Nos. 12-6056, 12-6057 and 12-6182

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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

v.

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

and

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

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

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PRINCIPAL BRIEF ON BEHALF OF TONY DEHNER AND DANNY REED

DEFENDANTS – APPELLANTS CROSS – APPELLEES

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The Appellants Tony Dehner and Danny Reed are sued in their official capacities as Commissioner and Distilled Spirits Administrator, respectively, of the Kentucky Department of Alcoholic Beverage Control. As such no corporate disclosure is required of these parties.

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Community Preventive Services Task Force

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JURISDICTIONAL STATEMENT

The federal question jurisdiction of the District Court was invoked pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3), and allegations of violations of the United States Constitution and 42 U.S.C §1983. Declaratory relief was demanded pursuant to 28 U.S.C. §§ 1391(b) and 1392.

The jurisdiction of this Court was invoked as a matter of right by timely filing Notice of Appeal from the Final Order of the district court disposing of all parties claims pursuant to 28 U.S.C. § 1291 and FRAP 3. The Final Order was entered August 21, 2012. Notice of the Appeal was filed on September 5, 2012.

STATEMENT OF ISSUES

1. Whether the District Court erred when it determined that KRS 243.230(5) is not rationally related to the Commonwealth's Twenty-First Amendment authority;
2. Whether the District Court erred by failing to balance the Commonwealth's authority under the Twenty-First Amendment against the Equal Protection Clause of the Fourteenth Amendment; and
3. Whether the District Court erred by reversing the burden of proof and substituting its judgment for the Commonwealth's.

INTRODUCTION

This is an appeal of a summary judgment (Record Document No. 67, Final Order) entered in a declaratory action in which the district court found that Kentucky's alcoholic beverage control laws offend the equal protection clause of the Fourteenth Amendment to the United States Constitution because they prohibit the sale of hard liquor and wine in grocery stores and gas/food marts, but not in other retail establishments. The district court should be reversed because:

a. the relevant statutes and regulations are rationally related to the Commonwealth's exercise of police power under the Twenty-First Amendment to the United States Constitution;

b. the trial court does not balance the "core powers" reserved to the Commonwealth in the Twenty-First Amendment against the least demanding equal protection standard of the Fourteenth Amendment;

c. the district court inverted the burden of proof to the Commonwealth to demonstrate a rational basis for the statute (which is presumed constitutional) when the law requires that the appellees demonstrate that there is no conceivable basis for the statute; and

d. the district court erroneously tested rationales for the statute against a hard evidence standard, when the correct standard is that the rationales "may be

based on rational speculation unsupported by evidence or empirical data." *Federal Communications Commission v. Beach Communications, Inc.*, 508 U.S. 307, 315, 113 S. Ct. 2096, 2102 (1993).

The Twenty-First Amendment grants to the Commonwealth near plenary authority in the regulation of where alcoholic beverages may be sold. This "core power" alone is the rational basis for restricting the location and nature of premises where alcoholic beverages may be sold. *Simms v. Farris*, 657 F. Supp. 119, 124 (E.D. Ky. 1987).

Kentucky Revised Statutes 243.230(5) is a proper exercise of this Twenty-First Amendment authority and treats all Kentucky businesses equally. The district court nevertheless dismissed Kentucky's Twenty-First Amendment authority to prohibit hard liquor and wine sales at certain types of businesses. With neither analysis nor mention, the district court dismissed one of the greatest sources of Constitutional authority granted to the States, in favor of the least of any protected interest under the Fourteenth Amendment.

The district court's analysis is internally inconsistent. On the one hand, the court accurately stated that states may constitutionally classify and treat businesses differently so as to permit certain kinds of alcohol sales at one type of business, but

not another.[1] The district court also acknowledged that states may constitutionally classify and treat alcohol businesses differently, based on their sales of one product as a percentage of their total gross sales.[2] On the other hand, the court ultimately, and inconsistently held, that Kentucky cannot prohibit hard liquor and wine sales at certain types of businesses based on their sales of one product as a percentage of their total gross sales.

