms. Erickson concluded the following:

> [it] will seriously weaken Kentucky's regulatory system . . . This will occur by making all forms of alcohol more available; by increasing the availability of more dangerous, higher alcohol content products; by lessoning controls provided by clerks; by decreasing the deterrent effect of liquor store age restrictions; by increasing the promotions which use price to induce high volume purchase; and by decreasing the ability of law enforcement to maintain its current level of enforcement.

(*Id.*, Page ID #678). It is worth highlighting key points from Ms. Erickson's Reports.

First, the elimination of KRS 243.230(5) and 804 KAR 4:270 allows distilled spirits to be sold in grocery stores, gas stations/convenience stores. Going back to the Fosdick and Scott Study and the Committee Report, one of the primary concerns after Prohibition was curbing access to and consumption of distilled spirits. The 1938 Act addressed the issue of easy access to distilled spirits by limiting their sale to licensed package liquor stores. (*Id.*, Page ID #683) ("The strategy of making products of higher alcohol content less available is recommended as an effective strategy by an international collection of scholars…").

Alcohol is not a benign consumer product. It is a dangerous substance that can harm individuals, families, and communities. (Cole Aff., RE 40-24, Page ID

#762). There are serious health risks to oneself and others relating to alcohol consumption including, but not limited to, alcohol poisoning, addiction, and drunk driving. (Erickson Supp. Rep., RE 40-21, Page ID #715). The dangers of allowing distilled spirits to be sold on every corner where a grocery store, gas station/convenience store is located should be readily apparent.

Second, key to Kentucky's alcohol regulation system is the package liquor store concept for providing sale controls. (*Id.*). Package liquor stores are subject to strict controls over how alcohol is sold. (*Id.*). From limited hours of operation to patron age restrictions, the sale of alcohol through licensed package liquor stores is controlled by state statutes and regulations. (*Id.*). Package liquor store employees are required to be trained to require age verification and to assess potentially intoxicated persons attempting to purchase alcohol. *Id.*; Lewis Aff., RE 40-6, Page ID #468-469). All of these restrictions are valid regulatory protections designed to minimize alcohol problems. (Erickson Exp. Rep., RE 40-19, Page ID #680).

Third, one of the fundamental purposes of alcohol regulation is to limit consumption, including underage consumption. Minors (those under 21) are not allowed in package liquor stores. KRS 244.085(7). There are usually few issues with package liquor stores keeping minors out. (*Id.*, Page ID #685). Minors are allowed unfettered entry to grocery stores and gas stations/convenience stores with

no controls in place to limit their access to alcohol sold in those stores. The increased access to alcohol would come at a time when minors are switching their drinking preferences from beer to spirits. (*Id.*). Getting rid of regulations that make it more difficult for minors to obtain alcohol makes no rational sense.

B. The District Court Holding That KRS 243.230(5) And 804 KAR 4:270 Violate The Equal Protection Clause Discriminates Against Intervening Defendant And All Similarly Situated Retailers.

The district court opinion suggests that the statute and regulation at issue violate the Equal Protection Clause, "essentially a direction that all persons similarly situated should be treated alike." (Mem. Op., RE 62, Page ID #1303). The opinion seems to hold that grocery stores and gas stations are victims of a denial of equal protection because they, unlike all other commercial establishments, are prohibited from generating monthly gross sales of 10% or more of staple groceries (or gasoline) and selling wine or distilled spirits within the confines of their premises. However, are package liquor licensees free to sell more than 10% of staple groceries in their premises and retain the package liquor license? Of course not, so where is the equal protection? Are minors now free to roam grocery stores and gas stations that will sell intoxicating liquors without being accompanied by a parent or guardian, as is required in the package store under KRS 244.085(7)? What does KRS 244.085(7) now mean? If a grocery store can sell booze because of the district court's ruling of no equal protection, isn't it

the package store that is the party who is discriminated against?

How does the district court finding fit with the long-time language of KRS 243.230(4)(b), a provision that holds that licensed premises not located in an incorporated city must be used exclusively for the sale of distilled spirits and wine and not used in any manner, including any other commercial enterprise "except as a drug store in which a registered pharmacist is employed." Who, again, is being the victim of discrimination?

It is beyond cavil that all retailers are subject to the language of KRS 243.230(5) (and, correspondingly, KRS 243.230(4)), including grocery stores, gas stations and drug stores. Package liquor retailers are well-familiar with the provisions of KRS 243.230(5) and 804 KAR4:270 concerning "staple groceries" and the limitation that they impose upon package liquor licensees. (Leasor Aff., RE 40-20, Page ID #701; Lewis Aff., RE 40-6, Page ID #467). The relevant provisions limit a package liquor licensee from selling more than 10% on its licensed premises. (*Id.*). A violation of that rule can result in suspension or revocation of the violator's package license. Accordingly, it is always important for a package liquor licensee to comply with the 10% rule. (*Id.*).

The requirements and prohibitions of the 10% rule have been in place since at least 1939 and are clear and unambiguous. *Id.* Accordingly, package retailers as Party Source have played by the rules and sell less than 10% staple groceries in

order to remain qualified in their chosen field. (Leasor Aff., RE 40-20, Page ID #701-702; Lewis Aff., RE 40-6, Page ID #467).

If a commercial enterprise wants to engage in the package liquor business, it must do so in conformity with the cited statute. It matters not what that retailer's primary business is. If Party Source or a hardware store wants to sell 10% of staple groceries, it is welcome to do so, but it will not sell distilled spirits and wine on its premises. Plaintiffs get no free ride in this regard under KRS 243.230(5). Since the law applies equally to all retailers, there can be no equal protection violation and there are no distinctions to be addressed.

In the instant case, the General Assembly has treated all potential package liquor applicants equally. Even if not, it has decided that those who choose to hold themselves out as major sellers of staple groceries or gas and oil, without limitation, must determine in which business they will advertise and focus their finances and attention. Party Source and package liquor licensees similarly situated have made that decision. The district court holding of an equal protection violation is erroneous, particularly in view of its acknowledgment that "[t]he guarantee of equal protection does not require a statute to apply equally to all persons – it may "impose special burdens upon defined classes in order to achieve permissible ends." (Mem. Op., RE 62, Page ID #1303).

CONCLUSION AND REQUEST FOR RELIEF

This suit is not about equal protection. It is a suit in which the grocer Plaintiffs are trying to obtain a legislative change to the current prohibition against the sale of wine and spirits in grocery stores that the General Assembly refuses to give to them. But the requested change would go far beyond the Plaintiffs and this case. The exponential increase in the availability and access to alcohol in Kentucky through grocery stores and gas stations/convenience stores that would result flies in the face of Kentucky's post-Prohibition history of alcohol regulation and the will of Kentuckians and their elected officials.

Therefore, for the reasons set forth more fully above, Party Source respectfully requests that this Court vacate the decision of the district court granting summary judgment to Plaintiffs and denying summary judgment to Defendants, declare that there is a rational basis for KRS 243.230(5) and 804 KAR 4:270, declare that neither the statute or regulation violates the Equal Protection Clause, and quash the injunctive relief enjoining the subject statute's and regulation's enforcement.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to 6th Cir. R. 32(a), the undersigned counsel certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7). Exclusive of the exempted portions in Fed. R. App. P. 32(a)(7)(B)(iii), the brief contains 13,828 words. The brief was prepared in Microsoft Word, using a Times New Roman 14pt font.

