18-2611

IN THE UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

MISSOURI BROADCASTERS ASSOCIATION, *et al.*,
Plaintiffs-Appellees,

v.

DOROTHY TAYLOR, *et al.*,
Defendants-Appellants.

Appeal from the United States District Court
Western District of Missouri,
The Honorable Douglas Harpool

BRIEF OF APPELLANTS

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CASE SUMMARY AND STATEMENT ON ORAL ARGUMENT

Missouri's "tied-house" law prohibits manufacturers and distributors from providing financial support to retailers of alcohol. Relying on a Ninth Circuit panel decision that had already been overruled en banc, the district court declared this law unconstitutional under the First Amendment. That decision conflicts with the Ninth Circuit's en banc decision. And because nearly every state and the federal government has adopted a tied-house law just like Missouri's, the district court's decision casts doubt on dozens of similar laws.

The district court also declared two provisions in a regulation unconstitutional. Those provisions bar advertising alcohol at below cost because below-cost alcohol is far more likely to be overconsumed or purchased by those who are underage. The district court overlooked that the provisions significantly decrease overconsumption because Plaintiffs themselves admitted that advertisements for below-cost alcohol "significantly" increase consumption of that kind of alcohol.

Because this appeal concerns the constitutionality of a statute adopted by nearly every jurisdiction, plus two provisions important to public welfare, the State requests 20 minutes for oral argument.

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STATEMENT OF JURISDICTION

The district court had jurisdiction over under 28 U.S.C. §§ 1331 and 1343. It entered final judgment in Plaintiffs' favor after a trial on June 28, 2018, disposing of all claims. The State timely noticed its appeal on July 27, 2018. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Like nearly every other state and the federal government, Missouri responded to the adopted Twenty-First Amendment by adopting a "tied-house" law, which prohibits manufacturers and distributors from providing financial support to retailers. Are tied-house laws constitutional under the First Amendment, as the Ninth Circuit held, or not, as the district court held?

- *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011)

- *Retail Digital Network, LLC v. Prieto*, 861 F.3d 839 (9th Cir. 2017) (en banc)

- *S. Wine & Spirits of Am., Inc. v. Div. of Alcohol & Tobacco Control*, 731 F.3d 799 (8th Cir. 2013)

- Mo. Rev. Stat. § 311.070.1

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II. Subsection 1 of Missouri's tied-house law prohibits manufacturers and distributors from providing financial support to retailers. Subsection 4(10) creates a limited exception for certain advertisements that list more than one retailer. Does a declaration that subsection 4(10) unconstitutionally compels speech or association redress an injury caused by a different provision, subsection 1, and does subsection 4(10) unconstitutionally compel speech or association?

- *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992)

- *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985)

III. Plaintiffs challenge two state regulatory provisions that, with some exceptions, prohibit advertising alcohol at discount or below cost. Do those provisions satisfy the *Central Hudson* test?

- *Central Hudson Gas & Electric Corp. v. Public Service Commission of N.Y.*, 447 U.S. 557 (1980)

- *S. Wine & Spirits of Am., Inc. v. Div. of Alcohol & Tobacco Control*, 731 F.3d 799 (8th Cir. 2013)

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STATEMENT OF THE CASE

Alcohol is a unique product that has many beneficial effects but also engenders many social ills. At the conclusion of the Prohibition era, the States adopted comprehensive laws to prevent social problems associated with alcohol from returning.

Despite the success of many of these laws, social costs of alcohol abuse still run high. Excessive drinking causes 88,000 deaths per year. *Alcohol Use and Your Health*, CENTERS FOR DISEASE CONTROL AND PREVENTION (2018).[1] For comparison, motor vehicles and firearms each account for just 36,000 deaths (sometimes influenced by alcohol). Sherry L. Murphy, *et al*., *Deaths: Final Data for 2015*, 66 NAT'L VITAL STATS. REPORTS (6), 13 (2017).[2] The national economic cost of excessive consumption is $249 billion, $2.05 per drink. *Alcohol Use and Your Health*, *supra*. That cost is even greater in Missouri: $3.25 per drink. Doc. 81-8. These social and economic harms are most pronounced when underage drinkers are involved in overconsuming alcohol.

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[1] https://www.cdc.gov/alcohol/fact-sheets/alcohol-use.htm (last visited Oct. 17, 2018).

[2] https://www.cdc.gov/nchs/data/nvsr/nvsr66/nvsr66_06.pdf.

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Plaintiffs are members of the liquor industry, the media, or the nonprofit sector. JA.66–67. They want to advertise discount or below-cost alcohol and enable manufacturers and distributors to provide financial support to retailers for advertising. JA.86, 91–92. They challenge, under the First Amendment, one statute and two regulatory provisions designed to minimize the harms from alcohol abuse. JA.91–92. After a bench trial, the district court declared all three provisions unconstitutional. JA.226–44.

I. The challenged statute

Plaintiffs challenge Missouri's "tied-house" law. Tied-house laws prohibit manufacturers and distributors from providing financial support to retailers. Subsection 1 of Missouri's law declares that manufacturers and distributors may not "have any financial interest" in a retail business or "directly or indirectly, loan, give away or furnish equipment, money, credit or property of any kind" to "retail dealers." Mo. Rev. Stat. § 311.070.1. The "vast majority of states," plus the federal government, have adopted tied-house laws. *Actmedia, Inc. v. Stroh*, 830 F.2d 957, 959 (9th Cir. 1986); *see also* 27 U.S.C. § 205 (federal tied-house law).

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These laws target the "tied-house" liquor establishments that ravaged communities before the Eighteenth Amendment ushered in the era of Prohibition. *See Retail Digital Network, LLC v. Prieto*, 861 F.3d 839, 843 (9th Cir. 2017) (en banc). "Tied-house" businesses were "saloons" where manufacturers exercised undue influence over retailers by providing resources to those retailers. *Id.* at 843, 845. Anticompetitive and antisocial harms flowed from that undue influence. *Id.* at 843. Missouri, like other states and the federal government, adopted its tied-house law to prevent these harms from recurring. *E.g.*, Tr. 249, 254–55.

Tied-house laws also recognize that not every transfer of resources from manufacturers to retailers carries the same risk of anticompetitive, antisocial consequences. Missouri adopted an exception to subsection 1, *i.e.*, subsection 4(10), allowing manufacturers to advertise on behalf of retailers if the advertisement lists "two or more unaffiliated retailers," does so only once, excludes retail price, and lists the retailers inconspicuously. Mo. Rev. Stat. § 311.070.4(10). Federal law contains the same exception. 27 C.F.R. § 6.98.

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Plaintiffs challenge both subsection 1, which prohibits providing financial support to liquor retailers, and subsection 4(10), which provides an exception to subsection 1, allowing limited advertising support by manufacturers and distributors for retailers.

II. The challenged regulation

Plaintiffs also challenge two subsections of one regulation. That regulation is designed to combat overconsumption and underage drinking by prohibiting companies from advertising alcohol at discount or below acquisition cost. One subsection, the "Below Cost" provision, prohibits companies from advertising "[a] price that is below the retailer's actual cost." Mo. Code Regs. Ann. tit. 11, § 70-2.240(5)(I). Another provision, the "Discount Advertising" provision, prohibits companies from issuing a "statement" offering of a "coupon, premium, prize, [or] rebate." *Id.* § 70-2.240(5)(G). Thus, the first provision bars listing below-cost prices. The second bars listing statements other than actual prices that designate below-cost or discount prices, such as "two for one" and "all you can drink." JA.252. Neither provision applies to independent publishers. Mo. Code Regs. Ann. tit. 11, § 70-2.240(1)(A).

The provisions contain three exceptions. Both provisions apply to "any sign or outdoor billboard or other printed or graphic matter." *Id.* § 70-2.240(2). But some ambiguity exists about whether "outdoor" modifies "sign" or only "billboard." The State has given companies the benefit of the doubt and enforced the provisions only against *outdoor* advertisements. Tr. 190.

The Discount Advertising provision includes two more exceptions. The first one again depends on the presence of ambiguity. The text about discounts is "somewhat ambiguous." JA.248. In an abundance of caution, the State has not enforced the provision when advertisers issue statements like "happy hour" that could—but do not necessarily—imply below-cost or discount sales. JA.248. The second exception is unambiguous: manufacturers of liquors other than beer or wine can advertise a discount, but only on the back-end of the transaction through a rebate. Mo. Code Regs. Ann. tit. 11, § 70-2.240(5)(G).

III. Procedural history

In their First Amended Complaint, Plaintiffs challenged the two regulatory provisions and subsection 4(10) of the tied-house law. They did not challenge subsection 1 of the tied-house law. *E.g.*, JA.47. After

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they moved for summary judgment, the district court granted the State's motion to dismiss for failure to state a claim. The district court noted that binding precedent held that the State's interests were substantial. *Mo. Broadcasters Ass'n v. Lacy*, No. 13-CV-04034-FJG, 2015 WL 10578935, at *4 (W.D. Mo. Mar. 31, 2015). It then concluded that Plaintiffs raised only facial challenges and that their complaint did not adequately plead that the three provisions were facially unconstitutional. *Id.* at *3, 9; 2016 WL 1298140, at *2 (W.D. Mo. Mar. 31, 2016).