The district court found the statute is unconstitutionally discriminatory by comparing grocery stores with drugstores and declaring there is no rational basis for distinguishing between them.[3] The district court's analysis was flawed, for the statute makes no exception for drugstores. The statute applies equally to all retailers in prohibiting the sale of "distilled spirits or wine" on "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."[4]

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[1] Record Document No. 62, Memorandum Opinion, at p.12 (citing *37712, Inc. v. Ohio Dept. of Liquor Control*, 113 F.3d 614, 623 (6th Cir. 1997)).

[2] *Id.*, at p. 13 (citing, *Gary v. City Warner Robins*, 311 F.3d 1334, 1336 (11th Cir. 2002)).

[3] The trial court made little or no mention of the statute's prohibition on the sale of liquor and wine at gas/food marts.

[4] While the trial court found there was no rational basis for distinguishing between groceries and drugstores, its analysis was silent in regard to the prohibition on the sale of liquor and wine at gas stations.

While some grocery chains and some drugstore chains do sell similar products, they do not sell similar volumes of products. Grocery stores and drugstores retain their separate primary purposes and no drugstore selling ten percent (10%) or more of its gross receipts in staple groceries may hold a Kentucky liquor license. The point of the distinction is the volume of sales, and it is at least "conceivable" (*Beach*) that there is a rational basis for this distinction. Grocery stores are the essential retail gathering places of all communities. As the trial court acknowledged, "Kentucky's legislature was well within its broad powers to prohibit liquor sales in stores that might serve as a gathering point in a community." (Record Document No. 62, Memorandum Opinion, pp. 21-22) But the district court inappropriately subjected a short list of potential rationales to its own speculative "courtroom fact finding." *Beach*. While the trial court disagreed that a grocery may have more community gathering power than a drugstore, the suggested rationales for the statute are at least "plausible" or "conceivable." *Beach*. For this reason, the statute passes muster of the least burdensome equal protection analysis.

STATEMENT OF FACTS

The Department of Alcoholic Beverage Control ("ABC") is the state agency responsible for the supervision and enforcement of alcohol statutes and regulations, including the licensing of alcohol retail sales. Tony Dehner is the Commissioner of

the ABC and Danny Reed is the Distilled Spirits Administrator of ABC and directs the Division of Distilled Spirits, which administers the laws in relation to the sale of wine and distilled spirits.[5]

Plaintiff-Appellee and Cross-Appellant Maxwell is a grocery in Louisville, Jefferson County, Kentucky, and Plaintiff-Appellee and Cross-Appellants Food with Wine Coalition, Inc., is a Kentucky non-profit corporation comprised of owners of Kentucky grocery stores. Kentucky Revised Statute 243.230(5), provides: "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 oils." (emphasis added) Further, "substantial part" and "staple groceries" are clarified in Sections 1 and 2 of 804 KAR 4:270 to aid in compliance with and enforcement of KRS 243.230(5).[6] Plaintiff Maxwell has neither applied for nor been denied a retail package license pursuant to KRS 243.230(5), but because its primary business involves the sale of

[5] Since this appeal was filed, Reed has completed his term and is no longer in office. Dehner has succeeded Reed as the Distilled Spirits Administrator. Frederick Higdon has been appointed to succeed Dehner as Commissioner.

[6] 804 KAR 4:270 provides, in pertinent part: "Sec. 1. For purposes 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. Sec. 2. For purposes 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."

staple groceries, the premises would not qualify for a license to sell wine or distilled spirits. On the other hand, several members of the coalition do have premises licensed for the sale of wine and distilled spirits, but those premises are maintained and operated separately from their grocery premises.

The parties filed cross motions for summary judgment. There is consensus that there are no genuine questions of fact to be decided in this action. The action presents only questions of law.

ARGUMENT

III. THE TWENTY-FIRST AMENDMENT PREVAILS OVER THE PROTECTION AFFORDED TO THE SOCIAL AND ECONOMIC PRIVILEGE HERE

The statute and regulation challenged by the plaintiffs in this action are a valid exercise of the Commonwealth's authority under the Twenty-First Amendment. They serve a rational basis for the need to regulate establishments selling alcoholic beverages. It is well settled that the Commonwealth, or any state, has a legitimate interest in regulating where, when, how, to whom and in whose presence intoxicating beverages may be sold. *Glicker v. Michigan Liquor Control Commission*, 160 F.2d 96 (6th Cir. 1947); *37712, INC., v. Ohio Department of Liquor Control*, 113 F.3d 614 (6th Cir. 1997); *44 Liquormart, Inc.v. Rhode Island*, 517 U.S. 484, 116 S.Ct. 1495 (1996). As recognized by the Supreme Court, this

