NO. 18-2611

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MISSOURI BROADCASTERS ASSOCIATION, *et al.*,

Plaintiffs-Appellees,

v.

DOROTHY TAYLOR, *et al.*,

Defendants-Appellants,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI, CENTRAL DIVISION
Case No. 2:13-cv-04034-MDH
The Honorable Douglas Harpool
United States District Court Judge

JOINT BRIEF OF THE NATIONAL BEER WHOLESALERS ASSOCIATION, THE WINE & SPIRITS WHOLESALERS OF AMERICA, INC., THE MISSOURI BEER WHOLESALERS ASSOCIATION, THE MISSOURI CRAFT BREWERS GUILD, AND THE AMERICAN BEVERAGE LICENSEES AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT TAYLOR'S BRIEF SEEKING REVERSAL OF THE DISTRICT COURT

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Appellate Case: 18-2611 Page: 2 Date Filed: 10/26/2018 Entry ID: 4719586

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The National Beer Wholesalers Association ("NBWA") is a Virginia non-profit corporation. It does not have any parent corporation and there is not any publicly held corporation that owns 10% or more of its stock.

Wine & Spirits Wholesalers of America, Inc. ("WSWA") is a Missouri non-profit corporation. It does not have any parent corporation and there is not any publicly held corporation that owns 10% or more of its stock.

The Missouri Beer Wholesalers Association ("MBWA") is a Missouri non-profit corporation that represents the business interests of MBWA and its 32 members. It does not have any parent corporation and there is not any publicly held corporation that owns 10% or more of its stock.

The Missouri Craft Brewers Guild (the "Guild") is a Missouri non-profit corporation. It does not have any parent corporation and there is not any publicly held corporation that owns 10% or more of its stock.

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

Appellate Case: 18-2611 Page: 3 Date Filed: 10/26/2018 Entry ID: 4719586

RULE 29(a)(4) STATEMENT OF COMPLIANCE

This brief is submitted pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure with the consent of all parties through their respective counsel. No party or party's counsel authored this brief in whole or in part or contributed money intended to fund its preparation or submittal. No person other than Amici or their members contributed money to fund its preparation or submittal.

Appellate Case: 18-2611 Page: 4 Date Filed: 10/26/2018 Entry ID: 4719586

TABLE OF CONTENTS

RULE 26.1 CORPORATE DISCLOSURE STATEMENT iii

RULE 29(a)(4) STATEMENT OF COMPLIANCE iv

TABLE OF AUTHORITIES vi

INTERESTS OF *AMICI CURIAE* 1

BACKGROUND 3

ARGUMENT 4

1. Introduction. 4
2. Policies Underlying Three-Tier and Tied-House Laws. 5
3. The District Court Erred in Invalidating the Missouri Tied-House Law. 14
4. Impact and Scope of Affirmance. 23

CONCLUSION 24

Appellate Case: 18-2611 Page: 5 Date Filed: 10/26/2018 Entry ID: 4719586

TABLE OF AUTHORITIES

Cases

Actmedia, Inc. v. Stroh,
830 F.2d 957 (9th Cir. 1986) 21

Arnold's Wines, Inc. v. Boyle,
571 F.3d 185 (2d Cir. 2009) 24

Auen v. Alcoholic Beverages Div., Iowa Dept. of Commerce
679 N.W.2d 586 (Iowa 2004)....................8

Bd. of Trs. Of State Univ. of N.Y. v. Fox,
492 U.S. 469 (1989) 22

Capital Cities Cable, Inc. v. Crisp,
467 U.S. 691 (1984) 14, 15

Central Hudson Gas & Electric Corp. v. Public Service Commission of New York,
447 U.S. 557 (1980) 5, 20, 21

Clark v. Cmty for Creative Non-Violence,
468 U.S. 288, 293 (1984) 16

Giboney v. Empire Storage & Ice Co.
336 U.S. 490 (1949) 18

Granholm v. Heald,
544 U.S. 460 (2005) 6, 8

Harris v. McRae,
448 U.S. 297 (1980) 19

High Life Sales Co. v. Brown-Forman Corp.,
823 S.W.2d 493 (Mo. 1992)....................8