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Date: 01/31/2013

CERTIFICATE OF SERVICE

It is hereby certified that on this 31st day of January, 2013, pursuant to Fed. R. App. P. 25(d), the original of the Principal Brief of Intervening Defendant/Appellant/Cross-Appellee Liquor Outlet, LLC, dba The Party Source, was electronically filed with the clerk of the Court by using the CM/ECF system, which will send a notice and service of electronic filing to the following:

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LIQUOR OUTLET, LLC, DBA THE PARTY SOURCE'S DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Description of Item	Record No.	Page ID #
Complaint	1	1-9
Motion to Intervene	7	41-51
Answer	8	53-59
Amended Answer	14	113-116
Memorandum and Order	17	122-124
Amended Complaint	37	308-320
Answer	38	321-325
Answer	39	326-335
Mason Deposition	40-3	378-406
FWWC Articles of Incorporation	40-4	407-411
Lentz Affidavit & Exhibits	40-5	412-464
Lewis Affidavit & Exhibits	40-6	465-510
FWWC Web Pages	40-8	513-525
FWWC Petition	40-9	526-527
Plaintiffs' Answer to Discovery	40-10	528-540
Maxwell Deposition	40-11	541-559
Liquor Control Committee Report	40-12 (Part I) 40-13 (Part II)	560-591 592-630

Description of Item	Record No.	Page ID #
1938 Ky. Acts	40-14	631-637
Shelby Report	40-15	638-645
Plaintiffs' Supplemental Answer to Discovery	40-16	646-654
ABC Kroger Lookup	40-17	655-669
Erickson Expert Report	40-19	674-696
Leasor Affidavit & Exhibit	40-20	697-709
Erickson Supplemental Expert Report	40-21	710-717
Cole Affidavit	40-24	758-764
Order	60	1290
Notice of Filing	61	1291-1294
Memorandum and Opinion	62	1295-1323
Order	63	1324
Order	67	1328-1329
Notice of Appeal	75	1480-1481

LIQUOR OUTLET, LLC, DBA THE PARTY SOURCE'S ADDENDUM TO ITS PRINCIPAL BRIEF

Description of Item	**Page ID #**
Excerpts from *Toward Liquor Control*	A2
Excerpts from 1934 Act	A14
Ky. Stat. § 2554b-1(5) Ky. Stat. § 2554b-16 Ky. Stat. § 2554b-17 Ky. Stat. § 2554b-20	
Excerpts from 1938 Law	A19
Ky. Stat. § 2554b-154 Ky. Stat. § 2554b-154(8)	
Excerpt from 1942 Kentucky Revised Statutes	A23
KRS 243.230(3)(c)	

Excerpts from *Toward Liquor Control*

TOWARD LIQUOR CONTROL

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and
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- It expresses strong support for the state serving as the seller of alcohol over the license system. The book asserts that a state run system would prevent the gradual erosion of alcohol controls by those with economic interests in the alcohol business.
- It strongly pushes for trade practice regulations and the prevention of vertical integration in the alcohol market. Alcohol regulation should also ensure the continued absence of the saloon from American social life.
- It notes that states must use their control systems to steer society to lower alcohol form of products. Liquor is to be tightly restricted; lower forms of alcohol such as lower alcohol beer and wines are to have less restrictive regulations. It notes that the return of beer early in 1933 did not create problems and should serve as a model for lower alcohol products; and
- It notes the limits of theoretical and utopian ideals as a way to regulate society. There must be political support the authors concluded:

> *Forty eight states are attempting to set up a new method of control. In the last analysis, there is but one fundamental rule to be followed-and all other rules are corollaries: If the new system is not rooted in what the people of each state sincerely desire at this moment, it makes no difference how logical and complete it may appear as a statute – it cannot succeed.*

There are many other important points relating to the proper level of taxation, both of the product and the industry, education, the best type of license systems, political influence by the alcohol industry, and education programs by government entities. Many of these points remain relevant and timely discussion items to this date.

However, it must also be noted what is not in *Toward Liquor Control*. Many important regulatory functions were developed after this book as state governments put the theories of *Toward Liquor*

Case: 12-6182 Document: 006111576663 Filed: 01/31/2013 Page: 78

coholic beverages is in itself reprehensible. That there is grave peril of immoderate use is unanimously conceded. In respect to every human desire, intemperance has always been the chief frailty of mankind. But while hundreds of thousands of people are by preference and practice teetotalers, public opinion will not support the thesis that the temperate use of alcohol is inconsistent with sobriety, self-control, good citizenship and social responsibility. More than that, many people believe that such moderate use can be made an agreeable phase of a civilized mode of living.

3. The saloon, as it existed in pre-prohibition days, was a menace to society and must never be allowed to return. Behind its blinds degradation and crime were fostered, and under its principle of stimulated sales poverty and drunkenness, big profits and political graft, found a secure foothold. Public opinion has not forgotten the evils symbolized by this disreputable institution and it does not intend that it shall worm its way back into our social life.

4. Despite the reaction from the Eighteenth Amendment, America is in no mood to stand any aggressiveness on the part of the brewers, the distillers and the liquor trade generally. The memory of their campaigns against temperance, of their corrupt legislative activities and of their insolent intrusion into our political life in the days before prohibition, is still alive. Any indication that they are once more pushing their business in violation of decent social standards will bring the pendulum swinging back.

5. Public opinion is gratified by the record of sobriety that has attended the return of beer. It is distinctly apprehensive over the prospective legalized return of spirits. For America aspires to be a temperate nation. It has a passionate desire that its young people shall be protected against the greedy commercialization of the liquor trade and the pitfalls of intemperance. It dreads the hazards and inefficiencies that attend immoderation. It is fully prepared to take drastic steps if, as a result of the present attitude of toleration, conditions should once more get out of control.

6. America is inclined to believe that there is some definite solution for the liquor problem—some method other than bone-dry

Case: 12-6182 Document: 006111576668 Filed: 01/31/2013 Page: 79

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prohibition—that will allow a sane and moderate use of alcohol to those who desire it, and at the same time minimize the evils of excess. There is no unanimity of opinion as to what that solution shall be, but the people at the moment are in an adventurous mood. A new philosophy of change is in the air, and political ideas are now being put into effect which were unthinkable even a decade ago. The question is asked: Why should we follow the old pre-prohibition route? Why is it not possible to strike out on a fresh trail? If in relation to every other business new social and political controls are daily being devised, why in relation to this liquor business should we not create a new technique, a new method, by which it can be brought within the compass of what the public really desires?

The Conclusions of this Report

This report attempts to find an answer to this type of question, and our conclusions may be briefly summarized as follows:

1. State-wide, bone-dry prohibition will prove unsuccessful in controlling the problem of alcohol, unless such a system has behind it overwhelming public support. Even then it will tend to carry in its trail the hypocrisy and lawlessness which marked the national experiment.

2. The experience of every country supports the idea that light wines and beers do not constitute a serious social problem.

3. While many states will doubtless follow the license method in the control of beverages of higher alcoholic content, this method contains a fundamental flaw in that it retains the private profit motive which makes inevitable the stimulation of sales.

4. Wide experience in many countries indicates that the best approach to the problem of heavier alcoholic beverages is through state control. By state control we mean specifically a system by which the state, through a central authority, maintains an exclusive monopoly of retail sale for off-premises consumption. This authority determines prices, fixes the location of its stores, controls advertising, and in general manages the trade in such a way as to meet a minimum, unstimulated demand within conditions established solely in the interests of society.

