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

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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

v.

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

and

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

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

---

RESPONSE TO PETITION FOR REHEARING AND REHEARING EN BANC

ON BEHALF OF TONY DEHNER AND DANNY REED

DEFENDANTS – APPELLANTS CROSS – APPELLEES

Peter F. Ervin
La Tasha Buckner
Public Protection Cabinet
Office of Legal Services
5th Floor, Capital Plaza Tower
Frankfort, Kentucky 40601
(502) 564-7760

COUNSEL FOR DEFENDANTS-APPELLANTS CROSS-APPELLEES

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions **Page**

Cases

TABLE OF AUTHORITIES – Continued

Page

Kentucky Revised Statutes

Federal Rules of Appellate Procedure

I. NO CASE OF EXCEPTIONAL IMPORTANCE TO JUSTIFY REHEARING *EN BANC*.

The appellees argue that this is a case of exceptional importance which justifies rehearing *en banc*. The criteria for determining whether to grant rehearing *en banc* are set out in FRAP 35(a). Under the rule, the party seeking the rehearing must demonstrate:

> (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or
>
> (2) the proceeding involves a question of exceptional importance.

This is not a case which would justify rehearing *en banc*, because the Appellees cannot satisfy the requirements of either criteria.

The Appellees are unable to rely on the first criteria of the rule, because the unanimous panel opinion is entirely consistent with both Supreme Court rulings and other similar subject matter rulings of this Court. Authoring the opinion of the court, Judge Cook was careful to follow the Supreme Court's bench mark standard for equal protection challenges of social and economic policy set out in *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307 (1993). She acknowledged the limits of states' 21st Amendment authority as set out in *Granholm v. Heald*, 544 U.S. 460 (2005). Similarly, Judge Cook found that the panel's holding was consistent with this Court's decision in *37712, Inc. v. Ohio Dep't of Liquor Control*, 113 F. 3d 614

(6th Cir. 1997) (upholding "an Ohio provision that subjected taverns, but not breweries, to local referenda prohibiting package beer sales").[1]

With the first criteria for rehearing *en banc* not only unavailable, but contra-indicated, the Appellees resort to the other, *exceptional importance*. Again, the burden is beyond the reach of Appellees' arguments. The outcome of this case is of utmost importance to the parties, to be sure, but that importance does not satisfy the standard for exceptionality under the rules. The rule itself points to an example of the type of exceptionality to be considered:

> [a] petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue. FRAP 35(b)(1)(B).

The Appellees fail to point to *any* decision in conflict with the panel's decision, because there is no demonstrable variance. To the contrary, the panel's decision is completely harmonious with those of other circuits on similar issues. For example, *Gary v. City of Warner Robins*, 311 F.3d 1334, 1339 (11th Cir. 2002) (distinguishing between those who sell food with alcoholic beverages and those who don't, not a violation of equal protection); *Oklahoma Ed. Assoc. v. Alcoholic Bev Laws Enforcement*, 889 F.2d 929 (10th Cir. 1989) (prohibiting state employees

[1] Opinion p. 7. *Cf., also, Sam & Ali, Inc. v. Ohio Dep't of Liquor Control*, 158 F. 3d 397, 399 (6th Cir. 1998)

from working second jobs involving direct sales of alcoholic beverages to the public, not a violation of equal protection); and *Southern Wine & Spirits v. Div. of Alcohol and Tobacco Ctrl*, 731 F.3d 799, 812 (8th Cir. 2013) (state residency requirement for one to hold state wholesale liquor license, not a violation of equal protection).[2]

In the most recent cases where *en banc* review was granted by this Court, there appears to be a consistent theme of remedying some injustice or severe infringement of personal rights, i.e., *Ohio Republican Party v. Brunner,* 544 F.3d 711, (6th Cir.2008) (right to vote); *Lewis v. Humboldt Acquisition Corp., Inc.,* 634 F.3d 879 (6th Cir. 2011) (right to protection under the ADA); *Nichols v. U.S.,* 563 F.3d 240 (6th Cir. 2009) (right to effective assistance of counsel); and *Bell v. Bell*, 512 F.3d 223, (6th Cir. 2008) (right to fair trial). All of these cases are fundamentally different and much more serious in nature than the claimed right to sell liquor and wine in groceries or gas stations.

In the end, Judge Sutton's conclusions in *Mitts v. Bagley*, 626 F.3d 366, 369-71 (6th Cir. 2010), of both the appropriateness and usefulness of rehearing *en banc*, should guide the court here. In *Mitts*, Judge Sutton authored the denial of a

[2] While the opinion is primarily devoted to a discussion of the application of the Commerce Clause, the court found that the rational basis standard satisfied there, also satisfied the rational basis requirement of the 14th Amendment.

petition for rehearing *en banc*, even though he disagreed with the original panel's decision. Like *Mitts*, "the traditional grounds for full court review are not 'compelling' here." *Id.*, at 370. Judge Sutton observed that an *en banc* effort to resolve differences of opinion is not productive:

> If the goal is to produce consistent and principled circuit law, moreover, it is fair to wonder whether a process that requires a majority of circuit judges to sit in judgment of two or three colleagues does more to help than to deter that objective, particularly when the central ground for review is mere disagreement on the merits. *Id.*

In the absence of a demonstrable inconsistency, the goal of the *en banc* hearing cannot be fulfilled. Because the petition for rehearing in *en banc* does not present that "rarest of circumstances,"[3] an issue of exceptional public importance, it should be denied.