Holder v. Humanitarian Law Project,
561 U.S. 1 (2010) 8

Appellate Case: 18-2611 Page: 6 Date Filed: 10/26/2018 Entry ID: 4719586

Interpipe Contracting, Inc. v. Becerra,
898 F.3d 879 (9th Cir. 2018) 17, 19

May Department Stores v. Supervisor of Liquor,
530 S.W.2d 460 (Mo.App.1975) 8

McCutcheon v. FEC,
572 U.S. 185 (2014) 18

Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue,
460 U.S. 575 (1983) 16, 18

Minority Television Project, Inc. v. FCC,
763 F.3d 1992 (9th Cir. 2013) (en banc) 17

National Distributing, Co., Inc. v. U.S. Treasury Dept.,
626 F. 2d 997 (D.C. Cir. 1980) 10

North Dakota v. U.S.,
495 U.S. 423 (1990) 6, 8, 15

R.A.V. vs. St. Paul,
505 U.S. 377 (1992) 15

Regan v. Taxation with Representation of Washington,
461 U.S. 540 (1983) 19

Retail Digital Networks, LLC v. Applesmith,
810 F.3d 638 (9th Cir. 2016) 5, 21

Retail Digital Networks, LLC v. Prieto,
861 F.3d 839 (9th Cir. 2017) 5, 21, 22, 23

Rumsfeld v. Forum for Academic & Institutional Rights, Inc,
547 U.S. 47 (2006). 16, 17, 19

Sorrell v. IMS Health, Inc.,
564 U.S. 552 (2011) 16, 17, 18

Appellate Case: 18-2611 Page: 7 Date Filed: 10/26/2018 Entry ID: 4719586

Southern Wine & Spirits of America, Inc. v. Division of Alcohol and Tobacco Control,
731 F.3d 799 (8th Cir. 2013) 7, 10, 20, 21

United States v. North Dakota,
495 U.S. 423 (1990) 14

Vaughan v. EMS,
744 S.W.2d 542 (Mo.App.1988) 8

Statutes and Administrative Code

14B NCAC § 15C.0709 4
14B NCAC § 15C.0710 12
14B NCAC § 15C.0711 12
18-553 CMR Ch. 104, §2..12
235 ILCS 5/6-5...4
235 ILCS 5/6-6..4, 12
27 C.F.R. § 6.51 3
27 C.F.R. § 6.98 3
27 U.S.C. § 205(b) 3
27 U.S.C. § 205(b)(4)...3
3 VAC § 5-30-60..12
4 Del. Admin. Code 2 (III)(B) 4
16 TAC § 45.113..12
16 TAC § 45.117..12
40 Pa. Code §§ 13.51—13.56 12
47 P.S. § 4-493(24)(i) 4, 12
547 U.S. at 65-66 17
804 Ky. Admin. Regs. 11:010 12
905 IAC § 1-5.2 et seq. 4, 12
A.C.A. § 3-3-213(a)(2)(B) 4
A.R.S. § 4-243(A)(4) 4
A.R.S. § 4-243.04(B) 11
A.R.S. § 4-243(D) 11
ALA Code § 28-3A-25(10)...4
AR Admin. Code, Title 2, Subtitle E, § 2.28(4) 4, 11
C.G.S.A. § 30-94...4
Cal. Bus. & Prof. Code § 25503(f) 4
Cal. Bus. & Prof. Code § 25503(f)-(h) 23

