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

PETITION FOR REHEARING AND REHEARING *EN BANC*

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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.

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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.

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[1] Throughout the course of this litigation the statute at issue was codified as KRS 243.230**(5)**. The Kentucky General Assembly amended other parts of KRS 243.230 in 2013, resulting in subsection (5) being renumbered as subsection (7).

May It Please The Court:

Pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure, Maxwell's Pic-Pac, Inc. and the Food With Wine Coalition, Inc. (collectively "FWWC"), respectfully request that this Honorable Court rehear this expedited appeal, and suggest that it rehear the appeal *en banc*. Rehearing or rehearing *en banc* is necessary because this matter raises an issue that is of exceptional importance. District Judge John Heyburn labeled the case as "unusual, difficult, and perhaps historic" [RE 85, Page ID #1718]. FWWC's opponents observed that this case "will greatly impact not only the parties to these appeals, but will greatly impact the entire landscape of alcohol regulation in Kentucky and beyond" [10/25/13 Motion].

These observations are apropos, as the District Court's decision, which declared as unconstitutional a Kentucky statute that allows retailers like Walgreens to obtain one of Kentucky's limited number of "retail package licenses" (*i.e.*, license to sell wine and/or liquor), but prohibits similarly-situated retailers like Kroger from doing the same thing, received extensive media coverage. So did the recent reversal of that decision by a Panel of this Court ("the Panel").

At bottom, the constitutional rights of thousands of Kentucky retailers now hang in the balance, along with the interests of the hundreds of

thousands of Kentucky consumers who purchase wine or liquor. FWWC respectfully submits that the Panel's decision should be revisited, and reversed, because the Panel decided this case based upon rationales that were not argued or developed below. Moreover, the Panel's decision rests entirely on assumptions of fact that overlook, and actually contradict, both the record and common experience. If, however, the opinion is not reversed, the case should at the very least be remanded to the District Court for fact-finding on the rationales that the Panel developed *sua sponte*.

I. The Panel Overlooked The Fact That Today's "Grocery Stores" and "Pharmacies" Are Similarly Situated.

When presented with this case, the Panel was charged with determining whether in today's marketplace there is any rational basis for allowing retailers like Walgreens to sell wine and liquor in Kentucky but not retailers like Kroger. Accordingly, the threshold question is whether these retailers, historically categorized as a "pharmacies" and "grocery stores," have become so similarly situated that they must now be treated equally.

The only other court that has squarely confronted this issue answered the question with an affirmative "yes." Specifically, in *Walgreen Co. v. City and County of San Francisco*, 185 Cal.App.4th 424 (2010), a California appellate court held 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 [RE 41-47, Page ID #1025-1026].

The record in this case, as well as common experience, confirms that conclusion to be right. Today's "pharmacies" are every bit as much "grocery stores" as they are pharmacies. The 1930s version of a "pharmacy" is virtually extinct. In fact, "pharmacies" such as Rite-Aid proudly proclaim that they are also "food marts" on the huge signs at the fronts of their stores [RE 41-41, Page ID #947]. Moreover, Sunday newspaper circulars make it crystal clear that today's "pharmacies" compete head-to-head with Kentucky's "grocery stores" for the next sale of a gallon of milk, loaf of bread, or box of cereal [RE 41-2 through 41-21, Page ID #834-853]. Today's "pharmacies" sell everything from soup [RE 41-12, Page ID #844] to nuts [RE 41-14, Page ID #846]. Today's consumers can go to either a Kroger or a Walgreens and purchase all of "life's essentials" at the same location. Today's "pharmacies" even accept SNAP benefits (a/k/a "food stamps"), which can ***only*** be used to purchase staple groceries [RE 41-4, Page ID #836]. What is more, today's Kentucky "pharmacies" strategically advertise wine and liquor on the same page where they advertise that they accept food stamps [*id.*].

The Panel overlooked these critical facts. Instead, relying on a 1933 study, it found that a legislature could have concluded that a "grocery store," like a Kroger, is the only a place that consumers go in 2014 to buy "life's essentials." The Panel viewed a "pharmacy," such as a Walgreens, to be a retailer who "specializes" in products that people do not frequently use, and therefore a retailer who will not be heavily patronized:

> A legislature could rationally believe that average citizens spend more time in grocery stores and gas stations than in other establishments; people typically need to buy staple groceries (for sustenance) and gas (for transportation) more often than items from retailers that specialize in other, less-frequently-used products.