Case: 12-6182 Document: 006111576663 Filed: 01/31/2013 Page: 80

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e, North Carolina, North Dakota, Ohio, Oklahoma,
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lative acts generally restricting manufacture, sale or transportation have ordinarily contained exceptions. Thus, legislators have rarely attempted to prohibit manufacture of wines, beers and ciders in the home. Indeed, commercial manufacture and sale of the lighter beverages have sometimes been permitted. Under all but the dryest laws sale has been licensed for medicinal purposes. Many dry states have allowed importation by the package from outside, and there are plenty of other instances of modifications of the prohibition principle which were employed prior to the Eighteenth Amendment in an effort to meet particular demands.

The possible future success of state-wide prohibition will depend entirely upon whether there is within the state an overwhelming majority in favor of this type of control. On no other basis can it hope to be even moderately successful. Any law relating to liquor has a broad incidence; it touches many people directly. Consequently, its popular backing must be strong. If an uncompromising, bone-dry prohibition is attempted, failure to marshal a preponderant sentiment behind it will, we believe, admit all the abuses which have recently been experienced under the national régime. Each state is familiar with the peculiar manifestations of these abuses within its borders. Undoubtedly federal repeal has altered some of the conditions, and it is possible that in a few states factors favorable to the retention of prohibition are discernible. As a general rule, however, it would seem to be advisable for a state to adhere to prohibition only when there is tangible evidence that public opinion is running definitely and irresistibly in its favor. No other method of handling the liquor problem depends so completely upon undeviating public support.

Even in a state where a large majority of the voters have expressed themselves in favor of a thoroughgoing non-sale policy it may be eminently desirable to make concessions to an irreconcilable minority as a means of eliminating an organized bootlegging traffic. Legalized importation by package for personal use has been one of the methods by which some so called prohibition states in the past have secured respect for the law. Whether or not this modifica-

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ıtill think of unqualified, bone-dry
ıost effective method of handling

Chapter Three

LIGHT WINES AND BEERS VS. SPIRITS

WE COME NOW TO THE SITUATION EXISTING IN THOSE STATES IN WHICH, BY the repeal of the Eighteenth Amendment, the slate has been wiped clean for a new experiment in liquor control. What is the road to be taken? From what point do we see the beginning of a path toward temperance?

American liquor legislation in the past has, as we have seen, been guided more by emotion than by reason or experience. In the stumbling search for a law to cure the drink evil, legislators seldom paused to inquire what drinks should be the main target of attack. To many earnest and sincere temperance workers alcohol in any form was a vice. Beer containing 3.2 per cent of alcohol was condemned indiscriminately along with whiskey having a content of 30 to 45 per cent.[1] In most states, under the old régime, a single license permitted the sale of both beer and whiskey. As a result, they were commonly sold over the same counter, and often the chief source of profit of the "beer saloon" was its sales of hard liquor.

True to this American tradition of treating all alcoholic beverages alike, the Volstead Act defined as "intoxicating liquor" any beverage containing one-half of one per cent, or more, of alcohol by volume. An overwhelming weight of medical and scientific testimony to the contrary was brushed aside by Congress. Facts were not wanted when they were in conflict with the fervently held belief that alcohol in a concentration of one-half of one per cent, or more, makes a drink unfit for human consumption.

[1] Unless otherwise stated, the basis of measurement used in this book is by weight rather than by volume.

Case: 12-6182 Document: 006111576663 Filed: 01/31/2013 Page: 82

What is an Intoxicating Beverage?

A rational approach to the problem of liquor control requires an about-face and a new viewpoint. We should start by inquiring what concentration of alcohol makes a beverage intoxicating in fact to the ordinary man. When the alcoholic content is below that point, a drink should be subject to little, if any, restraint upon its use. The sale of stronger drinks should be regulated under a program which, so far as is practicable, discourages consumption with increasing strictness as the alcoholic content increases. Such a system directs its spear-head against alcohol in the forms most liable to abuse by man, and, by permitting relative freedom in the use of the weaker drinks, tends to promote temperance.

Where shall the lines be drawn in setting up such a plan of control? A natural and convenient division is between fermented beverages and distilled liquors. The fermented drinks, consisting mainly of beers and wines, have a range in alcoholic content up to 12 per cent. Distilled liquors, which include whiskey and gin, usually contain from 30 to 45 per cent of alcohol.[2]

The distilled liquors are thus seen to be in a class by themselves, with an alcoholic strength far in excess of wines and beers. This difference should be made the basis of a radical difference in treatment under the law. It is true that even the heaviest spirits may be consumed in such moderation as to avoid injurious consequences and that it is possible to over indulge in wine or beer. But the experience and common sense of mankind have always recognized the difference between the two—if legislators have not.

No one will deny that whiskey and gin are more intoxicating than beer and wine. The argument for treating the two classes of beverages alike in the past has been that the beer drinker of today becomes the whiskey sot of tomorrow. There may be danger that this will occur if 3.2 per cent beer can be sold only over the same bar and subject to the same conditions as whiskey. Since there is a greater profit in whiskey, the bartender is under a constant temptation to push its sale. But we find no definite evidence to support the

[2] For a tabulation of the alcoholic strength of various beverages, see Appendix V.

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s of partisan political considerations.

Nor should resort be had to a bipartisan board in the mistaken belief that this device eliminates politics. In practice, it turns public departments over to the keeping of *both* parties.

Third: The "tied house," and every device calculated to place the retail establishment under obligation to a particular distiller or brewer, should be prevented by all available means. "Tied houses," that is, establishments under contract to sell exclusively the product of one manufacturer, were, in many cases, responsible for the bad name of the saloon. The "tied house" system had all the vices of absentee ownership. The manufacturer knew nothing and cared nothing about the community. All he wanted was increased sales. He saw none of the abuses, and as a non-resident he was beyond local social influence. The "tied house" system also involved a multiplicity of outlets, because each manufacturer had to have a sales agency in a given locality. In this respect the system was not unlike that now used in the sale of gasoline, and with the same result: a large excess of sales outlets. Whether or not this is of concern to the pubic in the case of gasoline, in relation to the liquor problem it is a matter of crucial importance because of its effect in stimulating competition in the retail sale of alcoholic beverages. "Tied houses" should, therefore, be prohibited, and every opportunity for the evasion of this system should, if possible, be foreseen and blocked.[2]

There are many devices used by brewers and distillers to achieve this same end, such as the furnishing of bars, electric signs, refrigerating equipment, the extension of credit, the payment of rebates, the furnishing of warranty bonds when required to guarantee the fulfillment of license conditions and of bail bonds when the dealer is haled into court. A license law should endeavor to prohibit all such relations between the manufacturer and the retailer, difficult though this may be.

[2] Almost every beer and general liquor law that has recently been enacted includes this provision, e.g., Rhode Island (Laws 1933, Chapter 2013, Section 48). In some states, as in Illinois (Laws 1933, Page 518, Section 9) and New York (Laws 1933, Chapter 180, Section 86), the manufacturer and the retail licensee are jointly held responsible for any violations of this provision. In Indiana (Laws 1933, Chapter 80, Section 21) and in Iowa (Laws 1933, Chapter 37, Section 26) the gift of equipment such as bars, refrigerators, furniture, electric signs, etc., by manufacturers is expressly prohibited.