Appellate Case: 18-2611 Page: 8 Date Filed: 10/26/2018 Entry ID: 4719586

Cal. Bus. & Prof. Code § 25501 11
Cal. Bus. & Prof. Code § 25503.1 11
Cal. Bus. & Prof. Code § 25503.2 11
CO Code Regs. § 203:2-47-316..11
CO Code Regs. § 203-2:47-322..4, 11
CO Rev. Stat. § 12-47-308...4
CO Rev. Stat. § 12-47-308(3)(a)...11
COMAR § 03.02.05.10 12
COMAR § 03.02.05.11 12
COMAR § 03.02.05.12 12
DC ST § 25-735(a)... 4
DC ST § 25-735(c)...11
DC ST § 25-736(a)...4
DC ST § 25-736(c)...11
Fla. Admin. Code R. §§ 61A-1.010—61A-1.01027.......................................11
FL Stat. § 561.42(1) 4
FL Stat. § 561.42(10), (12), and (14) 11
GA Comp. R. & Regs. § 560-2-2-.13 4
GA Comp. R. & Regs. § 560-2-2-.17 11
GA Comp. R. & Regs. § 560-2-2-.18 11
GA Comp. R. & Regs. § 560-2-2-.19 11
HRS § 281-42(a)(3) 4, 11
Iowa Admin. Code § 185-16...12
IA Code § 123.45(2) 4, 12
ID Code Ann. § 23-1033 (2), (3), (4), (5), and (6) 4, 12
IN Code § 7.1-5-5-10..4, 12
IN Code § 7.1-5-5-11 ....4, 12
KRS § 244.590(1)(c)...4
KRS § 244.590(2)(a) and (b) 12
KSA § 41-702 4
KS Admin. Code § 14-10-11 12
KSA § 41-703 ....4, 12
LA Admin. Code § 55-317(A), (B), and (D) 4
LA Admin. Code § 55-317(C) 12
MCA § 16-3-241 ....4, 12
MCL § 436.1609 ....4, 12
MD Code Art. 2B § 12-102 4
MD Code, Alcohol Beverages, § 2-216(c) 12
MD Code, Alcohol Beverages, § 2-315(c) 12
Minn. Stat. § 340A.308..4

Appellate Case: 18-2611 Page: 9 Date Filed: 10/26/2018 Entry ID: 4719586

Minn. Stat. § 340A.308(a)(1).....12
Mo. Rev. Stat. § 311.070..... 3, 5, 23
Mo. Rev. Stat. § 311.070.1.....10
Mo. Rev. Stat. § 311.070.4 (1) & (2).....11
Mo. Rev. Stat. § 311.180.....7
Mo. Rev. Stat. § 311.200.....7
Mo. Rev. Stat. Chapter 311.....10
MS Code Ann. § 67-3-45.....4
MSRA § 28-A-707(2).....4
ND Cent. Code § 5-01-11.....3, 4
NDAC § 81-12-01-10.....12
N.J.S.A. § 33:1-43.2.....12
N.J.A.C. § 13:2-24.2(a).....4
N.J.A.C. § 13:2-24.2(b).....12
N.R.S. § 369.485.....4
N.Y. Comp. Codes R. & Regs. Tit. 86.1.....4
ND Cent. Code § 5-01-11.....12
NE Rev. Stat. § 53-168(1).....4
Neb. Admin. R. & Regs. Tit. 237, Ch. 6, § 016.....12
New York State Liquor Authority Rules, § 86, et. seq......12
NH Rev. Stat. § 179.11.....4
NM Stat. Ann. § 60-8A-1(B)(3).....4
O.A.R. §§ 845-013-0001—845-013-0110.....12
OH Admin. Code § 4301:1-1-43(H)(2).....4
OR Stat. § 471.398.....4
ORC § 4301.24.....4
ORC § 4301.22(E) and (F).....12
ORC § 4301.242.....12
O.R.S. § 471.400.....12
RCW § 66.28.305.....4
RCW § 66.28.310.....12
Regs. Conn. State Agencies § 30-6-A32a.....11
SC Code Ann. § 61-4-940(B).....4
SC Code Ann. § 61-4-940(C).....12
SD Admin. R. § 64:75:08:02.....12
SD Admin. R. § 64:75:08:03.....12
SD Admin. R. 64:75:08:02.....4
TN Code Ann. § 57-6-110.....4
TN Comp. R. & Regs. § 0100-03.11(1).....4
TN Comp. R. & Regs. § 0100-06-.03.....12

