CASE NUMBERS 12-6056/12-6057/12-6182
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, DBA THE PARTY SOURCE,
Intervening Defendant/Appellant/Cross-Appellee

On Appeal from the United States District Court,
Western District of Kentucky, Case No. 3:11-cv-00018

RESPONSE OF INTERVENING DEFENDANT/APPELLANT/CROSS-APPELLEE LIQUOR OUTLET, LLC, DBA THE PARTY SOURCE IN OPPOSITION TO PETITION FOR REHEARING AND REHEARING *EN BANC*

Kenneth S. Handmaker
Kevin L. Chlarson
Loren T. Prizant
MIDDLETON REUTLINGER
401 South Fourth Street, Suite 2600
Louisville, Kentucky 40202
Tel: (502) 584-1135; Fax: (502) 561-0442
khandmaker@middletonlaw.com
kchlarson@middletonlaw.com
lprizant@middletonlaw.com
Counsel for Intervening Defendant/Appellant/Cross-Appellee Liquor Outlet, LLC, dba The Party Source

LIQUOR OUTLET, LLC, DBA THE PARTY SOURCE'S STATEMENT OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, Intervening Defendant/Appellant/Cross-Appellee Liquor Outlet, LLC, dba The Party Source makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

NO.

If the answer is YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

N/A.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome?

NO.

If the answer is YES, list below the identity of the corporation and the nature of the financial interest:

N/A.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution

Statutes

Administrative Regulations

Rules

Secondary Sources

ARGUMENT

Unhappy with this Court's January 15, 2014 Opinion (the "Opinion"), Maxwell's Pic Pac, Inc. and the Food With Wine Coalition, Inc. (together "FWWC") filed a Petition for Rehearing and Rehearing *en banc* (the "Petition") claiming that: (1) "the Panel decided this case based upon rationales that were not argued or developed below"; and (2) "the Panel's decision rests entirely on assumptions of fact that overlook, and actually contradict, both the record and common experience." But FWWC ignores that the Panel correctly ruled that there is a legitimate, rational basis for KRS 243.230(7)[1] and 804 KAR 4:270. Consequently, FWWC ignores that it failed to carry its high burden to convince the Panel that the statute and the regulation failed a properly applied rational basis test.

FWWC's Petition is an obvious attempt to reargue the factual issues on appeal. That is not a basis under FRAP 35 or IOP 35 for a rehearing by this Court *en banc*. To the contrary, IOP 35 specifically prohibits a rehearing *en banc* based upon any errors (if any) made in determining the facts. For these reasons and those discussed below, the Court should deny the Petition.[2]

---

[1] Prior to June 25, 2013, the statute was numbered as KRS 243.230(5).

[2] For this Response, Party Source will solely focus its arguments on the *en banc* rehearing as requested by the February 21, 2014 letter to counsel from the Court's En Banc Coordinator. To the extent that FWWC's petition for rehearing before the Panel is still under consideration, that request should be denied for the same substantive reasons. In short, the Panel decided correctly.

I. FWWC'S PETITION DOES NOT SATISFY THE IOP 35 STANDARD FOR A REHEARING *EN BANC*.

FWWC gives lip service to its Petition as one involving an issue of "exceptional importance" for *en banc* rehearing, but fails to satisfy the IOP 35 standard for granting the Petition. FRAP 35(a) does not mince words: "[a]n en banc hearing or rehearing is not favored . . . ." This Court's parallel rule, IOP 35(a), is perfectly clear that an *en banc* rehearing is an extraordinary remedy:

> A petition for rehearing en banc is an extraordinary procedure intended to bring to the attention of the entire court a precedent-setting error of exceptional public importance or an opinion that directly conflicts with Supreme Court or Sixth Circuit precedent.

The rule also makes clear what is NOT a basis for an *en banc* rehearing:

> Alleged errors in the determination of state law or in the facts of the case (including sufficient evidence), or errors in the application of correct precedent to the facts of the case, are matters for panel rehearing but not for rehearing en banc.

IOP 35(a). The Petition fails both provisions of the Rule.

First, the Petition fails to identify the required "precedent setting error." That is because there is none. The Panel's Opinion was a straightforward rational basis analysis under the Equal Protection Clause of the Fourteenth Amendment to the following question: is there a rational basis for KRS 243.230(7) distinguishing grocery stores and gas stations from other retailers for purposes of selling wine and spirits in Kentucky? The Panel's answer was an unmitigated, "Yes." Neither the

Panel's rational basis analysis, nor its conclusion that KRS 243.230(7) does not violate equal protection, were "precedent-setting errors."[3] The Panel's rational basis analysis was not novel, and its decision was consistent with other cases that have upheld similar alcohol laws against equal protection challenges. *See, e.g.*, *37712, Inc. v. Ohio Dep't of Liquor Control*, 113 F.3d 614 (6th Cir. 1997); *Gary v. City of Warner Robins*, 311 F.3d 1334 (11th Cir. 2002); *Simms v. Farris*, 657 F. Supp. 119 (E.D. Ky. 1987).