This Court reversed. *Mo. Broadcasters Ass'n v. Lacy*, 846 F.3d 295 (8th Cir. 2017). This Court did not disagree that the State's interests were substantial. *Id.* at 302 n.7. It instead determined that Plaintiffs pleaded they could prove that each provision was facially unconstitutional. *Id.* at 303. This Court stressed that its decision did not resolve the merits because its order "does not impact the district court's denial of summary judgment." *Id.* at 299 n.4. Plaintiffs still had to meet the demanding standard required for facial challenges. *See id.* at 301–02.

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This Court noted that its review of Missouri's tied-house law extended only to subsection 4(10)—the exceptions provision—not subsection 1, which Plaintiffs had not challenged. This Court stated that subsection 1 prohibits manufacturers from providing financial support to retailers and that "[t]he challenged statute is an exception to those restrictions." *Id.* at 302. Thus, the "challenged statute" was subsection 4(10), not subsection 1. *Id.*; *see also id.* at 298 (identifying the challenged statute as subsection "4(10)"). This Court also noted that the exception might "conceivably" require compelled speech and association, depending on what Plaintiffs could prove. *Id.* at 303.

On remand, Plaintiffs moved for reconsideration of their motion for summary judgment. JA.12. The district court rejected that motion because this Court's decision did not decide the merits, only that Plaintiffs might be able to prove their case at trial. *See* JA.227.

Plaintiffs then sought leave to amend their complaint. JA.14. In response to Plaintiffs' motion for reconsideration, the State pointed out that a declaration that subsection 4(10) was unconstitutional would not redress Plaintiffs' injury. Subsection 4(10) is simply an exceptions statute. It is subsection 1 that prohibits manufacturers and distributors

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from providing financial support to retailers. Doc. 81 at 17–18. Plaintiffs responded by amending their complaint to challenge, for the first time, subsection 1. JA.91–92.

At trial, the State presented evidence about the statute, its historical justification, and its purpose. The State elicited testimony that the statute is a tied-house law like those passed by nearly every state and the federal government and that the law is designed to combat the historical problem of manufacturers and distributors exercising undue influence over retailers. *E.g.*, Tr. 126–28, 241–42, 249. The State also elicited testimony that the State modeled the limited exception in subsection 4(10) on a nearly identical exception in the federal tied-house law. Tr. 245–46, 263.

As for the two provisions in the challenged regulation, all parties agreed that an increase in advertising discount or below-cost alcohol will significantly increase consumption of that type of alcohol. Because persons are more likely to overconsume on cheaper alcohol, the State focused on a study by the Harvard School of Public Health that found a substantial correlation between an increase in advertising of discount or below-cost alcohol and a marked increase in consumption of that kind of

alcohol. Meichun Kuo, *et al.*, *The Marketing of Alcohol to College Students: The Role of Low Prices and Special Promotions*, Harvard Sch. Pub. Health, 25 Am. J. Prev. Med. 204 (2003);[3] ADD.22–29. That study concluded that areas that had "more exterior advertising of alcohol promotions had higher binge-drinking rates." *Id.* at 208; ADD.26.

Plaintiffs agreed that increasing advertising of discount or below-cost alcohol would increase consumption of that kind of alcohol. They stated that "higher prices will be associated with *significantly* lower consumption" and vice versa. Tr. 62–63; *accord* Tr. 46. They acknowledged also that the targeted advertising control imposes "higher search costs," which is "an additional pricing burden on the consumer." Tr. 58–59.

The parties disagreed about whether increasing advertising would also increase aggregate consumption. Plaintiffs submitted evidence measuring the relationship "between total advertising and total consumption of alcohol products." Tr. 38–39. And they elicited testimony that an increase in aggregate advertising merely shifts

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[3] https://www.ajpmonline.org/article/S0749-3797(03)00200-9/pdf.

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preference among kinds of alcohol; it does not increase "aggregate" consumption. *Id.* at 38–39, 48.

The district court declared all three provisions unconstitutional under the First Amendment. As for the tied-house law, the district court crafted a balancing test. It determined that some exceptions detracted from the State's interest and that Plaintiffs' interests outweighed the State's remaining interest. JA.241. Relying on a Ninth Circuit panel decision that the district court did not recognize had already been overruled, the district court also determined that the tied-house law was overextensive. JA.242. The district court declared the tied-house law unconstitutional "to the extent it prohibits alcoholic beverage manufacturers and distributors from providing financial or other support for retail advertising." JA.243.

The district court also determined that subsection 4(10) unconstitutionally compelled speech and association. The district court did not explain how this decision factored into the relief granted to Plaintiffs from enforcement of the different provision, subsection 1. JA.242–43.

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As for the two regulatory provisions, the district court determined that the provisions did not advance the State's interest "at all" because the State did not prove that increasing aggregate advertising would increase aggregate consumption. The district court did not mention the undisputed agreement among all parties that increasing advertising for discount or below-cost alcohol would significantly increase consumption of that kind of alcohol. JA.234–36. The district court also determined that three purported exceptions to the provisions detracted from the State's interest and that the provisions were overextensive even though the State had adopted a narrow interpretation of the provisions that permitted more speech, not less. JA.234–38.

SUMMARY OF ARGUMENT

I. Missouri's tied-house law, Mo. Rev. Stat. § 311.070.1, does not violate the First Amendment. Because it regulates conduct, not speech, the tied-house law does not even implicate the First Amendment. It prohibits manufacturers and distributors from giving anything of value (other than merchandise to be sold) to retailers. Its only effect on speech is incidental, so under binding precedent, it is not subject to challenge under the First Amendment.

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In any event, the statute satisfies the *Central Hudson* test. The Ninth Circuit, en banc, arrived at the same conclusion just last year when considering California's tied-house law.

First, because Plaintiffs have not raised an overbreadth challenge, they must establish that the statute violates the Constitution in every conceivable set of facts. They have not done so because the tied-house law affects both truthful and misleading speech, and the First Amendment does not protect misleading commercial speech.

Second, the tied-house law directly advances the State's substantial interest in minimizing the risk of harms that can flow from manufacturers and distributors exercising undue influence over retailers. Historically, manufacturers and distributors exercised that undue influence by providing financial support to retailers. This undue influence created both anticompetitive and antisocial harms. Antisocial harms occurred because manufacturers and distributors generally resided outside the communities in which the retailers resided. They pressured retailers to make irresponsible retail decisions that generated large profits but caused local harms that did not directly affect absentee manufacturers and distributors. The federal government, and nearly

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every state, responded to these harms by prohibiting manufacturers and distributors from providing financial support to retailers.

The exceptions to Missouri's tied-house law do not fatally undermine the efficacy of that law. The district court overlooked that the exceptions occur only where financial support for retailers does not risk creating anticompetitive and antisocial harms. Thus, Missouri allows some manufacturers to sell at retail—but only in those communities where the manufacturers reside. The problem of absentee manufacturers does not occur in that situation. Missouri, like other jurisdictions, allows manufacturers to provide retailers with tangible goods of *de minimis* value because that financial support is unlikely to cause undue influence.

Third, the tied-house law does not affect "substantially" more speech than necessary. The district court relied on a Ninth Circuit panel decision to suggest that the State could achieve its interests by improving policing. But the district court did not realize that the Ninth Circuit, en banc, had already overruled the panel decision on precisely that point. As the Ninth Circuit determined, States cannot achieve their interests with additional policing. Only a tied-house law will do.

II. The tied-house law does not unconstitutionally compel speech or association. First, Plaintiffs' challenge is not redressable. Plaintiffs assert that subsection 4(10) compels speech and association because it allows a manufacturer to advertise on behalf of a retailer if (among other things) the advertisement mentions more than one retailer. But the district court's declaration that subsection 4(10) is unconstitutional does not redress Plaintiffs' injury. Their injury stems from subsection 1, which prohibits manufacturers from providing financial support to retailers. Subsection 1 does not even mention speech, much less compel it. If subsection 4(10) were held unconstitutional and excised from the statute, subsection 1 would still bar Plaintiffs from providing financial support to retailers.

Subsection 4(10) also does not unconstitutionally compel speech because refusing to provide a broader exception is "reasonably related to the State's interest" of minimizing the risk that providing financial support to retailers will lead to historic social and economic harms. And subsection 4(10) does not compel association. If it compels anything (and it does not), it simply requires manufacturers to identify two or more retailers with whom they *already* associate.

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III. The two regulatory provisions Plaintiffs challenge satisfy the *Central Hudson* test. First, Plaintiffs' claim again fails because they raised a facial challenge but cannot prove that the provisions are unconstitutional in every circumstance.

Second, the regulation provisions directly advance the State's interest in combatting overconsumption and underage drinking. The district court's central mistake was assuming that the State had to prove that increasing aggregate advertising would increase aggregate consumption. But the State needed to prove only that increasing advertising of a specific *kind* of alcohol—discount or below-cost alcohol—would increase consumption of that kind of alcohol. All parties agree that the State met this burden. Indeed, Plaintiffs admitted that increasing advertising "significantly" increases consumption of the kind of alcohol advertised. That matters because overconsumption and underage drinking are more likely to occur with discount or below-cost alcohol. The provisions directly advance the State's interests because they decrease consumption of discount or below-cost alcohol.

The district court identified three exceptions it believed detracted from the State's interests. But none of the exceptions is so excessive

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that it prevents the provisions from advancing the State's interest "at all."