TX Alco. Bev. Code Ann. § 102.07..4
TX Alco. Bev. Code Ann. § 102.07(b)..12
TX Alco. Bev. Code Ann. § 102.15(b)..12
UT Code Ann. § 32B-4-704(3)(a) 4
UT Code Ann. § 32B-4-705...12
VA Code Ann. § 4.1-216(c)...4
VA Code. Ann. § 4.1-216.1 12
VT Admin. Code § 14-1-3(19) 4
VT Admin. Code § 14-1-8(9) and (15)...12
WAC § 314-12-140(3) 12
WI Stat. § 125.33(1)...4
WI Stat. § 125.33(2)...12
W. Va. Code St. R. § 176-1-6.3.c 12
WV Code § 11-16-18(6) 4
WV Code § 11-16-18(6) 12
WY Stat. § 12-5-402 4
WY Stat. § 12-5-403(a)..4
WY Stat. § 12-5-403(b) 12

Federal Rules

U.S. Const. Amend 18 & 21 6

Other Authorities

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Asher, Bernard, *Global Beer: The Road to Monopoly*, the American Antitrust Institute (2012). 12

http://money.cnn.com/2015/10/13/investing/ab-inbev-sabmiller-beer-merger/......13

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https://atc.dps.mo.gov/documents/fy18-revenues-and-licenses.pdf (last visited 10/21/18)...20

https://atc.dps.mo.gov/SuspensionFiles/Aug22Suspensions2018.pdf....................13

https://research.archives.gov/id/299967 9

https://www.ttb.gov/fo/compromise/2018/warsteiner-oic-redacted.pdf.................13

https://www.ttb.gov/press/press-release-fy-17-09-illinois-auth-conduct-joint-tp-invest.shtml...13

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INTERESTS OF *AMICI CURIAE*

Since 1938, the NBWA has served as the national membership organization of the beer distributing industry representing over 3,000 family-owned independent licensed beer distribution entities, including beer distributors in Missouri. Its members reside in all fifty states and employ over 130,000 individuals.

WSWA is a Missouri non-profit corporation and the voice of the wholesale branch of the wine and spirits industry. Founded in 1943, WSWA represents over 350 companies in all 50 States and the District of Columbia that hold state licenses to act as wine and/or spirits wholesalers and/or brokers. WSWA's members distribute more than 80% of all wine and spirits sold at wholesale in the United States.

Founded in 1971, MBWA is a Missouri non-profit corporation that represents the business interests of MBWA and its 32 members. MBWA is committed to promoting the responsible use of its products, fair and effective government regulation, and active participation in legislative affairs affecting the malt beverage industry. The key mission of MBWA is the preservation and protection of the three-tier system. MBWA actively works with suppliers, retailers, and other industry members to ensure the vitality of the three-tier system.

The Guild, founded in 2011, is a non-profit organization representing over 100 independent craft breweries in the state of Missouri. Missouri craft

Appellate Case: 18-2611 Page: 13 Date Filed: 10/26/2018 Entry ID: 4719586

brewers produced over 372,000 barrels of beer at breweries of all sizes across the state in 2017. Many of its members rely on the wholesale distribution network to get part of their product to market in the state.

ABL is an association representing licensed off-premises retailers (such as package liquor stores) and on-premises retailers (such as bars, taverns, restaurants) across the nation, with nearly 15,000 members in 33 states including Missouri.

This case implicates the interests of NBWA, WSWA, MBWA, the Guild, ABL ("Amici"), and their members. This case calls into question long-standing federal and state laws that regulate the alcohol industry. These laws, including specifically "tied-house" laws, regulate economic relations between suppliers, distributors, and retailers and prevent industry members (suppliers and distributors) from unduly influencing or controlling retailers through the direct or indirect payment of cash or other value. These laws promote transparent, accountable, and well-regulated alcohol markets and protect against anticompetitive behavior that would lead to excess retail capacity, vertical integration and monopoly, less consumer choice and variety, and overstimulated sales, which, if allowed, would undermine public health, safety and welfare.

Amici support the position of Appellant and urge the Court to reverse the District Court's Order finding that the challenged statute and regulation violated the First Amendment.