Case: 12-6182 Document: 006111576663 Filed: 01/31/2013 Page: 84

Fourth: Suitable restrictions should be established by the license law or by administrative regulation with respect to the number and character of *places* where liquor may be sold. This is regarded as of the highest significance in England, where great effort is being made to reduce the number of licenses from year to year and to improve the appearance and character of licensed places. The number of licenses may be limited on a population basis as is done in Massachusetts and Rhode Island under the new law.[3]

Closely related to the limitation of the number of licenses is the restriction of the location and character of places where liquor may be sold. In the past, saloons were prohibited in some states within a specified distance of schools and churches. While location must be subject to control, we believe the restriction should be an administrative measure rather than a legislative enactment. This will enable the state licensing authority to grant or refuse licenses on a rational basis after consulting neighborhood and community desires, and after considering the requirements of local zoning laws. While the license law should also prohibit screens, upstairs rooms and back rooms, and the presence of gambling and slot machines, and should establish general regulations with regard to lavatories, et cetera, the licensing authority should be given wide power to expand and enforce such legal provisions through appropriate rules and regulations.[4]

Fifth: Licenses should be classified to recognize the inherent differences between beer, wine and spirits as problems of control.[5] One of the most satisfactory license classifications in this country before prohibition was in Massachusetts where seven kinds of licenses were provided.[6]

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[3] Massachusetts (beer law) Laws 1933, Chapter 120, Section 6; Rhode Island, Laws of 1933, Chapter 2013, Section 16.

[4] The use of screens is prohibited in the new laws of the following states: Connecticut (taverns only) (Laws 1933, Chapter 140, Section 25), Missouri (beer law) (Laws 1933, Page 256, Section 13139Z8), Nebraska (beer law) (Laws 1933, Page 85, Section 10), New Jersey (beer law) (Laws 1933, Chapter 85, Section 3) and Rhode Island (Laws 1933, Chapter 2013, Section 27).

[5] See page 29.

[6] Massachusetts Revised Laws, 1902 -- Ch. 100, Sec. 18.

Case: 12-6182 Document: 006111576663 Filed: 01/31/2013 Page: 85

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IE LICENSE SYSTEM IN OPERATION

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Sense, p. 120.
the South, p. 19.
al and Social Science, Nov. 1908, p. 545.

cense plans in dealing with such matters as sales stimulation, advertising, price control, character of liquor sales shops, temperance education and liability to graft and corruption.

It should be observed, first of all, that the objective is the same under both plans, namely, to place the sale of liquor under a series of restrictions devised to curtail excessive consumption. The only difference lies in the method of achieving this object. The licensing system endeavors to establish these controls through *negative* rules, regulations, conditions and taxes, *imposed from without*, upon *private* enterprise, which necessarily is conducted for *personal profit*. The State Authority plan endeavors to impose these controls through *positive management* from *within a public* enterprise conducted for the *benefit of society*.

Sales Stimulation

In what way do these differences in method of control affect the problem of sales stimulation? The answer is obvious. Under a state monopoly system the liquor would be sold directly by the state through a chain of stores and the profits turned into the state treasury, and that would be the end of it. No individual connected with the retail sale would gain one penny by reason of his sales, nor would his employment be imperiled if he failed to show good sales returns, as might be the case in private trade. In harmony with the underlying principle of the Authority, the salaried employees waiting on the customers in the various state stores would be under strict supervision not only to see that there was no encouragement of the sale of liquor, but to make sure that no beverages were sold in violation of the letter *and the spirit* of the regulations.

Under the license system, on the other hand, competing private dealers are under constant temptation to build up their sales and profits. The issuance of liquor licenses to private dealers presupposes the right to make a living by the sale of liquor. Since his livelihood is at stake, the private seller always has been, and always will be, interested in sales, and in nothing but sales.

Case: 12-6182 Document: 006111576663 Filed: 01/31/2013 Page: 86

terms of speed. Indeed, the whole economic and industrial structure of our social order is held together by machinery,—machinery that requires cool heads and steady nerves to run it,—delicately adjusted, interlocked machinery, capable, if mishandled, of wrecking the social system itself and scattering death and suffering in wide circles.

This conception of the evils of intemperance in a machine age was alive in America long before the advent of prohibition. As early as 1899 the famous Rule G was in operation on every Class 1 railroad:

> The use of intoxicants by employees while on duty is prohibited; their use, or the frequenting of places where they are sold, is sufficient cause for dismissal.

That rule was not written by fanatics or by moralists. It was written by engineers in the interest of human safety. By the same token every automobile today is an argument against liquor; every new mechanical invention is a plea for temperance. It is this point of view that gives rise to apprehension among thoughtful people everywhere as they face a new era of liquor control, with the machine process fastening itself more securely each year on all the details of human life. Never was there a greater need for temperate habit and self-control. Never was the necessity for education so compelling.

What is Meant by Education

We are conscious, of course, that education is a much-abused term and that all too frequently it is employed as a charm by which miracles can be wrought. The public mind is tempted to fall back upon it when quicker approaches are blocked, and, like legislation, it becomes in popular imagination a final solution rather than a working method. Moreover, when we think of education, we are inclined to think almost exclusively in terms of the school. In relation to the problem of alcohol, for example, we think of the part that formal and systematized instruction can play in the development of temperate habits.

Excerpts from 1934 Act

Case: 12-6182 Document: 006111576663 Filed: 01/31/2013 Page: 88

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(Eighth Edition)

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BALDWIN'S 1936 REVISION

Containing all Laws to October 1936

WILLIAM EDWARD BALDWIN, D.C.L.

Editor-in-Chief

Editor, Carroll's Official Statutes of Kentucky, 1922, 1930; Official Codes of Practice of Kentucky; Officially Certified Code of Ohio, 1930, 1934, 1936; Baldwin's Ohio Civil Practice Manual, 1936; Baldwin's Indiana Statutes, 1934; Tennessee Code Supplement; Michigan Compiled Laws, Supplement; Bouvier's Law Dictionary, Baldwin's Revision.

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CLEVELAND

Case: 12-6182 Document: 006111576663 Filed: 01/31/2013 Page: 89

ARTICLE I.

Definitions and Short Title

§ 2554b-1. Definitions.—1. The word "person" as used in this Act shall include any and all corporations, partnerships, associations or individuals.

2. The word "manufacturer" shall mean, unless otherwise specified, any person engaged in the business of distilling, brewing, making, blending, rectifying or producing for sale in wholesale quantities alcoholic liquors of any kind, including whiskey, brandy, cordials, liquors, wines, ales, beers, or other liquids containing alcohol.

3. A "dispensary" shall mean any store which, under the provisions of this Act, and having paid all taxes required by the Commonwealth, sells at retail in unbroken packages for non-consumption on the premises a pint or quart of any intoxicating alcoholic liquor as defined by this Act.

4. The words "commission," or "tax commission," refer to Kentucky State Tax Commission.

5. "Non-intoxicating" alcoholic liquors shall mean all liquors which have 6.02 per cent or less of alcohol by volume, or 4.81 per cent by weight. "Intoxicating" alcoholic liquors shall be all liquors which contain more than 6.02 per cent of alcohol by volume of* 4.81 per cent by weight.

6. The word "hotel" shall mean any establishment for the accommodation of the public, which has been in existence and operation for not less than one year at the time as of which its standing under this Act is called in question, which is equipped with not less than twenty bed-rooms containing not less than one bed in each such room, with sufficient covering therefor, and which is equipped with a public dining-room and with facilities and equipment for preparing and serving bona fide meals.