II. NEITHER FACT NOR LAW WERE OVERLOOKED OR MISAPPREHENDED BY THE COURT.

The Appellees lead argument on the merits of their petition for rehearing is "The Panel Overlooked The Fact that Today's "Grocery Stores" and "Pharmacies" Are Similarly Situated." This is a particularly curious conclusion because the panel prefaced its opinion with the head-on acknowledgement of the question posed by District Judge Heyburn, that he could find no rational reason "why a

[3] *Id.*, citing *Air Line Pilots Ass'n Int'l v. E. Air Lines, Inc.*, 863 F.2d 891, 925 (D.C. Cir. 1988).

grocery-selling drugstore like Walgreens may sell wine and liquor, but a pharmaceutical-selling grocery store like Kroger cannot." [Opinion p. 5].

Before addressing the question substantively, it should be understood that the statute makes no exception for drugstores. It applies equally to all retailers[4] to prohibit the sale of "distilled spirits or wine" on "any premises used as or in connection with the operation of any business in which a substantial part of the commercial transaction consists of selling at retail staple groceries or gasoline and lubricating oil." KRS 243.230(5). The statute makes its classifications based on the real distinction in the volume of groceries or nature of the product, gasoline, sold. It is these *distinguishing characteristics* and the corresponding social effects that support the rationale.

It should likewise be acknowledged that the more available alcoholic beverages are, the greater their consumption becomes.[5] Kentucky has a legitimate interest in controlling the time, type, place and number of licenses for the sale of alcoholic beverages so as to limit consumption. In the words of the court:

> For present purposes, we note that the 21st Amendment's express grant of authority to the states, if it means anything in this context, provides

[4] Liquor package licenses are usually sought by those for whom the sale of alcoholic beverages will be the primary business because of restrictions against minors on most premises. KRS 244.085(7).

[5] Record Document No. 27, Expert Witness Disclosure with attachment.

> legitimacy to the state's interest in restricting access to alcohol. [Opinion, p. 7].

Substantively, in response to the question posed by the district court, this Court's panel concluded that:

> "[R]easonably conceivable facts support the contention that grocery stores and gas stations pose a greater risk of exposing citizens to alcohol than do other retailers…. Kentucky could believe that its citizenry visits grocery stores and gas stations more often than pharmacies – people can survive without *ever* visiting a pharmacy given that many grocery stores fill prescriptions…. Though some modern pharmacies sell staple groceries, grocery stores may remain the go-to place for life's essentials. And though Kentucky otherwise reduces access to wine and liquor by capping the *number* of places that supply it, the state can also reduce access by limiting the *types* of places that supply it – just as a parent can reduce a child's access to liquor by keeping smaller amounts in the house *and* by locking it in the liquor cabinet. [Opinion, p. 6].

The court's conclusion that grocery stores remain the go-to place for life's essentials is not illogical, but in fact a rationale which supports the statute. When families prepare the weekly grocery list, the isles of food product in the mind's eye are those of a grocery not a drugstore. This is because while a drugstore may carry some food stuff for convenience of its shoppers, it does not have a produce isle, fresh meat, poultry or fish counter. It does not have flour, powdered sugar, or anything like the variety of all types of food goods that a grocery has. It is the

ubiquitous[6] nature of the grocery that distinguishes it from other retailers as the primary and "go-to" place for Kentucky citizenry. These rational suppositions, if not facts, are both real and *current* so as to legitimize Kentucky's interest in limiting consumption by prohibiting the sale of liquor in groceries and gas stations.[7]

There is even greater legitimacy to the prohibition of the sale of liquor in gas stations. The issue is less related to the proximately of a highway as the grocers attempt to ridicule in their motion.[8] In arguments, Judge Carr articulated the state's legitimate concern of the exposure and access of potent alcoholic beverages to children in Thorntons, Speedway, Super America and the like. Teens are far more common and frequent shoppers in these types of stores. These realities are current, not antiquated, and they provide a rational basis for the statute.

Finally, the cornerstone of Appellees argument is *Walgreen Co. v. City and County of San Francisco,* 185 Cal. App. 4th 424 (2010.) They argue that the California state court "squarely confronted" the "issue" of pharmacies and

---

[6] In fact the grocer's effort here is an economically motivated effort to become all the more ubiquitous.

[7] The Appellees demand to be returned to the district court for fact finding and empirical data is contraindicated by the applicable standard of review. *Beach, supra*.