BACKGROUND

This case arises out of a First Amendment challenge by Missouri Broadcasters Association ("Appellee") to certain key provisions of Missouri's liquor regulations, which govern the economic activity between members of the liquor industry. The District Court struck down a Missouri liquor regulation and a liquor statute finding that they violated the First Amendment of the United States Constitution. Furthermore, the Court "permanently enjoined [Defendant-Appellant] from enforcing Mo. Rev. Stat. § 311.070 to the extent it prohibits alcoholic beverage manufacturers and distributors from providing financial or other support for retail advertising of alcoholic beverages . . ." To the extent that it invalidated Mo. Ann. Stat. § 311.070, the District Court decision calls into question the legality of key provisions of the Federal Alcohol Administration Act as well as the tied-house provisions of a majority of state's liquor regulatory laws.[1]

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[1] The challenged Missouri statute is nearly identical to Federal law, which generally prohibits suppliers and distributors from providing, directly or indirectly, "things of value" to retailers for the purpose of inducing the retailer to buy the industry member's products to the exclusion, in whole or in part, of other industry members. 27 U.S.C. § 205(b). More specifically, 27 U.S.C. § 205(b)(4) prohibits directly or indirectly *paying or crediting the retailer for any advertising, display, or distribution service*. *See also* 27 C.F.R. § 6.51. ("The act by an industry member of paying or crediting a retailer for any advertising, display, or distribution service constitutes a means to induce within the meaning of the Act[.] This includes payments or credits to retailers that are merely reimbursements, in full or in part, for such services purchased by a retailer from a third party."); 27 C.F.R. § 6.98.

Forty-six states and the District of Columbia, like Missouri, have laws that contain broad prohibitions on an industry member providing items of value to

Appellate Case: 18-2611 Page: 15 Date Filed: 10/26/2018 Entry ID: 4719586

ARGUMENT

1. Introduction.

Amici submit this *Amici* Brief in support of Defendant-Appellant Taylor's brief, which urges this Court to reverse the District Court. Addressing the District Court's erroneous invalidation of Mo. Ann. Stat. § 311.070 (the "Missouri Tied-House law"), this Brief discusses the following: (1) the national implications of the lower court decision; (2) the strong public policy benefits and critical importance of three-tier and tied-house laws; (3) the historically-rooted and modern rationales for the restrictions on economic activity and non-expressive conduct embodied in Mo.

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retailers. *See* ALA Code § 28-3A-25(10); A.R.S. § 4-243(A)(4); A.C.A. § 3-3-213(a)(2)(B) and AR Admin. Code, Title 2, Subtitle E, § 2.28(4); Cal. Bus. & Prof. Code § 25503(f); CO Rev. Stat. § 12-47-308 and CO Code Regs. § 203-2:47-322; C.G.S.A. § 30-94; DC ST §§ 25-735(a) and 25-736(a); 4 Del. Admin. Code 2 (III)(B); FL Stat. § 561.42(1); GA Comp. R. & Regs. § 560-2-2-.13; HRS § 281-42(a)(3); ID Code Ann. § 23-1033; 235 ILCS 5/6-5 and 5/6-6; IN Code §§ 7.1-5-5-10 and 7.1-5-5-11; IA Code § 123.45; KSA §§ 41-702 and 41-703; KRS § 244.590(1)(c); LA Admin. Code § 55-317(A), (B), and (D); MSRA § 28-A-707(2); MD Code, Alcoholic Beverages, § 2-216(b)(2) and 2-315(b)(3); MCL § 436.1609; Minn. Stat. § 340A.308; MS Code Ann. § 67-3-45; MCA § 16-3-241; NE Rev. Stat. § 53-168(1); N.R.S. § 369.485; NH Rev. Stat. § 179.11; N.J.A.C. § 13:2-24.2(a); NM Stat. Ann. § 60-8A-1(B)(3); N.Y. State Liquor Authority Rules § 86.1; 14B NCAC § 15C.0709; ND Cent. Code § 5-01-11; ORC § 4301.24 and OH Admin. Code § 4301:1-1-43(H)(2); 37A OK Stat. Ann. § 3-119(2); O.R.S. § 471.398; 47 P.S. § 4-493(24)(i); SC Code Ann. § 61-4-940(B); SD Admin. R. § 64:75:08:02; TN Code Ann. § 57-6-110 and TN Comp. R. & Regs. § 0100-03.11(1); TX Alco. Bev. Code Ann. § 102.07; UT Code Ann. § 32B-4-704(3)(a); VT Admin. Code § 14-1-3(19); VA Code Ann. § 4.1-216(c); RCW § 66.28.305; WV Code § 11-16-18(6); WI Stat. § 125.33(1); WY Stat. §§ 12-5-402 and 12-5-403(a).