Third, the provisions are not overextensive because they do not affect "substantially" more speech than necessary. The Supreme Court has declared regulations unconstitutional when those provisions barred nearly all communication about a product. The challenged provisions, by contrast, allow nearly all communication. They target a small subset of possible communication: advertisements that offer to sell alcohol below the retailer's cost or at discount.

STANDARDS OF REVIEW

Review of a district court's application of the *Central Hudson* test is *de novo*. *IMS Health Inc. v. Ayotte*, 550 F.3d 42, 48 (1st Cir. 2008), *abrogated on other grounds by Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011). Because this case involves the First Amendment, this "court has an obligation to 'make an independent examination of the whole record.'" *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984) (citation omitted).

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ARGUMENT

Although the State "bears the burden of identifying a substantial interest and justifying the challenged restriction," *Greater New Orleans Broad. Assoc., Inc. v. United States*, 527 U.S. 173, 183 (1999), Plaintiffs bear a "'heavy burden' in advancing their claim" because they challenge each provision facially. *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998) (citation omitted). "Facial invalidation 'is, manifestly, strong medicine' that 'has been employed by the Court sparingly and only as a last resort.'" *Id.* (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)).

To prevail, Plaintiffs must prove that each provision "is unconstitutional in all of its applications." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008). A "second type of facial challenge" exists where this stringent standard does not apply, but that type occurs only when plaintiffs brings an "overbreadth" challenge. *Id.* at 450 & n.6 (holding that courts "do not apply the strong medicine of overbreadth analysis where the parties fail to describe the instances of arguable overbreadth of the contested law" (citation and internal quotation marks omitted)). This Court has held the same:

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plaintiffs "must" show that a challenged provision is "unconstitutional in all cases" when they do not "attempt to show that the disclosure requirements are facially overbroad." *1-800-411-Pain Referral Serv., LLC v. Otto*, 744 F.3d 1045, 1060 (8th Cir. 2014). Plaintiffs did not bring an overbreadth challenge, so they must comply with the most stringent standard for facial challenges.

Each challenged provision is constitutional. The tied-house law, Mo. Rev. Stat. § 311.070.1, is one of dozens of similar tied-house statutes across the country. That law does not even implicate the First Amendment because it regulates economic relations, not speech. Its effect on speech is only incidental. In any event, it satisfies the *Central Hudson* test. The challenged statute does not unconstitutionally compel speech or association. And the two regulatory provisions satisfy the *Central Hudson* test.

I. Longstanding "tied-house" laws like those in Missouri comply with the First Amendment.

Plaintiffs challenge Missouri's "tied-house" or "three-tier" statute. Nearly all states, plus the federal government, have adopted tied-house laws. Although their details vary, tied-house laws prohibit manufacturers and distributors from providing financial support to

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retailers. They also allow for limited exceptions where financial support is unlikely to enable manufacturers and distributors to exercise undue influence over retailers.

These statutes are well-established. The Supreme Court has repeatedly declared that States have nearly unbounded authority to adopt these laws. The en banc Ninth Circuit, just last year, upheld California's tied-house law against a challenge just like this one. *Retail Digital Network, LLC v. Prieto*, 861 F.3d 839 (9th Cir. 2017) (en banc). Because tied-house laws regulate economic arrangements, they do not implicate the First Amendment. And even if they did, Missouri's law satisfies the *Central Hudson* test.

A. Tied-house laws target historical anticompetitive and antisocial harms.

Before the Eighteenth Amendment established a 14-year Prohibition period, "tied-house" liquor establishments ravaged many communities. *See Retail Digital Network*, 861 F.3d at 843; *California Beer Wholesalers Ass'n, Inc. v. Alcoholic Bev. etc. Appeals Bd.*, 5 Cal. 3d 402, 407 (1971) (citing sources). "Tied-house" businesses were liquor establishments where manufacturers and distributors exercised undue

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influence over retailers by providing retailers with financial support. *Retail Digital Network*, 861 F.3d at 843.

Manufacturers and distributors often obtained this influence by providing retailers with advertising support. *Id.* A manufacturer could buy influence with a retailer by advertising on behalf of the retailer or paying the retailer for advertisements the retailer made on the manufacturer's behalf. *Id.* at 843–45.

That influence was destructive on at least two levels. On one level, it harmed the economy by fostering local monopolies. *Actmedia, Inc. v. Stroh*, 830 F.2d 957, 960 n.2 (9th Cir. 1986). On another, it generated "serious social and political evils." *Id.* (quoting S. Rep. No. 1215, 74th Cong., 1st Sess. 2, 6–7 (1935)). Because manufacturers and distributors generally resided outside the communities of the retailers whom they influenced, they could profit handsomely from any irresponsible decisions they induced retailers to make, without experiencing the local social consequences of those decisions. *See id.*

These antisocial effects were many. Unduly influenced retailers were more likely to sell to minors, sell at more dangerous hours, and oversell. Raymond B. Fosdick & Albert L. Scott, *Toward Liquor Control*

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29 (1933). "The 'tied house' system had all the vices of absentee ownership. The manufacturer knew nothing and cared nothing about the community. All he wanted was increased sales. He saw none of the abuses, and as a non-resident, he was beyond local influence." *Id.* at 43.

The Eighteenth Amendment temporarily addressed these issues by prohibting alcohol altogether. Indeed, the amendment passed at least in part because of these issues. The "abuses [of tied-house establishments] were so prevalent before prohibition that they were regarded in a large measure as responsible for the evils which led to prohibition." H.R. Rep. No. 1542, 74th Cong., 1st Sess. 11 (1935).

But when the Twenty-First Amendment repealed the Eighteenth Amendment, many feared the return of tied-house establishments. President Franklin D. Roosevelt led the initiative for States to adopt tied-house laws. He asked for "the whole-hearted cooperation of all our citizens to the end that this return of individual freedom shall not be accompanied by the repugnant conditions that obtained prior to the adoption of the eighteenth amendment." Franklin D. Roosevelt,

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Presidential Proclamation 2065 (Dec. 5, 1933).[4] The President "ask[ed] especially that no State shall by law or otherwise authorize the return of the saloon either in its old form or in some modern guise." *Id.*

The people heeded this call. Nearly "every state" and the federal government adopted tied-house laws designed to minimize the risk of harms that can flow from manufacturers and distributors exercising undue influence over retailers. Tr. 249.

Tied-house laws accomplished this purpose by curtailing the ability of manufacturers and distributors to financially support retailers. Under Missouri law, manufacturers and distributors may not, with certain exceptions, "directly or indirectly, loan, give away or furnish equipment, money, credit or property of any kind" to "retail dealers." Mo. Rev. Stat. § 311.070.1. Federal law similarly prohibits giving any "thing of value" to retailers other than merchandise. 27 U.S.C. § 205(b)(3); *accord* H.R. Rep. No. 1542, *supra*, at 11 ("Section 5(b) prohibits . . . the furnishing, giving, renting, lending, or selling to a

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[4] https://catalog.archives.gov/id/299967.

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retailer of equipment, fixtures, signs, supplies, money, or other thing of value, except as permitted under regulations"). Similarly, for example, under California law, manufacturers cannot "give or furnish anything of value" to retailers in exchange for advertisements by retailers. Cal. Bus. & Prof. Code § 25503(h).

These statutes addressed all harms related to undue influence—anticompetitive and antisocial. As the House Report for the federal law stated, "The prohibition of [tied-house] practices will, accordingly, not only prevent monopoly and restraint of interstate trade but will also tend to eliminate or mitigate certain incidental social evils, such as those which have necessarily followed the forced increase in alcoholic-beverage sales resulting from the 'tied house.'" H.R. Rep. No. 1542, *supra*, at 12. The tied-house law protects against these harms by ensuring that those who "sell the product to the consumers have more vested interest[s] in the community." Tr. 242.

The legislatures that passed these statutes believed the laws were necessary to minimize the harms that flow from undue influence over retailers. "Without the three-tier system, the natural tendency historically has been for the supplier tier to integrate vertically."

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*Manuel v. State, Office of Alcohol & Tobacco Contro*l, 982 So. 2d 316, 330 (La. Ct. App.), *writ denied*, 989 So. 2d 107 (La. 2008). "A vertically integrated enterprise—comprising manufacture, distribution, and retailing—is inevitably a powerful entity managed and controlled from afar by non-residents. The three-tier system was implemented to counteract all these tendencies." *Id.*

But no legislature believed that every instance of financial support ran the risk of undue influence. The legislatures have thus crafted exceptions for circumstances where financial support for retailers is "not likely to cause undue influence." Tr. 266.

B. Tied-house laws are economic regulations, not speech regulations, so they do not implicate the First Amendment.

Missouri's tied-house law is a regulation of economic activity that does not implicate the First Amendment. "[R]estrictions on protected expression are distinct from restrictions on economic activity." *Sorrell*, 564 U.S. at 567. For that reason, "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Id.*

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As the history of tied-house laws makes clear, tied-house laws are economic regulations, not speech regulations. Subsection 1 of Missouri's law does not even mention speech. It simply prohibits manufacturers and distributors from providing financial support to retailers. States can craft antitrust laws even though antitrust laws necessarily limit speech. *Id.* And States can ban outdoor fires even though fire bans necessarily ban protected speech such as flag burning. *Id.* Nothing prohibits Missouri or the dozens of other States, plus the federal government, from determining whether manufacturers and distributors can provide financial support to retailers. Tied-house laws affect speech—as all laws do that concern money—but that effect is only incidental.