[Opinion, p. 6]. Specifically, the Panel offered that grocery stores might have more traffic because consumers can purchase all of "life's essentials" from a "grocery store" but not from a "pharmacy:"

> 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.

[*Id.*].

While acknowledging that "some modern pharmacies sell staple groceries," the Panel summarily concluded that this fact makes no difference as "grocery stores ***may*** remain the go-to place for life's essentials" [*id.* (emphasis added)].

FWWC respectfully submits that the Panel's conclusion runs squarely against the record, which shows that in today's marketplace, stores such as Walgreens have become every bit as much a "go to place for life's essentials" as a Kroger.[2] In fact, "73.8% of the United States population lives within five miles of a Walgreens and 6.1 million shoppers visited [Walgreens] stores daily" [RE 41-22, CVS 10-K, Page ID #857]. There are now 7,786 Walgreens, 7,337 CVSs, and 4,714 Rite-Aids nationwide (with proportionate numbers in Kentucky) [RE 41-31, Page ID #922; RE 41-32, Page ID #923; RE 41-23, Page ID #866]. Compare this with the fact that America's largest grocery chain, Kroger, only has 2,460 stores nationwide [RE 41-33, Page ID #924]. What is more, CVS generated $96 billion in total sales in 2010, whereas Kroger generated $82 billion in total sales in that same year [RE 41-40, Supp. Report of John Hinman, Page ID #937].

Accordingly, the record indicates that today's "pharmacies," on a macro level, may have comparable, if not more, traffic than grocery stores. And on a micro level, a single Walgreens may have the same, or more,

[2] Moreover, the rational basis offered by the Panel employs circular reasoning. Put under a different lens, the Panel has actually concluded that a Kroger can be prohibited from selling wine because it sells prescriptions, while a Walgreens can be allowed to sell wine because it primarily sells prescriptions [Opinion, p. 6]. This basis is plainly irrational and cannot stand.

traffic than an independent "grocery store" like Maxwell's Pic-Pac, which has only 10,000 square feet of space [RE 41-29, p. 19, Page ID #903]. Therefore, to the extent foot traffic provides any basis for discriminating between today's "pharmacies" and "grocery stores" (and it does not because they are both now all-in-one retailers selling the same products), the case should, at the very least, be remanded to the District Court for fact finding on the "traffic" rationale. This is especially true considering today's Kentucky "pharmacies" use wine and liquor offerings to entice consumers to purchase staple groceries in their stores [RE 41-4, Page ID #836].

In fact, many of today's "pharmacies" can be fairly characterized as "convenience stores" for all of "life's essentials." Yet these "convenience stores," which just happen to have a pharmacy in back instead of a gas pumps out front, can sell wine and liquor, whereas larger "grocery stores," which sell the same products in a less convenient manner, cannot.

The Panel, however, also found Kentucky's discrimination rational because it purportedly creates a place for teetotalers to shop for "life's essentials" without having to observe wine and liquor [Opinion, p. 6]. This rationale overlooks the fact that in today's marketplace a teetotaler can just as easily shop for "staple groceries" such as eggs, milk, and cereal at a Walgreens as he or she can at a Kroger. It also overlooks the fact that

teetotalers are offended by ***alcohol***. A teetotaler who is going to be offended by being near a bottle of wine is going to be just as offended by being near high-potency "malt liquor," or "alcopops," which can be more potent than wine, and which Kentucky "grocery stores" are allowed to sell [RE 41-40, Report of John Hinman, Page ID #938].

It is implausible to conclude that someone who might be offended by wine would not also be offended by malt liquor. Protecting such a (non-existent) discriminating teetotaler's alleged sensibilities is not a legitimate state interest. But even if it is, the state must do so with laws treating all similarly situated retailers equally. Kentucky does not do so.

Finally, the Panel stated that while "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." [Opinion p. 6]. That is correct. What Kentucky cannot do, however, is discriminate between classes of retailers who, **in today's marketplace**, are the same *type* of retailer. But that is exactly what KRS 243.230(7) does.