Appellate Case: 18-2611 Page: 16 Date Filed: 10/26/2018 Entry ID: 4719586

Ann. Stat. § 311.070; (4) the District Court's erroneous reliance on *Retail Digital Networks, LLC v. Applesmith*, 810 F.3d 638 (9th Cir. 2016) which was overruled *en banc* by *Retail Digital Networks, LLC v. Prieto,* 861 F.3d 839 (9th Cir. 2017); (5) the reasons why the Missouri Tied-House law does not implicate First Amendment concerns; and, assuming arguendo that the law does trigger First Amendment analysis, the reasons why the law passes muster under the four-part test established by *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980). If permitted to stand, the District Court decision will have an unintended, detrimental and nationwide impact on federal and state liquor regulatory structures and markets. Although Amici confine their arguments to the Missouri Tied-House law, they support the other bases for reversal asserted in Defendant-Appellant's brief.

2. Policies Underlying Three-Tier and Tied-House Laws.

Alcohol is a unique product in American law. Government agencies have found that the detrimental impacts on individuals, families, and society as a whole that result from excessive or underage consumption of alcohol are dramatically different from those related to the use of other products.[2] Government has attempted

[2] Excessive alcohol consumption remains a very serious health and social problem in the U.S. According to the federal government's Center for Disease Control, alcohol causes or contributes to over 88,000 deaths a year in this country and the estimated economic cost of excessive drinking in the U.S. is over $249 Billion annually. *See* http://www.cdc.gov/alcohol/fact-sheets/prevention.htm (last accessed

Appellate Case: 18-2611 Page: 17 Date Filed: 10/26/2018 Entry ID: 4719586

to mitigate these impacts through regulation. Indeed, alcohol has always been, and remains, one of the most heavily regulated, publicly-available products in the country. No other product has been the subject of one, let alone two, Constitutional Amendments: the Eighteenth Amendment, which established National Prohibition and the Twenty-first Amendment, which returned primary responsibility for alcohol regulation to the states. *See* U.S. Const. Amends. 18 & 21.

The keystones of alcohol regulation in this country are three-tier and tied-house laws. Pursuant to the states' plenary authority to regulate the sale and distribution of alcohol under the Twenty-first Amendment, each state regulates the sale and distribution of alcohol within its borders through some form of a three-tier system of licensed and structurally separate producers, distributors, and retailers. *Granholm v. Heald*, 544 U.S. 460, 466 (2005); *North Dakota v. U.S.*, 495 U.S. 423, 432 (1990). The purpose of the three-tier system is, in part, to avoid the harmful effects of vertical integration in the industry by restricting producers, distributors, and retailers to their respective service functions. The regulatory and commercial benefit has been the creation of a fundamentally transparent, accountable beverage alcohol market that is the best in the world in terms of safety, consumer choice, and innovation.

September 18, 2018); https://addiction.surgeongeneral.gov/executive-summary (last accessed September 18, 2018).

Appellate Case: 18-2611 Page: 18 Date Filed: 10/26/2018 Entry ID: 4719586

The underlying purpose and policy of Missouri's alcohol laws is set forth in Mo. Ann. Stat. § 311.015 which states as follows:

> Alcohol is, by law, an age-restricted product that is regulated differently than other products. The provisions of this chapter establish vital state regulation of the sale and distribution of alcohol beverages in order 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.

Significantly, this section specifically references the overarching importance of an orderly marketplace and the three-tier system. As detailed below, the Missouri Tied-House law is a key component of that regulatory system.