Second, the Petition contains no argument that the Panel's Opinion directly conflicts with U.S. Supreme Court or Sixth Circuit precedent. IOP 35(a). There is no such conflict. In the two 1930s U.S. Supreme Court cases cited by FWWC (*Nashville, C. & St. L. Rwy. v. Walters*, 294 U.S. 405, 414-415 (1935); *Abie State Bank v. Weaver*, 282 U.S. 765, 772 (1931)) the Court simply recognized that changed factual circumstances may impact the validity of an existing statute. That recognition is not inconsistent with FWWC's burden under a rational basis analysis to establish the changed factual circumstances "to negative every conceivable basis which might support [KRS 243.230(7)] . . . ." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993). Moreover, such a recognition is not inconsistent with the

---

[3] FWWC appears to suggest that protecting Kentucky consumers' "constitutional rights" to purchase alcohol is a basis for an *en banc* rehearing. Petition, pp. 1-2. FWWC is not a consumer group, it does not represent a single Kentucky consumer, much less "hundreds of thousands" of them, and purchasing alcohol is not a constitutional right. Moreover, "extensive media coverage" of the Opinion is not a basis for *en banc* rehearing. IOP 35(a).

current controlling equal protection law that provides: (1) "equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices"; and (2) "[t]he Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." *Beach Commc'ns, Inc.*, 508 U.S. at 313-314. *See also*, *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 175-176 (1980), quoting *Flemming v. Nestor*, 363 U.S. 603, 611 (1960) ("it is not within our authority to determine whether the [legislative] judgment expressed in that Section is sound or equitable, or whether it comports well or ill with purposes of the [statute] . . . . The answer to such inquiries must come from [the legislature], not the courts.").

Importantly, FWWC overlooks the actual rational basis analysis conducted by the Panel of the economic/social policy statute at issue. Under that analysis, the legislature "need not 'actually articulate at any time the purpose or rationale supporting its classification.' Instead, a classification 'must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'" *Heller v. Doe by Doe*, 509 U.S. 312, 320 (1993) (emphasis added). Such a state of facts can be based on a court's rational speculation "unsupported by evidence or empirical data." *Beach Commc'ns*, 508 U.S. at 315.

The Panel performed this analysis. Opinion, pp. 5-7. The Opinion's unmistakable language shows the Panel's determination that there are "reasonably conceivable facts" providing a rational basis for KRS 243.230(7). Opinion, p. 6. Consider the following language used in the Panel's analysis: "[a] legislature could rationally believe"; "Kentucky could believe"; "a plausible set of facts"; "conceivably provide"; "Kentucky could also believe"; "conceivably pose" (used three times). Opinion, pp. 6-7. The Panel clearly applied the appropriate rational basis analysis (*Beach Commc'ns*, 508 U.S. 313-315) without limiting the temporal scope to either 1938 or 2014. The Panel did not have to consider such a limit since its rational basis analysis applies to either date, and those in between.

Third, all of the so-called errors identified in the Petition (i.e. the Panel was wrong) are "[a]lleged errors in the determination of state law or in the facts of the case (including sufficient evidence) . . . ." IOP 35(a). In pages 2-12 of the Petition all FWWC does is argue about alleged factual errors that the Panel committed. These errors can be summarized as the Panel should have determined from the case record that modern grocery stores and drug stores are indistinguishable, similarly situated retailers, and that modern convenience stores/gas stations and drug stores are similarly situated retailers. Rearguing the facts of the case is specifically excluded from *en banc* rehearing by IOP 35(a).

Finally, the Petition's alleged error in the determination of state law also is

not a basis for an *en banc* rehearing. The Petition claims that the Panel "acknowledged that Kentucky's higher standard of [equal protection] review exists and would apply to this case." Petition, p. 15. That is not what the Panel stated. Rather, it simply acknowledged that "Kentucky law occasionally subjects economic policies to stricter standards . . . ." Opinion, p. 5 (emphasis added). The Panel did not state that such a standard applies to this case. *Id.* However, even if the Panel should have determined that the "higher standard" applied (it does not, and as discussed below, such an argument has been waived by FWWC), such an error in determining state law is precluded from rehearing *en banc*. IOP 35(a).