II. The Panel Overlooked Numerous Critical Facts In Its Discussion "Regarding Minors."

The Panel next stated that "[o]ur conclusion also rings true regarding minors" [Opinion, p. 6]. Specifically, the Panel speculated that the legislature could have concluded in 1938 that "more minors work at grocery

stores and gas stations than other retailers; after all, grocery stores and gas stations conceivably provide more low-skilled and low-experience jobs, including clerks, baggers, and stockers" [*id.*].

The deficiency with this rationale, again, is that it assumes that "modern pharmacies" like Walgreens fall in a very broad category of "other retailers," and are not similarly situated to a Kroger. Today a Walgreens ***is*** similarly situated to a Kroger, and therefore provides exactly the same "low skilled and low-experience jobs" that a Kroger provides, such as clerks, baggers, and stockers. In fact, Walgreens alone employs 247,000 people nationwide, 71,000 of whom work less than 30 hours a week [RE 41-22, Page ID #860]. As a result, these retailers can no longer be viewed as belonging to different classes who employ different kinds of employees. Moreover, minors are free to work at any Walgreens in Kentucky, including those selling wine and liquor in "wet" areas. KRS 244.090(1)(c)(3)(b).

The Panel then suggested that "Kentucky could also believe that grocery stores typically outweigh other retailers in size and traffic allowing minors to more easily steal wine and liquor" [Opinion, p. 6]. This suggestion also fails for a number reasons. First, it too overlooks the fact that "grocery stores" and "pharmacies" are now similarly situated. Second, the Panel assumed that grocery stores are bigger in "size and traffic" than

"other retailers." There is no record evidence supporting that premise. If anything, the record proves otherwise, as the largest "pharmacy" chains have far more locations than the largest "grocery store" chains, and generate more revenue [*see supra*, pp. 5-6]. Accordingly, in today's marketplace, the Panel cannot merely assume that "grocery stores" are larger, or have more traffic, than "pharmacies."

Furthermore, numerous grocery stores are not as big as a Walgreens or CVS. The lead Plaintiff in this case, Maxwell's Pic-Pac, is a grocery store in Louisville with only 10,000 square feet of space [RE 41-29, p. 19, Page ID #903]. It competes with nearby "pharmacies," like Rite-Aid, who are the same or larger in size [RE 41-24, Page ID #873]. The Panel overlooked these record facts, and simply assumed, improperly, that all "grocery stores" are larger and have more traffic than "pharmacies."[3]

The Panel also assumed that a larger store, like a Kroger, is more susceptible to minors stealing wine or liquor [Opinion p. 6]. This is not a reasonable assumption, because if it were true, Kentucky would not allow large grocery stores to sell beer, which is minors' alcoholic beverage of

[3] Again, the issues of "size" and "traffic" were not argued below. They are rationales that the Panel conceived *sua sponte*. Accordingly, to the extent that these rationales are even viable, this case, at minimum, should be remanded for fact finding on those issues.

choice [RE 41-40, Supp. Report of John Hinman, Page ID #939]. Or malt liquor. Or cigarettes. Or any other potentially objectionable items that minors might want to steal. But Kentucky allows large "grocery stores" to sell these items, and has for decades, because they do so responsibly. In fact, the record squarely offers that "statistics in other states show grocery stores are as good or better at enforcing minimum age requirements as package stores" where minors are not allowed [*id.*, RE 41-40, Page ID #936].

Moreover, the Panel's rationale, even if valid (and it is not), is impermissibly overinclusive and underinclusive. It results in "small" grocery stores, such as Maxwell's Pic-Pac, being excluded from the wine and liquor market, while allowing "pharmacies" of any size to sell those products. While many "pharmacies" are already large, any "pharmacy" is free to expand to be as large as it wants to be, and still sell wine and liquor.

If the physical size of a store actually has a relationship to a minor's ability to "steal wine or liquor," as the Panel speculated, Kentucky must address that problem with a law that discriminates based on a retailers ***size***. It cannot do so with a law that discriminates based upon the percentage of "staple groceries" sold. As Maxwell's Pic-Pac demonstrates, a retailer's physical size ***is not*** a function of the percentage of groceries it sells.

Accordingly, a retailer cannot be prohibited from selling wine and liquor simply because a large portion of ***its*** business is staple groceries.

