

No. 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
Honorable, John G. Heyburn, II, United States District Judge

**BRIEF OF *AMICUS CURIAE* AMERICAN BEVERAGE LICENSEES IN
SUPPORT OF DEFENDANTS-APPELLANTS, ET AL, AND IN
OPPOSITION TO PETITION FOR RE-HEARING *EN BANC***

Anthony S. Kogut
David M. Nelson
Willingham & Coté, P.C.
333 Albert Avenue, Suite 500
East Lansing, MI 48823
517-351-6200; FAX: 517-351-1195
akogut@willinghamcote.com
dnelson@willinghamcote.com
Attorneys for Amicus Curiae American
Beverage Licensees

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
CORPORATE DISCLOSURE.....	iv
SUMMARY OF ARGUMENT.....	1
ARGUMENT	2
The Challenged Law was Rational When Enacted and Continues to Serve a Rational Purpose Today	2
There Was in 1938 a Rational Basis For the Classification That Has Been Carried Forward to Ky. Rev. Stat. Ann. § 243.230(7)	4
That Business Models May Have Changed Somewhat Over the Years Does Not Mean That a Rational Law Dealing With Economic/Alcohol Beverage License Classifications Now is Subject to Equal Protection Challenge. Nevertheless, There Remains a Rational Basis for the Statute	6
ANTI-VIRUS CERTIFICATION FORM	11
CERTIFICATE OF SERVICE	12

TABLE OF AUTHORITIES

CASES

<i>Albie State Bank v. Bryan</i> , 282 U.S. 765, 772 (1931).....	7
<i>Breck v. State of Michigan</i> , 230 F.3d 392 (6 th Cir. 2000)	4
<i>Craig v. Boren</i> , 429 U.S.190 (1976).....	3
<i>Dillinger v. Schweiker</i> , 762 F.2d506 (6 th Cir. 205)	8
<i>Hadix v. Johnson</i> , 230 F.3d 840 (6 th Cir. 2000)	4
<i>Nashville C. & St. L. Rwy v. Walters</i> , 294 U.S. 405, 415 (1935).....	7
<i>Nordlinger v. Hahn</i> , 505 U.S. 1; 112 S. Ct. 2326;120L.Ed2d 1 (1992).....	9
<i>TriHealth, Inc. v. Bd. Of Comm’rs, Hamilton City, Ohio</i> , 430 F.3d 783 (6 ^t Cir. 2005)	9

CONSTITUTIONAL PROVISIONS

Twenty-first Amendment Enforcement Act, 27 U.S.C. § 122a (b).....	<i>Passim</i>
---	---------------

MISCELLANEOUS

Ky. Rev. Stat. Section 243.230(7).....	4
<u>Last Call, The Rise and Fall of Prohibition</u> , Daniel Okrent, Scribner (2010).....	5

National Highway Traffic Safety Administration,
The Role of Alcohol Beverage Control Agencies in the Enforcement
and Adjudication of Alcohol Laws (2003 NHTSA publication) located at
www.nhtsa.gov/people/injury/.../abcroleweb/.../ABCFinal.pdf7,8

National Prohibition: The Volstead Act Annotated,
Arthur W. Blakemore, Matthew Bender & Company (2d Ed. 1295)5

Corporate Disclosure Statement

The American Beverage Licensees is a New York non-profit corporation. It does not have any parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

SUMMARY OF ARGUMENT

Plaintiffs' desire to sell wine and spirits does not justify eliminating a long-standing legislative judgment on how to balance competing public interests in making wine and spirits available, yet not so available as to stimulate overconsumption and abuse. Singling out one provision of Kentucky's comprehensive distribution system (under the guise that circumstances have changed somewhat) would undermine Kentucky's Twenty-first Amendment authority to maintain orderly markets (and thereby promote temperance) by establishing different categories of licensees with different privileges and burdens.¹

The Petition does not dispute that the challenged law was rational when passed. In 1938 it evidenced rational legislative line drawing because: (1) during National Prohibition pharmacies had been permitted to sell medicinal beverage alcohol, while neither grocery stores nor gasoline stations had that experience; and, (2) pharmacies were not as often visited by the public or minors as grocery stores and gasoline stations; therefore, resulting in less exposure to beverage alcohol by the public, minors, and those opposed to its sale.