7. The word "restaurant" shall mean an establishment, which has been in existence and operation for not less than one year at the time as of which its standing under this Act is called in question, equipped with a public dining-room and with facilities and equipment for preparing and serving bona fide meals to the public. "Restaurant" shall include dining cars of any railroad company, provided said company has procured the restaurant license for such dining cars as required under the provisions of law relating to restaurants in counties containing cities of the first class.

8. The word "club" shall mean any corporation, lawfully organized, which has been in existence and operation for not less than one year at the time as of which its standing under this Act is called in question which is the owner, lesee, or occupant of premises operated solely for educational, social, fraternal, patriotic, political or athletic purposes, and not for profit, which maintains a dining-room where, in consideration of payment, prepared and cooked food is regularly served, and in which membership entails the prepayment of dues.

9. The word "block" shall mean the area on both sides of that portion of a street lying between intersecting streets and extending back, on both sides, half-way to the next parallel street.

10. The word "medicinal liquor" as applied to alcoholic liquors within the meaning of this Act shall, and does, mean any liquor containing any per cent of alcohol which is used as a curative, alleviative or palative for bodily disorders or bodily pain, or as a tonic or stimulant for nervous or mental fatigue or other necessities of the human body.

11. All other words used in this Act shall be defined according to the statutes in such case made and provided, if any, and otherwise shall be defined according to the custom and usage of the people of Kentucky. (1934, c. 146, Art. II, §§ 1 to 11. Eff. March 17, 1934.)

* So in the printed Acts. Should it read "or"?

Functions under this act removed from state tax commission and vested in division of alcoholic control in department of business regulation, §§ 4618-113, 4618-116.

Liquor taxes:
- Beer, wine and fruit juices, § 4214d-1 et seq.
- Fermented liquors, sales tax, § 4214c-1.
- License taxes in general, §§ 4224, 4224a-1.
- Manufacture, sale, transportation, etc., § 4214a-12 et seq.
- Medicinal, sacramental, etc., § 2554b-16.
- Permits and fees for manufacture, sale, etc., § 2554b-1 et seq.
- Sales tax on liquors, § 4281c-1 et seq.
- Small container tax, § 4281c-25.
- Warehousemen and rectifiers, § 4105 et seq.

§ 2554b-2. Title of Act.—This Act shall be known, and may be cited in all legal proceedings, as "The Kentucky Alcoholic Control Act." (1934, c. 146, Art. II, § 12. Eff. March 17, 1934.)

Note: Article I of this act was a declaration by the legislation of the need for liquor control.

ARTICLE II.

Functions of the State Tax Commission

§ 2554b-3. Provisions for enforcement.—The provisions of this Act shall be enforced by the State Tax Commission of the Commonwealth of Kentucky, and any deputy, employee or member thereof, and all reports required under said Act shall be made to said Tax Commission at Frankfort, Kentucky. (1934, c. 146, Art. III, § 1. Eff. March 17, 1934.)

Administration and enforcement of this act now vested in division of alcoholic control in department of business regulation, §§ 4618-113, 4618-116.

§ 2554b-4. Members of commission and employees not to be interested.—No member of the State Tax Commission or any officer, employee, or deputy or assistant thereof, shall have any interest, direct or indirect, in or

scientific, sacramental or medicinal purposes at wholesale. Such application shall be in writing and shall set forth in detail such information concerning the applicant for said permit and the premises to be used by the applicant as the State Tax Commission may require; and shall be accompanied by a certified check, or cash, or postal money order for the amount required by this Act for such permit. If the State Tax Commission shall deny the application it shall return the fee to the applicant and, if the State Tax Commission shall grant the application, it shall issue a permit in such form as shall be determined by the rules of the Tax Commission. Such permit shall contain a description of the premises permitted and in form and substance shall be a permit to the person therein specifically designated to sell spirituous, vinous or intoxicating malt liquors for mechanical, scientific, sacramental or medicinal purposes.

A person holding a distiller's or rectifier's permit, need not obtain a wholesaler's permit in order to sell at wholesale spirituous or vinous liquors. No person, after this Act becomes effective, other than a person holding a distiller's, manufacturer's, rectifier's or wholesaler's permit shall sell spirituous, vinous or intoxicating malt liquors at wholesale for mechanical, scientific, sacramental or medicinal purposes, and no wholesaler, holding a permit, shall sell or buy from others unless they hold permits, but such wholesalers may export from or import into this State, such liquors for mechanical, scientific, sacramental or medicinal purposes under rules and regulations promulgated by the State Tax Commission.

No wholesaler shall sell or contract to sell any spirituous, vinous intoxicating malt liquors for medicinal, scientific, mechanical or sacramental purposes to any dispensary, hotel, restaurant or club, who is not duly authorized under this Act to receive, possess, transport, distribute or sell same. (1934, c. 146, Art. IV, § 5. Eff. March 17, 1934.)

§ 2554b-16. Retailer's permit.—Any person, other than a distiller, rectifier or wholesaler, may apply to the State Tax Commission for a permit to sell and dispense vinous or spirituous liquors for medicinal, mechanical, sacramental or scientific purposes at retail. Such application shall be in writing and shall set forth in detail concerning the applicant for said permit and the premises to be used by the applicant as the State Tax Commission may require and shall be accompanied by a certified check, or cash or postal money order for the amount required by this Act for such permit. If the State Tax Commission shall deny the application it shall return the fee to the applicant, and if the State Tax Commission shall grant the application, it shall issue a permit in such form as shall be determined by the rules of the Tax Commission. Such permit shall contain a description of the premises permitted and in form and substance shall be a permit to the person therein specifically designated to sell and dispense at retail spirituous or vinous liquors.

All such sales shall be in unbroken package in either quart, one fifth gallon, pint, and half-pint sizes, and shall not be consumed on the premises except in the case of spirituous liquors which are contained in two-ounce (2 oz.) or less containers, that said containers shall not be sold by any licensed dispensary unless such dispensary has obtained a license to sell spirituous liquor by the drink. That the tax levied upon spirituous liquor contained in two ounce (2 oz.) containers or containers less in size shall be two cents (2c) upon each such container of spirituous liquor. (1936, 3rd. ex. s., c. 2, § 2; 1934, c. 146, Art. IV, § 6. Eff. May 1, 1936.)

Note.—The 1936 act amended the last paragraph of this section. Section one of the 1936 act is compiled as § 4281c-24.

Tax on sale of alcoholic beverages, § 4281c-1 et seq.

§ 2554b-17. Application for purchase of liquor; amount allowed each person.—Any person more than twenty-one (21) years of age, not an habitual drunkard, or not having been convicted of any offense attributable to the use of intoxicating liquors, may, if he deems it necessary for his health, purchase from any dispensary holding a permit from the State Tax Commission, one quart or pint of spirituous or vinous liquor, provided that no person shall purchase more than one quart within seven days, or no person shall purchase more than one pint within four days; and before any person shall purchase either one pint or quart, he shall sign an application which shall be provided by the State Tax Commission to such dispensaries upon the payment by said dispensaries to said Commission of the cost of the printing thereof, and which shall state in words and figures as follows:

I do hereby make application for pint, quart, case (strike out all but one) of spirituous, vinous or intoxicating malt liquor, which is purchased by me for medicinal, scientific, mechanical or sacramental purposes (strike out those purposes for which it is not purchased). I am over 21 years of age and am not addicted to the habit of drink, and I have not, within 6 months prior hereto, been convicted of drunkenness. This .... day of ......, 19.....