Finally, the Panel suggested that "regarding gas stations, their convenience and prevalence near highways suggest and even greater danger in allowing alcohol sales" [Opinion, p. 6]. Accordingly, the Panel concluded that there is a rational basis for excluding "gas stations" from the wine and liquor market because they are near highways [*id.*].

FWWC does not dispute that gas stations are generally near highways. What the Panel overlooked, however, is that in today's marketplace, wine and liquor selling "pharmacies" such as Walgreens are also located near highways. In fact, today's "pharmacies" intentionally place themselves in "easy-to-access" locations [RE 41-24, Page ID #873]. A drive down any Kentucky highway reveals that they are located at the very intersections where gas stations are located. While that may not have been the case when KRS 243.230(7) was passed in 1938, it most certainly is the case today.

What is more, a number of Kentucky's current wine and liquor retailers sell those products ***at drive through windows*** strategically placed alongside highways. For instance, "Old Town Liquors" sells wine and liquor from its drive-through on one of the busiest highways in Kentucky – U.S. Highway 31E/150 (a/k/a Bardstown Road) [RE 54-2, Page ID #1270].

These highway drive-throughs are blessed by Kentucky, meaning there is no rational basis for prohibiting a retailer located next to a highway from selling wine and liquor simply because it also sells gasoline. Virtually all wine and liquor sold is now sold to buyers who come and go in their cars.[4]

The Panel, however, also seemed concerned from the 1933 study that if gas stations are allowed to sell wine and liquor, there may be a liquor retailer on every corner [Opinion, p. 6]. Respectfully, the Panel overlooked the fact that Kentucky's quota system establishes, by law, exactly how many wine and liquor licensees that Kentucky deems acceptable. In many "wet" jurisdictions, like McCracken County (Paducah), all licenses are already taken. That said, if the State truly fears that treating similarly situated retailers equally will result in too many licensees, it can constitutionally address that problem by reducing the number of available licenses. It cannot, however, cling to the outdated 1933 model and deny licenses to retailers simply because they sell a lot of "staple groceries" or gasoline.

[4] The parties also did not argue this "highway" rationale below. The Panel developed it *sua sponte*. Accordingly, to the extent that this rationale is not sufficiently addressed by the record, and the common knowledge that today's "pharmacies," like Walgreens, are located on highways, the case should be remanded for fact finding on that issue and other *sua sponte* factual assumptions made by the Panel that are not supported by the record.

III. The Panel Overlooked The Fact That There Must Be A *Current* Rational Basis For KRS 243.230(7) To Survive.

The Panel's opinion provides a long discussion of the history behind KRS 243.230(7), which was enacted in 1938 [Opinion, pp. 3-5]. In doing so, the Panel also correctly recognized that Kentucky then relied upon a study prepared in 1933 by Raymond Fosdick and Albert Scott, which set forth many rationales for the system Kentucky adopted then [*id.* at 3].

This 1930s historical information is helpful in that it sets the stage for the current case. It also demonstrates that KRS 243.230(7) may have had a rational basis at the time it was originally passed in 1938. That said, the fact that a law had a rational basis at the time it was passed does not mean that rational basis will last forever. As the Supreme Court recognized in 1935, a "statute valid when enacted may become invalid by a change in the conditions to which it is applied." *Nashville C. & St. L. Rwy. v. Walters*, 294 U.S. 405, 415 (1935); *Abie State Bank v. Bryan*, 282 U.S. 765, 772 (1931).

And that is exactly what happened here. When KRS 243.230(7) was enacted in 1938 "grocery stores" did not sell prescriptions. Nor did "pharmacies" sell staple groceries. Each retailer had its own turf. Such is not the case today. A Walgreens sells the same things, in the same way, as a Kroger. They are both "grocery stores." They are both "pharmacies." They

compete with each other. They both accept food stamps. Likewise, most gas stations now also sell groceries instead of repairing cars. And some "grocery stores" now sell gasoline. Accordingly, the lines that formerly separated these retailers have, over the past 76 years, disappeared.

The Panel was asked to determine whether KRS 243.230(7) is constitutional in light of the fact that these lines have disappeared. The Panel instead assumed beyond the factual record that the lines between these retailers are still in place. It also assumed that a rational basis lasts forever.