Because tied-house laws are simply economic regulations, the Supreme Court has already held that States have virtually unbounded authority to adopt these laws. "States can mandate a three-tier distribution scheme in the exercise of their authority under the Twenty-first Amendment." *Granholm v. Heald*, 544 U.S. 460, 466 (2005). The Supreme Court has never "call[ed] into question the constitutionality of the three-tier system." *S. Wine & Spirits of Am., Inc. v. Div. of Alcohol*

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& Tobacco Control, 731 F.3d 799, 806 (8th Cir. 2013) (quoting *Granholm*, 544 U.S. at 488). "Indeed, the Court described the three-tier system as 'unquestionably legitimate.'" *Id.* (quoting *Granholm*, 544 U.S. at 489). States have "virtually complete control over the structure of the liquor distribution system." *Id.* at 805; *accord North Dakota v. United States*, 495 U.S. 423, 431 (1990) (same). "[A] State may, at a minimum, require separation among the various levels of the distribution chain to control the importation and sale of liquor within its borders." *Id.* at 805.

Those decisions control here. Missouri's tied-house statute does not target speech. Subsection 1 does not even mention speech. The tied-house law is an economic law that merely prohibits manufacturers and distributors from providing financial support to retailers. Because any effect on speech is purely incidental, Missouri "may, at a minimum, require separation among the various levels of the distribution chain." *Id.*

C. The Missouri tied-house law satisfies the *Central Hudson* test.

Even if tied-house laws did implicate the First Amendment, Missouri's law satisfies the test from *Central Hudson Gas & Electric Corp. v. Public Service Commission of N.Y.*, 447 U.S. 557 (1980). Under

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that test, the Court should determine "(1) whether the commercial speech at issue concerns unlawful activity or is misleading [removing the speech from First Amendment protection]; (2) whether the governmental interest is substantial; (3) whether the challenged regulation directly advances the government's asserted interest; and (4) whether the regulation is no more extensive than necessary to further the government's interest." *Otto*, 744 F.3d at 1055 (citation omitted).

i. Not all expression affected by the statute satisfies the first element.

If this Court reviews Missouri's tied-house law under the First Amendment, then the State agrees that some speech satisfies the first *Central Hudson* element. Because the tied-house law prohibits licensed manufacturers and distributors from providing anything of value to retailers, the statute affects some speech that has value and is truthful.

But Plaintiffs cannot establish that all possible speech incidentally affected satisfies the first *Central Hudson* element, which they must do because they brought a facial challenge but not an overbreadth challenge. JA.89; *Washington State Grange*, 552 U.S. at 450 & n.6; *Otto*, 744 F.3d at 1060–61. The tied-house law prohibits not only truthful advertisements, but also misleading advertisements,

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which are not protected. Because they cannot prove that the tied-house law implicates the First Amendment in every circumstance, Plaintiffs' facial challenge fails.

ii. The State's interest is substantial.

The State has satisfied the second *Central Hudson* element by identifying a "substantial" interest. The text of the challenged statute identifies several non-exhaustive interests: "to promote responsible consumption, combat illegal underage drinking, and achieve other important state policy goals such as maintaining an orderly marketplace composed of state-licensed alcohol producers, importers, distributors, and retailers." Mo. Rev. Stat. § 311.015. The phrase "orderly marketplace" and its variants are umbrella terms referring to monopolistic behavior, "serious social and political evils," "irresponsible ownership of retail outlets," and other antisocial harms that flow from exercising undue influence over retailers. *Actmedia*, 830 F.2d at 960 & n.2 (expanding the term "disorderly marketing conditions"). Missouri's tied-house law promotes at least the State's interest in "maintaining an orderly marketplace."

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Plaintiffs previously disputed that the State's interest is "substantial." *Mo. Broadcasters Ass'n*, 846 F.3d at 302 n.7. But a State's interest in maintaining "the three-tier system itself is 'unquestionably legitimate.'" *Granholm*, 544 U.S. at 489 (quoting *North Dakota v. United States*, 495 U.S. 423, 432 (1990)); *accord S. Wine & Spirits of Am.*, 731 F.3d at 806 (same). As the Ninth Circuit determined, "there is little question that [a State] has a 'substantial' interest in exercising its twenty-first amendment powers and regulating the structure of the alcoholic beverage industry." *Retail Digital Network*, 861 F.3d at 844 (citation omitted). The district court correctly determined that the State's interest is substantial. JA.231.

iii. The statute directly advances the State's interests.

The statute satisfies the third *Central Hudson* element because it directly and materially advances the State's interest in minimizing the harms that flow from undue financial influence by manufacturers and distributors over retailers. To satisfy this factor, the State need only show that there is "a reasonable fit between the legislature's ends and the means chosen to accomplish them." *Missouri ex rel. Nixon v. Am.*

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Blast Fax, Inc., 323 F.3d 649, 655 (8th Cir. 2003) (quoting *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 556 (2001)) (brackets adopted).

This burden is not heavy. The "reasonable fit" test "leaves ample room for [a State] to . . . favor using one means rather than another." *Reno v. Flores*, 507 U.S. 292, 305 (1993) (emphasis added). Only if the means chosen by the State are "overall irrational[]" will a court declare that the means and the goal are not a "reasonable fit." *Am. Blast Fax*, 323 F.3d at 656 (quoting *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 488 (1995)).

The State met its burden of proving that the tied-house statute is a reasonable means to achieve its interests. Although the State cannot rely on "mere speculation or conjecture," *Greater New Orleans Broad.*, 527 U.S. at 188, the State can rely on many categories of evidence: "reference to studies and anecdotes" or "history, consensus, and 'simple common sense.'" *Am. Blast Fax*, 323 F.3d at 656 (quoting *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1998)). Here, "consensus" and "history"—as well as precedent—establish that the tied-house law reasonably advances the State's interests.

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1. Consensus, history, and precedent establish that the statute directly advances the State's interests.

As for "consensus," nearly every jurisdiction has arrived at the same conclusion as Missouri: tied-house laws are necessary to minimize the harms that flow from manufacturers and distributors providing too much financial support to retailers. Nearly "every state" plus the federal government has adopted and maintained a tied-house law. Tr. 249; 27 U.S.C. § 205. These laws have withstood the test of time for 85 years. Missouri passed its statute during a special legislative session in 1933–34, a month after ratification of the Twenty-First Amendment. *Northcutt v. McKibben*, 159 S.W.2d 699, 704 (Mo. Ct. App. 1942). Both California's and the federal government's tied-house laws were enacted in 1935. *Actmedia*, 830 F.2d at 959; Act of Aug. 29, 1935, 49 Stat. 981.

These tied-house laws are remarkably similar. The details of each law vary, but they generally prohibit manufacturers and distributors from providing financial support to retailers. And each includes a variety of exceptions for circumstances where financial support is unlikely to create undue influence. *E.g.*, Mo. Rev. Stat. § 311.070.4; 27 U.S.C. § 205(b)(3) (prohibiting manufacturers from providing retailers any "thing of value, subject to such exceptions as the Secretary of the

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Treasury shall by regulation prescribe"); Cal. Bus. & Prof. Code §§ 25503 *et seq*. (providing scores of exceptions).

The same exceptions often appear in the tied-house laws of many different jurisdictions. For example, Plaintiffs challenge subsection 4(10). That subsection is an exception to the prohibition in subsection 1 against providing financial support to retailers. It allows a manufacturer to advertise on behalf of a retailer if the advertisement excludes retail price, names two or more retailers, and does so inconspicuously. Mo. Rev. Stat. § 311.070.4(10). Federal law includes a materially identical exception. 27 C.F.R. § 6.98. Indeed, Missouri modeled its exception on the federal exception. Tr. 245–46, 263.

"History" also reveals that tied-house laws directly advance the State's interests. As explained in more detail in Part I.A., these statutes target well-documented social harms. *Retail Digital Network*, 861 F.3d at 843. Before Prohibition, manufacturers and distributors bought influence over retailers and shaped the decisions of those retailers. *Id.* That influence was particularly destructive not only because it created anticompetitive conditions, but also because absentee manufacturers and distributors could profit handsomely from irresponsible decisions

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they induced retailers to make, without having to live with the consequences of those decisions, such as overconsumption, in their communities. *See id.*; Tr. 241–42; *supra*. Advertising was particularly problematic. Historically, legislatures were widely concerned that advertisements could be used "to conceal illegal payoffs to alcoholic beverage retailers." *Retail Digital Network*, 861 F.3d at 843 (citation and internal quotation mark omitted); *Actmedia*, 830 F.2d at 967. Nearly all states and the federal government adopted tied-house laws to combat harms associated with manufacturers and distributors exercising undue influence over retailers. And those dozens of legislatures did so because they believed tied-house laws were necessary to prevent those harms. *E.g.*, *Manuel*, 982 So. 2d at 330.

Precedent also establishes that tied-house laws advance States' interests in minimizing these problems. The Ninth Circuit, just last year, reviewed this history and upheld California's tied-house law against a constitutional challenge just like the challenge here. There, manufacturers and distributors wanted to provide advertising support to retailers, and they argued that California's tied-house law was unconstitutional under the First Amendment. *Retail Digital Network*,

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861 F.3d at 841. Applying *Central Hudson*, the Ninth Circuit concluded that the State's interest in minimizing the harms caused by manufacturers and distributors having undue influence over retailers justified California's tied-house law. *Id.* at 843–50.