Missouri has adopted its version of the three-tier system:

> Missouri funnels liquor sales through a tier system, separating the distribution market into discrete levels: the first tier consists of producers such as brewers, distillers, and winemakers; the second tier is comprised of solicitors who acquire alcohol from producers and sell it "to, by or through" wholesalers, who purchase alcohol from producers and sell it to retailers; the third tier is made up of wholesalers, who purchase alcohol from producers or solicitors and sell it to retailers; and the fourth tier consists of retailers, who sell alcohol to consumers.

Southern Wine & Spirits of America, Inc. v. Division of Alcohol and Tobacco Control, 731 F.3d 799, 802 (8th Cir. 2013) (citing Mo. Rev. Stat. §§ 311.180 (1) & 311.200).[3]

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[3] Although the *Southern Wine* court characterized the Missouri distribution system as a "four tier" system, the second tier of "solicitors" are really just agents of suppliers rather than a separate tier.

Appellate Case: 18-2611 Page: 19 Date Filed: 10/26/2018 Entry ID: 4719586

The United States Supreme Court has expressly recognized that the three-tier system is "unquestionably legitimate." *North Dakota*, 495 U.S. at 432; *Granholm*, 544 U.S. at 466. Similarly, the Missouri Supreme Court has recognized the importance of effectively regulating alcohol, in particular, the middle tier of the three-tier system:

> [T]he control of liquor distribution is an important state interest in Missouri. *See Vaughan v. EMS*, 744 S.W.2d 542, 547 (Mo.App.1988), and *May Department Stores v. Supervisor of Liquor Control,* 530 S.W.2d 460, 468 (Mo.App.1975). Liquor distribution is an area that has always been heavily regulated by state government; moreover, the methods of distribution and extent of regulation vary enormously from state to state. It is evident that in this area what one state may approve, and even encourage, another state may prohibit and declare illegal. This principle even has constitutional endorsement by reason of the Twenty-first Amendment to the United States Constitution repealing Prohibition. Thus, the interest that a particular state has in construing and applying liquor control legislation in its own state is apparent.

High Life Sales Co. v. Brown-Forman Corp., 823 S.W.2d 493, 497-98 (Mo. 1992); *see Auen v. Alcoholic Beverages Div., Iowa Dept. of Commerce,* 679 N.W.2d 586, 591 (Iowa 2004).

In furtherance of these interests, tied-house laws are economic regulations which serve to enforce separation between the tiers and, in particular, to insulate retailers from undue influence and control by producers and distributors. The nation's experience prior to Prohibition has proved that vertical integration and tied-houses lead to excessive retail capacity and overstimulated sales, and, ultimately,

intemperate consumption and alcohol abuse.[4] Prior to Prohibition, tied-houses were identified as a root cause of alcohol abuse and related problems because retailers were pressured to sell product by any means, including selling to minors, selling after hours, and overselling to intoxicated customers. Raymond B. Fosdick and Albert Scott, Toward Liquor Control, (Center for Alcohol Policy, 2011), Harper & Brothers, at 29 (1933).

President Franklin D. Roosevelt recognized this governmental interest in preventing a return to the tied-house saloon days and noted in his official Proclamation on the Repeal of Prohibition on December 5, 1933, "*I ask especially that no State shall by law or otherwise authorize the return of the saloon in its old form or in some modern guise*."[5] Following Repeal, as states and Congress debated

[4] These conditions of unregulated distribution and over-stimulated sale arose:

> in part [owing] to the failure to recognize the effects of industrial organization on the manufacture and sale of intoxicating liquor. With the rise of the large distilling and brewing corporations seeking new markets through high-pressure sales organizations, the independent tavernkeep, theretofore subject to the restraints imposed by local legislation and local public opinion, ceased to exist.

Joe de Ganahl, "Trade Practice and Price Control in the Alcoholic Beverage Industry," 12 Law and Contemporary Problems 665 (1940), *citing* the Federal authoritative National Commission on Law Observance and Enforcement, (The Wickersham Commission), Report on the Enforcement of the Prohibition Laws of the United States, H.R. Doc. No. 722, 71st Cong., (3rd Sess. 1931) at 6-7.