This is confirmed by the fact that the Panel cited the 1933 Fosdick and Scott report as providing a rational basis for discriminating between modern retailers [Opinion, p. 6]. That report, however, should not have been relied on for anything other than background, because "pharmacies" were not also "food marts" in 1933. But most are today, and this Court must decide this case in light of this modern reality. Therefore, FWWC urges this Court to reconsider this case in the framework of today's competitive marketplace, as the District Court properly did, or remand it for further fact development.

IV. The Panel Overlooked The Fact That FWWC's Claim That A Heightened Standard Must Be Applied Is Still Viable.

FWWC argued to the District Court that Kentucky law applies "a guarantee of individual rights in equal protection cases that is higher than the

minimum guaranteed by the Federal Constitution," and that this heightened standard of review should be applied to this case [RE 41-1, Page ID #802-826]. *Elk Horn Coal v. Cheyenne Res.*, 163 S.W.3d 408, 418-19 (Ky. 2005)(decided under KY. CONST. § 2, the state equal protection standard).

While acknowledging that this higher standard of review exists, the District Court found it unnecessary to perform that review because it "concluded that the Statute lacks a rational basis" [RE 62, p. 26, Page ID #1320]. The State and Party Source then appealed that ruling to this Court.

On appeal, the Panel acknowledged that Kentucky's higher standard of review exists and would apply to this case [Opinion, p. 5]. It also concluded, however, that it did not need to apply the standard because "the grocers contend only that the statute lacks a rational basis" [*id.*].

Respectfully, the Panel is mistaken as to FWWC's contention. FWWC has never abandoned its argument that the higher standard applies to this case. Instead, FWWC argues that KRS 243.230(7) fails under ***both*** standards of review [FWWC's Principal Brief, p. 19]. Accordingly, in the event this Court does not change its current ruling, and finds that the law survives under the lower "rational basis" standard, it must then remand this case to the District Court so that the District Court can decide whether the law survives under the higher standard set by KY. CONST. § 2.

Respectfully submitted,

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It is hereby certified that on this 28th day of January, 2014, a copy of the foregoing was served electronically via the CM/ECF filing system upon the following:

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DESIGNATION OF
RELEVANT DISTRICT COURT DOCUMENTS

RECORD ENTRY	DESCRIPTION	PAGE ID #
40-11	Deposition of David Maxwell	541-559
41-2 through 41-21	Kentucky Drugstore Newspaper Advertising Circulars Showing Their Sale of Wine, 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
41-29	Deposition of David Maxwell	898-907
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41-32	CVS Store Count	923
41-33	Kroger Store Count	924
41-40	Supp. Report of Expert John Hinman	934-943
41-41	Affidavit of Neil Wellinghurst (with picture of Rite-Aid "Food Mart")	944-947
54-2	Pictures of Drive-Through at "Old Town Liquors" in Louisville	1270-1272
62	Memorandum Opinion	1295-1323
85	Memorandum Opinion and Order	1717-1720

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RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 14a0015p.06

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,

LIQUOROUTLET, LLC, d/b/a The Party Source,
Intervenor-Appellant/Cross-Appellee.

Nos. 12-6056/ 6057/ 6182

Appeal from the United States District Court
for the Western District of Kentucky at Louisville.
No. 3:11-cv-00018;—John G. Heyburn II, District Judge.

Argued: November 19, 2013

Decided and Filed: January 15, 2014

Before: COOK and STRANCH, Circuit Judges; CARR, District Judge.*

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*The Honorable James G. Carr, United States District Judge for the Northern District of Ohio, sitting by designation.

Dehner & Reed. Kevin L. Chlarson, Kenneth S. Handmaker, Loren T. Prizant, MIDDLETON REUTLINGER, Louisville, Kentucky, for Appellant/Cross-Appellee Liquor Outlet. M. Stephen Pitt, Christopher W. Brooker, J. Brooken Smith, WYATT, TARRANT & COMBS, LLP, Louisville, Kentucky, for Appellees-Cross/Appellants. Anthony S. Kogut, WILLINGHAM & COTÉ, P.C., East Lansing, Michigan, for Amicus Curiae.