¹ Radical changes to a regulatory system creates uncertainty, gives a dangerous incentive to licensees to pursue short term profits, and risks unintended consequences such as a proliferation of alcohol beverage outlets and an increase in consumption.

Plaintiffs cite no authority that holds that legislatures are required to subject legislation concerning the structure of a State's beverage alcohol distribution system to periodic review under the Equal Protection Clause. Nevertheless, the challenged law remains rational. Even assuming *arguendo* that pharmacies and grocery stores and convenience stores/gas stations are now somewhat similar, the Kentucky Legislature could now rationally conclude that an expansion of entities permitted to sell spirits and wine would be detrimental to the public policy of promoting temperance. The Legislature could further rationally conclude that it should, however, continue the *status quo* to permit those already selling to continue to sell, thereby recognizing their experience with regulation and their reliance interests. The Panel's decision was correct and should not be re-heard.

ARGUMENT

The Challenged Law Was Rational When Enacted and Continues to Serve a Rational Purpose Today.

The Twenty-first Amendment, U.S. Const. Amed. XXI, gives states the primary responsibility for regulating traffic in wine, beer and spirits for use within their borders and "virtually complete control" over how to structure their distribution system.² Being able to determine who may be licensed to sell

² *Granholm v Heald*, 544 U.S. 460, 488-89 (2005) citing *California Retail Liquor Dealers Ass'n v Midcal Aluminum*, 445 U.S. 97,110 (1980). *Granholm* re-confirmed the right of states to structure their beverage alcohol distribution systems as they deem appropriate so long as they do not discriminate against out-

beverage alcohol and what type of product they may sell remains central to a State's ability to regulate. Like every state, Kentucky promotes temperance by maintaining orderly markets through different categories of licensees with different privileges and burdens.

No state has a policy of making beverage alcohol as widely and cheaply available as possible.

Long-standing laws dealing with license classifications should not be set aside lightly. Otherwise, there is great danger that the balance struck by a State's legislature – furthering temperance by restricting selling while not endangering temperance by over-restricting and thereby inciting unregulated sales – will be severely compromised.

It is noteworthy that the Supreme Court has never held that the Twenty-first Amendment is irrelevant in a judicial review of economic classifications involving the regulation of beverage alcohol.³ Since the Equal Protection Clause and the Twenty-first Amendment are parts of the same Constitution the interests sought to be achieved by each provision should be considered, with due deference to a

of-state producers or products. *See also, Arnold's Wines v. Boyle*, 571 F.3d.185 (2nd Cir 2009)

³ *But see, Craig v. Boren*, 429 U.S. 190, 205 (1976) involving gender based disparate treatment.

State's Twenty-first Amendment authority to determine how it wishes to structure its beverage alcohol distribution system.

As noted in *Hadix v Johnson*, 230 F3d 849, 843 (6th Cir. 2000)⁴, “[t]he government has no obligation to produce evidence to support the rationality of its statutory classifications and may rely entirely on rational speculation unsupported by any evidence or empirical data.” And, ““Perfection in making the necessary classifications is neither possible nor necessary.””⁵

There Was in 1938 a Rational Basis for the Classification That Has Been Carried Forward to Ky. Rev. Stat. Ann. § 243.230(7).

Plaintiffs argue that the Equal Protection Clause renders the challenged statute invalid because in 2014 drugstores/pharmacies are permitted to sell spirits and wine, while grocery stores (which also may have a pharmacy) are not permitted to do so. Plaintiffs gloss over the fact that if their challenge succeeds not only grocery stores with pharmacies, but convenience stores/gas stations will be able to sell wine and spirits.

After the repeal of National Prohibition, the Kentucky Legislature had the task of structuring a regulatory system which would allow for the sale of beverage alcohol but, at the same time, limit access (and thus promote temperance) and retain regulatory control. In devising its distribution system, it was rational for the

⁴ Citing *FCC v. Beach Comm., Inc.*, 508 U.S. 307, 315; 113 S. Ct. 2096; 124 L.Ed 211 (1993).

⁵ *Breck v State of Michigan*, 203 F.3d 392, 396 (6th Cir. 2000).

Legislature to consider persons who had recent experience with regulated beverage alcohol. Kentucky pharmacies were obvious candidates since they had been able to distribute medicinal spirits even during National Prohibition.