authority confers "virtually complete control" to Kentucky in determining "how to structure the liquor distribution system." *Granholm v. Heald*, 544 U.S. 488-89 (2005) (quoting *California Retail Dealers Ass'n v. Aluminum, Inc.*, 445 U.S. 97, 110 (1980)). State alcohol laws enjoy a unique legal status under the Constitution and, "[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." *North Dakota v. United States*, 495 U.S. at 433 (emphasis added) (also citing e.g. *Capital Cities Cable, Inc v. Crisp*, 467 U.S. 691, 714 (1984)). The Commonwealth's Twenty-First Amendment authority to regulate alcoholic beverages is one of its "core powers." *Simms*.

Discounting the *Simms* case as inapposite, the district court failed even to attempt to balance the division of power between the Commonwealth's authority under the Twenty-First Amendment and the Appellees' demand for the privilege to sell liquor and wine. In its Memorandum Opinion and Order (Record Document No. 85, at p.2) granting stay of the enforcement of its judgment, the district court denied the need to conduct any analysis of the division of power, holding:

> The Court particularly disagrees with Defendants that its failure to specifically discuss the Twenty-First Amendment is reversible error. The Court fully considered the State's known regulatory powers in reaching its decision. However, that amendment does not change the well-known equal protection analysis.

The district court's conclusion on this issue is erroneous and its failure to find that the prevailing authority of the Twenty-First Amendment is controlling is reversible.

The leading case discussing the relationship between the Twenty-First Amendment and the equal protection clause is *Craig v. Boren*, 429 U. S. 190 (1976). While the Court did not accept the argument that the Twenty-First Amendment immunized state liquor laws from all equal protection challenges, the holding in that case was limited to the following statement: "[The Supreme] Court has never recognized sufficient strength in the [Twenty-First] Amendment to defeat an otherwise established claim of *invidious* discrimination in violation of the Equal Protection Clause." *Id.*, at 462 (emphasis added). The Supreme Court has not addressed the application of the Twenty-First Amendment to an equal protection challenge to a liquor law that, as here, does not involve a suspect classification or infringe upon a fundamental constitutional right.

That the fundamental rights protected by the Fourteenth Amendment trump the States' Twenty-First Amendment authority should go without saying. The Fourteenth Amendment specifically addresses State action by saying "No state shall …." But the strength of that protection is diminished proportionately by the stretch of interests protected down the line. If that diminishing strength of protection is to have any meaning, the contrasting magnified strength of the Twenty-First

Amendment should prevail in this circumstance. The Appellees demand for the privilege to sell liquor and wine does not fall within the same sphere of equal protection afforded to fundamental rights, suspect classes or even quasi-suspect classes. The privilege is no right at all and it is subject to social and economic regulation. The privilege to sell alcohol is afforded the least protection under the Fourteenth Amendment. In contrast, the Twenty-First Amendment empowers in the States with super authority to regulate the sale of alcohol.

The Twenty-First Amendment is an exclamation point on the authority reserved to the States by the Tenth Amendment. This is why the *Simms* court says what it does:

> [t]here exists a rational basis for the statute, namely, the need to regulate establishments serving alcoholic beverages. *Id.*, at 124.

Likewise this Court has observed in similar context:

> "The [legislature's] actual reason for forestalling some types of retail alcohol sales within their community, while permitting other types, is irrelevant, as long as some identifiable legitimate public interest is arguably advanced by the enacted restriction." *Ohio Department of Liquor Control*, at p. 10, note 11.

The strength of the Twenty-First Amendment is why the district court should have deferred to the Kentucky General Assembly. As this Court observed in *Ohio Liquor Control*, at p.13, quoting from *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440, 105 S. Ct. 3249, 3254, 87 L. Ed.2d 313 (1985):

> 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. *Id.*

When attempted to be balanced, the scales tip substantially in favor of the Commonwealth's authority to regulate liquor sales as they have been for decades under KRS 243.230(5). This authority, coupled with the presumed constitutionality of the statute, establishes a burden which the Appellees cannot surpass under the circumstances of this case. While this analysis does not mean that all state liquor control laws are immune from a Fourteenth Amendment Equal Protection challenge, it does demonstrate that the subject law was entitled to more deference than that given by the district court here.