2. The limited exceptions to the statute do not render the law wholly "irrational."

The district court did not question that the State has a substantial interest in minimizing the harms that flow from manufacturers and distributors exercising undue financial influence over retailers. It instead determined that the statute was unconstitutional because it includes exceptions that allow for limited financial support to retailers. JA.240–41.

At the outset, the district court applied the wrong legal standard. It determined that the statute was unconstitutional because, in its view, Plaintiffs' speech interests "exceed[ed] any direct benefit to maintaining what is left of the three tier regulatory scheme." JA.241. But district courts are not called to balance interests. The district court should have considered only whether the statute "*advances* the governmental interest asserted," not whose interests it considered more

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important. *Am. Blast Fax*, 323 F.3d at 655 (emphasis added) (quoting *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367 (2002)).

The district court also erred by failing to give Missouri deference. "[S]tate policies defining the three-tier system are subject to deferential scrutiny." *S. Wine & Spirits of Am.*, 731 F.3d at 810–11; *accord id.* at 812 (rejecting the plaintiff's argument as one that "cannot be reconciled with the deference demanded by *Granholm*'s considered *dicta*"). States must meet their burden, but district courts cannot ignore "a judgment by the State" about what is or is not needed to protect its interests. *Id.* at 812.

Missouri's tied-house law, like the dozens of similar laws across the country, substantially advances the State's interest in minimizing the harms that flow from undue influence over retailers. Instead of crafting a balancing test, the district court should have rejected Missouri's tied-house law only if an exception made the statute so completely "irrational[]" that the exception "*ensures* that the [statute] will fail to achieve [its] end." *Coors*, 514 U.S. at 489 (emphasis added). The exceptions must be so severe that the law can no longer advance the State's interest "at all." *Mo. Broadcasters Ass'n*, 846 F.3d at 301. All

the exceptions the district court identified fit the State's desire "to allow some exceptions that are *not likely* to cause undue influence." Tr. 266 (emphasis added).

First, the district court noted that Missouri law allows some wine producers, spirits producers, and microbrewers to sell at direct retail. JA.240. But this exception exists because these arrangements are unlikely to lead to the social harms that flow from undue influence. The district court failed to consider that these exceptions allow producers to sell only in their own communities. Microbreweries can sell at retail only "on the premises of the microbrewery or in close proximity to the microbrewery." Mo. Rev. Stat. § 311.195.3. "They can't sell to other retailers." Tr. 250. The same is true for wine producers, *id.* § 311.070.11, and spirits producers, *id.* § 311.070.1. Indeed, these exceptions are better tailored than parallel exceptions in tied-house laws of other states. Louisiana, for example, allows microbreweries to engage in direct retail, but imposes no "close proximity" requirement. La. Stat. Ann. § 26:271.1.

These exceptions do not detract from the State's interests because the harms the State is interested in minimizing are unlikely to

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materialize when producers retail only in their own communities. A principal harms tied-house laws target is that of absentee producers inducing retail behavior they would be less likely to encourage in their own communities. *E.g.*, *Retail Digital Network*, 861 F.3d at 843. The concern about absentee producers disappears when producers retail in their own communities.

In any event, these exceptions apply only to a small percentage of alcohol sold: "less than a couple hundred retailers" out of the "13,000" retailers across the State—about 1.5 or 2 percent of retailers. Tr. 254. Many of these retailers are small. Microbreweries, for example, are by definition small. Mo. Rev. Stat. § 311.195.1 (defining "microbrewery" as a business producing fewer than ten thousand barrels annually). Because these exceptions apply only to a small fraction of retailers, they "have a minimal effect on the overall scheme." *Retail Digital Network*, 861 F.3d at 850.

For similar reasons, the provision that allows some wine manufacturers to ship wine directly to individual consumers, Mo. Rev. Stat. § 311.185.1, tracks the State's interests in minimizing the harms that flow from undue influence over retailers. Most consumers purchase

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alcohol at brick-and-mortar establishments. Direct-mail retail accounts only for a fraction of sales. Any harmful effects also are diffuse. Harmful effects caused by a brick-and-mortar establishment are concentrated in the community where that establishment resides. But direct-mail retail diffuses negative effects across a much wider region. The provision also limits the amount of wine that can be sold and prohibits recipients of direct-mail retail from reselling. *Id.*

This appeal is thus unlike *Greater New Orleans Broadcasting*. There, a broadcast ban on casino gambling was irrational in part because it exempted advertisements by tribal casinos even though tribal casinos offered "precisely the same" kind of gambling as other casinos and were numerous enough to create the same harms. *Greater New Orleans Broad.*, 527 U.S. at 191–92. Here, by contrast, direct-mail retailers and community-based producers are not "precisely the same" as other manufacturers. They receive an exemption because they account for only a small proportion of alcohol sold and because the concerns about absentee producers disappear when producers retail in their own communities.

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The district court's mistaken belief that these exceptions undermined the State's interests appears to stem from a misunderstanding of those interests. The district court stated that the purpose of limiting financial support was simply to prevent "manufacturers and wholesalers from comingling with, or picking favorites among, retailers." JA.240. But the State's interest is not limiting financial support for the sake of limiting financial support. It is limiting financial support to the extent that support harms competition or creates antisocial effects. The State's ideal is not avoiding *any* financial support, but avoiding *too much* financial support, especially the *kind* of financial support that creates antisocial harms. Arrangements carrying no appreciable risk of anticompetitive or antisocial harms can reasonably be made exempt.

Second, the district court noted that the "very limited," Tr. 198, exception in subsection 4(10) allows manufacturers and distributors to engage in limited advertising on behalf of retailers. JA.240–41. But this exception is tailored to avoid detracting from the State's interests. The subsection allows manufacturers to advertise on behalf of retailers so long as (among other things) the advertisement names "two or more

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unaffiliated" retailers, does so inconspicuously, and excludes price. Mo. Rev. Stat. § 311.070.4(10) (emphases added). These limits ensure that the value any particular retailer receives from this kind of advertisement is limited. When an advertisement includes a retailer's competitor and includes the retailer only inconspicuously, the value of the advertisement to the retailer is *de minimis*. And again, this "very limited," Tr. 198, exception is small, so it "ha[s] a minimal effect on the overall scheme," *Retail Digital Network*, 861 F.3d at 850. By contrast, permitting unbridled financial support of retailers by authorizing manufacturers and distributors to advertise on their behalf without restriction—as the district court's decision does—creates a gaping hole in the tied-house law.

The district court also overlooked that Missouri modeled this exception after a materially identical exception in federal law, 27 C.F.R. § 6.98. Tr. 245–46, 263. The federal government adopted its exception in 1995. 60 Fed. Reg. 20,402, 20,423–24 (Apr. 26, 1995). Missouri followed suit the next year. Mo. S.B. No. 933 (1996). The federal government adopted a separate amendment to this provision after receiving comments that "there is no possibility" the amendment would allow

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undue influence over retailers. 60 Fed. Reg. 20,402, 20,417 (April 26, 1995). Missouri adopted this provision because it agreed that the "very limited," Tr. 198, circumstances envisioned by the exception do not risk allowing manufacturers and distributors to exercise undue influence.

Third, the district court noted that various exceptions allow manufacturers and distributors to provide small, "tangible goods" such as barware and mirrors to retailers. JA.241. But the district court did not consider that these exceptions pose little or no risk of enabling manufacturers and distributors to exercise undue influence over retailers, because these exceptions encompass only items of *de minimis* value.

Missouri is not alone in providing "tangible goods" exceptions. The federal government allows manufacturers to provide retailers with physical signs, 27 C.F.R. § 6.102; shelves, racks, and other product displays, *id.* § 6.83; window decorations, *id.* § 6.84; glassware and other equipment and supplies, *id.* § 6.88; product samples, *id.* § 6.91; and countless other goods. Similarly, the California tied-house law, which the Ninth Circuit upheld despite its exceptions, allows manufacturers and distributors to provide decorations, paintings and pictures, window

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displays, floor displays, and dozens of other tangible goods. Cal. Bus. & Prof. Code § 25503.1.

None of these exceptions detracts from the State's interest in minimizing the negative competitive and social harms that arise when manufacturers and distributors provide too much financial support to retailers. And they certainly do not detract so completely from that interest that they render the tied-house law entirely "irrational[]" and "ensure[] that the [statute] will fail to achieve [its] end." *Coors*, 514 U.S. at 489. Each exception exists because the circumstances envisioned by those exceptions "are not likely to cause undue influence." Tr. 266. And each exception, individually and cumulatively, makes up a small proportion of total retail. Missouri's exceptions are no more extensive than "the numerous exceptions" to the California tied-house law that the Ninth Circuit held, just last year, did not undermine that law's purpose. *Retail Digital Network*, 861 F.3d at 850.

But even if the exceptions rendered the Missouri statute "irrational" in some circumstances, it would not be irrational in all circumstances, so Plaintiffs would not be entitled to facial relief. The State's interest in minimizing the competitive and social harms that

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flow from too much financial support for retailers is multiplied across each community. Even if the exceptions meant that the statute were wholly "irrational" in some locations, the State would retain an interest in minimizing the harms in other communities. Plaintiffs' challenge fails because Missouri's tied-house law is not irrational at all, much less irrational in every circumstance.

iv. The statute does not burden "substantially" more speech than necessary.