OPINION

COOK, Circuit Judge. A Kentucky statute prohibits businesses that sell substantial amounts of staple groceries or gasoline from applying for a license to sell wine and liquor. Ky. Rev. Stat. § 243.230(7). A regulation applies this provision to retailers that sell those items at a rate of at least 10% of gross monthly sales. 804 Ky. Admin. Regs. 4:270. Harmed by the statute, Maxwell's Pic-Pac (a grocer) and Food With Wine Coalition (a group of grocers) sued administrators of the Kentucky Department of Alcoholic Beverage Control; The Party Source (a liquor store) intervened as a defendant. The grocers alleged that the statute irrationally discriminates against them in violation of their state and federal equal-protection rights. They also alleged that the statute violates (1) state separation-of-powers principles by granting the administrative board unfettered discretion to define the law and (2) state and federal due-process rights by vaguely defining its terms. The district court granted summary judgment to the grocers on the federal equal-protection claim but rejected the others. All parties appeal.

Because the statute conceivably seeks to reduce access to high-alcohol products, and because the statute offends neither separation of powers nor due process principles, we REVERSE the district court's judgment on the federal equal-protection claim and AFFIRM on the remainder.

I.

In the decades before 1920, the free market for alcohol in the United States begot political corruption, prostitution, gambling, crime, and poverty. (R. 40-19, Erickson Expert Report at 4.) National manufacturers built saloons near factories to attract workers, saturating neighborhoods with alcohol suppliers. The manufacturers funded advertising campaigns, fueling high consumption, and bribed politicians away from crackdowns. The country thus constitutionalized the prohibition of alcohol. Effective in 1920, the 18th Amendment banned the "manufacture, sale, or transportation of intoxicating liquors" in the United States. U.S. Const. amend. XVIII.

Prohibition, it turned out, bred a new kind of lawlessness. (R. 40-19, Erickson Expert Report at 4.) Though reducing alcohol consumption, Prohibition, poorly enforced, spawned a violent and unruly organized crime industry to satisfy appetites for alcohol. The country recognized Prohibition as an extreme response to the dangers of alcohol and, with the 21st Amendment, repealed the 18th Amendment in 1933. U.S. Const. amend. XXI § 1. The 21st Amendment also expressly granted each state the right to regulate alcohol use within its borders. *See id.* § 2.

In establishing their regulatory systems, the states relied on a study by Raymond Fosdick and Albert Scott. (R. 40-19, Erickson Expert Report at 5.) Fosdick and Scott argued that a regulatory system must limit access to products with high alcohol content, such as liquor. Raymond B. Fosdick & Albert L. Scott, Toward Liquor Control ix (Center for Alcohol Policy 2011) (1933). To this end, according to the study, license law should restrict the number and character of places selling liquor. *Id.* at 30. Analogizing the saloon-on-every-corner problem to the prevalence of gas stations in the modern world, Fosdick and Scott emphasized the danger of selling liquor at gas stations. *Id.* at 29. "[E]very automobile today is an argument against liquor . . ." *Id.* at 86.

In line with these principles, Kentucky banned most grocery stores and gas stations from selling wine and liquor. After the repeal of Prohibition, the General Assembly established a licensing system in 1938 that provided:

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

1938 Ky. Acts c. 2 art. II § 54(8) (codified as Ky. Stat. § 2554b-154(8) (1939)). This basic distinction between grocery stores/gas stations and other retailers exists today. Currently, the state offers two basic alcohol licenses for retail sales—a generic malt beverage license and a wine-and-liquor license—and caps the number of wine-and-liquor licenses available. (R. 40-19, Erickson Expert Report at 8.) The current statute reads:

> No quota retail package license or quota retail drink license for the sale of distilled spirits [liquor] 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.

Ky. Rev. Stat. § 243.230(7). In 1982, almost 50 years after the original statute, the Alcohol Beverage Control Board promulgated a regulation defining the terms of the statute. *See* Ky. Rev. Stat. § 241.060(1) (granting the board authority to promulgate reasonable administrative regulations). The regulation provides:

> Section 1. For the purpose of enforcing [the statute] "substantial part of the commercial transaction" shall mean ten (10) percent or greater of the gross sales as determined on a monthly basis.
>
> Section 2. For the purpose of enforcing [the statute] 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 Ky. Admin. Regs. 4:270. Together, § 243.230(7) and the regulation prevent retailers like Maxwell's Pic-Pac and the grocers comprising Food With Wine Coalition (jointly, "the grocers") from competing for a wine-and-liquor license.