II. THE PANEL'S REJECTION OF FWWC'S FACTUAL ARGUMENTS DID NOT OVERLOOK "THE RECORD AND COMMON EXPERIENCE."

FWWC uses the Petition to now present certain expanded factual reargruments. But these factual arguments were previously made in FWWC's appeal briefing or FWWC had the full opportunity to make them.[4] For the Court's convenience, Party Source presents the following comparison table:

---

[4] For example, in its briefs FWWC did not cite to the expert it disclosed and from whom a report and supplement were submitted to the District Court. FWWC now cites to their expert's supplemental report (RE 41-40) four times in the Petition to support its expanded factual reargruments. FWWC's newfound reliance on its expert as any basis for an *en banc* rehearing of the case must be ignored since FWWC failed to do so during the appellate briefing and oral argument.

The Petition's Factual Reargruments	Fact Arguments Already Presented
The California case of *Walgreen Co. v. City and County of San Francisco*, 185 Cal.App.4th 424 (2010), determined drug stores and grocery stores should be treated equally as to a state ban on cigarette sales (pp. 2-3).	*See* pp. 12 and 15 of FWWC's Principal and Response Brief, Document 006111583295, filed on 02/06/13 ("Principal Brief").
Drug stores' advertisements and newspaper circulars show that they are as much grocery stores as pharmacies (pp. 3, 6).	*See* pp. 9, fn. 1 of FWWC's Principal Brief.
Today's drug stores accept SNAP/EBT ("food stamps") benefits (p. 3).	*See* pp. 9, fn. 1 and p. 43 of FWWC's Principal Brief.
The Form 10-K filings of chain drug stores that are of record show that they are bigger in terms of number of stores and gross sales than Kroger (pp. 5-6).	*See* pp. 35-36 of FWWC's Principal Brief.
FWWC states that Walgreens employs significant numbers of clerks, baggers, and stockers in response to the Panel's analysis about the exposure of employed minors to alcohol (p. 7).	*See* pp. 50-51 of FWWC's Principal Brief for its discussion of minors' exposure to alcohol.
Maxwell's Pic Pac and other grocery stores are smaller than a chain drug store in terms of square footage (p. 9).	*See* p. 35 of FWWC's Principal Brief.
Chain drug stores are in "easy-to-access" locations according to their Form 10-Ks (p. 11).	*See* pp. 14 and 40-41 of FWWC's Principal Brief.
Some Kentucky retail package stores have drive-through windows (pp. 11-12).	*See* pp. 41-42 of FWWC's Principal Brief.

The table vividly shows that the factual reargruments raised in the Petition were argued by FWWC previously or intentionally were not. FWWC's failure to argue certain facts in detail or to argue certain facts at all in its briefs and oral argument is not a valid basis for *en banc* rehearing. IOP 35(a).

III. THE PANEL'S DETERMINATION THAT THERE WAS A RATIONAL BASIS FOR KRS 243.230(7) WAS NOT TIED TO A TIME PERIOD.

While FWWC admits that "KRS 243.230(7) may have had a rational basis at the time it was originally passed in 1938," it argues that the Panel erred by not addressing the statute's rational basis in terms of "modern reality." The Opinion's reality is that there is no language stating that the Panel's rational basis analysis was limited to 1938 as opposed to 2014, or vice-versa. Rather, the Panel's analysis was conducted under the required analytic standard, regardless of the temporal period, to determine "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Beach Commc'ns*, 508 U.S. at 313. When the Panel discussed that "some modern pharmacies sell staple groceries" (Opinion, p. 6), it plainly considered in its analysis the "modern reality" advocated for by FWWC. The Panel's criticized citation to the 1933 Fosdick and Scott report simply showed that concerns with the proliferation of alcohol sales outlets in 1933 are still relevant in 2014 (especially gas stations and convenience stores).

FWWC also criticized the Panel for overlooking "common experience." That is exactly what FWWC does when it continues to reargue in detail points already provided to the Panel that the modern drug store as a seller of staple groceries is indistinguishable from the modern grocery store. Anyone who has stepped foot into a modern Kroger knows by common experience that there is no

comparison to any drug store (CVS, Walgreens, or other) in terms of retail space, variety and volume of groceries sold, reduced pricing due to volume selling, etc. For that matter, the "food marts" of convenience store chains such as Thornton's and Speedway are commonly known to be bigger "grocers" than drug stores. This is why the business model for a drug store or package retailer is different than grocers and gas stations – they want the right to sell alcoholic beverages, not volumes of groceries and gasoline. For FWWC to continue to suggest that a drug store or package retailer that sells five loaves of bread or ten bottles of milk is in competition with any behemoth grocery store is factually unsupportable.