The statute also satisfies the fourth *Central Hudson* element because it "achieves a reasonable fit between the means it adopts and the ends it seeks to serve." *Am. Blast Fax*, 323 F.3d at 660. To satisfy this standard, all that is required is a "fit that is not necessarily perfect, but reasonable"—a regulation "in proportion to the interest served." *Id.* at 659 (quoting *Florida Bar*, 515 U.S. at 632).

A statute lacks a reasonable fit under this element only if it is "substantially excessive." Although the Supreme Court has declared that courts should determine whether the State "'carefully calculat[ed] the costs and benefits associated with the burden on speech imposed' by the regulation[]," *Lorillard*, 533 U.S. at 561 (citation omitted), a statute fails only when it "curtail[s] *substantially* more speech than is necessary

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to accomplish its purpose," *Passions Video, Inc. v. Nixon*, 458 F.3d 837, 843 (8th Cir. 2006) (emphasis added) (citation omitted). "None of [the Supreme Court's] cases invalidating the regulation of commercial speech involved a provision that went only marginally beyond what would adequately have served the governmental interest," so courts will not hold that a provision fails this element unless the provision is "substantially excessive." *Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 479 (1989).

Missouri's tied-house law, like those in other jurisdictions, satisfies this standard. The Missouri law is not like those laws the Supreme Court determined "constitute nearly a complete ban on the communication of truthful information" about a product. *Lorillard*, 533 U.S. at 562. The statute does not target communication at all. Nothing prohibits manufacturers from advertising their products. Nothing prohibits retailers from advertising their products. And nothing prohibits the media from accepting and publishing such advertisements. The statute preserves all avenues of speech. It simply regulates what activities licensed manufacturers and distributors can engage in "with a retail licensee"—that is, it merely prohibits financial

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support by manufacturers and distributors for retailers. Mo. Rev. Stat. § 311.070.4. Its scope is not excessive, much less "substantially excessive." *Fox*, 492 U.S. at 479.

In their Second Amended Complaint, Plaintiffs themselves describe the statute as preventing manufacturers and distributors from "providing financial or other support" to retailers. JA.92. The statute thus targets financial arrangements, not speech. In *American Blast Fax*, this Court upheld a ban on unsolicited fax advertisements because "Congress was not concerned with the effect of the content of the advertisements, but rather with the effect of the act of communicating." *Am. Blast Fax*, 323 F.3d at 659–60. Here, Missouri is not concerned with the content of advertisements, but with manufacturers and distributors using advertisements—or anything else of value—to obtain undue influence over retailers. The tied-house law is not excessive.

The State also could not obtain its objective using more tailored means. The district court suggested three ways the State could obtain its objective without prohibiting financial entanglement, but none of those methods would suffice.

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First, the district court said that the State could simply "police" advertising arrangements. JA.242. For this proposition, the district court relied on the Ninth Circuit panel decision in *Retail Digital Networks*. JA.242 (citing *Retail Digital Networks, LLC v. Appelsmith*, 810 F.3d 638, 653 (9th Cir. 2016)). But the district court overlooked that the en banc Ninth Circuit had already overruled the panel decision and did so on the very point on which the district court relied. *Retail Digital Network*, 861 F.3d at 845 (citation omitted).

The Ninth Circuit rejected the "policing" argument for many reasons. For one thing, policing advertising arrangements can "interfere in the advertising process itself and thereby create other First Amendment problems." *Id.* But more importantly, policing is insufficient because it "would be impossible" to detect all undue influence caused by financially supporting retailers. *See id.* Legislatures have historically been concerned that advertisements are used "to conceal" financial support. *Id.* at 843; *Actmedia*, 830 F.2d at 967. So the only way to achieve the State's interest is by "flatly proscribing" such arrangements. *Retail Digital Network*, 861 F.3d at 845 (citation omitted).

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The kind of policing the district court envisioned would be especially unavailing. The district court suggested that the State ask manufacturers and distributors to self-report advertising payments. JA.242. But one of the historical reasons for manufacturers to shift resources to retailers through advertisements is "to conceal" the influence the manufacturer or distributor holds. *Retail Digital Network*, 861 F.3d at 843; *Actmedia*, 830 F.2d at 967.

Second, the district court suggested that the State could better obtain its objective by eliminating some exceptions that detract from its objective. JA.242. But as already explained, those exceptions do not detract from the State's objective.

Third, the district court suggested that the State could obtain its goals instead by "limit[ing] the amount of money allowed to be spent on advertising on an annual basis." JA.242. Not only would that restriction affect speech just as much, but that statement is simply a variant of the argument the Ninth Circuit rejected. Because of the ability to conceal influence through advertisements, only by "flatly proscribing" financial support for retailers can the State achieve its objectives. *See Retail Digital Network*, 861 F.3d at 845 (citation omitted). In any event, the

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amount of money likely to cause undue influence on a retailer depends on the retailer, making it difficult or impossible to declare any limit greater than zero.

As many courts and dozens of jurisdictions have determined, tied-house laws are necessary to minimize the harms that arise when manufacturers and distributors exercise too much influence over retailers. As the Ninth Circuit put it, tied-house laws "serve[] the important and *narrowly tailored* function of preventing manufacturers and wholesalers from exerting undue and undetectable influence over retailers." *Retail Digital Network*, 861 F.3d at 850 (emphasis added). Other courts agree. "Without the three-tier system, the natural tendency historically has been for the supplier tier to integrate vertically." *Manuel*, 982 So. 2d at 330 (emphasis added). This Court should defer to the "judgment by the State" of Missouri that tied-house laws are "the best system" to combat historic problems in the alcohol industry. Tr. 249; *S. Wine & Spirits of Am.*, 731 F.3d at 812.

But even if the State could make some modifications and still fully achieve its objectives, *Central Hudson* requires a "reasonable fit," not a

"perfect fit." The scope of Missouri's tied-house law is not excessive, much less "substantially excessive." *Fox*, 492 U.S. at 479.

II. The district court's determination that subsection 4(10) unconstitutionally compels speech and association does not redress Plaintiffs' alleged injury and is incorrect.

The district court determined that subsection 4(10) unconstitutionally compels speech and association. Subsection 4(10) is an exception to subsection 1. It states that a manufacturer or distributor can advertise for a retailer if (among other things) the advertisement lists "two or more unaffiliated" retailers and does so only inconspicuously. Mo. Rev. Stat. § 311.070.4(10). The district court determined that this subparagraph unconstitutionally compels speech and association because it does not allow advertisements that identify only one retailer. JA.242. That determination was both advisory and wrong.

First, that determination was advisory because a decision finding subsection 4(10) unconstitutional does not redress Plaintiffs' alleged injury. To satisfy "the irreducible constitutional minimum of standing," Plaintiffs must prove not only that they suffered an injury and that subsection 4(10) caused that injury, but also that a court's order would

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redress their injury. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Plaintiffs want manufacturers to provide financial support for advertising to retailers. JA.92. But even if subsection 4(10) were unconstitutional and excised from the statute, subsection 1 would still prohibit manufacturers from engaging in that activity. It is subsection 1 that prohibits providing financial support to retailers, causing Plaintiffs' alleged injury. Mo. Rev. Stat. § 311.070.1. But because subsection 1 is a speech-neutral economic regulation, it is not subject to First Amendment scrutiny at all, as discussed above. In other words, if subsection 4(10) were unconstitutional, the proper remedy would be to excise that unconstitutional exception from the statute. But that remedy would leave Plaintiffs' proposed conduct just as illegal as it is now.

This Court should reverse the district court's declaration about the validity of subsection 4(10). The district court's conclusion about compelled speech and association concerns only subsection 4(10). The single paragraph it devoted to the issue did not even discuss subsection 1. JA.242. Because the district court's declaration cannot redress Plaintiffs' alleged injury, it is an advisory opinion that must be vacated.

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Bush v. Taylor, 912 F.2d 989, 991 (8th Cir. 1990) ("If our decision would not afford Bush some actual redress, we would be issuing only an advisory opinion and that we are not constitutionally empowered to do.").

The district court's decision also was incorrect. Subsection 4(10) cannot compel speech or association because it does not prohibit or compel anything. It is subsection 1 that prohibits manufacturers from providing financial support to retailers. Subsection 4(10) does not and cannot compel speech or conduct because it merely creates a limited exception to the prohibition found in subsection 1. Any other construction of the statute is not only unreasonable, but should be rejected because of the canon of constitutional avoidance. Even in First Amendment cases, "the elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (citation omitted).

Subsection 4(10) also cannot compel association. Even if the subsection were compulsory, which it is not, it would not require

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manufacturers to associate with retailers. Manufacturers already associate with retailers by selling their products to retailers. If subsection 4(10) were construed to compel anything, it would compel only disclosure, not association.

And if subsection 4(10) were to compel disclosure, that compulsion would be constitutional. The district court presumed that compelled speech necessarily is unconstitutional. JA.242. But binding precedent establishes otherwise: compelled commercial speech complies with the Constitution if the speech is "reasonably related to the State's interest" and is not "unjustified or unduly burdensome." *Otto*, 744 F.3d at 1053 (quoting *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985)). That standard is "akin to rational-basis review." *Id.* at 1061 (quoting *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1212 (D.C. Cir. 2012)). So this Court must "presume [the] legislation is valid." *Chance Mgmt., Inc. v. South Dakota*, 97 F.3d 1107, 1114 (8th Cir. 1996).