(Signed)....................

The State Tax Commission shall adopt such rules and regulations concerning all records the dispenser shall keep of such applications, sales made in pursuance thereof and the manner and method of reporting such sales and of obtaining and recording such facts on which such sale is made. (1934, c. 146, Art. IV, § 7(a). Eff. March 17, 1934.)

This section referred to in § 2554b-18.

§ 2554b-18. Purchase of malt liquors.—Any person under the conditions set forth in subsection (a)* may, if he deems necessary for his health, purchase from such dispensary one case of intoxicating malt liquors, but no per-

Case: 12-6182 Document: 006111576663 Filed: 01/31/2013 Page: 91

272 Ky 770

son shall purchase more than one case within 15 days and such person shall make the application set forth in subsection (a)*. (1934, c. 146, Art. IV, § 7(b). Eff. March 17, 1934.)

* § 2554b-17.

287 Ky 125

§ 2554b-19. Liquor not to be consumed in public place.—Any spirituous, vinous or intoxicating malt liquor obtained from such dispensaries shall not be consumed on the premises where purchased nor in any public place. (1934, c. 146, Art. IV, § 7(c). Eff. March 17, 1934.)

287 Ky 125

§ 2554b-20. Prescription by physician allowed.—Any physician who deems spirituous, vinous or intoxicating malt liquor necessary for the health of a patient of his whom he has seen or visited professionally may give to such patient a prescription therefor in the prescribed form, signed by the physician, or the physician may administer the liquor to the patient, for which purpose the physician shall administer only such liquor as was purchased by him under special permit pursuant to this Act, and may charge for the liquor so administered; but no prescription shall be given nor shall liquor be administered by a physician except a bona fide patient in cases of actual need, and when in the judgment of the physician the use of liquor as medicine in the quantity prescribed or administered is necessary. (1934, c. 146, Art. IV, § 8(a). Eff. March 17, 1934.)

287 Ky 125

§ 2554b-21. Prescriptions given in evasion of this act.—Every physician who gives any prescription or administers any liquor in evasion or violation of this Act, or who gives to or writes for any person a prescription for or including liquor for the purpose of enabling or assisting any person to evade any of the provisions of this Act, or for the purpose of enabling or assisting any person to obtain liquor to be used as a beverage, or to be sold or disposed of in any manner in violation of the provisions of this Act, shall be guilty of an offense against this Act. (1934, c. 146, Art. IV, § 8(b). Eff. March 17, 1934.)

287 Ky 125

§ 2554b-22. Administration of liquor to inmates of sanatoriums and homes for the aged.—Any person in charge of an institution regularly conducted as a hospital or sanatorium for the care of persons in ill health, or as a home devoted exclusively to the care of aged people, may, if he holds a special permit under this Act for the purpose, administer liquor purchased by him under this special permit to any patient or inmate of the institution who is in need of the same, either by way of external application or otherwise for emergency medical purposes, and may charge for the liquor so administered; but no liquor shall be administered by any person under this section except to bona fide patients or inmates of the institution of which he is in charge and in cases of actual need, and every person in charge of an institution who administers liquor in evasion or violation of this Act shall be guilty of an offense against this Act. (1934, c. 146, Art. IV, § 9. Eff. March 17, 1934.)

287 Ky 125

§ 2554b-23. Tax commission to prescribe regulations for issuing permits.—All special permits referred to in the foregoing sections shall be in such form and issued under such regulations as the State Tax Commission may prescribe. (1934, c. 146, Art. IV, § 10. Eff. March 17, 1934.)

287 Ky 125

§ 2554b-24. Prescription for a case of liquor.—Any physician who deems liquor necessary for the health of a patient may prescribe for said patient an unbroken case of spirituous, vinous or intoxicating malt liquor, and such prescription may be filled by any dispensary possessing a duly authorized permit from the State Tax Commission; provided, however, no such prescription shall be issued by a physician or filled by a dispensary unless the patient by reason of location or other handicap is unable to obtain such liquor as herein provided as needed. (1934, c. 146, Art. IV, § 11. Eff. March 17, 1934.)

287 Ky 125

§ 2554b-25. Permit to serve liquor with meals.—Any person operating a hotel, club or restaurant as defined in this Act may apply for a permit to dispense and sell for medical purposes spirituous and vinous liquors by the drink and intoxicating malt liquors by the glass, same to be served with food ordered by the same person for and as a meal. Such applications shall be in writing and shall set forth such information in detail concerning the applicant for said permit and the premises to be used by the applicant as the State Tax Commission may require, and said application shall be accompanied by a certified check or cash or postal money order for the amount required by this Act for such permit. If the State Tax Commission shall deny the application it shall return the fee to the applicant, and if the Commission grant the application it shall issue a permit in such form as shall be determined by the rules of the Tax Commission. Such permit shall contain a description of the premises permitted and in form and in substance shall be a permit to the person therein specifically designated to sell and dispense under the provisions hereof. (1934, c. 146, Art. IV, § 12(a). Eff. March 17, 1934.)

287 Ky 125

§ 2554b-26. Conditions under which permits shall be granted restaurants.—The Commission shall not grant a permit to a hotel, restaurant or club which has not actually and continuously engaged in such business for the period of 12 (twelve) months immediately preceding the date of the application and unless the license required under the provisions of law for the operation of such hotel, restaurant or club has been heretofore paid in advance for the period between the date of said application and the first day

Excerpts from 1938 Law

Case: 12-6182 Document: 006111576663 Filed: 01/31/2013 Page: 93

§ 2548. Surety in judgment, etc.

Failure to issue execution within seven years after prior execution discharges surety from liability under the judgment, even though in the meantime a nulla bona suit had been brought. Frick Co. v. Eversole, 273 Ky. 160, 116 S.W.(2d) 333.

§ 2550. Surety for fiduciary released in five years.

Suit was brought on bond of administrator on the ground that the judgment of final settlement of administrator had been procured through fraud and collusion between the administrator and certain relatives of the deceased, whereby plaintiff, a relative of the deceased, was excluded from the settlement. Limitations prescribed by this section were applicable. Tucker v. Aetna Casualty & Surety Co., 270 Ky. 723, 110 S.W.(2d) 649.

§ 2551. Surety in any obligation released in seven years.

This section is not repealed by the negotiable instruments law. A new promise to pay surety after limitations has run must be supported by consideration in order to bind surety. Sparkman's Guardian v. Huff, 266 Ky. 183, 98 S.W.(2d) 484.

Limitations held to run against surety on note. Harned v. Harned, 270 Ky. 735, 110 S.W.(2d) 674.

Waiver of "extension of time of payment" was waiver simply of surety's right to claim immediate release from liability upon mere indulgence to maker. Bank v. Hutchison, 272 Ky. 195, 113 S.W. (2d) 1148.

Surety held discharged by limitation under facts of this case. Citizens Bank of Shelbyville v. Hutchison, 272 Ky. 195, 113 S.W.(2d) 1148.

Provision in will that executor should pay testator's just debts, meant his legal debts, and did not include debts barred by limitations. Jones' Ex'r. v. Jones, 275 Ky. 753, 122 S.W.(2d) 779.

§ 2552. Surety; when provisions of four preceding sections do not apply.