As noted in Last Call, The Rise and Fall of Prohibition, Daniel Okrent, Scribner (2010), the “legal distribution of alcoholic beverages for medicinal purposes was the third of the main exceptions enumerated in the Volstead Act. *** [I]t was the one exception that authorized the legal distribution of hard liquor.” *Id.* at 193. Sales of medicinal alcohol were permitted in most states (*Id.* at 200), including Kentucky, and many pharmacies did a lucrative business in medicinal alcohol during National Prohibition.⁶ So when the Kentucky Legislature first determined to allow pharmacies to sell spirits and wine it was engaging in rational line drawing because pharmacies were allowed to fill prescriptions for medicinal alcohol during National Prohibition--whereas neither groceries nor gasoline stations had been allowed to sell beverage alcohol during National Prohibition.

Even the District Court recognized that one plausible reason for the line drawn by the Kentucky Legislature in 1938 was that pharmacies were already experienced in selling alcohol products: “Perhaps the General Assembly sought to

⁶ See also, National Prohibition: The Volstead Act Annotated, Arthur W. Blakemore, Mathew Bender & Company (2d Ed. 1925), pp. 858-861 (discussing sales at retail and use by pharmacists).

extend the status quo under which drugstores had sold alcohol ostensibly only for medicinal purposes throughout Prohibition.” Document 62, Memorandum Opinion, p. 5. The recognition of that potential (“status quo”) reason for a classification should have ended the Equal Protection inquiry at the trial court.

As recognized by the Panel, the Legislature could have legitimately concluded that pharmacies were less likely to be frequented by the public (and minors in particular) and that segment of the public opposed to the sale of beverage alcohol, than grocery stores or gas stations. That recognition is certainly a rational way of balancing the competing goals of making wine and spirits available, but at the same time promoting their temperate use and taking local mores into consideration.

Since it is possible to conjecture at least two rationales for why the Kentucky Legislature would decide to allow pharmacies to traffic in spirits and wine while not allowing other entities to do so, the challenged law as initially enacted passes Equal Protection scrutiny.

That Business Models May Have Changed Somewhat Over the Years Does Not Mean That a Rational Law Dealing With Economic/Alcohol Beverage License Classifications Now is Subject to Equal Protection Challenge. Nevertheless, There Remains a Rational Basis for the Statute.

Balancing competing interests in the realm of who can be licensed to distribute beverage alcohol is for the Legislature, not the courts. But, plaintiffs’

claim, without citing any authority on point, that beverage alcohol licensing laws are subject to equal protection challenges as business models change.

The two 1930s cases upon which Plaintiffs rely to challenge a long-standing statute on equal protection grounds are cited at p. 13 of the Petition. Those cases are neither controlling nor relevant. *Nashville C. & St. L. Rwy v. Walters*, 294 U.S. 405 (1935) involved whether a state administrative agency could require a railroad to pay one-half of the cost of a railroad underpass without considering the need for the underpass or the effects of that type of assessment on railroads. The assessment was found to be arbitrary and unreasonable without due process of law under the Fourteenth Amendment. *Albie State Bank v. Bryan*, 282 U.S. 765, 772 (1931) involved whether a special assessment levied on state banks constituted the taking of property without due process of law. Neither *Nashville* or *Albie* dealt with liquor license classifications, the Twenty-first Amendment, an Equal Protection Clause analysis or rational laws.

When enacted the challenged law limited access by limiting the entities who could sell spirits and wine. As the Panel recognized, it is rational and sound public policy to limit the number of outlets selling beverage alcohol, especially for high alcohol volume products like distilled spirits.

As noted in National Highway Traffic Safety Administration, The Role of Alcohol Beverage Control Agencies in the Enforcement and Adjudication of

Alcohol Laws (2003 NHTSA publication)⁷, “Research conducted over the last three decades demonstrates a connection between alcohol availability and public health outcomes. Within a general population, public health problems will increase as availability increases (through lower prices or increased physical access. . . .”⁸

Even the District Court conceded that “the State might want to limit accessibility to the general public to avoid abuse of these products. These interests certainly justify tighter control on the sale of these products....” Document 62, Memorandum Opinion, p. 17.⁹

It is rational *now* to limit the number of outlets by leaving the 1938 enactment in place. Even assuming (incorrectly) that there is no longer a difference between pharmacies which sell groceries and groceries which sell drugs and convenience stores, this does not mean that there is no rationale for continuing

⁷ Located at www.nhtsa.gov/people/injury/.../abcroleweb/.../ABCFinal.pdf

⁸ *Id.* at p. 1.