Agreeing on the pertinent facts, each party to this suit moved for summary judgment, which the district court granted to the grocers on their federal equal-protection claim. The court concluded that no rational reason explains "why a grocery-selling drugstore like Walgreens may sell wine and liquor, but a pharmaceutical-selling grocery store like Kroger cannot." The court expressly denied relief on the state separation-of-powers claim, concluding that the statute, neither vague nor overbroad, constitutionally delegates legislative authority to the administrative agency.

II.

On appeal, Kentucky and The Party Source contend that a rational basis—reducing access to products with high alcohol content—supports distinguishing grocery stores and gas stations from other retailers, and thus the statute complies with the Equal Protection Clause. The grocers face a high burden to convince us otherwise. For this type of legislation, "[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); *Northville Downs v. Granholm*, 622 F.3d 579, 586 (6th Cir. 2010). We must uphold an economic regulation "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313–14 (1993); *Smith v. Botsford Gen. Hosp.*, 419 F.3d 513, 520 (6th Cir. 2005). Though Kentucky law occasionally subjects economic policies to stricter standards, *see Elk Horn Coal Corp. v. Cheyenne Res.*, 163 S.W.3d 408, 418–19 (Ky. 2005), the grocers contend only that the statute lacks a rational basis.

The state indisputably maintains a legitimate interest in reducing access to products with high alcohol content. According to Fosdick and Scott, "states must use their control systems to steer society to lower alcohol form[s] of products." Fosdick & Scott, *supra*, at ix. Products with high alcohol content exacerbate the problems caused by alcohol, including drunken driving. *See id.* at 86. The state's interest applies not only to the general public; minors, inexperienced and impressionable, require particular vigilance. And the state's interest applies to abstinent citizens who, morally or

practically objecting to alcohol exposure, wish to avoid retailers that sell such drinks. As Kentucky puts it, its legislature "chose to prohibit the sale in those places where all in the community must come together." (State's Principal Br. at 17.)

We conclude that reasonably conceivable facts support the contention that grocery stores and gas stations pose a greater risk of exposing citizens to alcohol than do other retailers. A legislature could rationally believe that average citizens spend more time in grocery stores and gas stations than in other establishments; people typically need to buy staple groceries (for sustenance) and gas (for transportation) more often than items from retailers that specialize in other, less-frequently-used products. Consider the district court's pharmacy example. 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. On the other hand, most people who object to confronting wine and liquor conceivably cannot avoid grocery stores and gas stations. 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.

Our conclusion also rings true regarding minors. According to a plausible set of facts, more minors work at grocery stores and gas stations than other retailers; after all, grocery stores and gas stations conceivably provide more low-skilled and low-experience jobs, including clerks, baggers, and stockers. Kentucky could also believe that grocery stores typically outweigh other retailers in size and traffic, allowing minors to more easily steal wine or liquor. Regarding gas stations, their convenience and prevalence near highways suggest an even greater danger in allowing alcohol sales. Fosdick and Scott recognized in the early days of the automobile that the saloon system of the pre-Prohibition era "was not unlike that now used in the sale of gasoline, and with the same result: a large excess of sales outlets." Fosdick & Scott, *supra*, at 29.

Courts, including ours, sustain similar alcohol provisions against challenges under the Equal Protection Clause. For example, we upheld an Ohio provision that subjected taverns, but not breweries, to local referenda prohibiting packaged beer sales. *37712, Inc. v. Ohio Dep't of Liquor Control*, 113 F.3d 614, 621–22 (6th Cir. 1997). That case's reasoning—that taverns conceivably pose a greater risk of fights, automobile accidents, and crime—applies equally here. So does the reasoning of a case concluding that bars conceivably pose a greater risk of underage drinking than do restaurants, *see Gary v. City of Warner Robins*, 311 F.3d 1334, 1339 (11th Cir. 2002) (sustaining ordinance setting age limits for bars), and a case concluding that rural areas conceivably pose a greater risk of unpoliced alcohol use than do urban areas, *see Simms v. Farris*, 657 F. Supp. 119, 124 (E.D. Ky. 1987) (upholding restrictive license caps for rural areas). *Simms* relied heavily on the 21st Amendment's grant of authority to the states to regulate alcohol use; we need not rely on that amendment because Kentucky's provision here satisfies rational-basis review under the Equal Protection Clause. 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 legitimacy to the state's interest in restricting access to alcohol. *See Granholm v. Heald*, 544 U.S. 460, 486, 493 (2005) (noting that the states "have broad power to regulate liquor under § 2 of the Twenty-First Amendment").