The State easily meets this standard. Legislatures have historically been concerned that advertisements can be used "to conceal" undue influence in the liquor industry. *Retail Digital Network*, 861 F.3d

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at 843; *Actmedia*, 830 F.2d at 967. Missouri and the federal government have determined that advertisements by manufacturers that name retailers are unlikely to risk undue influence if certain steps are made to minimize the value of the advertisement to the particular retailers, including allowing only inconspicuous statements identifying retailers and allowing advertisements that list two or more competing retailers. Nothing is irrational about the determination by Missouri and the federal government that those advertisements pose a low risk of allowing undue influence over retailers. And nothing is "unduly burdensome" about an exception that applies only when an advertisement refrains from listing only one retailer.

III. States may, under the First Amendment, ban advertisements for discount or below-cost alcohol to combat underage drinking and overconsumption.

Plaintiffs also challenge two subsections of a single regulation. One subsection, the "Below Cost" provision, prohibits a company from advertising "[a] price that is below the retailer's actual cost." Mo. Code Regs. Ann. tit. 11, § 70-2.240(5)(I). Another provision, the "Discount Advertising" provision, prohibits not the listing of the price itself, but any "statement" suggesting a below-cost price or discount, such as "half

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price," "two for one," or "all you can drink." JA.252. Under that provision, an advertisement cannot issue a "statement" offering a "coupon, premium, prize, [or] rebate." Mo. Code Regs. Ann. tit. 11, § 70-2.240(5)(G). These provisions satisfy the *Central Hudson* test.

A. Not all expression covered by the regulation implicates the First Amendment.

The State agrees that the first element under *Central Hudson*—whether expression is protected by the First Amendment—is met in at least some circumstances. Companies sometimes sell products at discount or below cost, making advertisements of those prices truthful.

But again, Plaintiffs cannot prevail on their facial challenge because they cannot prove that the regulation would be invalid in all circumstances. For example, the "Discount Advertising" provision prohibits advertising a coupon for a discount price. But if a company in fact always "discounts" its price so that the "discount" is the actual price, the advertisement would fall outside First Amendment protection because it would "be misleading." *Central Hudson*, 447 U.S. at 566. Plaintiffs cannot prevail because they raised a facial challenge under the First Amendment but did not raise an overbreadth challenge.

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JA.89; *Washington State Grange*, 552 U.S. at 450 & n.6; *Otto*, 744 F.3d at 1060.

B. Plaintiffs concede that the governmental interest is substantial.

The text of the Missouri law under which the regulation was promulgated identifies the purpose of the regulation: "to promote responsible consumption." Mo. Rev. Stat. § 311.015. As the district court determined, Plaintiffs concede that this interest is substantial and includes "both dissuading overconsumption of alcohol and combating underage drinking." JA.231.

C. The regulation provisions directly advance the State's interests.

Each provision also satisfies the third *Central Hudson* element. Both provisions directly and materially advance the State's interests in reducing underage drinking and overconsumption. The State proved (and Plaintiffs admitted) that advertisements for below-cost or discount alcohol will "significantly" increase consumption of below-cost or discount alcohol—the kind most likely to be overconsumed. None of the exceptions detracts from the ability of the provisions to advance the State's goal of responsible consumption.

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i. The regulation advances the State's goals because it decreases consumption of the kind of alcohol most likely to prove problematic.

The district court's critical error was misunderstanding what the State had to prove. Plaintiffs submitted evidence that increasing advertising does not increase "aggregate" consumption. Other things being equal, Plaintiffs contended that increasing advertising simply shifts consumption from one kind of alcohol to another. Tr. 38, 39, 48. Adopting this evidence, the district court held that the provisions could not advance the State's interest in promoting responsible consumption because the State did not prove that the regulation decreases aggregate or "overall" consumption. JA.234.

But the district court failed to understand that the provisions need not decrease aggregate or "overall" consumption to advance the State's goal. The State's goal is not to reduce "overall" consumption, but instead to reduce consumption of one specific kind of alcohol: alcohol sold below cost or at discount. That kind of alcohol is by definition cheaper—often cheaper than the cost of production—and thus more likely to be overconsumed. Similarly, underage persons, who typically

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have limited financial resources, can access this kind of alcohol more easily.

There is no dispute that the State met its burden of proving that increasing advertisements for below-cost or discount alcohol increases consumption of that kind of alcohol. The district court's decision recognizes this basic, common-sense conclusion; Plaintiffs conceded as much; and the State submitted empirical evidence of this relationship.

The district court's own decision recognizes that increasing advertising for below-cost alcohol significantly increases consumption of that type of alcohol. The district court determined that advertising did not affect aggregate consumption but "significantly affected the brand and type of alcohol sold." JA.234. Thus, the district court recognized that increasing advertising of one "type" of alcohol "significantly" increases consumption of that type. JA.234 That recognition is no surprise. As the Supreme Court acknowledged, common sense dictates this result. Companies will not spend money on advertisements unless they expect those advertisements to increase sales. *See, e.g.*, *Central Hudson*, 447 U.S. at 569.

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Plaintiffs similarly acknowledged that advertisements for below-cost or discount alcohol "significantly" increase consumption of that kind of alcohol. As their own expert witness testified, "as price increases, consumption decrease[s]" and vice versa. Tr. 46. Plaintiffs even volunteered that "higher prices will be associated with *significantly* lower consumption." Tr. 62–63. And they admitted that the regulation, because it increases information costs, imposes "an additional pricing burden on the consumer." Tr. 59. So under Plaintiffs' own evidence, when the State restricts advertising of below-cost or discount alcohol, that restriction "significantly" decreases consumption of that kind of alcohol—the kind most likely to be abused—because it increases the price burden. As Plaintiffs' counsel summarized, any price change is "sharply associated" with consumption rates. Tr. 299.

The State also elicited testimony[5] about a study by the Harvard School of Public Health, which reviewed the effect of advertising below-

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[5] Although the State did not admit the study into evidence, the full study was included in the summary judgment materials, Doc. 52-2, on which the district court relied. JA.227 n.2. In addition, the State elicited testimony about the study. Appellees did not agree to the inclusion of

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cost alcohol within 2 miles of colleges. Tr. 67. The study reviewed data for 118 colleges and well over a thousand establishments. Tr. 67. It concluded that areas with "more exterior advertising of alcohol promotions had higher binge-drinking rates." Meichun Kuo, *et al.*, *The Marketing of Alcohol to College Students: The Role of Low Prices and Special Promotions*, Harvard Sch. Pub. Health, 25 Am. J. Prev. Med. 204, 208 (2003);[6] ADD.26.

This study found a strong correlation between increasing advertising of below-cost or discount alcohol and increased binge-drinking rates. Plaintiffs' own expert conceded that the finding was "not by chance" and that the study, if repeated, would find the same result at least 999 out of 1,000 times. Tr. 70. This study shows what common sense dictates: when alcohol is cheaper and advertised as cheaper, people are more likely to overconsume. Plaintiffs themselves admit that decreasing the price of one kind of alcohol will cause consumption of that kind of alcohol to increase "significantly." Tr. 62–63.

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this study in the Joint Appendix, so a copy is included in the addendum at pages 22 through 29 for the Court's convenience.

[6] https://www.ajpmonline.org/article/S0749-3797(03)00200-9/pdf.

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Advertising below-cost or discount alcohol has an especially pronounced effect on consumption for people, such as college students, who have lower incomes. Tr. 30, 73–74. A modest increase in price might have almost no effect on an upper-middle-class individual because that increase represents just a small proportion of what that individual can spend. *Id.* But for a college student on a budget, a price increase can make the difference between responsible consumption and binge drinking. *Id.*

The district court's fundamental error was concluding that the State needed to prove that increasing advertising for below-cost or discount alcohol would increase aggregate or "overall" consumption of all types of alcohol. That error is understandable because Plaintiffs repeatedly mischaracterized the State's goal as reducing all consumption instead of consumption of those kinds of alcohol more likely to be abused.[7] But that error still infected the district court's

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[7] *See, e.g.*, Doc. 51 at 22 (misstating the State's goal as "significantly reduc[ing] alcohol consumption"); *id.* at 26 (asserting that the State's interest is "temperance"); *id.* (asserting that the State's goal is generally "lowering alcoholic beverage consumption"); *id.* at 27 (asserting that

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analysis. The State never needed to prove an aggregate increase in consumption. It needed to prove only that advertising below-cost or discount alcohol—the kind far more likely to cause overconsumption and underage drinking—would increase consumption of that kind of alcohol. The State did so.

Because advertising below-cost or discount alcohol is directly related to consumption rates for that kind of alcohol, the challenged provisions directly advance the State's interest. The State's interest is reducing irresponsible consumption of alcohol, especially overconsumption and underage consumption. The provisions materially advance that goal. The targeted advertising regulation, as Plaintiffs admit, leads to "significantly" lower consumption of below-cost or discount alcohol.

"the State could prohibit alcohol altogether"); *see also* Doc. 52 at 18 (pointing out that Plaintiffs repeatedly "misstate" the State's goal).