IV. THE PANEL WAS NOT REQUIRED TO CONSIDER KENTUCKY'S "HEIGHTENED" EQUAL PROTECTION STANDARD OR REMAND THE CASE TO THE DISTRICT COURT FOR SUCH CONSIDERATION.

For the Petition's final gambit, FWWC seeks remand to the District Court to determine whether KRS 243.230(7) satisfies Kentucky's occasionally-applied heightened equal protection review. One of the problems for FWWC is that the application of Kentucky's equal protection standard was not presented on appeal and was therefore waived. *GenCorp, Inc. v. Olin Corp.*, 477 F.3d 368, 373 (6th Cir. 2007) ("[Appellant] opted not to present this issue in its written or oral appellate arguments and thus waived appellate consideration of the argument."). FWWC's Principal Brief (including the section dedicated to FWWC's Cross-Appeal) contained no argument section presenting the reasons why the Kentucky

standard would apply to strike down KRS 243.230(7). Rather, FWWC simply footnoted in its Principal Brief (p. 19, fn. 5) a reference to the standard with no argument, and FWWC did not discuss during oral argument as to why the statute fails the standard.[5] Moreover, FWWC did not file a "protective cross-appeal" as to the application of Kentucky's heightened equal protection standard in this case if the challenged statute met the federal rational basis standard. FWWC's Civil Appeal Statement of Parties and Issues, Doc. 006111460628, filed 10/10/2012.

Accordingly, the Panel was correct that FWWC only argues on appeal (in its briefing and at oral argument) that the challenged statute cannot survive rational basis scrutiny. Opinion, p. 5. Assuming, *arguendo*, FWWC somehow presented the issue to the Panel, no *en banc* rehearing is available for such an alleged error in the determination of state law. IOP 35(a).

CONCLUSION

Being a losing party to an appeal does not suffice for *en banc* rehearing. None of the Petition's factual or legal arguments require an *en banc* rehearing. To the contrary, FWWC's arguments for such a rehearing are not proper under IOP 35(a). Therefore, the Court should deny the Petition in its entirety.

---

[5] While *Elk Horn Coal Corp. v. Cheyenne Res., Inc.*, 163 S.W.3d 408, 418-419 (Ky. 2005), recognized that Kentucky's "heightened" standard results from Ky. Const. §§ 1-3 in concert with Ky. Const. § 59's prohibition against local or special legislation, this is not a special legislation case, nor has FWWC argued so. Furthermore, FWWC neglects to inform the Court that *Elk Horn* was actually decided under the same rational basis standard applied by the Panel. *Id.* at 419.

Respectfully Submitted,

/s/Kevin L. Chlarson
Kenneth S. Handmaker
Kevin L. Chlarson
Loren T. Prizant
MIDDLETON REUTLINGER
401 South Fourth Street, Suite 2600
Louisville, Kentucky 40202
Tel: (502) 584-1135
Fax: (502) 561-0442
khandmaker@middletonlaw.com
kchlarson@middletonlaw.com
lprizant@middletonlaw.com
Counsel for Intervening
Defendant/Appellant/Cross-Appellee
Liquor Outlet, LLC, dba The Party Source

CERTIFICATE OF SERVICE

It is hereby certified that on this 7th day of March, 2014, pursuant to Fed. R. App. P. 25(d), a copy of the foregoing was electronically filed with the clerk of the Court by using the CM/ECF system, which will send a notice and service of electronic filing to the following:

M. Stephen Pitt, Esq.
Christopher W. Brooker, Esq.
J. Brooken Smith, Esq.
Wyatt, Tarrant & Combs
500 West Jefferson Street, Suite 2800
Louisville, Kentucky 40202
Counsel for Appellees/Cross-Appellants
Maxwell's Pic Pac and Food with Wine Coalition

Peter F. Ervin, Esq.
LaTasha A. Buckner, Esq.
General Counsel
Public Protection Cabinet
Capital Plaza Tower
500 Metro Street, Fifth Floor
Frankfort, Kentucky 40601
Counsel for Appellants/Cross-Appellees
Tony Dehner and Danny Reed

Anthony S. Kogut, Esq.
David M. Nelson, Esq.
Willingham & Cote, P.C.
333 Albert Avenue, Suite 500
East Lansing, Michigan 48823
Counsel for Amicus Curiae
American Beverage Licensees

/s/ Kevin L. Chlarson
Counsel for Intervening
Defendant/Appellant/Cross-Appellee
Liquor Outlet, LLC, dba The Party
Source