IV. THERE IS A RATIONAL BASIS FOR THE STATUTE AS APPLIED TO APPELLEES

As noted by the Sixth Circuit, the burden upon a party seeking to overturn a social or economic classification "for irrationally discriminating between groups under the equal protection clause is an extremely heavy one." *Borman's Inc. v. Michigan Property & Casualty Guar. Ass'n*, 925 F.2d 160, 162 (6th Cir.), *cert. denied*, 502 U.S. 823 (1991). Such a classification is entitled to a "strong presumption of validity." *Lyng v. Automobile Workers*, 485 U.S. 360, 367 (1988). A party may only demonstrate a lack of rational basis 'either by negativing every

conceivable basis which might support the government action, or by demonstrating that the challenged government action was motivated by animus or ill-will." *Johnson v. Bredesen*, 624 F.3d 742, 747 (6th Cir. 2010); *see Lehnhausen v. Lake Shore Auto Parts, Co.*, 410 U.S. 356, 364 (1973). Appellees have failed to meet this heavy burden on either count.

KRS 243.230(5) and 804 KAR 4:270 classify the types of premises where alcoholic beverages may be sold and they do not classify the persons or entities who may be licensed. The statute makes no exception for drugstores and applies equally to all retailers to prohibit the sale of "distilled spirits or wine" on "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). The statute makes its classifications based on the real distinction in the volume of groceries or nature of the product, gasoline, sold. It is these *distinguishing characteristics* and the corresponding social effects that support the rationale.

When reviewing the rational basis for a statute, "'every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'" *Id.* (quoting *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). A statute will not be

struck down for lack of a rational basis "'unless the varying treatment of different groups or person is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational.'" *Id.* (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979) (emphasis added). The relationship between the governmental interest and the legislative classification need only be "debatable." *United States v. Caroline Prods Co.*, 304 U.S. 144 (1938). Expressed another way, "a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group or if the rationale for it seems tenuous." *Romer v. Evans*, 517 U.S. 620, 632 (1996) (emphasis added).

As mentioned above, the Commonwealth offered six governmental interests which were advanced by the statute:

"(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." (Record Document No. 62, Memorandum Opinion, pp. 15-16).

The District Court analyzed each of these interests in a vacuum and concluded that they did not provide a rational basis for the statute. NBWA respectfully submits that the District Court erred in several fundamental respects. It required more than a "debatable" causal relationship between each governmental interest and the challenged classification. The District Court also failed to consider the relationship between the combination of some or all of these interests and the challenged classification. Ultimately, the District Court substituted its subjective judgment as to how these interests might be best achieved. While true or not, the District Court's decision exceeded the bounds established by the Equal Protection Clause and the Separation of Power Doctrine and impermissibly invaded the province of the Kentucky Legislature.

Certain assumptions underlying effective and appropriate liquor regulation are beyond dispute. The more potent the alcoholic beverage, the greater the likelihood of abuse and societal harm. The greater the number and density of retail outlets and the lower the price of alcohol, the greater the likelihood of increased consumption and alcohol abuse. The more accessible alcohol is to minors, the greater the likelihood that they will imbibe and possibly harm themselves and others. The greater the exposure to alcohol by those who object to its use for personal (for instance, abstinence after past abuse) or religious reasons, the greater the likelihood

that their choice of abstinence will be undermined or that they will take offense.

Balancing these interests against those of Kentucky citizens who choose to consume or desire to sell, the Kentucky Legislature determined that liquor and wine should not be sold in stores whose business included substantial sales of groceries or gasoline. By "drawing the line" in this fashion or, expressed another way, by delineating the "regulatory field" in this way, the Legislature at least arguably advanced several governmental interests.

By preventing the sale of liquor and wine in stores where substantial sales of groceries or gasoline occurs, the Legislature reduced minor access to alcohol. Certainly, it is "conceivable" that the Legislature assumed that many minors are employed by grocery stores or convenience stores as clerks, baggers, or stockers. Furthermore, it is certainly reasonable to assume that this legislative classification would expose fewer minors to alcohol and would reduce the likelihood that these minor employees or their friends would have access to and consume alcohol. With regard to this interest, the classification is certainly at least tenuously related to the goal of protecting minors and is certainly not irrational.

The statute inherently recognizes the wisdom of promoting temperance and creating orderly alcohol markets. *See North Dakota v. United States*, 495 U.S. 423, 432 (1990) (discussing states' interest in "promoting temperance, ensuring orderly

market conditions, and raising revenue" through liquor regulations). This interest is clearly advanced by narrowing the nature of retail outlets in the state.[7] Appellees and the District Court questioned whether this goal was best served by limiting spirits and wine retail licenses to exclusive liquor stores and drug stores, but that is not the issue. The question before the Court is whether, in light of all of the identified interests, this legislative choice is irrational. It clearly is not. Had the Legislature broadened the classification to include grocers and convenience stores, the largest chains,[8] with enormous political and economic power, would have brought inexorable pressure to increase the number of outlets. Furthermore, given the economic superiority of these chains, the potential to create a hyper competitive environment and to disrupt an orderly market, would be greater with respect to these outlets. In the absence of uniform pricing or a volume discount ban, smaller retailers might have great difficulty competing with these behemoths. A retailer on the verge of financial collapse is more likely to sell to minors, sell to obviously intoxicated persons, or otherwise violate Kentucky liquor regulations. It is at least conceivable, if not probable, that expanding the classification as posited by

[7] The Community Preventive Services Task Force, appointed by the director of the Centers for Disease Control and Prevention, has extensively studied the relationship between alcohol outlet diversity and consumption problems and abuse. Increased alcohol diversity is associated with increases in alcohol related harms. *See* "Preventing Excessive Alcohol Consumption: Regulation of Alcohol Outlet Density." http://www.thecommunityguide.org/alcohol/outletdensity.html.

[8] For instance, Wal-Mart is the largest company and the largest grocer in the world.

Appellees would lead to more retail outlets, a greater density of outlets, and more disruption of the alcohol markets.

Finally, balancing the interests and sensibilities of those who choose abstinence against those who chose to consume spirits and wine, the Legislature chose to prohibit the sale in those places where all in the community must come together. While it is true that an abstinent person may still have occasion to visit a drug store, it is undeniable that he or she will visit a grocery store or a gas station far more frequently. The current law makes spirits and wine readily available, but limits its exposure to those choosing abstinence. This choice is not irrational. It is at least conceivable that it advances the legitimate interest of respecting the sensitivity of those who choose abstinence or prohibition.

Looking at all of these interests, either separately or together, the Kentucky Legislature drew a line and created a classification which advanced in at least some modest way the identified interests. It is certainly debatable that it has done so. That is all that is required under the rational basis test. It is irrelevant whether any of these were the actual motive behind the legislation, whether the classification chosen was the best means to accomplish the governmental objective, or whether the Court agrees with this legislative choice. *Beach.*

In this action, there is no evidence of a discriminatory purpose and the

Kentucky statute at least minimally advances the governmental interest of limiting minor access to alcohol, limiting the number and density of retail outlets, maintaining a stable and orderly alcohol market, respecting the choice of many Kentucky citizens to abstain from alcohol consumption, and respecting the choice of many Kentucky communities to prohibit the sale of alcohol.

V. CONCLUSION

For the foregoing reasons, the Appellants move the Court to reverse that portion of the district court's Order which denies the Defendants'-Appellants' Motion for Summary Judgment and direct that the district court enter judgment for the Defendants-Appellants, and, further, reverse that portion of the district court's Order which sustains the Plaintiffs'-Appellees' Motion for Summary Judgment. The remaining elements of the judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2013, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system to be served electronically through the Court's electronic filing system upon counsel of record in this action**.**

/s/ Peter F. Ervin
Peter F. Ervin

CERTIFICATE OF COMPLIANCE

Pursuant to the 6th Cir. R. 32 (a), the undersigned counsel certifies that this brief complies with 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 5065 words. The brief was prepared in Microsoft Word, using the Times New Roman 14pt font.

/s/ Peter F. Ervin
Counsel for Defendants-Appellants Cross-Appellees