⁹ The District Court’s conclusion that a quota system would better serve the purpose of limiting access as the classification at issue here is the type of judicial policy making that is expressly forbidden under the rational basis test. It is not a Court’s prerogative to question the wisdom or the manner in which the Legislature attempts to achieve its legitimate purpose as long as there is some conceivable basis for the distinction. *See, Dillinger v. Schweiker*, 762 F.2d 506, 508 (6th Cir. 1985).

to enforce the law. And the rationale, just like the rationale for the law's initial enactment, need not have been articulated by the Legislature. Legislatures do not usually subject their enactments to periodic review nor does the Equal Protection Clause permit the judiciary to require them to do so.

The challenged law is rational now just as it was at the time of its enactment even if for somewhat different reasons. Limiting access to alcohol beverages by maintaining the original law is rational. The Legislature could have determined that it did not wish to greatly expand the number of permitted licensees and instead would limit licenses to those entities who already were eligible. This is the equivalent of "grandfathering". As recognized by the Supreme Court, "[T]he protection of reasonable reliance interests is not only a legitimate governmental objective: it provides an exceedingly persuasive justification."¹⁰

Having given statutory rights previously (and legitimately) to pharmacies, the Equal Protection Clause does not require Kentucky to now extend to numerous other entities the same statutory rights because grocery stores now sometimes have pharmacies (and some pharmacies now sometimes sell groceries). Permitting the sale of distilled spirits and wine by grocery stores (and others) would clearly

¹⁰ *Nordlinger, supra*, 505 U.S. 1, 13; 112 S. Ct. 2326; 120 L.Ed. 201 (1992). *See also, TriHealth, Inc. v. Bd. of Comm'rs, Hamilton Cty, Ohio*, 430 F.3d 783 (6th Cir. 2005) (upholding decision to withhold distribution of tax proceeds to several additional hospitals where previously the proceeds had only been distributed to one hospital).

undermine the reliance interests of those pharmacies which structured their businesses around the now challenged law. It would also detrimentally undermine the public policy goal of limiting the number of outlets for the sale of beverage alcohol (especially high alcohol volume products such as spirits). A legislature's decision to protect reliance interests and to promote temperance by limiting outlets (by maintaining the *status quo* as to license eligibility) are justification for line drawing and defeat an Equal Protection challenge. It is rational that a legislature would maintain the *status quo* so as not to extend the right to traffic in beverage alcohol to numerous other entities thereby detrimentally impacting the public policy of fostering temperance by limiting ready availability.

Respectfully submitted,

WILLINGHAM & COTÉ, P.C.
Attorneys for *Amicus Curiae* American
Beverage Licensees

BY: s/Anthony S. Kogut
Anthony S. Kogut
David M. Nelson
333 Albert Avenue; Suite 500
East Lansing, MI 48823
(517)351-6200
E-Mail: akogut@willinghamcote.com
dnelson@willinghamcote.com

Dated: March 7, 2014

ANTI-VIRUS CERTIFICATION FORM

Case Name: *Maxwell's Pic-Pac v. Tony Dehner, et al*

Docket Number: 12-6056, 12-6057 ad 12-6182

I, Heather Devereaux, certify that I have scanned for viruses the PDF version of the *Amicus Curiae* Brief of the American Beverage Licensees that was submitted in this case by using Symantec AntiVirus, 10.1.0.394, and found it to be virus free.

Dated: March 7, 2014

BY: s/Heather Devereaux
Heather Deveraux

CERTIFICATE OF SERVICE

I certify that the foregoing Brief of *Amicus Curiae* American Beverage Licensees in Support of Defendants-Appellants, et al, and in Opposition to Petition for Re-Hearing *En Banc* was filed with the Clerk using the appellate CM/ECF system on March 7, 2014, all counsel of record are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

Willingham & Coté, P.C.
Attorneys for *Amicus Curiae*
American Beverage Licensees

BY: *s/Anthony S. Kogut*
 Anthony S. Kogut
333 Albert Avenue
Suite 500
East Lansing, MI 48823
517-351-6200
E-Mail: akogut@willinghamcote.com