[8] Concern for the proximity of a highway to a liquor outlet is not without merit. While drugstores may be on street corners in neighborhoods where the average speed is 35 mph, gas stations are located on super highways where average speeds are a more deadly 75 mph.

groceries being similarly situated and that the two must now be treated equally for *all* purposes [pg. 2, Petition for Rehearing and Rehearing En Banc]. While the *Walgreen* subject matter makes the case otherwise inapposite, the court never reaches the conclusion argued by the Appellees.

In *Walgreen*, the California court merely held that for the purposes of surviving the City's demurrer, any store containing a pharmacy, was similarly situated for the purpose of the sale of tobacco. But the court refused to grant the judgment that is argued by the Appellees, holding:

> Walgreens goes one step further and asks this court to direct entry of judgment in its favor on the equal protection causes of action. It claims the relevant facts are "largely undisputed" and that this court could decide the matter in its favor as a matter of law. [Citation omitted] *We decline to do so.* As far as this court is aware, the City has not yet answered the complaint or had the opportunity to assert and litigate any affirmative defenses it may wish to raise. It is therefore premature to enter judgment in favor of Walgreens.[13] [Appellants' emphasis] *Walgreen, supra,* 185 Cal. App. 4th at 443-44, 110 Cal. Rptr. 3d at 514.

This is the extent of the ruling. No conclusion can be drawn from the case.

Neither is *Walgreen* analogous. Appellees continuously and erroneously contend that KRS 243.230(5) draws a line between pharmacies and grocery stores. The statute makes no such distinction and even a cursory reading of *Walgreen* reveals that the facts in that matter are not helpful to the present case. Appellees

effort to expand the holding of *Walgreen*, even to the extent it purportedly declares pharmacies and groceries stores to be similarly situated, misses the actual questions in this matter. Because the sale of tobacco does not have the same history or legal precedent as wine and liquor, nor a 21st Amendment equivalent, the considerations and factors for distinction among retailers of alcohol and retailers for the sale of tobacco are not analogous.

The state's interest in controlling the sale of tobacco and alcoholic beverages is not analogous because the two do not pose the same risks. A minor who steals or surreptitiously purchases a pack of cigarettes is far less likely to straight-away cause a catastrophic auto collision than one who steals or surreptitiously purchases a fifth of vodka. A teen consuming liquor is far more susceptible to immediate brain or other injury than one using tobacco. Consequently, the penalty for the sale of alcohol to minors is dramatically different from the penalty for the sale of tobacco to minors.[9] The rationale of the state's authority to prohibit the sale of liquor and wine in the types of stores most frequented by minors is at least conceivable.

[9] *Cf.* KRS 244.080(1) and 244.990(1) (imprisonment for sale of alcohol to a minor) and KRS 438.310(4) (fine for sale of tobacco to a minor).

The panel correctly conceived that the distinguishing characteristics of businesses where a substantial part of the commercial transaction is the selling of staple groceries or gas remain current to the state's interests. For these reasons the rehearing should be denied.

III. NO HEIGHTENED EQUAL PROTECTION STANDARD APPLIES.

Despite Appellees argument in the district court, Judge Heyburn was unable to determine with any certainty whether or when some heightened ("reasonable basis") standard of review may be required by Kentucky's Constitution. It found, "[i]t is unclear whether the "reasonable basis" standard applies in all Kentucky equal protection cases, and if not, what factors control whether the heightened standard applies." [Record Document No. 62, p. 25] Finding it unnecessary, the district court declined to rule further on the Kentucky standard.

In this Court, the Appellees abandoned the issue. Not only did they not appeal the failure of the district court to address the question, they did not brief the matter here. The only reference Appellees made to the standard was by way of footnote in which they merely conclude the standard would apply here but acknowledge the question was not addressed by the district court.[10] The panel

[10] Appellees Principal Brief, at p. 19, note 5.

correctly observed that, "Though Kentucky law occasionally subjects economic policies to stricter standards [citations omitted], the grocers contend only that the statute lacks a rational basis." [Opinion, p. 5] The question was neither overlooked nor misapprehended. Appellees effort to breathe life into the question at this stage of the proceedings should be dismissed out of hand and cannot form the basis for rehearing.

CONCLUSION

Appellees are unable to satisfy the requirements for either rehearing or rehearing *en banc*. There is no merit in Appellees argument that the panel either overlooked or misapprehended questions that it clearly articulated and squarely addressed. Similarly, there is no merit to the exceptionality of this case beyond the interests of the parties to it. The petition should be denied.

Respectfully submitted,

/s/ Peter F. Ervin
Peter F. Ervin
La Tasha Buckner
Public Protection Cabinet
Office of Legal Services
5th Floor, Capital Plaza Tower
Frankfort, Kentucky 40601
Telephone: (502) 564-7760

COUNSEL FOR DEFENDANTS-APPELLANTS CROSS-APPELLEES

CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2014, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system to be served electronically through the Court's electronic filing system upon counsel of record in this action.

/s/ Peter F. Ervin

Peter F. Ervin