This section is not repealed by the negotiable instruments law. A new promise to pay surety after limitations has run must be supported by consideration in order to bind surety. A request for indulgence or extension is not a "hindering" or "Obstructing" etc. of the bringing of a suit against the surety. Sparkman's Guardian v. Huff, 266 Ky. 183, 98 S.W. (2d) 484.

Snit was brought on bond of administrator on the ground that the judgment of final settlement of administrator had been procured through fraud and collusion between the administrator and eertain relatives of the deceased, whereby plaintiff, a relative of the deceased, was excluded from the settlement. Provisions of this section have no application to the foregoing factual situation. Tucker v. Aetna Casualty & Surety Co., 270 Ky. 723, 110 S.W.(2d) 649.

Surety said he would pay so much of debt as principal didn't pay. Held, such statement did not amount to an obstruction or hindrance of a suit. Jones' Ex'r. v. Jones, 275 Ky. 753, 122 S.W.(2d) 779.

CHAPTER 81.

LIQUORS, INTOXICATING

§§ 2554b-1 to 2554b-66. Repealed.—Eff. Mar. 7, 1938. 1938 c 2 p 48 § 122. (1936 3rd ex. s. c 2 § 2; 1934 c 146 Art II § 1 to Art VII § 2.)

§ 2554b-57.

Lessee of distillery must pay the permit fee prescribed by this section although owner also pays same. Shannon v. Esbeco Distilling Corp., 275 Ky. 51, 120 S.W.(2d) 745.

§ 2554b-67. Unlawful to possess or transport an illicit still; penalty.

This section referred to in K.S. § 2554b-141.

§§ 2554b-68 to 2554b-72. Repealed.—Eff. Mar. 7, 1938. 1938 c 2 p 48 § 122. (1934 c 146 Art VII §§ 3 to 8.)

§ 2554b-73. Disposal of illicit stills, etc.

This section referred to in K.S. § 2554b-141.

§§ 2554b-74 to 2554b-96. Repealed.—Eff. Mar. 7, 1938. 1938 c 2 p 48 § 122. (1934 c 146 Art VII § 10 to Art VIII § 16.)

Note.—§§ 2554b-80 to 2554b-96 were impliedly repealed by 1936 c 1 compiled as §§ 2554c-1 to 2554c-42.

Title I.—Short Title; Definitions

Title II.—Administration

Art. I. Division of Alcoholic Control. 2554b-99.
Art. II. Local Control Authorities. 2554b-110.

Title III.—Licenses and License Taxes

Art. I. Local Licenses. 2554b-112.
Art. II. Kinds of State Licenses and Taxes for Distilled Spirits and Wines. 2554b-114.
Art. III. Traffic Authorized by Various Licenses. 2554b-118.
Art. IV. Licenses: Who May Receive and How Obtained. 2554b-128.
Art. V. Revocation and Suspension of Licenses. 2554b-141.

Title IV.—Prohibitions, Restrictions and Regulations

Art. I. Prohibitions, Restrictions and Regulations Relating to All Persons. 2554b-150.
Art. II. Prohibitions, Restrictions and Regulations Relating to Licensees Generally. 2554b-154.
Art. III. Prohibitions, Restrictions and Regulations Relating to All Manfacturers and Wholesalers. 2554b-168.
Art. IV. Prohibitions, Restrictions and Regulations Relating Only to Wholesalers. 2554b-172.
Art. V. Prohibitions, Restrictions and Regnlations Relating to All Sales at Retail. 2554b-174.
Art. VI. Prohibitions, Restrictions and Regulations Relating Only to Retail Package Sales. 2554b-184.
Art. VII. Prohibitions, Restrictions and Regulations Relating Only to Retail Drink Licenses. 2554b-187.

Case: 12-6182 Document: 006111576663 Filed: 01/31/2013 Page: 94

restored unless the person from whose possession same was taken proves that he was in lawful possession of said property. If the owners of any contraband seized under this Act cannot be located within ninety days, and during that time shall fail to appear and claim such contraband, or if such owner appears and agrees, title to such contraband shall immediately vest in the State Alcoholic Control Board. (1938 c 2 p 48 § 53.)

Acts 1938 c 2. Eff. Mar. 7, 1938.
* § 2554b-179.

§ 2554b-152. Penalty for drinking or being drunk in a public place.—Any person who shall in any public place or in or upon any passenger coach, street car, or in any other vehicle commonly used for the transportation of passengers, or in or about any depot, platform, waiting station or room, drink any intoxicating liquor of any kind, or if any person shall be drunk or intoxicated or under the influence of intoxicants on any public or private road or in any passenger coach, street car, or other public place or building or at any public gathering, he shall be guilty of a misdemeanor and upon conviction thereof shall be published* by a fine of not less than ten dollars nor more than one hundred dollars or by imprisonment for not less than five days nor more than thirty days, or by both such fine and imprisonment. (1938 c 2 p 48 § 53½.)

Acts 1938 c 2. Eff. Mar. 7, 1938.
* So in the Printed Acts. Should it read "punished"?

§ 2554b-153. Penalty for unlicensed roadhouses permitting drinking.—Any person conducting a place of business patronized by the public, other than the holder of a license for the sale of distilled spirits and wine by the drink, who permits any person or persons to sell, barter, loan, give away, or drink distilled spirits or wine therein or thereon shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than one hundred dollars ($100) nor more than five hundred dollars ($500) in the discretion of the jury or court trying the accused. (1938 c 2 p 48 § 53¾.)

Acts 1938 c 2. Eff. Mar. 7, 1938.

ARTICLE II.

Prohibitions, Restrictions and Regulations Relating to Licensees Generally.

§ 2554b-154. Persons who may not become licensees.—No person shall become a licensee under this Act, or manufacture, sell, transport or otherwise traffic in any alcoholic beverages, as that term is defined in this Act, who:

(1) Has been convicted of a felony or of any misdemeanor or offense directly or indirectly attributable to the use of intoxicating liquors, within two years next preceding the application.

(2) Is under the age of twenty-one years.

(3) Is not a citizen of the United States and has not had an actual, bona fide residence in this Commonwealth for at least one year next before the date on which his application for a license is made, provided this sub-section shall not apply to applicants for manufacturer's licenses, or to applicants which are corporations authorized to do business in Kentucky, or to persons licensed on the date of the passage of this Act.

(4) Is a co-partnership or corporation, unless each member of the partnership or each of the principal officers, managers and employees and each of the directors of the corporation has not been convicted of a felony or of any misdemeanor or offense directly attributable to the use of intoxicating liquors, is twenty-one years of age or more, and is a citizen of the United States.

(5) Has had any license issued under this Act or any license issued under any act or ordinance relating to the regulation of the manufacture, sale and transportation of alcoholic beverages revoked for cause or has been convicted of a violation of any of the provisions of this Act or of any such other act or ordinance, until the expiration of two years from the date of such revocation or conviction.

(6) Is a co-partnership or corporation, if any member of such partnership or any of the principal officers or any of the directors of such corporation has had any license issued under this Act or any license issued under any act or ordinance relating to the regulation of the manufacture, sale and transportation of alcoholic beverages revoked for cause or has been convicted of a violation of any of the provisions of this Act or of any such other act or ordinances, until the expiration of two years from the date of such revocation or conviction.

(7) A Transporter's License as provided for in section 18* (7) of this Act shall be issued only to persons who are authorized by proper certificate from the Division of Motor Transportation in the Department of Business Regulation to engage in the business of a common carrier.