III.

In their cross-appeal, the grocers contend that the statute and regulation "are also void for vagueness" under (1) the separation-of-powers principle of the Kentucky Constitution and (2) the due-process clauses of the state and federal constitutions.

We start with Kentucky's separation of powers. Kentucky's constitution, perhaps more than any other, "emphatically separates and perpetuates what might be termed the American tripod of Government." *Bd. of Trs. of Judicial Form Ret. Sys. v. Attorney Gen.*, 132 S.W.3d 770, 782 (Ky. 2003) (internal quotation marks omitted); *see* Ky. Const. §§ 28–29. But, even in Kentucky, this principle means only that the "duty to define general terms cannot be delegated by the legislative branch to the executive

branch." *Kuprion v. Fitzgerald*, 888 S.W.2d 679, 699 (Ky. 2004). After all, "given the realities of modern rule-making, the General Assembly has neither the time nor the expertise to do it all; it must have help." *TECO Mech. Contractor, Inc. v. Commonwealth*, 366 S.W.3d 386, 397 (Ky. 2012) (internal quotation marks and brackets omitted). Therefore, the General Assembly need prescribe only "sufficient standards to prevent the agency from exercising unfettered discretion." *TECO*, 366 S.W.3d at 398; *see also Judicial Form*, 132 S.W.3d at 782.

Section 243.230(7) does just that, granting *limited* discretion to the administrative board. The statute, from its 1938 inception to the present, addresses businesses in which "a substantial part of the commercial transaction consists of selling at retail" staple groceries or gasoline. Accordingly, the board may regulate only businesses whose sales of staple groceries and gasoline make up a substantial part of their commercial transactions. The regulation follows these terms: only businesses that sell staple groceries or gasoline at a rate of at least 10% of gross monthly sales may not apply for wine-and-liquor licenses. 804 Ky. Admin. Regs. 4:270 § 1. Moreover, the board's authority is further limited to operations selling staple groceries—"major trade item[s] in steady demand." Webster's II New College Dictionary 1076 (2001). Again the regulation follows these terms, excepting from its definition of "staple groceries" "food products prepared for immediate consumption," among other things. *See* 804 Ky. Admin. Regs. 4:270 § 2.

At bottom, the statutory language limits the board's authority to define the terms of the statute. This fact distinguishes this case from the one relied upon by the grocers, *Diemer v. Commmonwealth*, 786 S.W.2d 861, 864–65 (Ky. 1990). In that case, the General Assembly imposed restrictions for erecting billboards "outside of an urban area" while defining "urban area" as "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." *Id*. at 862. The General Assembly expressly granted the executive branch the authority to define the statute's application. Here, by contrast, the General Assembly

used the limiting terms "substantial," "part of the commercial transaction," and "staple" to cabin its application.

The due-process claim similarly lacks grounding. The grocers rely on cases involving criminal statutes for the proposition that a statute is void for vagueness if people of common intelligence must necessarily guess at its meaning. *See Connally v. Gen. Const. Co.*, 269 U.S. 385 (1926); *Sullivan v. Brawner*, 36 S.W.2d 364, 367–68 (Ky. 1931). But, unlike a criminal statute that threatens a defendant's liberty, the Kentucky statute at issue here affects no liberty interest. Nor do the grocers assert that the statute offends a property right, and thus the statute avoids procedural due-process scrutiny. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 569–71 (1972); *Warren v. City of Athens, Ohio*, 411 F.3d 697, 708 (6th Cir. 2005).

IV.

For these reasons, we REVERSE in part and AFFIRM in part.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 12-6056/6057/6182

FILED
Jan 15, 2014
DEBORAH S. HUNT, Clerk

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,

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

Before: COOK and STRANCH, Circuit Judges; CARR, District Judge.

JUDGMENT

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

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is REVERSED IN PART and AFFIRMED IN PART.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk