CASE NOS. 12-6056, 12-6057, 12-6182

IN THE
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 d/b/a THE PARTY SOURCE

Intervening Defendant – Appellant - Cross-Appellee

On Appeal from the United States District Court
for the Western District of Kentucky

Civil Action No. 3:11-CV-18-H

PRINCIPAL AND RESPONSE BRIEF OF APPELLEES/CROSS-APPELLANTS MAXWELL'S PIC-PAC, INC. and FOOD WITH WINE COALITION, INC.

M. Stephen Pitt
Christopher W. Brooker
J. Brooken Smith
WYATT, TARRANT & COMBS, LLP
500 W. Jefferson Street, Suite 2800
Louisville, Kentucky 40202
Telephone: (502) 589-5235
Facsimile: (502) 589-0309
mspitt@wyattfirm.com
cbrooker@wyattfirm.com
bsmith@wyattfirm.com

Attorneys for Maxwell's Pic-Pac, Inc. and Food With Wine Coalition

MAXWELL'S PIC-PAC, INC.'S DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTERESTS

Pursuant to 6 Cir. R. 26.1 Appellee/Cross-Appellant Maxwell's Pic-Pac, Inc. makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? NO.

2. Is there a publicly owned corporation, not a part to the appeal, that has a financial interest in the outcome? NO.

s/ Christopher W. Brooker
Christopher W. Brooker
WYATT, TARRANT & COMBS, LLP
500 W. Jefferson Street, Suite 2800
Louisville, Kentucky 40202
Telephone: (502) 589-5235
Facsimile: (502) 589-0309
cbrooker@wyattfirm.com

Attorney for Maxwell's Pic-Pac, Inc.

FOOD WITH WINE COALITION, INC.'S DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTERESTS

Pursuant to 6 Cir. R. 26.1 Appellee Food With Wine Coalition, Inc. makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? Kroger Limited Partnership I is a member of the Food With Wine Coalition, Inc. Kroger Limited Partnership I is a subsidiary of The Kroger Co., a publicly owned company.

2. Is there a publicly owned corporation, not a part to the appeal, that has a financial interest in the outcome? NO.

s/ Christopher W. Brooker
Christopher W. Brooker
WYATT, TARRANT & COMBS, LLP
500 W. Jefferson Street, Suite 2800
Louisville, Kentucky 40202
Telephone: (502) 589-5235
Facsimile: (502) 589-0309
cbrooker@wyattfirm.com

Attorney for Food With Wine Coalition, Inc.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

ADMINISTRATIVE REGULATIONS

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Maxwell's Pic-Pac, Inc. and the Food With Wine Coalition, Inc. believe that oral argument will be beneficial to the Court and the parties. Oral argument will allow the attorneys to address any outstanding factual or legal issues that the Court deems relevant.

JURISDICTIONAL STATEMENT

The District Court possessed jurisdiction under 28 U.S.C. § 1331 and 1343(a)(3), which rests jurisdiction for all actions alleging the violation of rights and privileges under the United States Constitution in the federal district courts. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291. The District Court entered a final Order granting summary judgment to Plaintiffs Maxwell's Pic-Pac, Inc. and the Food With Wine Coalition, Inc. on August 21, 2012 [Order, RE 67, Page ID #1328-1329]. This Order disposed of all claims in the case. Defendants Tony Dehner and Danny Reed timely filed a notice of appeal on September 5, 2012 [Notice of Appeal, RE 72, Page ID #1457-1458]. Intervening Defendant Liquor Outlet, LLC also timely filed a notice of appeal on September 5, 2012 [Notice of Appeal, RE 75, Page ID #1480-1481]. Plaintiffs Maxwell's Pic-Pac, Inc. and the Food With Wine Coalition, Inc. timely filed a notice of cross-appeal on September 18, 2012 [Notice of Cross-Appeal, RE 78, Page ID #1489-1491].

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Issues on Appeal:

1. Whether the trial court erred when it granted Maxwell's Pic-Pac, Inc.'s and the Food With Wine Coalition, Inc.'s motion for summary judgment, and permanently enjoined enforcement of KRS 243.230(5) and 804 KAR 4:270, on grounds that these laws violate the equal protection guarantees provided by the United States Constitution and the Kentucky Constitution.

Issue on Cross-Appeal:

2. Whether the trial court erred when it determined that KRS 243.230(5) and 804 KAR 4:270 are not also void for vagueness.

STATEMENT OF THE CASE

This case concerns a question that Kentucky consumers have pondered for many decades: Why is it that a person can buy groceries and wine together in one transaction at Kentucky "drug stores" such as Walgreens or CVS, and can also buy groceries and wine together in one transaction at Kentucky "liquor stores" such as the Intervening Defendant Party Source, but cannot buy wine at Kentucky "grocery stores" such as Kroger and Maxwell's Pic-Pac?

The answer to that question lies in KRS 243.230(5) – a provision of Kentucky's Alcoholic Beverage Control Act ("ABC Act") that groundlessly discriminates against grocery stores and convenience stores. This statute, coupled with regulation 804 KAR 4:270, allows ***any*** retailer in Kentucky to obtain a "retail package license" (*i.e.*, a license to sell wine and liquor; there are no separate wine or liquor licenses in Kentucky) ***except*** those retailers who happen to receive more than 10 percent of their gross sales from "retail staple groceries or gasoline and lubricating oil." Accordingly, retailers who primarily sell any other product, such as prescription drugs, can receive a retail package license while those who primarily sell "staple groceries" or gasoline cannot. As a result, retailers such as Walgreens can (and do) sell wine and liquor right alongside

groceries in their Kentucky stores, and are allowed to do so simply because they make more money selling prescriptions than groceries. A Kroger down the street from a Walgreens, which also sells groceries and prescription drugs, cannot sell wine and liquor simply because it derives a larger percentage of its revenue from the sale of "staple groceries" than Walgreens does.

Appellees in this case are (1) a small grocery store in Louisville and (2) a coalition of large and small grocery stores and convenience stores from across Kentucky who have, for years, been fighting against this arbitrary discrimination. Prior to filing this lawsuit, Appellees (hereinafter the "Grocers") spent a number of years trying to convince the Kentucky Legislature to amend or repeal KRS 243.230(5). The Legislature, however, refused to change the law. Accordingly, the Grocers filed this lawsuit challenging the constitutionality of KRS 243.230(5) and 804 KAR 4:270 – laws that plainly violate the Grocers' constitutional right to equal protection.

In 2011 and 2012 the parties took discovery and filed cross motions for summary judgment. On August 14, 2012, Judge John Heyburn of the United States District Court for the Western District of Kentucky held that KRS 243.230(5) and 804 KAR 4:270 violate the Grocers' right to equal protection of the laws [Memorandum Opinion, RE 62, Page ID #1295-

1323]. In short, the District Court found that there is no rational basis for a law that allows a drug store like Walgreens, which sells staple groceries and medication, to sell wine and liquor but prohibits a grocery store like Kroger, which sells the same products as Walgreens, from doing the same. The District Court wrote a lengthy opinion rebutting every one of the groundless arguments advanced by the Commonwealth of Kentucky and its liquor store ally, The Party Source, which intervened in an attempt to save the arbitrary discrimination that protects it and its brethren from having to compete with Kentucky grocers in the wine and liquor market [*id.*].

On August 21, 2012, the District Court entered a final order permanently enjoining enforcement of KRS 243.230(5) and 804 KAR 4:270 [Order, RE 63, Page ID #1324]. The Commonwealth and Party Source appealed to this Court and moved the District Court to stay its permanent injunction until the conclusion of this appeal. The District Court stayed its order in the Grocers' favor pending conclusion of this appeal, which is proceeding on an expedited basis [Order Granting Stay, RE 85, Page ID #1717-1720].

Interestingly, however, the District Court did not stay the injunction because of any fear of reversal by this Court. In fact, the District Court explicitly agreed "with [the Grocers] that [the Commonwealth and

Party Source] are not likely to succeed on their appeal," and stated that "the Court does not believe that the appeal will likely succeed" [*id.* at 2-3; Page ID #1718-1719]. The District Court nevertheless stayed its decision because it "view[ed] the question of a stay in a larger context than the parties' immediate interests" [*id.* at 2, Page ID #1718]. It found this to be an "historic" case, and wanted to provide the Kentucky legislature with an opportunity to repeal the offending statute, and/or provide this Court an opportunity to review the case, before the injunction takes effect [*id.* at 2-3, Page ID #1718-1719].

STATEMENT OF THE FACTS

A. The History of KRS 243.230(5) and 804 KAR 4:270.

Underlying this appeal is Kentucky's ABC Act, which is a comprehensive body of legislation spanning Chapters 241 through 244 of the Kentucky Revised Statutes. From a broad perspective, the Act was originally passed in 1938 after the 21st Amendment repealed Prohibition and vested the individual states with certain powers to regulate alcoholic beverages within their borders. Each state adopted its own alcohol laws, and the differences among the states were dramatic. Some states assumed direct control of alcohol distribution through state-run outlets, while others passed legislation funneling sales through what is known as a "three-tier system."

Granholm v. Heald, 544 U.S. 460, 488-489 (2005). Kentucky's ABC Act established a three-tier system, the premise of which is that producers of alcohol (distillers, vintners, brewers, etc.) can sell only to wholesalers, and wholesalers can then only sell to retailers, and retailers may then finally sell to consumers. KRS 243.130, KRS 243.150, KRS 243.170, KRS 243.240, KRS 243.892. The United States Supreme Court has found that the "three-tier" system is "unquestionably legitimate." *Granholm*, 544 U.S. at 489.

The ABC Act, however, goes much further than simply establishing a three-tier distribution system in Kentucky. It contains dozens of specific limits, barriers, and controls on the distribution and sale of alcohol. For instance, the Act allows counties, and even individual voting precincts, to completely ban the sale of alcohol therein. KRS 242.020, *et seq.* The Act also limits the number of retail package liquor licenses in Louisville/Jefferson County to one per every 1,500 residents. KRS 241.065. It further provides the ABC Board with the authority to limit the number of retail package licenses issued in the rest of the state. KRS 241.060(2). The ABC Board has exercised that authority, and outside of Louisville/Jefferson County, has capped the number of retail package liquor licenses to one for every 2,300 residents per county. 804 KAR 9:010. Accordingly, Kentucky law only allows a finite number of retail package liquor licenses to be issued

in the state, meaning that there is no danger of there being a liquor outlet on every street corner or crossroads in the state. In other words, Kentucky has established, by law, what it deems to be an acceptable number of retail package licensees. This case will neither expand nor contract that limit.

Furthermore, Kentucky law does not allow retailers to sell alcoholic beverages below cost. KRS 244.050. Therefore, Kentucky statutorily prohibits the use of "loss leaders" in connection with the sale of wine and liquor. Selling below cost can result in license revocation and criminal penalties. KRS 244.990. The ABC Act also drives the price of wine and liquor up by imposing excise taxes, and wholesale taxes of at least 11 percent, and by charging fees for retail package licenses. KRS 243.720, KRS 243.884, KRS 243.710, KRS 243.030.

These are but a few of the numerous limitations, controls, and provisions in Kentucky's ABC Act. While most of the limitations and controls in the ABC Act, both past and present, are constitutional, the Act has an unfortunate history of including discriminatory provisions serving no legitimate state purpose and thereby violating the equal protection provisions of both the United States and Kentucky Constitutions. For instance, the Act included a statute that prohibited women from working as bartenders unless they actually owned the bar. Specifically, KRS 244.100 provided that a

holder of a retail drink license (bar, restaurant, etc.) shall not "employ any female for any duties with respect to the sale of alcoholic beverages for consumption on the premises, except to wait upon tables or serve as cashier or usher." *See Ky. Alcoholic Beverage Control Bd. v. Burke*, 481 S.W.2d 52, 53 (Ky. 1972). The Act also included another statute, KRS 244.320, that provided that "no distilled spirits or whiskey shall be sold, given away or served to females" at a bar or restaurant "except at tables where food may be served." *Id.*

While these laws were in effect an ABC agent observed one woman working as a bartender at Dixie Burke's restaurant, and observed another woman drinking whiskey while sitting at that restaurant's bar. *Burke*, 481 S.W.2d at 53. Based upon these infractions the ABC Board suspended the restaurant's beer and liquor licenses. *Id.* The state circuit court set aside the suspension as unconstitutional, and the ABC Board appealed, choosing to defend the constitutionality of these discriminatory laws. *Id.* at 53-54. Specifically, the ABC Board argued that the statutes were a valid exercise of the state's police power to regulate the sale of liquor and beer. *Id.* at 53. The ABC Board undoubtedly argued that prohibiting women from working as bartenders, and from drinking liquor at a bar, promoted temperance and reduced societal problems caused by alcohol.

Kentucky's highest court disagreed with the ABC Board, finding that "this discrimination is invidious and arbitrary and that the statutes are unconstitutional in their application to women under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution." *Id.* at 54. The Court reasoned that "[a]s long as women are permitted to secure licenses to operate bars and thereby serve as bartenders and waitresses, and so long as women are legally permitted to sit at bars and consume malt beverages which have alcoholic content, we perceive neither a rational connection nor a fair and substantial relation between the claimed objective of the statute (to properly regulate the sale of liquor or beer) and a purely discriminatory provision prohibiting non-licensee women bartenders and the consumption at the bar of distilled spirits rather than beer by women." *Id.*

Unfortunately today's ABC Act retains a purely discriminatory provision as baseless as the two provisions struck down by *Burke*. That provision is KRS 243.230(5), which allows all Kentucky retailers ***except*** those who sell "substantial" amounts of groceries or gasoline to obtain a license to sell wine and liquor:

> 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). Accordingly, grocers and gas stations are excluded from the wine and liquor market simply because their bottom lines rely more heavily on the sale of "staple groceries" or "gasoline and lubricating oil" than medication, or some other kind of merchandise.

There is, however, obviously nothing objectionable about the sale of "staple groceries" alongside wine and liquor, because many (if not most) of the retailers who now hold retail package licenses, including Intervening Defendant Party Source, also sell "staple groceries" at the same premises.[1] Likewise, there is nothing objectionable about the sale of "staple groceries" with alcohol in general, as many grocery stores already possess malt beverage licenses, and thus already sell beer, malt liquor, and other malted alcoholic beverages along with groceries. Therefore, as it stands today, a grocery store in Kentucky can sell beer and bread, but not wine,

[1] *See* RE 41-2 through 41-21, Page ID #834-853, which are advertisements from Kentucky retail package licensees showing that they sell wine and liquor alongside eggs, milk, cereal, and other "staple" groceries. In fact, these licensees advertise accepting SNAP/EBT Card Benefits ("food stamps") at the same locations where they sell wine and liquor, and even on the same page where they advertise wine and liquor [*see*, *e.g.*, 10/23/11 Rite-Aid Circular from LOUISVILLE COURIER-JOURNAL, RE 41-4, Page ID #836. *See also* photo of a Rite-Aid in Louisville, depicting it as a "liquor" store and "food mart." RE 41-41, p. 4, Page ID #947].

while a similarly situated Walgreens can sell beer, bread, ***and*** wine. This distinction is as groundless as allowing a woman to drink beer at a bar but not liquor, while allowing a man to sit at a bar and drink both. But that is exactly what KRS 243.230(5) does.

KRS 243.230(5) also squarely contradicts other provisions of the ABC Act. For instance, in order for a gas station or auto repair shop to obtain a Kentucky malt beverage retailer's license (beer license), it is required to carry and sell groceries:

> A malt beverage retailer's license shall not be issued to sell malt beverages at retail for any premises from which gasoline and lubricating oil are sold or from which the servicing and repair of motor vehicles is conducted, **unless there is maintained in inventory on the premises for sale at retail not less than five thousand dollars ($5,000) of food, groceries, and related products valued at cost.**

KRS 243.280(2) (emphasis added). Accordingly, while carrying groceries is a ***barrier*** to applying for a retail package wine and liquor license in Kentucky, it is a ***requirement*** in order for a gas station or car repair shop to apply for a malt beverage retailer's license. This ridiculous inconsistency only demonstrates the absurdity of KRS 243.230(5): If selling groceries and alcohol together were undesirable or problematic, KRS 243.280(2) would ***prohibit*** beer and groceries from being sold together. But it does not. Instead, where gasoline is sold, or cars are repaired, Kentucky law ***requires***

that beer and groceries be sold together, indicating that Kentucky's legislature deems the sale of groceries with alcohol as being a good thing.

The District Court properly recognized that the State "does not contend that the Statute addresses an inherent problem with the selling of wine and liquor alongside staple groceries," as retailers like Party Source, CVS, and Walgreens sell the products together in the same transaction every day [Memorandum Opinion, RE 62 p. 16, Page ID #1310].

B. The History of The Food With Wine Coalition.

When a law arbitrarily and unconstitutionally discriminates against a group of people, the victims of the discrimination often form coalitions that work to change or eliminate the discriminatory law. These coalitions often take their fight to the legislature, or to the courts, or to both, as a legislature has the power to repeal or modify an unconstitutional law, and the court has the power to strike it down if the legislature, for whatever reason, will not voluntarily change it. The Constitutions of both the United States and Kentucky provide those being discriminated against with these two avenues of relief. As the District Court correctly recognized, "[l]egislative enactment and judicial action are not 'either/or' propositions" [11/2/11 Order re Discovery; RE 31 p. 13, Page ID #290].

Here, several Kentucky grocers fed up with the arbitrary discrimination leveled against them by KRS 243.230(5) formed the Food With Wine Coalition ("the Coalition") to try to end the discrimination.[2] The members of the Coalition want, quite simply, to be treated the same as other Kentucky retailers when it comes to applying for and obtaining a retail package license. The members want to be placed on a level playing field with similarly situated retailers such as the Walgreens and Party Sources of Kentucky, who undeniably sell both groceries and wine in a single location and in a single transaction.[3] To be clear, the Grocers do not seek to strike down the entire ABC Act or Kentucky's three-tier system. The Grocers simply seek to eliminate one discriminatory provision of the ABC Act, and a

[2] On Page 15 of Party Source's brief, it alleges that none of the Coalitions' members sell gasoline. This is a stunning misstatement considering that Party Source asked the Coalition, in written discovery, which of its members sell gasoline, and the Coalition answered that Kroger, Houchens, and Food City sell gasoline, and provided a detailed list of their gasoline locations [Grocers' Responses to Party Source's Interrogatory No. 5, RE 45-1, Page ID #1182-1188].

[3] Walgreens, Rite-Aid, and CVS have all recently filed 10-K annual reports with the Securities and Exchange Commission confirming that they sell groceries and consider "supermarkets" and "grocery stores" to be competitors [*see* portions of the 10-K annual reports, RE 41-22, 41-23, and 41-24, Page ID #854-876]. *See also Walgreen Co. v. City and County of San Francisco*, 185 Cal.App.4th 424, 432 (2010), where Walgreens argues that it is similarly situated to grocery stores regarding tobacco sales.

related regulation, so that they are free to operate and compete with all other Kentucky retailers within the ABC Act's existing framework.

Accordingly, the Grocers first tried to obtain relief from KRS 243.230(5) from the Kentucky legislature [Depo. of the Coalition's Executive Director, John ("Ted") Mason, RE 41-25 p. 25, Page ID #878]. Starting in or around 2008, the Grocers launched a petition drive, and lobbied the legislature, to effect a legislative change to KRS 243.230(5) [*id.* at pp. 62-69, Page ID #879-880]. The Grocers' legislative efforts were unsuccessful. In hindsight this is not surprising, as history teaches that legislatures are often reluctant to change laws that they have already passed, especially when those who benefit from the discrimination vigorously fight and lobby to preserve the *status quo*.

In fact, Party Source makes clear that the reason the Grocers' prior legislative efforts failed was that Party Source and its allies mobilized their lobbyists at the Kentucky Liquor Retailer Coalition. As Party Source concedes, its lobbyists spoke to legislators, voiced their opposition to change, and succeeded in convincing the legislature to do nothing [Party Source's Brief, p. 30].

That said, what happened (or did not happen) in Frankfort over the past legislative sessions has no bearing on the question of whether KRS

243.230(5) is constitutional. It simply sets the stage for why this lawsuit had to be filed. It is the courts, not the legislatures, who determine the constitutionality of laws. And regardless of what the legislature did (or did not do), KRS 243.230(5) and 804 KAR 4:270 violate the equal protection provisions of the federal and state constitutions. These laws are also unconstitutionally vague. Accordingly, the Grocers ask this Court to affirm the District Court's judgment declaring KRS 243.230(5) and 804 KAR 4:270 unconstitutional. Doing so would bring a necessary end to the unconstitutional discrimination leveled against the Grocers.

C. It Is Undisputed That "Grocery Stores" Such As Kroger, And "Drug Stores" Such As Walgreens, Are Similarly Situated Retailers.

Common experience teaches that "drug stores" have evolved over time to the point that they do not look, or operate, anything like the way they did 50 years ago. There is now seemingly one at every commercial intersection in the state. In today's world "drug stores" essentially have small grocery stores in front of their pharmacy, with checkout lanes at the front of the store that handle the sale of groceries and general merchandise items, including wine and liquor. And the checkout clerks at the front of "drug stores" like Rite-Aid are ***not*** pharmacists and have no special experience in selling highly controlled products. Instead, they are checkout

clerks identical to checkout clerks at grocery stores or convenience stores who scan bar codes and bag merchandise.

This is true across the country. For instance, a San Francisco ordinance banned "pharmacies" such as Walgreens from selling tobacco while allowing "grocery stores" and "big box" stores to sell tobacco. Walgreens challenged that discrimination on equal protection grounds, contending that "grocery stores" and "drug stores" are similarly situated when it comes to the sale of tobacco, and that the law prohibiting "pharmacies," but not "grocery stores," from selling tobacco is a violation of the equal protection clause. *Walgreen Co. v. City and County of San Francisco*, 185 Cal.App.4th 424, 432 (2010). The California appellate court agreed, finding that "based upon an objective comparison of the stores, a Walgreens store and a general grocery store are similarly situated" when it comes to the sale of tobacco. *Id.* at 439. Accordingly, they are also similarly situated when it comes to the sale of wine and liquor. A copy of this analogous case can be found in the record at RE 41-47, Page ID #1012-1030.

Party Source obviously agrees that grocery stores and drug stores are now similarly situated. While it suggests (without any proof) that there "***was*** a clear divide between the business of a drug store and the

business of a grocery store" many decades ago,[4] any such "divide" is now gone, as these businesses now sell the same products, in the same manner, just in differing percentages.

SUMMARY OF ARGUMENT

The Grocers make two arguments in this case. First, there is no rational basis for a law that allows a retailer such as Rite-Aid to be licensed to sell wine and cheese in the same transaction but not a retailer like ValuMarket, simply because a ValuMarket store sells proportionally more "staple groceries" than a Rite-Aid store. This discrimination is as arbitrary as a law prohibiting businesses whose names start with the letters A through G from obtaining retail package licenses, but allowing those whose name starts with the letters H through Z to obtain them. While the Kentucky laws that discriminate in this manner – KRS 243.230(5) and 804 KAR 4:270 – limit the number of potential wine and liquor sellers, they do so arbitrarily, and thereby violate the equal protection provisions of the federal and state constitutions. If the State is going to allow retailers to sell wine and liquor, it must treat similarly situated retailers alike.

Second, KRS 243.230(5) and 804 KAR 4:270 are unconstitutionally vague as a matter of law. In fact, KRS 243.230(5)'s key

[4] Party Source's Brief, p. 39.

terms – "staple groceries" and "substantial part of the commercial transaction" – are so vague that Kentucky's ABC Board felt compelled to adopt 804 KAR 4:270 in order to define them, and, as the regulation's preamble states, "eliminate the confusion" that those vague terms caused. The executive branch, however, cannot provide definitions to a vague statute via regulation, as doing so constitutes legislating by the executive, and thereby violates the separation of powers doctrine embodied in Sections 27, 28, and 29 of the Kentucky Constitution. Doing so also violates the Due Process guarantees of the 14th Amendment of the United States Constitution and Sections 1, 2, and 3 of the Kentucky Constitution. Accordingly, KRS 243.230(5) and 804 KAR 4:270 should be declared to be void *ab initio*.

STANDARD OF REVIEW

All rulings of the District Court were made in the context of motions for summary judgment filed by the parties on various issues. Accordingly, the standard of review for all issues is *de novo*. *Knox v. Neaton Auto Prods. Mfg.*, 375 F.3d 451, 456 (6th Cir. 2004); *Therma-Scan, Inc. v. Thermoscan, Inc.*, 295 F.3d 623, 629 (6th Cir. 2002).

ARGUMENT

I. KRS 243.230(5) VIOLATES THE EQUAL PROTECTION GUARANTEES OF THE UNITED STATES AND KENTUCKY CONSTITUTIONS.

A. The Equal Protection Clause Applies to Liquor Laws.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution commands that no state shall deny to any person within its jurisdiction the equal protection of the laws. Equal Protection "is essentially a direction that all persons similarly situated should be treated alike." *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985); *Elk Horn Coal Corp. v. Cheyenne Resources, Inc.*, 163 S.W.3d 408, 411 (Ky. 2005).

The standard of review for an equal protection challenge to a law not involving a suspect class is a "rational basis" review. *See Cleburne*, 473 U.S. at 442; *Weiand v. Board of Trustees of Kentucky Retirement Systems*, 25 S.W.3d 88, 92 (Ky. 2000). As the United States Supreme Court has warned, "arbitrary and irrational discrimination violates the Equal Protection Clause under even our most deferential standard of review." *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 83 (1988). A law must be ruled unconstitutional if the classification drawn by it is not rationally related to a legitimate state interest. *See Cleburne*, 473 U.S. at 442; *Weiand*, 25 S.W.3d at 92.

Section 2 to the Kentucky Constitution, which denies the General Assembly arbitrary power, embraces the Equal Protection Clause of the Fourteenth Amendment. *Ky. Milk Mktg. and Antimonopoly Comm'n v. Kroger Co.*, 691 S.W.2d 893, 899 (Ky. 1985).[5]

Accordingly, the Equal Protection Clause applies to ***all laws*** passed by the Kentucky legislature – including laws concerning alcohol. In *Granholm v. Heald*, 544 U.S. 460 (2005), the Supreme Court unequivocally held that the 21st Amendment, which provides the states with broad powers when it comes to the manufacture, sale, and transportation of alcohol, "does not supersede other provisions of the Constitution." *Id.* at 486. "[S]tate laws that violate other provisions of the Constitution are not saved by the Twenty-First Amendment. The [United States Supreme] Court has applied this rule in the context of the First Amendment, the Establishment Clause,

[5] In fact, Kentucky law applies "a guarantee of individual rights in equal protection cases that is higher than the minimum guaranteed by the Federal Constitution." *Elk Horn Coal*, 163 S.W.3d at 418. As Kentucky's Supreme Court recently noted, Kentucky's Constitution requires "a 'substantial and reasonable justification' for discriminatory legislation in areas of social and economic policy." *Id.* at 418-419. The current case, which concerns a statutory prohibition against grocery stores selling wine and liquor, most certainly falls in the areas of "social and economic policy," and therefore actually qualifies for Kentucky's heightened equal protection standard. The District Court, however, said it need not address this higher standard of review "because it has concluded that the Statute lacks a rational basis" [Memorandum Opinion, RE 62 p. 26; Page ID #1320].

the Equal Protection Clause, the Due Process Clause, and the Import-Export Clause." *Id.* at 486-487 (citations omitted).[6]

B. There Is No Rational Basis For The Discrimination In KRS 243.230(5).

Here, there can be no dispute that when it comes to a retailer's ability to apply for and obtain a retail package license, similarly-situated Kentucky retailers are not treated alike: A store like Food City cannot obtain a retail package license while a store like CVS can, simply because a store like Food City sells more "staple groceries" than a store like CVS. Accordingly, for the statute to survive, there must be a rational basis for denying a store like Food City a retail package license ***because*** it sells a "substantial" amount of "staple groceries" or gasoline. The District Court correctly found there is no rational basis for this discrimination. Accordingly, it correctly ruled the law unconstitutional.

[6] Kentucky's high court actually applied this rule decades before *Granholm* when it struck down the statutes prohibiting women from working as bartenders, and drinking liquor at bars, on equal protection grounds. *Ky. Alcoholic Beverage Control Bd. v. Burke*, 481 S.W.2d 52 (Ky. 1972). While the statutes at issue in *Burke* may have received a higher level of scrutiny because they discriminated based on gender, that case nevertheless establishes that Kentucky liquor laws must satisfy equal protection requirements. Moreover, the court opined that the laws at issue in *Burke* failed because they had no rational basis. *Id.* at 54.

Importantly, the District Court's decision left every other provision of the ABC Act untouched. All other controls in the ABC Act, such as the quota limits on licenses, price floor, hours of sale restrictions, and advertising restrictions, will remain in place. The only change is that grocery stores and gasoline retailers will be able to compete for any available license just like Walgreens, CVS, or Liquor Barn are free to do.

C. The State And Party Source Fail To Cite Any Rational Basis For The Discrimination At Issue.

In a combined 75 pages of briefing to this Court, the State and Party Source fail to cite to a single rational basis for prohibiting a retailer from obtaining a retail package license just because it happens to sell a substantial amount of "staple groceries" or gasoline. In other words, the State and Party Source fail to explain why it is rational to allow a retailer such as Walgreens to obtain a retail package license, but not a retailer such as a Remke Market, just because a Walgreens happens to sell a smaller percentage of "staple groceries" than a Remke Market.

Unable to provide this necessary rational link, the State and Party Source try to redefine the equal protection inquiry, suggesting that KRS 243.230(5) and 804 KAR 4:270 pass constitutional muster because they "treat all retailers who sell 'staple groceries' alike" [Party Source's Brief, pp. 37, 54-55; State's Brief, pp. 4, 12]. In short, the State and Party

Source argue that all Kentucky retailers are presented with the following choice: They can choose to keep their sales of staple groceries and gasoline to under ten percent of their business, and thereby choose to be able to sell wine and liquor, or they can choose to make "staple groceries" or gasoline more than ten percent of their business, and thereby choose to be prohibited from selling wine and liquor:

> [T]he General Assembly has treated all potential package liquor applicants equally. Even if not, [retailers] must determine in which business they will advertise and focus their attention. Party Source and package liquor licensees similarly situated have made that decision.

[Party Source's Brief, pp. 54-55 (emphasis added)].

In other words, Party Source and the State believe that so long as persons or entities can "decide" which arbitrary class that they are a part of, then the state is free to create two arbitrary classes and discriminate against one of them. Under this logic, the University of Louisville can prohibit persons who wear earrings, or green shirts, from applying for admission to the school. While such discrimination has no rational basis, every potential applicant can simply choose not to wear an earring, or a green shirt, and by making that choice, can qualify to submit an application to the University. Or, according to Party Source, the legislature can ban the sale of wine and liquor by any retailer located on the south side of a street

that runs from east to west. While such discrimination has no rational basis, Party Source suggests that such arbitrary discrimination is perfectly fine because retailers can choose which side of the street they locate their businesses on, and by choosing to locate on the south side of a street, a retailer has chosen to be denied the right to sell wine and liquor.

Party Source's "choice" argument is groundless on its face. The question of whether a law violates equal protection does not turn on whether a person "chooses" to be part of an arbitrary class, or can "decide" to remove himself from that class. Instead, the analysis turns on whether there is a rational basis for discriminating between similarly situated individuals, even if the distinguishing difference is the result of a person's choice. Is there any rational basis for a law denying driver's licenses to those who wear earrings? Such a law, after all, would serve the "legitimate state purpose" of reducing road congestion, reducing pollution, and preventing accidents because it would result in fewer drivers. But if there is no substantial or reasonable justification for a classification that discriminates against earring wearers when it comes to issuing driver's licenses, the discrimination is unconstitutional, even though a person could "choose" not to wear earrings and therefore obtain a driver's license.

Party Source and the State proffer this "choice" argument because they cannot proffer any rational basis for the laws that prohibit grocery stores and convenience stores from competing for a retail package license. Their efforts to reframe the inquiry should be rejected, because the discrimination at issue in this case is as arbitrary and invidious as a law prohibiting those who wear earrings from obtaining a driver's license. The fact that the discrimination may serve a valid state purpose, and be the result of a retailer's "choice," does not render it constitutional.[7]

D. Arbitrary Discrimination Is Unconstitutional Even If It Serves A Legitimate State Purpose.

Both the State and Party Source also proffer the following argument: KRS 243.230(5) limits the number of potential wine and liquor retailers. Limiting the number of potential wine and liquor retailers serves

[7] Nebraska's Supreme Court has invalidated laws similar to KRS 243.230(5) and 804 KAR 4:270 on equal protection grounds. *See, e.g., Gas 'N Shop, Inc. v. Nebraska Liquor Control Comm'n*, 427 N.W.2d 784, 789 (Neb. 1988) (ordinance prohibiting any business other than a restaurant, bowling alley, hotel, motel, or club to sell liquor with other items was a violation of equal protection, as there was no rational basis for the distinction); *Gas 'N Shop, Inc. v. Nebraska Liquor Control Comm'n*, 492 N.W.2d 7, 12 (Neb. 1992) ("convenience stores may not be treated differently from other operations which combine the sale of liquor with the sale of other merchandise or services, for the differing treatment bears no reasonable relationship to the State's policy of furthering temperance"). As the District Court correctly noted, "[t]hese cases demonstrate that not every statute will meet even the (continued…)

the legitimate state objective of reducing the "evils accompanying the undue use of alcoholic beverages," such as overconsumption and underage drinking. Accordingly, the State and Party Source suggest that KRS 243.230(5) is "rationally related" to a legitimate state objective [Party Source's Brief, pp. 48-49; State's Brief, pp. 13-15, 17].

The State and Party Source misconstrue the "rational basis" requirement. The United States Supreme Court has consistently held that even if a law serves a legitimate state objective, "arbitrary and irrational discrimination violates the Equal Protection Clause under even our most deferential standard of review." *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 83 (1988).

A simple example reveals the flaw in the opposition's logic. Imagine that KRS 243.230(5) did not discriminate between retailers based upon their sale of "staple groceries" and "gasoline or lubricating oil," but instead discriminated between retailers based upon the number in their street address. Specifically, assume the law allowed retailers whose street address was an odd number, such as 101 Main Street, to obtain a package wine and

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(…continued)

rational basis test." [Memorandum Opinion, RE 62 pp. 14-15; Page ID #1308-1309].

liquor license, but prohibited those whose street address was an even number, such as 102 Main Street, from obtaining a retail package license. According to the State and Party Source, such arbitrary discrimination is constitutional because such a law would ban a sizable number of Kentucky retailers from potentially participating in the wine and liquor market, and therefore would help to keep "the evils" associated with alcohol in check.

Such arbitrary discrimination is, of course, unconstitutional. To pass constitutional muster the classification ***itself*** must be rationally related to a legitimate state interest. *Id*. Accordingly, in the above example, there must be something about a retailer having an even-numbered street address that warrants the State treating it differently than other retailers in regards to the sale of wine and liquor. There obviously is not.

And the same is true in this case. There is no justification for prohibiting retailers who happen to sell a "substantial" amount of "staple groceries" or gasoline – here, 10.1% or greater rather than 9.9% or less – from competing for one of the limited number of Kentucky package wine and liquor licenses if similarly situated retailers such as Walgreens, CVS, and Rite-Aid can compete for those licenses. This arbitrary discrimination, which is embodied in KRS 243.230(5), is logically identical to prohibiting a

retailer from selling wine and liquor because its name starts with the letter "A."

Accordingly, the suggestion that KRS 243.230(5) should survive because the arbitrary discrimination therein serves a "legitimate state purpose" is a non-starter. The State cannot accomplish its goals, no matter how legitimate, using arbitrary discrimination. Legitimate ends do not justify unconstitutional means.

Moreover, the State's suggestion that KRS 243.230(5) is designed to limit the number of wine and liquor retailers to acceptable levels is flawed on its face, because Kentucky law has already established, through the implementation of a quota system, exactly how many wine and liquor licensees are deemed to be acceptable and available. If the District Court's Order is affirmed these quota limits will not change. All the Grocers seek is the right to compete with similarly situated retailers for licenses ***already made available*** by the State. If the State truly fears that there will be (or are) too many licensees, it can constitutionally address that alleged problem by reducing the number of available licenses. It cannot, however, control the number of licensees by arbitrarily excluding a class of retailers from competing for a license. That is, however, ***exactly*** what KRS 243.230(5) does.

E. There Must Be A Rational Basis For A Law At The Time It Is Enforced, Not Just At the Time It Is Enacted.

The classifications set forth in KRS 243.230(5) are currently enforced by the Commonwealth. Accordingly, the Equal Protection Clause requires there to be a ***current*** rational basis for the law's classifications. Party Source disagrees, claiming that so long as a law's classifications have a rational basis when the law is first passed, the classifications are forever constitutional, even if they are arbitrary in today's world [Party Source's Brief, pp. 31-39].

Party Source then claims that KRS 243.230(5)'s classifications were rational when the law was enacted in 1938, and as a result, the statute is constitutional today [*id.*]. Specifically, Party Source suggests that drug stores and grocery stores were different creatures in 1938 from what they are today, and those differences somehow provided a rational basis for denying retail package licenses to retailers who, in 1938, primarily sold "staple groceries" or gasoline [*id.* at 39].

Notably, Party Source does not offer any description (much less proof) of how drug stores or grocery stores were actually operated in 1938. Nor does Party Source explain how the 1938 operation of those stores provided a rational basis then for denying retail package licenses to those

who primarily sold "staple groceries" or gasoline. Party Source basically asks this Court to conclude that this discrimination was rational in 1938 because "anyone over the age of 30 can recall . . . that grocery stores were grocery stores and drug stores were drug stores" [*id.*].

Nevertheless, assuming that differences between drug stores in grocery stores in 1938 provided a rational basis for KRS 243.230(5)'s classifications when the law was passed, those differences have since evaporated, meaning that the (unarticulated) rational basis for the classification has evaporated as well.

Both the United States Supreme Court and Kentucky's highest court have long recognized that a statute that may have been constitutional at the time it was enacted may be rendered unconstitutional by subsequent changes in circumstances. *See, e.g.*, *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938) ("the constitutionality of a statute predicated on the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist") (citing *Chastleton Corp. v. Sinclair*, 264 U.S. 543 (1924)); *Albie State Bank v. Weaver*, 282 U.S. 765, 772 (1931) ("a police regulation, although valid when made, may become, by reason of later events, arbitrary and confiscatory in operation"); *Louisville & Nashville R.R. Co. v. Faulkner*, 307 S.W.2d 196, 197 (Ky.

1957) ("[a] statute valid when enacted may become invalid by change in the conditions to which it is applied") (quoting *Nashville C. & St. L. Ry. v. Walters*, 294 U.S. 405, 415 (1935)).

Faulkner is a prime example of this principle in action. In that case, Kentucky's highest court struck down a state statute that created a presumption of negligence against railroads in cases involving livestock that were injured or killed by trains. 307 S.W.2d at 197-98. The statute, which was enacted before cars or trucks existed, created no such presumption for other motorized vehicles. *Id.* at 197. The statute's constitutionality had been challenged once before in 1889 and, at the time, was upheld. *Id.* The court, however, recognized that circumstances changed in the 68 years between its two decisions on the statute:

> Of course, there were no automobiles in those days. The subsequent inauguration and development of transportation by motor vehicles on the public highways by common carriers of freight and passengers created even greater risks to the safety of occupants of the vehicles and of danger of injury and death of domestic animals. Yet, under the law the operators of that mode of competitive transportation are not subject to the same extraordinary legal responsibility for killing such animals on the public roads as are railroad companies for killing them on their private rights of way.

Id. The Court held that the imposition of a heightened legal burden on railroads – but not on commercial over-the-road carriers – violated the equal protection clause. *Id.* at 197-198. Thus, *Faulkner* unequivocally recognized

that a change in circumstances could render a once-constitutional statute unconstitutional. Here, the District Court properly agreed [Memorandum Opinion, RE 62 pp. 23-24, Page ID #1317-1318].[8]

While courts are not permitted to "judge the wisdom, fairness, or logic of legislative choices," *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993), that does not mean that courts are forever bound by now-obsolete "rationales" that may have once justified legislative discrimination. The General Assembly's wisdom in enacting KRS 243.230(5) in 1938 is not at issue here. The relevant inquiry is whether the statute's discriminatory classification, as applied to today's Kentucky

[8] Courts have consistently evaluated the constitutionality of a law in terms of its current enforcement. For example, the Tenth Circuit Court of Appeals recently allowed an equal protection challenge to an ordinance banning the ownership of pit bulls to proceed under the theory that "although pit bull bans sustained twenty years ago may have been justified by the then-existing body of knowledge, the state of science in 2009 is such that the bans are no longer rational." *Dias v. City and Cnty. of Denver*, 567 F.3d 1169, 1183 (10th Cir. 2009). *See also, e.g., Romero v. Hodgson*, 319 F. Supp. 1201, 1202 (N.D. Cal. 1970) ("a legislative classification must be judged in light of today's circumstances, and that a classification deemed reasonable at the time of enactment can become quite arbitrary with the passage of time"); *Caruso v. Aluminum Co. of Am.*, 473 N.E.2d 818, 821 (Ohio 1984) (invalidating eight-year statute of limitations on silicosis claims on the basis of new knowledge about manifestation time of silicosis and noting "that each law's constitutionality is not cast in stone at the time of the law's enactment; nor is a law once found to be constitutional forever free from judicial scrutiny").

retailers, bears any rational relationship to a legitimate government interest.[9] The District Court correctly concluded that it does not.[10]

F. The *Simms v. Farris* Case Is Inapposite.

Unable to articulate a rational basis for the classifications in KRS 243.230(5) and 804 KAR 4:270, the State and Party Source next resort to claiming that the issue has already been decided. Specifically, they both argue that when the U.S. District Court for the Eastern District of Kentucky decided the *Simms v. Farris* case 26 years ago, it thereby issued the final word on the constitutionality of all sections of KRS 243.230, meaning neither the Western District of Kentucky, nor this Court, have any right to declare KRS 243.230(5) 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. . .

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[9] To that end, the cases Party Source cites on Page 35 of its brief are inapplicable because all dealt with challenges to the initial justification for the enactment of a statute – ***not*** whether the statute was still constitutional in light of changed circumstances.

[10] Both the State and Party Source suggested to the District Court that KRS 243.230(5) has a rational basis because some Kentucky groceries now use "self-scanner" checkouts, which the State and Party Source declared, without any proof, are a less reliable guard against underage purchases than a live checker. The District Court squarely rejected this argument on numerous grounds [Memorandum Opinion, RE 62 pp. 20-21, Page ID #1314-1315]. Tellingly, neither the State nor Party Source saw fit to advance this frivolous argument again in their briefs to this Court.

> . [I]t had already been determined that there is a rational basis for KRS 243.230 under the Commonwealth's Twenty-first Amendment powers.

[Party Source's Brief, pp. 39-40. *See also* State's Brief, pp. 3, 8].

The District Court squarely, and correctly, rejected this contention [Memorandum Opinion, RE 62 p. 13, Page ID #1307]. First, *Simms* involved a challenge to Subsection (4) of KRS 243.230, which sets conditions on package liquor licenses for premises not located in a city. This case involves a challenge to Subsection (5), which concerns discrimination against retailers who happen to derive a "substantial" portion of their business from "staple groceries" or gasoline. As the District Court correctly noted, "[t]he differential treatment of grocery stores and gas stations . . . was neither challenged nor discussed" in *Simms* [*id.*].

Second, *Simms* is devoted almost entirely to the plaintiffs' argument that KRS 243.230 gave existing licensees a monopoly, violating federal antitrust statutes. Then, without any analysis of the plaintiffs' equal protection claim, the *Simms* opinion summarily states that the "plaintiffs' substantive due process and equal protection attacks fail" because KRS 243.230 was "a valid exercise of the Commonwealth's Twenty-first Amendment power." *Simms*, 657 F. Supp. at 124. Therefore, the District

Court properly concluded that "*Simms* at heart was an antitrust case and, as such, does not inform this Court's equal protection analysis" [*id.*].

Accordingly, the State's and Party Source's contention that the *Simms* decision addressed the issues raised in this case, and forever insulated all portions of KRS 243.230 from constitutional attack, is groundless.

G. KRS 243.230(5) Cannot, And Does Not, Keep Chain Stores Out of The Wine And Liquor Market.

The State also suggests that KRS 243.230(5) has a rational basis because it supposedly keeps "the largest chains, with enormous political and economic power," out of the Kentucky wine and liquor market [State's Brief, pp. 16-17]. In other words, the State claims that KRS 243.230(5) exists to protect small "mom-and-pop" retailers from economic competition, and speculates that without this statutory protection, chain stores will swoop in and will sell wine and liquor at lower prices [*id.*]. The State suggests that "smaller retailers might have great difficulty competing with these behemoths," and that such competitive pressure will make it "more likely" that small retailers will "sell to minors, sell to obviously intoxicated persons, or otherwise violate Kentucky liquor regulations" [*id.* at 16].

This argument fails for numerous reasons. First, "[c]ourts have repeatedly recognized that protecting a discrete interest group from

economic competition is not a legitimate governmental purpose." *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002). Accordingly, protecting "mom-and-pop" liquor retailers from economic competition cannot serve as the "rational basis" for the discriminatory classification in KRS 243.230(5). *Id.*

Nevertheless, even if protecting small liquor stores from competition were a legitimate governmental purpose (and it is not), KRS 243.230(5) is arbitrarily overinclusive and underinclusive. It is arbitrarily overinclusive because not all grocers are the "large chains" that the state purports to be afraid of. In fact, the lead Plaintiff in this case, Maxwell's Pic-Pac, is a one-location grocery store with just 10,000 square feet of floor space and three check-out lanes [Depo. of Dave Maxwell, RE 41-29, pp. 19, 24-25, Page ID #903-904]. There are literally hundreds of independent grocery stores and convenience stores throughout Kentucky like Maxwell's Pic-Pac that cannot be labeled as part of a "chain," but are nevertheless discriminated against by KRS 243.230(5) and 804 KAR 4:270.

The statute is also arbitrarily underinclusive because it currently allows "large chains" to obtain wine and liquor licenses. Walgreens, CVS, and Rite-Aid are all "large chains," and ***all*** of these chains already have numerous retail package licenses in Kentucky [*see, e.g.*, drug store circulars

from Kentucky newspapers, RE 41-2 through 42-21, Page ID #834-853]. In fact, each of these chains have thousands ***more*** stores nationwide than the largest grocery store chain – Kroger.[11] They also have more stores in Kentucky than Kroger – Kentucky's largest grocery chain.[12] Moreover, as Party Source points out, the Kroger and Trader Joe's chains already operate wine and liquor stores in Kentucky that are entirely separate and apart from their grocery stores [Party Source's Brief, pp. 43-44].

There are also "high volume" liquor stores operating in Kentucky right now. For example, the Liquor Barn has ten (10) locations spanning Louisville, Lexington, and Danville [Location Pages from Liquor Barn's Website, RE 41-34 and 41-35, Page ID #925-927]. And the Intervening Defendant, Party Source, is one of the largest liquor stores in the region, if not the entire nation [*Party Source is Getting Bigger*, CINCINNATI ENQUIRER, Dec. 28, 2000, RE 41-36, Page ID #928-930]. Party Source's

[11] Walgreens has 7,786 stores nationwide, including 95 in Kentucky [Store Count by State from www.walgreens.com, RE 41-31, Page ID #922]. CVS has 7,337 stores nationwide, including 59 in Kentucky [Store Count by State from www.cvscaremark.com; RE 41-32, Page ID #923]. Rite-Aid has 4,714 stores nationwide, including 117 in Kentucky [Rite-Aid's 2010 Form 10-K, RE 41-23, Page ID #866]. By comparison, Kroger – the largest conventional grocery store chain in Kentucky and the United States – has 2,460 stores nationwide, including 111 in Kentucky [Map of Kroger Supermarkets, RE 41-33, Page ID #924].

current premises in Bellevue covers approximately ***68,000 square feet***, and it recently moved an Ohio River floodwall in order to expand its building to ***98,000 square feet*** to make room for a distillery and community gathering room [12/08/11 WLWT Story re: Party Source, RE 41-27, Page ID #896]. Party Source will carry over 400 bourbons and ryes [*id.*]. Party Source is, therefore, the most "behemoth" liquor store in the state, if not the nation.

And these "behemoths" undoubtedly have the ability to negotiate, and do negotiate, bulk discounts on wine and liquor.[13] Their advertising circulars confirm that they can, and do, put wine and liquor on sale "at or near cost" [Circulars, RE 41-1 through 41-21 (Page ID #834-853), RE 41-37 through 41-39 (Page ID #931-933)]. In fact, Walgreens sells 1.5 liters of name-brand wine for $1.99, after rebate [11/27/11 Walgreens Circular from LEXINGTON HERALD-LEADER, RE 41-15, Page ID #847]. Kentucky wine and liquor retailers already compete fiercely on price, and there is absolutely no support for the State's speculation that allowing Grocers into the wine and liquor market will drive prices down further.

(…continued)

[12] *Id.*

[13] The State, of course, is silent on the effect of the "big box" liquor stores, and their purchasing power, on the traditional "mom-and-pop" liquor stores.

If, however, the State is truly interested in keeping the cost of wine and liquor higher, it can constitutionally do so by implementing price floors and taxes. The 21st Amendment provides the State the right to meddle in the wine and liquor market in this manner. In fact, Kentucky law already prohibits retail package licensees from selling wine or liquor at a loss. KRS 244.050. It also taxes wine and liquor heavily, as is its right. The State cannot, however, keep the price of wine and liquor artificially high by arbitrarily excluding a class of retailers from the marketplace. It must achieve the ends of higher prices through constitutional means.

H. Grocers Cannot Be Prohibited From Selling Wine And Liquor Because Their Stores Are Allegedly "Community Gathering Centers."

Another reason the State proffers for discriminating against grocery stores is that the State wants to keep wine and liquor out of stores where people purchase the necessities of life, such as staple groceries and medication, so that those opposed to alcohol use will not be exposed to wine or liquor [State's Brief, p. 17]. In other words, the State claims that grocery stores are "community gathering centers," and the "Legislature chose to prohibit the sale [of wine and liquor] in those places where all in the community must come together" [Defendant Dehner's Supp. Resp. to Int. No. 3, p. 4, RE 41-26, Page ID #884]. The State says that the law "advances

the legitimate interest of respecting the sensitivity of those who choose abstinence or prohibition" [State's Brief, p. 17].

The District Court accurately described the fatal flaw in the State's argument:

> If grocery stores are community gathering centers in some places, they are so presumably because they sell staple groceries and other necessities that attract the wider community. However, this attribute does not distinguish them from stores currently selling wine and liquor, like Walgreens, CVS, and Rite-Aid. . . . Drugstores also sell both staple groceries and other necessities that undoubtedly draw bibbers and teetotalers alike.

[Memorandum Opinion, p. 22, RE 62, Page ID #1316].

Moreover, the State's suggestion that KRS 243.230(5) "advances the legitimate interest of respecting the sensitivity of those who choose abstinence or prohibition" is baseless in light of the fact that the state already allows the sale of alcoholic malt beverages in grocery stores. To suggest that a sensitive teetotaler is less offended by the sale of malt liquor (which grocers can sell) than white wine (which grocers cannot sell), and that such an alleged (and wholly unproven) reduced level of personal offense to a teetotaler is a rational basis for allowing the sale of wine and liquor in a Walgreens and not a grocery store, is downright absurd.[14]

[14] One serving of beer is generally 12 ounces containing 5 percent alcohol, whereas one serving of wine is generally 5 ounces containing 12 percent (continued…)

Finally, to the extent the State suggests that it wants to limit alcohol at venues where the community actually "gathers," the justification is hard to swallow in light of the fact that one can buy wine and liquor at Party Source, which is adding a "community gathering room" to its premises,[15] and at Louisville's KFC Yum! Center, which is not only one of the largest indoor "community gathering centers" in the state, but is also owned by the State. The bottom line is the State must treat all similarly situated "community gathering centers" (*i.e.*, retailers) alike, and the State does not do so.

I. There Is No Rational Basis For Prohibiting Gasoline Retailers From Selling Wine and Liquor.

Party Source also contends that "gas stations" should not be allowed to compete for a retail package license because there is allegedly one on "every corner" [Party Source's Brief, p. 38]. Putting aside for a moment the fact that there now seems to be a CVS, Rite-Aid, or Walgreens

(…continued)

alcohol, and one serving of liquor is generally 1.5 ounces containing 40 percent alcohol. Accordingly, a typical drink – whether it be beer, wine, or liquor – contains 0.6 ounces of alcohol [Pamela Erickson Report, RE 41-43 p. 10, Page ID #959].

[15] 12/08/11 WLWT Story re: Party Source, RE 41-27, Page ID #896.

on every corner, Party Source does not offer – and did not offer below – any reason ***why*** gasoline retailers should not be allowed to compete for a retail package license. At oral argument in the District Court Party Source's attorney suggested that the reason was obvious – because it supposedly helps prevent drunk driving. Party Source, however, has never advanced this argument in any brief, and it is easy to understand why. Party Source probably took one look outside its front door at its 240-space parking lot (which is larger than a football field), or saw its website page that provides customers with "***driving*** directions," and decided that it would look silly if it argued that it is reasonable to ban stores from selling wine and liquor because their customers come and leave via automobile [*see* Picture of Party Source's parking lot and "Driving Directions" obtained from Party Source's Website; RE 54-1, Page ID #1268-1269].

It is undeniable that the vast majority of customers purchasing alcohol ***anywhere*** – whether at Party Source or at a convenience store – will ultimately drive away with it. In fact, numerous traditional "package stores" in Kentucky have ***drive through windows*** at which drivers can purchase wine and liquor from their running car without even having to get out [*see* photo of "Old Town Liquors" Drive-Through on Bardstown Road in Louisville, RE 54-2, Page ID #1270-1272]. Accordingly, it makes no sense

to exclude grocery and convenience stores from the wine and liquor market simply because some of their wine and liquor patrons will arrive and leave in an automobile. Party Source avoided this groundless contention in prior briefing, and to the extent it tries to rely upon it in its reply brief to this Court, the contention must be rejected.

J. The Fact That Grocers Can Open Separate, Stand-Alone Liquor Stores Does Not Render KRS 342.230(5) Constitutional.

From the beginning of this case both the State and Party Source have maintained that there is no equal protection problem with KRS 342.230(5) because a grocery store such as Maxwell's Pic-Pac can theoretically open a separate, stand-alone liquor store nearby an already existing grocery store. Party Source repeats that mantra in its brief to this Court [*see, e.g.*, Party Source's Brief, pp. 43-44].

The problem with this argument, of course, is that even if a grocery store has the wherewithal to open a separate store, similarly situated retailers are not being treated alike. The Walgreens, CVSs, and Rite-Aids of Kentucky do not have to build or rent a separate store, or hire additional employees, to obtain a license to sell wine and liquor. They are allowed to, and do, place the wine and liquor in aisles right next to their grocery aisles, and then check out a customer purchasing a bottle of wine and a gallon of

milk using the same cashier in the same transaction. They do not have to incur the expense of renting or building a separate building, assuming there is even nearby space available in which to do so.

The capital costs of establishing a separate premises are extremely burdensome on grocers. Furthermore, even if a grocer builds or rents a separate wine and liquor store close to its store, that retailer is ***still*** at a competitive disadvantage because a consumer purchasing milk and wine from a grocer such as a Houchens will have to engage in two transactions at two stores. A consumer purchasing milk and wine from a retailer such as Rite-Aid, on the other hand, will only have to engage in one transaction at one store. Consumers will be inclined to take the more convenient option. Rite-Aid naturally tries to take advantage of this discrimination in its favor, going so far as advertising that it accepts EBT ("food stamps") on the very same page that it advertises its low wine and liquor prices [10/23/11 Rite-Aid Circular from LOUISVILLE COURIER-JOURNAL, RE 41-4, Page ID #836].

Accordingly, the fact that a grocery store or convenience store might be able to open a separate wine and liquor store does not cure the constitutional flaw in 243.230(5) and 804 KAR 4:270. If Walgreens, CVS, and Rite-Aid can sell wine and liquor in the same premises as they sell

"staple groceries," Kentucky grocery stores must be allowed to do so as well.

K. An Unconstitutional Law Cannot Stand, Regardless Of The "Practical Effects" Of Striking It Down.

Unable to articulate any rational basis for the discrimination at issue, Party Source and the State resort to playing the role of "Chicken Little," claiming that the sky will fall if Kentucky grocers are allowed to compete for the limited number of retail package licenses made available by the State. In short, they suggest that the District Court's decision will result in "unfettered access" to alcohol, increased consumption, drunk driving, and every possible ill that could be associated with alcohol. In other words, Party Source and the State suggest that an unconstitutional law should remain in effect because the alleged "practical effects" of striking it down may be distasteful [Party Source's Brief, pp. 48-56; State's Brief, pp. 15-17].

The problem with this argument, of course, is that an unconstitutional law cannot survive regardless of the effects of its removal. There is nothing more harmful to our constitutional form of government than the continued enforcement of an unconstitutional law. Our legislatures and executives are required to tackle problems with constitutional laws.

Moreover, the sky will not fall if the District Court's decision is enforced as Party Source implies. First, the District Court's decision will not result in a liquor retailer on "every corner" as Party Source repeatedly suggests, as Kentucky's quota system for retailers will remain firmly in place [Memorandum Opinion, RE 62 p. 19, Page ID #1313]. If there is an increase in the number of retail package licensees, the number of licensees will still be constrained to a number ***already deemed acceptable*** by Kentucky law. In fact, in cities such as Paducah, where all retail package licenses are already spoken for, there will not be ***any*** additional wine or liquor retailers. Instead, there will simply be a larger pool of applicants for the limited number of licenses that the State has deemed fit to issue.

In jurisdictions such as Jefferson County, where licenses happen to be available, grocers may indeed receive some of the available licenses. But that is perfectly fine, as the Legislature has already deemed it acceptable for there to be a liquor license for every 1,500 Jefferson County residents. KRS 241.065. Interestingly, Party Source and the State do not oppose any available licenses being granted to retailers such as CVS, Rite-Aid, or Liquor Barn. Yet they oppose these same available licenses being issued to Grocers on grounds that there should not be any more liquor retailers. This position is unsustainable.

Party Source, however, implies that the District Court's surgical removal of KRS 243.230(5) from the ABC Act will result in the end of "Kentucky's system" of alcohol regulation as we know it [Party Source's Brief, pp. 48-53]. This suggestion is patently false. ***Every constitutional restriction*** in the ABC Act, including the quota on licenses, price floors, hours of sale, and advertising, will remain in place if the District Court is affirmed.

Courts have periodically exercised judicial review to surgically remove unconstitutional vestiges from Kentucky's ABC Act. And every time they have done so, the "Kentucky system" has survived regardless of the "practical effects" of the decision. For instance, the "Kentucky system" has survived for 41 years since the statutes prohibiting women from bartending and drinking liquor at a bar were struck down – even though the "practical effect" of that decision was to instantly ***double*** the number of people allowed to serve and drink liquor at bars. *See, e.g., Ky. Alcoholic Beverage Control Bd. v. Burke*, 481 S.W.2d 52 (Ky. 1972).

Moreover, just one month ago the Kentucky Court of Appeals struck down as unconstitutional the ABC Act's "700 foot rule," which requires liquor retailer entrances in Jefferson County to be at least 700 feet apart. *O'Sheas-Baxter, LLC v. Commonwealth of Ky., ABC Board*, ---

S.W.3d ---, 2013 WL 45315 (Ky. App. 2013). The "practical effect" of this decision, of course, is that there can now be bars and liquor stores next door to each other, or on opposite corners of the same intersection, in Jefferson County. The "Kentucky system" will survive this decision despite its "practical effects" because the numerous constitutional provisions of the ABC Act will survive.[16]

Likewise, the "Kentucky system" will survive the elimination of KRS 243.230(5), which arbitrarily discriminates against retailers who just happen to sell a substantial amount of "staple groceries" or gasoline.

What is more, Party Source offered evidence below strongly indicating that there will ***not*** be a significant increase in alcohol consumption if KRS 243.230(5) and 804 KAR 4:270 are overturned. Specifically, Party Source offered the report of William Alan Bartley, Ph.D., an economics professor at Transylvania University [RE 40-5; Ex. C, Page ID #451-464]. Party Source and its "package store" allies apparently hired Dr. Bartley in 2010 to study the economic effects of introducing wine sales in Kentucky grocery stores. They did so to enable their lobbyists to present Dr.

[16] Interestingly, the attorney who successfully challenged the "700-foot rule" in *O'Sheas-Baxter, LLC*, and thereby cleared the way for more than one bar or liquor store to be on a particular corner, is the lead counsel for Party Source in this case.

Bartley's findings to the legislature. Dr. Bartley's report is very interesting. Specifically, Dr. Bartley reviewed numerous studies of situations where wine was introduced into grocery stores in other states, and ultimately concluded that he would expect "relatively little change" in Kentucky wine consumption if grocery stores were allowed to sell it [*id.* at Page ID #452-455]. Dr. Bartley explains that when a state changes from a "control" model (meaning that the state controls ***all*** alcohol sales) to licensing sales in grocery stores, wine sales increased the most because "the number of wine outlets increased dramatically, but even then, for relatively short periods of time before returning closer to pre-legislation levels" [*id.* at Page ID #455]. Dr. Bartley then explains that in systems where the sale of wine was first limited to traditional "package stores," but then introduced into grocery stores, "demand increased very little, or none" [*id.*]. Dr. Bartley concluded that "the latter scenario is closest to that which will likely be experienced in Kentucky" [*id.*].

Accordingly, Party Source meets itself coming and going, just as it did in the District Court. While Party Source now speculates that allowing grocery stores to sell wine and liquor will result in increased consumption, it cannibalizes its own speculation with Dr. Bartley's report, which concludes exactly the opposite. But again, whether invalidation of the

laws at issue would result in an increase in consumption does not matter, because a valid state objective cannot be accomplished via unconstitutional laws.

Finally, the Grocers cannot help but note that Party Source's purported concerns about "alcohol problems" and "increased consumption" ring somewhat hollow considering that Party Source is the largest wine and liquor store in the state [Affidavit of Party Source President Kenneth Lewis, RE 40-6 ¶ 9, Page ID #468]. If Party Source truly wanted to reduce the availability of alcohol in Kentucky, as it claims it does, it certainly would not have filed the lawsuit culminating in *Liquor Outlet, LLC v. Alcohol Beverage Control Bd.*, 141 S.W.3d 378 (Ky. App. 2004), which resulted in Sunday sales of wine and liquor in its hometown of Bellevue. And if Party Source really wants to reduce the availability of wine and liquor, it can simply stop selling it. But Party Source will not do so because selling wine and liquor is a profitable enterprise. And it is even more profitable when potential competitors like the Grocers are excluded from the market by arbitrary discrimination. Truth be told, Party Source would love to see an increase in the consumption of wine and liquor – it just wants those purchasing wine and liquor to be coerced by law to make their purchases

from Party Source and its allies instead of from nearby grocery stores. And it now seeks to uphold arbitrary laws that force consumers to do just that.

L. Party Source's Attempt To Challenge a Statute Not Currently At Issue Should Be Rejected.

In an attempt to distract this Court from the actual issue in this case, Party Source suggests that another provision of the ABC Act violates its and other liquor stores' equal protection rights. Specifically, Party Source contends that KRS 244.085(7), which allows minors to enter drug stores, grocery stores, and convenience stores where alcohol is sold, unfairly excludes minors from its liquor store [Party Source's Brief, pp. 53-54]. If Party Source truly believes that there is no rational basis for keeping minors out of its store, where it primarily sells alcohol, it is free to file a lawsuit challenging the constitutionality of KRS 244.085(7). That statute, however, is not at issue in this case. The issue here is simply whether a grocery store or convenience store can be denied the right to obtain a retail package license because it sells a "substantial" amount of "staple groceries" or gasoline.

In its brief to this Court Party Source rhetorically asks "[a]re 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)?" [*Id.* at 53]. If the

District Court's decision is affirmed, the answer is "yes" – just as they are currently "free to roam" at stores like Walgreens, CVS, or Rite-Aid where "intoxicating liquors" are currently sold. And for whatever it is worth, for decades minors have been "free to roam" Kentucky grocery stores where "intoxicating" beer, malt liquor, and other malted beverages have been sold. Moreover, minors in 34 other states, including all but one of the states bordering Kentucky, are "free to roam" grocery stores where wine is sold. It is hardly an earth-shattering consequence.

II. THE 21ST AMENDMENT DOES NOT EXEMPT LIQUOR LAW CLASSIFICATIONS FROM HAVING TO HAVE A RATIONAL BASIS.

Unable to articulate a rational basis for the classifications in KRS 243.230(5) and 804 KAR 4:270, both the State and Party Source resort to arguing that the 21st Amendment is so strong that it trumps the Equal Protection Clause's requirement that all discriminatory classifications at least have a rational basis [Party Source's Brief, pp. 20-26; State's Brief, pp. 7-11]. While Party Source summarily states that "in light of the *Granholm* ruling, it is not hiding behind the Twenty-First Amendment," that is exactly what Party Source and the State are trying to do.

The 21st Amendment provides the states with broad powers when it comes to the manufacture, sale, and transportation of alcohol. That

said, the United States Supreme Court recently, and unequivocally, stated that "the Twenty-First Amendment does not supersede other provisions of the Constitution." *Granholm v. Heald*, 544 U.S. 460, 486 (2005). "[S]tate laws that violate other provisions of the Constitution are not saved by the Twenty-First Amendment." *Id.* at 486-487 (citations omitted).

The 14th Amendment and 21st Amendment are easily harmonized. While the 21st Amendment provides the State with substantial authority over the liquor industry, such as the power to limit the number of package liquor retailers in a particular locality, the 14th Amendment guarantees that similarly-situated retailers who want to compete for one of the limited number of licenses will be treated similarly. As powerful as the 21st Amendment may be, it does not provide the Commonwealth of Kentucky with a license to arbitrarily discriminate between its citizens. Any discriminatory classification must, at the very least, have a rational basis.

As the State and Party Source repeatedly point out, the "rational basis" test is the lowest constitutional hurdle there is. But it is a hurdle, and laws with arbitrary classifications do not clear it. *See Craigmiles v. Giles*, 312 F.3d 220, 228-229 (6th Cir. 2002). Since KRS 243.230(5) includes an arbitrary classification, it fails, and the fact that it involves liquor does not save it.

Amazingly, Party Source leads off its brief by declaring that the District Court "ignored" its 21st Amendment argument [Party Source's Brief, p. 20]. To the contrary, when ruling on Party Source's motion to stay pending appeal, the District Court confirmed that was not the case:

> 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.

[Order Granting Stay, RE 85 p. 2, Page ID #1718].

The fact that the State and Party Source both chose to ground their briefs in extolling the strength of the 21st Amendment, instead of offering a rational basis for the classification at issue, confirms that there is no rational basis for the classification. The District Court got it right.

III. THE DISTRICT COURT ENGAGED IN BASIC JUDICIAL REVIEW. IT DID NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE.

Finally, Party Source argues that the District Court's ruling violates the separation of powers doctrine. Party Source alleges that by merely declaring KRS 243.230(5) and 804 KAR 4:270 unconstitutional, the District Court "usurp[ed] the General Assembly's power to act on behalf of its citizens," and engaged in a "judicial activism" [Party Source's Brief, pp. 27-29].

In other words, Party Source contends that neither the District Court, nor this Court, have any power to declare any Kentucky liquor law unconstitutional:

> 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.

[*Id.* at 29].

If that is true, it would turn over 200 years of jurisprudence, beginning with *Marbury v. Madison*, 5 U.S. 137 (1803), on its head. But it is not true, as "judicial review" is one of the core duties of a court, and engaging in judicial review does not constitute "judicial activism" or an intrusion into the legislature's powers. To the contrary, judicial review is the primary check on the legislature's power, and is perhaps the Constitution's greatest protection. Contrary to Party Source's belief, both the Federal and Kentucky Constitutions are higher authorities than the "interests" of the Kentucky Legislature. The fact that a legislature is "not interested" in changing a law does not mean that the law is constitutional.

Moreover, the fact that the Grocers' prior legislative efforts were unsuccessful does not mean that KRS 243.230(5) is therefore constitutional, and/or is somehow immune from judicial review. As the District Court correctly held in a November 2, 2011 Order regarding a

discovery dispute in this case, "[l]egislative engagement and judicial action are not 'either/or' propositions. The [Grocers] may properly seek to affect change by either route without imperiling its ability to seek relief by the other one." [Order re Discovery, RE 31 p. 13, Page ID #290]. Accordingly, Party Source's contention that this Court cannot engage in judicial review of KRS 243.230(5) and 804 KAR 4:270 without invading on the legislature's province fails on its face.

Finally, Party Source suggests that public opinion somehow plays into this constitutional dispute. In its brief to this Court, Party Source boldly proclaims that the Grocers "are well-aware that historically (***and currently***) there has been little support for the sale of wine and distilled spirits in grocery stores," and the Grocers' "efforts are clearly not supported by Kentuckians through their elected representatives" [Party Source's Brief, pp. 15-16 (emphasis added)].

The public's opinion regarding the sale of liquor in grocery stores should have absolutely no impact on this case. Nevertheless, since Party Source felt compelled to inform this Court of the current state of "public opinion" on this issue, the Grocers are compelled to demonstrate that Party Source blatantly misrepresents it. And the Grocers can do so by simply pointing to the front page of the February 2, 2013 LOUISVILLE

COURIER-JOURNAL (*i.e.*, the newspaper published four days ago), where the newspaper reported the results of an independent, scientific statewide poll that it commissioned on this very issue from January 24-27, 2013.[17] A copy of the article is in the addendum to this brief. As the article explains, the scientific poll showed that 62% of Kentuckians favor the sale of wine and liquor in grocery stores, while only 27% oppose it. Moreover, "allowing liquor sales in groceries was strongly favored in every demographic category."[18] Suffice it to say, this article confirms that public opinion on this issue is exactly opposite of what Party Source represented it to be.

Again, this "public opinion" information should not bear on the constitutional issues in this case, and the Grocers would have never presented it to the Court if Party Source had not raised the issue ***and*** so blatantly misrepresented it to this Court.

CROSS-APPEAL

KRS 243.230(5) and 804 KAR 4:270 were properly struck down by the District Court because they violate the Grocers' Equal Protection rights. These laws, however, are also void for vagueness.

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[17] Gregory A. Hall, *Most Back Ky. Liquor Sales In Groceries*, LOUISVILLE COURIER-JOURNAL, February 2, 2013, at A1.

[18] *Id.* at A4.

Interestingly, the District Court opined that the Grocers made a "strong argument" to this effect, and that it "would respect any other court which might agree" with the Grocers on this issue [Memorandum Opinion, RE 62 p. 27, Page ID #1321]. Nevertheless, the District Court ultimately found against the Grocers in what it deemed to be a "close call" [*id.*]. The Grocers respectfully suggest that the District Court should have gone the other way, and found that the laws at issue are also unconstitutionally vague.

I. KRS 243.230(5) and 804 KAR 4:270 ARE VOID FOR VAGUENESS.

It is a bedrock principle of Kentucky law, and American law in general, that statutes cannot be vague and confusing. Statutes that are confusing are void *ab initio*:

> [W]here the law-making body, in framing the law, has not expressed its intent intelligibly, or in language that the people upon whom it is designed to operate or whom it affects can understand, or from which the courts can deduce the legislative will, the statute will be declared to be inoperative or void.

Bd. of Trustees of Judicial Form Ret. Sys. v. Attorney General, 132 S.W.3d 770, 778 (Ky. 2003) (quoting *Folks v. Barren County*, 313 Ky. 515, 232 S.W.2d 1010, 1013 (1950)). Accordingly, for at least one hundred years courts have been voiding Kentucky statutes that are "so carelessly drawn that it is impossible to determine just what the author intended." *Id.* at 779.

When laws are vague, a court "cannot supply omissions or remedy defects in matters committed to the legislature. A legislative act which is so vague, indefinite and uncertain that the courts are unable, by accepted rules of construction, to determine, with any reasonable degree of certainty, what the legislature intended . . . will be declared inoperative and void." *Id.*

Executive officials also cannot use administrative regulations to supply omissions or remedy defects in matters committed to the legislature. Therefore, if an executive agency charged with enforcing a statute itself finds the statute so confusing that it must enact a regulation defining the statutory terms in order to enforce the statute, as occurred here, the statute is void:

> If the legislature empowers the executive branch with the authority to implement a statute without sufficient guidelines, it effectively delegates lawmaking to the executive branch. Without guidelines contained in the statute, itself, the executive branch must guess at the intent of the legislature and is thereby transformed from implementer of the law into maker of the law.

Id. at 781.

A. Separation of Powers.

As suggested by the passages above, vague Kentucky statutes are usually held to violate Sections 27, 28, and 29 of the Kentucky Constitution, which (1) provide for the separation of powers between the

three branches of Kentucky's Government, and (2) vest legislative power solely in the General Assembly. Kentucky's courts generally apply a separation of powers analysis to vagueness challenges because Kentucky's separation of powers is incredibly strong – it is much stronger than the separation provided by the United States Constitution, and is arguably stronger than the separation of powers found in the 49 other states:

> 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 of Government than does our Constitution.

Judicial Form Ret. Sys., 132 S.W.3d at 782 (quoting *Sibert v. Garrett*, 179 Ky. 17, 246 S.W. 455, 457 (1922)). Kentucky's Supreme Court unapologetically holds that Kentucky laws must "prescribe some standard governing the scope of administrative action," meaning that a statute cannot "confuse" the agency charged with enforcing it. *Id.* at 783.

Kentucky's highest court explains that Kentucky's legislature, like most (if not all) others, sometimes passes vague statutes so as to effectively delegate tough legislative decisions to the executive. The Court observed that legislators "quite shrewdly prefer not to have to stand up and be counted but rather to let some executive branch bureaucrat take the inevitable heat." *Id.* at 784. The Court noted that legislators then "stand back and say when our constituents are aggrieved or oppressed by various

rules and regulations, 'Hey, it's not me. We didn't mean that. We passed this well-meaning legislation, and we intended for those people out there . . . to do exactly what we meant, and they didn't do it.'" *Id.* Kentucky's Constitution, however, does not afford its legislators that luxury.

For instance, in *Diemer v. Commonwealth*, 786 S.W.2d 861 (Ky. 1990), at issue was the constitutionality of KRS 177.814(2), a provision of Kentucky's Billboard Act that prohibited billboards from being erected on certain tracts of land outside of an "urban area." The legislature specifically delegated the power to define the term "urban area" to the Secretary of Transportation. The legislature did, however, direct the Secretary of Transportation that his definition could not be "at variance" with the federal definition:

> "Urban areas" means those areas which the secretary of transportation, in the exercise of his sound discretion and upon consideration being given to the population within boundaries of an area and to the traveling public, determines by official order to be urban; provided, however, that any such determination or designation of the secretary shall not, in any way, be at variance with the federal law or regulation thereunder or jeopardize the allotment or qualification for federal aid funds of the Commonwealth of Kentucky.

KRS 177.830(10) (invalidated by *Diemer*).

The Secretary of Transportation thereafter enacted a regulation defining "urban area" in exactly the same manner that the Federal

Government defined that term. The Kentucky Supreme Court nevertheless struck down the law banning billboards outside of "urban areas" as void for vagueness, finding that the legislature failed to provide the Secretary of Transportation with sufficient "guidelines" for defining the vague statutory term:

> But perhaps [the regulation's] most serious defect is not in what it says, but in the fact that the Kentucky Secretary of Transportation has "broad discretion" granted by KRS 177.841(2) to use any definition he might choose as long as it is not at variance with the federal definition. The definition of what is an "urban area" (and thus what is not) may be as restrictive as the Secretary shall decide to make it. . . . With respect to KRS 177.814(2) the General Assembly has abdicated its legislative power by causing the entire prohibitive power of the statute to be dependent upon the "sound discretion" of the Secretary of Transportation, by delegating its authority to define the phrase "urban area."

Diemer, 786 S.W.2d 865-866.

Therefore, in *Diemer*, the legislature at least tried to provide some guidance to the Secretary of Transportation as to how to define "urban area." But its guidance was not enough, as it left too much discretion to the Secretary of Transportation and thereby enabled him to make a policy decision.

The situation here is much worse. In this case, the Kentucky legislature gave absolutely no guidance to the ABC Board, or to the public, as to the meaning of the terms "substantial part of the commercial

transaction" and "staple groceries" – the key terms in KRS 243.230(5). The legislature failed to provide any guidelines, standards, or framework for defining or enforcing these terms. The Court needs to look no further than the preamble of 804 KAR 4:270 to confirm this fact. In that preamble the ABC Board expressly admitted that it was confused by the undefined terms, and was therefore adopting 804 KAR 4:270 to provide definitions that the legislature failed to provide:

> **The statute [KRS 243.230(5)] does not define "substantial part of the commercial transaction" or "staple groceries." This administrative regulation is adopted to eliminate the confusion that an absence of such definitions has caused.**

804 KAR 4:270 (emphasis added). Suffice it to say, if the "absence of definitions" in KRS 243.230(5) "confused" the ABC Board to the point where it felt the need to adopt its own definitions to cure the problem, the statute is unconstitutionally vague.

The ABC Board's confusion is certainly understandable. After all, what did the legislature mean by "the commercial transaction?" Did it mean just one transaction, or a month of transactions, or a year of transactions? And what did it mean by "substantial part?" Is that 95%, 90%, 75%, 50%, 30%, 25%, 10%, or 5% of the "commercial transaction?" These definitions are of great importance, because if "substantial part" is defined as

90%, or even 50%, many of the members of the Coalition would likely be able to apply for a retail package license.

The ABC Board, however, unilaterally declared that "[f]or 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." 804 KAR 4:270(1). And it did so without any statutory standards or guidelines. Accordingly, this regulation effectively bars any of the members of the Coalition from obtaining a retail package license. That said, the members of the Coalition are entities of common intelligence, and submit that "substantial part" could just as easily mean 50% or 75% of retail sales. There is simply no way to know what the legislature meant because the terms are so vague. In fact, the ABC has no idea how it arrived at the 10% number, or at any of the other definitions it promulgated in 804 KAR 4:270(1) [Depo. of ABC Comm. Tony Dehner, RE 41-45 pp. 43-45; Page ID #992].[19]

[19] KRS 13A.140 provides that "when an administrative regulation is challenged in the courts it shall be the duty of the promulgating administrative body to show and bear the burden of proof to show" that it had the authority to enact the regulation, and had legislative authority to do so. The State has failed to meet its statutory burden.

Similarly, what qualifies as a "staple grocery?" Is it milk, eggs, and sugar? What about items made from those ingredients, such as ice cream or bread? What about frozen pizzas? Frozen fruits? Soft drinks? Juices? Cereal? Chips? Raw meat? Lunch meat? Frozen chicken strips? Cooked chicken strips? Candy? Again, the legislature gave no clue as to what the term "staple grocery" means. It is hard to imagine a more vague and confusing term. The ABC Board obviously did not know what it meant, so it unilaterally declared that "[f]or 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(2). The legislature, however, did not write this definition. The ABC Board pulled it out of thin air because it was confused as to what the legislature, which provided no guidance, meant by "staple groceries." The ABC Board's confusion on these terms, while understandable, does not provide it with the authority to draw up its own definitions to eliminate the confusion, especially where it has been provided absolutely no guidelines or standards for doing so. That is the job of the legislature.

Accordingly, KRS 243.230(5) and 804 KAR 4:270 violate Kentucky's strong separation of powers in exactly the same manner that the laws at issue in *Diemer* violated the separation of powers, and should be declared void for vagueness. The mere fact that the ABC Act concerns alcohol does not provide Kentucky's executive branch with legislative powers.

B. Due Process.

Separation of powers is not the only constitutional foundation supporting a void for vagueness challenge (although it is certainly sufficient on its own). Vague statutes have also been voided on grounds that they violate the due process guarantees of the 5th and 14th Amendments of the United States Constitution and Sections 1, 2, and 3 of the Kentucky Constitution. For instance, in *Connally v. Gen. Const. Co.*, 269 U.S. 385 (1925), an Oklahoma statute prohibited state contractors from paying their employees "not less than the current rate of per diem wages in the locality where the work is performed." *Id.* at 388. The General Construction Company paid its employees an agreed upon wage, which Oklahoma's Commissioner of Labor deemed to be insufficient under the statute requiring "current rate" wages. The Commissioner threatened the construction company with penalties if it did not pay its employees more. *Id.* at 388-390.

The employer refused and sought a restraining order against the Commissioner on grounds that the statute was void for vagueness. *Id.* at 390-391. The case made it to the United States Supreme Court, which held that the enforcing the vague statute violated the employer's due process rights:

> [A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess as its meaning and differ as to its application violates the first essential of due process of law.

Id. at 391. The Court explained that "the vice of the statute here lies in the impossibility of ascertaining, by any reasonable test, that the Legislature meant one thing rather than another, and in the futility of an attempt to apply a requirement, which assumes the existence of a rate of wages single in amount, to a rate in fact composed of a multitude of gradations." *Id.* at 394. *See also Sullivan v Brawner*, 237 Ky. 730, 36 S.W.2d 364, 367-368 (1931) (citing *Connally* as authority for the proposition that vague statutes violate the Due Process Clauses).[20]

[20] *See also Alcoholic Beverage Control Bd. v. Hunter*, 331 S.W.2d 280 (Ky. 1960); *Roppel v. Shearer*, 321 S.W.2d 36 (Ky. 1959); *Oertel Brewing Co. v. Portwood*, 320 S.W.2d 317 (Ky. 1959); *Portwood v. Falls City Brewing Co.*, 318 S.W.2d 535 (Ky. 1958); *Dougherty v. ABC*, 279 Ky. 262, 130 S.W.2d 756 (1939); *ABC v. Anheuser-Busch, Inc.*, 574 S.W.2d 344 (Ky. App. 1978). Not even the most "moral and laudable purpose" can save an unconstitutional regulation. *See, e.g., Roppel*, 321 S.W.2d at 39.

Here, it is impossible to ascertain, by any reasonable test, what the Legislature meant by the terms "substantial part of the commercial transaction" and "staple groceries" – the key terms in KRS 243.230(5).[21] The Court needs to look no further than the preamble of 804 KAR 4:270, where the ABC Board admitted its "confusion," to confirm this fact. Accordingly, KRS 243.230(5) and 804 KAR 4:270 also violate the Grocers' federal and state due process rights.

CONCLUSION

The District Court properly concluded that there is no rational basis for the Kentucky statute and regulation that prohibit grocery stores from obtaining a license to sell wine and liquor. KRS 243.230(5) and 804 KAR 4:270 are textbook violations of the equal protection guarantees of both the Federal and Kentucky Constitutions. Moreover, KRS 243.230(5) is void for vagueness. Accordingly, the District Court's Opinion and Order permanently enjoining enforcement of both KRS 243.230(5) and 804 KAR 4:270 should be affirmed.

[21] Due process also requires that a legislature at least provide standards for an executive agency to use. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935); *Kerth v. Hopkins Co. Bd. of Educ.*, 346 S.W.2d 737, 741-742 (Ky. 1961).

Respectfully submitted,

s/ Christopher W. Brooker
M. Stephen Pitt
Christopher W. Brooker
J. Brooken Smith
WYATT, TARRANT & COMBS, LLP
500 W. Jefferson Street, Suite 2800
Louisville, Kentucky 40202
Telephone: (502) 589-5235
Facsimile: (502) 589-0309
mspitt@wyattfirm.com
cbrooker@wyattfirm.com
bsmith@wyattfirm.com

Attorneys for Maxwell's Pic-Pac, Inc. and Food With Wine Coalition, Inc.

CERTIFICATE OF COMPLIANCE

1. The undersigned hereby certifies that this brief complies with the type-volume limitation requirements of FRAP 32(a)(7)(B), as this brief contains 15,520 words according to a word count by the word-processing system used to produce this brief, exclusive of sections of this brief exempted by FRAP 32(a)(7)(B)(iii).

2. The undersigned hereby certifies that this brief complies with the typeface requirements of FRAP 32(a)(5) and the type style requirements of FRAP 32(a)(6), as this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, font size 14.

s/ Christopher W. Brooker
Christopher W. Brooker
WYATT, TARRANT & COMBS, LLP
500 W. Jefferson Street, Suite 2800
Louisville, Kentucky 40202
Telephone: (502) 589-5235
Facsimile: (502) 589-0309
cbrooker@wyattfirm.com

Attorney for Maxwell's Pic-Pac, Inc. and Food With Wine Coalition, Inc.

CERTIFICATE OF SERVICE

It is hereby certified that on this 6th day of February, 2013, a copy of the foregoing was served electronically via the CM/ECF filing system upon the following:

Peter F. Ervin, Esq.
La Tasha Buckner, Esq.
General Counsel
Public Protection Cabinet
Capital Plaza Tower
500 Mero Street
5th Floor
Frankfort, Kentucky 40601

Kenneth S. Handmaker, Esq.
Kevin L. Chlarson, Esq.
Loren Prizant, Esq.
Middleton Reutlinger
2500 Brown & Williamson Tower
Louisville, Kentucky 40202

s/ Christopher W. Brooker
One of Counsel for Maxwell's Pic-Pac, Inc. and Food With Wine Coalition, Inc.

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APPELLEES' / CROSS-APPELLANTS' DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

RECORD ENTRY	DESCRIPTION	PAGE ID #
1	Complaint	1-9
31	Order Regarding Discovery	278-291
37	Amended Complaint	308-320
40-5	Affidavit of Karen Lentz (with copy of Dr. William Bartley report attached)	412-464
40-6	Affidavit of Kenneth Lewis	465-471
41-2 through 41-21	Kentucky Drugstore Newspaper Advertising Circulars Showing Their Sale of Liquor and "Staple Groceries" In Same Store	834-853
41-22 through 41-24	Portions of 10-K Statements of CVS, Rite-Aid, and Walgreens	854-876
41-25	Deposition of John ("Ted") Mason	877-880
41-26	Tony Dehner's Supplemental Responses to Interrogatories	881-985
41-27	12/08/11 WLWT Story re Party Source	896
41-29	Deposition of David Maxwell	898-907
41-31	Walgreens Store Count	922
41-32	CVS Store Count	923
41-33	Kroger Store Count	924
41-34, 41-35	Liquor Barn Website Showing Locations	925-927

41-36	*Party Source is Getting Bigger*, CINCINNATI ENQUIRER, Dec. 28, 2000	928-930
41-37 through 41-39	Liquor Barn Ads From LOUISVILLE COURIER-JOURNAL	931-933
41-40	Supp. Report of Expert John Hinman	934-943
41-41	Affidavit of Neil Wellinghurst	944-947
41-42	BOSTON GLOBE Story re Self-Scanners	948-949
41-13	Pamela Erickson Report	950-971
41-45	Deposition of Tony Dehner, Part 1	979-995
41-46	Deposition of Tony Dehner, Part 2	996-1011
45-1	Grocers' Responses to Party Source's Supplemental Interrogatories	1181-1188
54-1	Pictures of Party Source's Parking Lot and Driving Directions from Its Website	1268-1269
54-2	Pictures of Drive-Through at "Old Town Liquors" in Louisville	1270-1272
62	Memorandum Opinion	1295-1323
63	Order	1324
67	Order Sustaining Grocers' Motion for Summary Judgment and Denying Defendants' Motion for Summary Judgment	1328-1329
72	Notice of Appeal	1457-1458
75	Notice of Appeal	1480-1481
78	Notice of Cross-Appeal	1489-1491
85	Memorandum Opinion and Order	1717-1720

APPELLEES' / CROSS-APPELLANTS'
ADDENDUM TO THEIR PRINCIPAL AND RESPONSE BRIEF

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Most back Ky. liquor sales in groceries

By Gregory A. Hall
ghall@courier-journal.com
The Courier-Journal

David Sattich says it makes no sense that a drugstore in Kentucky can sell wine and liquor, but a grocery store cannot.

"I don't see any difference between 'you sell it in a grocery store' and 'you sell it in a drugstore,'" said Sattich, 69, of eastern Jefferson County.

That's a view apparently shared by many in Kentucky, according to the latest Courier-Journal Bluegrass Poll, which found that 62 percent of respondents favor letting groceries sell wine and liquor where packaged alcohol sales are allowed already.

The poll, conducted by SurveyUSA, found 27 percent opposed the idea while 11 percent weren't sure.

It's an issue unlikely to come up during the legislative session that resumes on Tuesday — in part because of a battle being waged in the courts.

U.S. District Judge John Heyburn II ruled last summer that a Kentucky law allowing liquor and wine sales at drugstores but not groceries is unconstitutional. Enforcement of the ruling is on hold, however, while it is appealed by both the state and a Northern Kentucky

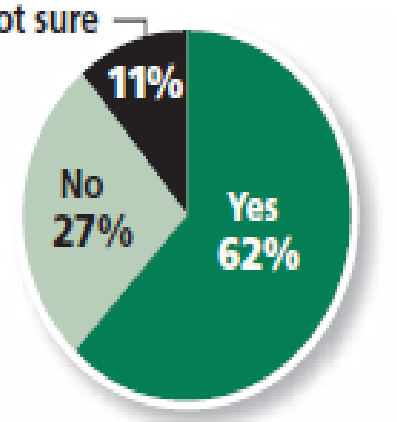
See POLL, Page A4

The Courier-Journal

BLUEGRASS POLL

ALCOHOL SALES

Do you want the Kentucky legislature, during the 2013 legislative session, to pass a law that would allow wine and liquor to be sold in Kentucky grocery stores in cities and counties where packaged alcohol sales are already allowed?



SOURCE: The poll of 609 registered voters was conducted Jan. 24-27 by SurveyUSA. This research was conducted using blended sample, mixed mode. Respondents reachable on a home telephone (72% of adults) were interviewed in the recorded voice of a professional announcer. Respondents not reachable on a home telephone (28% of adults) were shown a questionnaire on their smartphone, tablet or other electronic device. Margin of error: 3.9 percentage points.

THE COURIER-JOURNAL

POLL: All demographic groups favor sales of wine, liquor in grocery stores

Continued from Page A1

liquor store.

The ruling addressed a lawsuit filed in 2011 by the Food with Wine Coalition, a group of grocery and convenience stores, and Maxwell's Pic-Pac, a Louisville grocery store. The Party Source, a Northern Kentucky liquor outlet, joined the state as a defendant.

Rep. Dennis Keene, D-Wilder, who says he expects to file a bill addressing less controversial liquor issues next week, said the grocery question won't be a part of that.

"Everybody's kind of waiting to see what the courts decide," he said.

Tim McGurk, a regional spokesman for Kroger, said the grocery chain is satisfied to let the issue play out in the courts.

"Our own polling had almost identical numbers to that," he said of the Bluegrass Poll, "and our customers tell us that the polling is right in our stores every day when they're asking us why don't we sell wine."

Keene's bill, which is being pushed by Gov. Steve Beshear, relies on recommendations of a task force the governor appointed to tidy up Kentucky's alcoholic beverage laws and regulations — including some in effect virtually since Prohibition.

The recommendations include repealing a law that requires liquor stores and bars countywide to close on the day that one of its cities or precincts holds a wet-dry vote.

ALCOHOL SALES

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The Courier-Journal BLUEGRASS POLL

POSITION	IDEOLOGY			EDUCATION			INCOME			REGION		
	Conservative	Moderate	Liberal	H.S.	Some college	4-year	< $40K	$40K-$80K	>$80K	Louisville	N. Central	E. KY
Yes	52%	66%	81%	52%	64%	67%	56%	67%	72%	60%	66%	57%
No	38%	24%	11%	38%	26%	22%	31%	27%	17%	29%	23%	39%
Not Sure	11%	10%	8%	11%	11%	11%	13%	7%	11%	10%	11%	4%

SOURCE: The poll of 609 registered voters was conducted Jan. 24-27 by SurveyUSA. This research was conducted using blended sample, mixed mode. Respondents reachable on a home telephone (72% of adults) were interviewed in the recorded voice of a professional announcer. Respondents not reachable on a home telephone (28% of adults) were shown a questionnaire on their smartphone, tablet or other electronic device. Percentages based on subsamples are subject to a higher potential margin of error than the overall 3.9 percentage point margin of error.

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BILL AT A GLANCE

Intent: Reform Kentucky's liquor laws.

Bill number: The major reform bill with the recommendations of the governor's task force is expected to be filed around Tuesday.

Key players: Gov. Steve Beshear, Public Protection Secretary Robert Vance.

Supporters say: The controversial nature of any bill dealing with alcohol justifies a narrow change that deals only with the least controversial ideas — such as streamlining license types.

Others say: The legislature should address immediately a judge's ruling declaring Kentucky's prohibition on wine and liquor sales in groceries unconstitutional, despite the state's pending appeal of the ruling.

But the task force was silent on potentially controversial topics like the grocery store issue, and state laws that allow more liquor licenses in Louisville than elsewhere.

In the poll, allowing liquor sales in groceries was strongly favored in every demographic category, with the strongest support coming from those who described themselves as liberals and people whose annual incomes are above $80,000.

The groups with the largest percentage of opposition — all just under 40 percent — were seniors, conservatives and Eastern Kentuckians.

The poll's margin of error was plus or minus 3.9 percentage points, but results based on demographic subsamples are subject to a higher margin of error.

Keene, chairman of the House Licensing and Occupations Committee, which considers alcohol bills, said he has heard concerns from nearly two dozen family-owned liquor stores in his Campbell County district that would struggle if they had to compete against a larger grocer or gas station.

Keene said he's opposed to liquor and wine sales in groceries because of the jobs he believes it would cost his district.

"You could lose half of those mom and pops just because of the competition," Keene said, adding that the grocery stores that replace them would result in a net job loss.

"That's the scary part of it," he said.

He said his district includes Bellevue's Party Source, which is the store appealing Heyburn's ruling along with the state, but he said Party Source officials "have never discussed the issue with me."

Sattich, the eastern Jefferson County resident who responded to the poll, said he believes concerns about the impact on liquor stores are overblown. "I don't like to see the big guy always rolling over the little guy, but, I mean, I guess if drugstores didn't put them out of business (already)" the groceries — many of which get around the ban by establishing separate retail stores near their main stores — won't either.

"Good customer service and giving the customer what they want can make up for a lot of things," Sattich said.

But Paul Harrison, 76, of Fairdale, said he believes liquor doesn't need to be any more available than it already is.

"I think it ought to be just like it is now where it's a little harder to get for kids," he said. "... A lot of people have problems with it (drinking). There's no need helping them."

A coalition founded by a Kentucky liquor retailers association is pushing for the legislature to act this year to maintain the longtime limitations on liquor sales in a way that would withstand a constitutional challenge. The group, FACTKY.org, derives its name from Fighting Alcohol Consumption by Teens and wants the appellate court to reverse Heyburn.

"If the legislature does not take action, it paves the way for vodka, tequila, rum and other hard liquor to be available in dollar stores, truck stops, gas stations, pawn shops and any other retailer who gets a liquor license," spokesman Gary Gerdemann said in a statement. "More access to hard liquor means more problems with teenage drinking, binge drinking and other alcohol abuse problems."

But Heyburn cautioned in one of his rulings that, while enforcement of his ban would eliminate existing license prohibitions, it wouldn't guarantee a license.

Reporter Gregory A. Hall can be reached at (502) 582-4087 and on Twitter @gregoryahall.

ABOUT THE POLL

THE COURIER-JOURNAL BLUEGRASS POLL® is based on surveys conducted Jan. 24-27 with 609 Kentucky registered voters by Survey USA. Seventy-two percent of respondents were interviewed on their home telephone in the recorded voice of a professional announcer, while the other 28 percent were shown a questionnaire on their smart phone, tablet or other electronic device. The margin of error for the poll was plus or minus 3.9 percentage points. In theory, one can say with 95 percent certainty that the results would not vary by more than the stated margin of sampling error, in one direction or the other, had all respondents with telephones been interviewed with complete accuracy. Percentages based on subsamples are subject to a higher potential margin of error.

In addition to these sampling errors, the practical difficulties of conducting any survey can also influence the results.