(8) No Retailer Package License or Retail Drink License shall be issued for any premises used as or in connection with the operation of a grocery store or filling station. "Grocery Store" shall be construed to mean any business enterprise in which a substantial part of the commercial transaction con-

sists of selling at retail products commonly classified as staple groceries. "Filling Station" shall be construed to mean any business enterprise in which a substantial part of the commercial transactions consists of selling gasoline and lubricating oil at retail. (1938 c 2 p 48 § 54.)

Acts 1938 c 2. Eff. Mar. 7, 1938.
* § 2554b-114.
See § 2554b-97 and note citing Ziffrin, Inc. v. Martin.

§ 2554b-155. Persons who may not be employed by licensees.—No person holding any license under this Act shall knowingly employ in connection with his business, in any capacity whatsoever, any person who:

(1) Has been convicted of a felony or of any misdemeanor or offense directly or indirectly attributable to the use of intoxicating liquors, within two years next preceding the passage of this Act.

(2) Is under the age of twenty-one years, except in a bottling house or room of a licensed distiller, vintner or brewer or rectifier and except in an office of a wholesaler or manufacturer maintained in a building separate from the warehouses or factory.

(3) Is not a citizen of the United States or has not had an actual bona fide residence in this Commonwealth for at least one year next before the date of his employment, provided the above residence requirement shall not apply to persons employed by distillers, brewers, operators of dining cars or transporters engaged in interstate commerce.

(4) Within two years prior to the date of his employment, has had any license issued under this Act or under any other act or ordinance relating to the regulation of the manufacture, sale or transportation of alcoholic beverages revoked for cause, or has been convicted of a violation of any of the provisions of this Act or of any other such act or ordinance. Violation of this section shall subject both employer and employee to penalties provided in this Act, and shall be cause for revocation of license. (1938 c 2 p 48 § 55.)

Acts 1938 c 2. Eff. Mar. 7, 1938.

§ 2554b-156. Sales for cash only.—No brewer, wholesaler or distributor shall sell any alcoholic beverages to any person in Kentucky for any consideration except cash paid at or before the time of delivery; provided sales by wholesalers or distributors to licensees which are private clubs or voluntary associations shall be exempt from the provisions of this section.

No brewer or distributor shall furnish or deliver any bottled beer without collecting a minimum container charge or deposit of sixty cents (60c) per case of twenty-four twelve ounce bottles or the equivalent thereof, in the same manner that the price of the beer is collected.

No right of action shall exist to collect any claim for credit extended contrary to the provisions of this clause. Nothing herein contained, however, shall prohibit a licensee from crediting to a purchaser the actual prices charged for packages or containers returned by the original purchaser as a credit on any sale or from refunding to any purchaser the amount paid by such purchaser for containers or as a deposit on containers when title is retained by the vendor, if such containers or packages have been returned to the brewer or distributor. (1938 c 2 p 48 § 55½.)

Acts 1938 c 2. Eff. Mar. 7, 1938.

§ 2554b-157. Prohibited purchases and sales by licensees.—No holder of a license issued under this Act shall purchase or agree to purchase any alcoholic beverages from any person within or without this Commonwealth who is not duly licensed to sell such beverages to the particular purchaser at the time of such agreement to sell, nor give any order for any alcoholic beverages to any individual who is not a holder of a special agent's or solicitor's license if such license is required; and no holder of a license issued under this Act shall sell or agree to sell any alcoholic beverage to any person within or without this Commonwealth who is not duly licensed or otherwise legally authorized to buy and receive such beverages at the time of such agreement to sell, nor secure any order for the sale of any alcoholic beverages through any individual who is not the holder of a special agent's or solicitor's license if such license is required. (1938 c 2 p 48 § 56.)

Acts 1938 c 2. Eff. Mar. 7, 1938.

§ 2554b-158. Peddling prohibited.—No holder of any license issued under section 18* of this Act nor any of his agents, servants or employees shall peddle any alcoholic beverages from house to house, by means of a truck or otherwise, where the sale is consummated and delivery made concurrently at the residence or place of business of the consumer. This section shall not be construed so as to prohibit the delivery of alcoholic beverages in conformity with section 27† of this Act, pursuant to sales made at the place of business of such licensee. Deliveries shall not be made by holders of special agent's or solicitor's licenses. (1938 c 2 p 48 § 57.)

Acts 1938 c 2. Eff. Mar. 7, 1938.
* § 2554b-114; † § 2554b-124.

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below the ground floor for at least one year preceding the date on which its application for a license is made. In the class of cases described in this paragraph the administrator to whom the application is made may, in the exercise of his sound discretion, decide whether the premises are to be licensed.

(3) No license for the sale of alcoholic beverages at retail shall be issued for any premises that are located on the same street as, and within two hundred feet of, a building occupied exclusively as a school, hospital or place of worship without the written permission of the governing authority of the school, hospital or place of worship, except that a hotel, drug store or private club which has been bona fide in business as a licensee at that location for not less than one year preceding the passage of the Act of 1938, c.2, or the establishment of the school, hospital or place of worship may be issued a license by the state administrator, in the exercise of his sound discretion, even though the premises are within less than two hundred feet of a building occupied exclusively as a school, hospital or place of worship. The measurement shall be taken on the street on which the licensed premises are located, in a straight line from the nearest property line of the real estate on which is located the building used for the school, hospital or place of worship, to the nearest property line of the real estate on which is located the building for which a license is sought.

243.230 [2554b-129; 2554b-154] **Premises for which retail package and drink licenses may not be issued.** (1) Licenses to sell distilled spirits and wine by the drink for consumption on the premises may be issued only for premises located within cities of the first, second or third class, or elsewhere in counties containing a city of the first, second or third class if those counties maintain an adequate police force under KRS 70.510 to 70.530 or KRS 70.150 to 70.170.

(2) Licenses to sell distilled spirits or wine by the package may be issued only for premises located within incorporated cities, or elsewhere in counties containing a city of the first, second or third class if those counties maintain an adequate police force under KRS 70.510 to 70.530 or KRS 70.150 to 70.170.

(3) Notwithstanding subsection (2), the board may, after a field investigation, issue a license to sell distilled spirits and wine by the package at premises not located within any city if:

(a) Substantial aggregations of population would otherwise not have reasonable access to a licensed vendor;

(b) The premises to be licensed under this subsection shall be used exclusively for the sale of distilled spirits and wine by the package and will not be used in any manner, in connection with a dance hall, roadhouse, restaurant, store or any other commercial enterprise, except as a drug store in which a registered pharmacist is employed; and

(c) The part of any premises to be licensed under this subsection which is available to the public shall not, except in the case of a drug store, exceed one hundred square feet of floor space and shall not contain any chairs, benches, stools or similar furniture or fixtures.

(4) No retail package or drink license for the sale of distilled spirits or wine shall be issued for any premises used as or in connection with the operation of any business in which a substantial part of the commercial transaction consists of selling at retail staple groceries or gasoline and lubricating oil.

Note: KRS 70.510 to 70.530 were repealed by 1942, c. 115. See now KRS 70.540 to 70.570.

243.240 [2554b-122] **Business authorized by retail package license.** A distilled spirits and wine retail package license shall authorize the licensee to purchase, receive, poss[illegible] sell distilled spirits and wine at [illegible] in unbroken packages only, and only for consumption off the licensed premises. Such a licensee shall purchase distilled spirits and wine