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ii. The limited exceptions do not render the provisions wholly "irrational."

Again failing to give the State the deference it is due, *S. Wine & Spirits of Am.*, 731 F.3d at 811–12, the district court determined that three purported exceptions to the ban against below-cost advertising detracted from those provisions so much that the provisions "do not advance the [State's] interest at all." JA.236 (quoting *Mo. Broadcasters Ass'n*, 846 F.3d at 301). That decision was erroneous not only because the district court failed to give the State deference, but also because none of the exceptions render the regulatory scheme entirely irrational.

As an initial matter, the district court erred by effectively punishing the State for adopting less stringent interpretations of its own regulations that permitted *more* speech, not less. The first such interpretation, which applies both to the Below Cost and Discount Advertising provisions, is the State's decision to enforce these provisions only against *outdoor* advertisements. The regulation applies to "any sign or outdoor billboard or other printed or graphic matter." Mo. Code Regs. Ann. tit. 11, § 70-2.240(2). The State has given companies the benefit of the doubt about whether "outdoor" modifies

"sign" or only "billboard" and enforced the provisions only against outdoor advertisements. Tr. 190.

The second such interpretation is the State's decision not to enforce the Discount Advertising provision against vague advertisements like "happy hour" that might, but do not necessarily, imply below-cost or discount sales. Again, the State has given sellers the benefit of the doubt because the Discount Advertising provision is "somewhat ambiguous." JA.248. In each case, the district court treated this more permissive interpretation—interpretations that permitted more speech, not less—as undermining the State's overall interest in the regulatory scheme. By the district court's logic, the State violated the First Amendment by permitting *more* speech. As courts have frequently observed, such logic is self-contradictory and has no place in First Amendment analysis. *See, e.g., Wagner v. FEC*, 793 F.3d 1, 26–32 (D.C. Cir. 2015) (en banc); *S. Wine & Spirits of Am.*, 731 F.3d at 812 (holding that a restriction on alcohol sales "is not invalid because the legislature might have gone further than it did" to restrict sales). As both the Supreme Court and the en banc D.C. Circuit have emphasized, "[t]he First Amendment imposes no freestanding 'underinclusiveness

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limitation.' . . . We have accordingly upheld laws—even under strict scrutiny—that conceivably could have restricted even greater amounts of speech in service of their state interests." *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1668 (2015) (quoted in *Wagner*, 793 F.3d at 27).

The fact that Missouri regulators opted to permit *more* speech, not less, does not raise concerns under the First Amendment. "A statute that does not go as far as it might to cut off [commercial speech] can hardly be said to constitute an 'unnecessary abridgement' of the freedom" to engage in such speech. *Wagner*, 793 F.3d at 27. This Court should not "punish [Missouri] for leaving open more, rather than fewer, avenues of expression, especially when there is no indication that the selective restriction of speech reflects a pretextual motive." *Id.* at 32 (quoting *Williams-Yulee*, 135 S. Ct. at 1668–70).

In any event, none of the exceptions is problematic under *Central Hudson* because none renders the provisions wholly incapable of advancing the State's interest. Again, the standard is not whether the exceptions make achieving the State's interest more difficult, but whether they detract so much from the ability of the provisions to advance the State's interests that the provisions become "irrational[],"

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Coors, 514 U.S. at 489, and unable to advance the State's interest "at all," *Mo. Broadcasters Ass'n*, 846 F.3d at 301. None of the exceptions prevents the provisions from advancing the State's interest "at all." *Id.*

The district court suggested that below-cost or discount advertisements inside establishments contribute more to overconsumption than do such advertisements outside. JA.235. But that statement, unsupported by any evidence, is both incorrect and irrelevant. It is incorrect because the district court failed to consider that Missouri law prohibits bartenders from serving intoxicated persons, Tr. 167, so there is a preexisting safeguard in place for overconsumption inside establishments. That safeguard does not apply to prevent overconsumption at other locations such as people's homes and social gatherings such as fraternity parties, high-school dance after-parties, holiday parties, etc. Advertisements outside liquor establishments thus pose at least as great of a concern, if not greater, than advertisements inside establishments. The statement also is irrelevant. Even if the State could advance its interest more effectively by enforcing the Discount Advertisement provision against advertisements inside establishments, that does not mean that

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prohibiting advertisements outside establishments fails to combat overconsumption "at all." In fact, the absence of such advertising outside establishments makes it less likely that persons seeking to overconsume on below-cost or discount alcohol will be lured into the establishments offering that kind of alcohol in the first place. The provision thus materially advances the State's interests in that respect as well.

The State's allowance of signs such as "happy hour" also does not prevent the Discount Advertising Provision from advancing the State's interest "at all." Perhaps the State could achieve its interests marginally better by barring ambiguous advertisements like "happy hour." But that interpretation of the regulation would restrict more speech, not less. The provision "is not invalid [simply] because the [State] might have gone further than it did," *S. Wine & Spirits of Am.*, 731 F.3d at 812, especially where "going further" would involve restricting even more speech.

Nor does the exception permitting some manufacturers to offer "rebate coupons" render the Discount Advertising provision irrational. Selling something below cost is very different from promising a

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reimbursement later through a rebate. For example, if a person has $15, and a drink costs $4, he can buy three. If the retailer offers a 50-percent discount, he can buy seven. But if the retailer instead offers a 50-percent rebate, the person can buy only three drinks, the same he could have purchased without the rebate. Any discount does not occur until much later—after the danger of overconsumption that night has passed. Studies also show that the vast majority of persons who purchase items on rebate do not redeem those rebates, Doc. 61-1 at 2, which further minimizes the rebate exception. And in any event, that exception applies only to a small number of liquor companies, so it "ha[s] a minimal effect on the overall scheme." *Retail Digital Network*, 861 F.3d at 850.

D. The provisions do not affect "substantially" more speech than necessary.

The provisions also satisfy the fourth *Central Hudson* element because each provision "achieves a reasonable fit between the means it adopts and the ends it seeks to serve." *Am. Blast Fax*, 323 F.3d at 660. The provisions are "carefully calculate[ed]," *Lorillard*, 533 U.S. at 561, and do not "curtail substantially more speech than is necessary," *Passions Video*, 458 F.3d at 843.

This case is unlike those where the Supreme Court invalidated regulations under the fourth element of *Central Hudson* because those cases involved regulations so excessive that they "constitute[d] nearly a complete ban on the communication of truthful information" about a product. *Lorillard*, 533 U.S. at 562. In *Lorillard*, a regulation prohibited all advertisements for smokeless tobacco or cigars within 1,000 feet of schools or playgrounds. *Id.* at 561–62. But the regulation applied in densely populated areas like Boston, meaning that the regulation banned all communication about the product in about 90 percent of those regions. *Id.* Similarly, Rhode Island created a "categorical prohibition" against advertising "the price of *any* alcoholic beverages." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 490 (1996) (emphasis added).

The regulation here, by contrast, applies only to a narrow subset of communications. Nearly all communications about alcoholic products remain legal. The regulation does not prohibit listing "the price of *any* alcoholic beverages." *Id.* (emphasis added). It instead prohibits advertising the price of just one type of alcoholic beverage—the type most likely to lead to overconsumption. The regulation also does not

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apply to persons or businesses not licensed by the Division, such as Plaintiff Missouri Broadcasters Association. Mo. Code Regs. Ann. tit. 11, § 70-2.240(1). Rather than impose a blanket ban on nearly all truthful communications about a product, like those in *Lorillard* and *44 Liquormart*, Missouri adopted a regulation carefully tailored in scope to target specific ads for a single type of alcohol.

The district court determined that the regulation was overextensive because educational programs, taxes, and other non-speech initiatives might combat overconsumption and underage drinking. JA.236–38. The State does not deny that other methods unrelated to speech—such as educational programming—also help combat overconsumption and underage drinking. Indeed, the State has long used training and educational programs for just that reason. *E.g.*, Tr. 167–68. But none of those tools eliminates the need for the regulation. Overconsumption and underage drinking cannot be solved by a single tool or method. Even if Missouri tripled both its tax rate and output of educational programs, overconsumption and underage drinking would still occur. No jurisdiction has fully eliminated these problems. Nothing prohibits Missouri from supplementing tools that do

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not target advertising with one that does. Moreover, needless to say, the district court's instruction that the Missouri legislature should impose a tax increase instead of restricting alcohol advertising raises profound federalism concerns.

The district court also overlooked evidence that the State cannot fund additional programs. The State testified without rebuttal that, although it currently has many programs designed to promote responsible consumption, it lacks the resources to implement more. *E.g.*, Tr. 165–66, 219–22. Measures that are theoretically possible but not practically feasible do not defeat a regulation. The State cannot be faulted for declining to implement programs that it cannot implement.

CONCLUSION

This Court should reverse the judgment of the district court.

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October 18, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2018, an electronic copy of the foregoing Brief was filed via the Court's electronic filing system and served upon all counsel of record.

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CERTIFICATION OF COMPLIANCE

CERTIFICATION OF TYPE VOLUME LIMITATION

I hereby certify that the text of the foregoing document contains 12,943 words of proportionally spaced text as determined by the automated word count of the Microsoft Word 2016 word-processing system and has a 14-point, serif font.

/s/ Joshua M. Divine
Deputy Solicitor