[5] https://research.archives.gov/id/299967 (last accessed September 18, 2018).

Appellate Case: 18-2611 Page: 21 Date Filed: 10/26/2018 Entry ID: 4719586

how the nascent alcohol industry should be regulated, they all agreed that restrictions on payments between tiers was necessary and created regulation in this space to prevent the return of the tied-house saloon. *See* fn. 1 *supra*; *National Distributing, Co., Inc. v. U.S. Treasury Dept*., 626 F. 2d 997, 1008 (D.C. Cir. 1980)("The Members of Congress debating the [FAAA] bill repeatedly stated that the tied house provision was designed to prevent control by alcoholic beverage producers and wholesalers over retail outlets, especially saloons.").

The federal government, forty-six states, and the District of Columbia have enacted tied-house provisions nearly identical to the Missouri Tied-House law. *See* fn. 1 *supra*. Missouri's comprehensive statutory scheme restricts tied-house arrangements in the distribution of alcoholic beverages and generally prohibits "pay-to-play" arrangements between the tiers. *See* Mo. Rev. Stat. Chapter 311; *Southern Wine,* 731 F.3d 799.

To safeguard the independence of each tier, suppliers and distributors may not "have any financial interest in the retail business for sale of intoxicating liquors, and shall not, except as provided in the section, directly or indirectly, loan give away or furnish equipment, money, credit or property of any kind, except ordinary commercial credit for liquors sold to such retail dealers." Mo. Rev. Stat. § 311.070.1. The statute's reference to "indirectly" would obviously preclude channeling "value" to a retailer through a third-party conduit (like a media outlet) or

Appellate Case: 18-2611 Page: 22 Date Filed: 10/26/2018 Entry ID: 4719586

by merely characterizing it as reimbursement for or payment of a retailer's advertising. *Id*. This would constitute a "pay to play" arrangement prohibited by both federal and state law. The tied-house prohibition does not prevent an industry member from providing goods and services to retailers that are incident to the function of their tier, however. *See e.g.,* Mo. Rev. Stat. § 311.070.4 (1) & (2) (permitting limited supplier point-of-sale materials); *Id.* (5) (permitting dispensing equipment); *Id.* (6) (permitting tap line cleaning); *Id.* (7) (permitting limited product sampling); *Id.* (12) (setting forth specific, limited exemptions such as permitting delivery, shelf placement, rotation of product, and otherwise servicing the products); and *Id*. (14) (permitting participation in retail trade shows, advertising in a retail trade association publication, none of which inure to the benefit of any individual retailers).[6]

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[6] Most states, like Missouri, embody limited exceptions to their tied-house laws which permit industry members to provide specific, limited "items of value" that are incident to the respective function of a supplier or distributor. For instance, notwithstanding the fact that it is providing a service to retailers, distributors are generally permitted to deliver product to retailers and place it on their shelves, monitor the code date of their products, rotate older products to the front of retail shelves and replace outdated product with fresh product. Similarly, suppliers and retailers can provide limited point-of-sales materials in connection with the placement of product in retail accounts. *See e.g.*, A.R.S §§ 4-243.04(B), 4-243(D); AR Admin. Code Title 2, Subtitle E, § 2.28(4); Cal. Bus. & Prof. Code §§ 25501, 25503.1, and 25503.2; CO Rev. Stat. § 12-47-308(3)(a) and Co. Code Regs. §§ 203:2-47-316 and 203:2-47-322; Regs. Conn. State Agencies § 30-6-A32a; DC ST §§ 25-735(c) and 25-736(c); FL Stat. § 561.42(10), (12), and (14) and Fla. Admin. Code R. §§ 61A-1.010—61A-1.01027; Ga. Comp. R. & Regs. §§ 560-2-2-.17, 560-2-2-.18, and 560-2-2-.19; HRS § 281-42(a)(3); ID Code Ann. § 23-1033 (2), (3),

Appellate Case: 18-2611 Page: 23 Date Filed: 10/26/2018 Entry ID: 4719586

The concern over vertical integration and the need for three-tier and tied-house laws is as great or greater today as it was in the past. For instance, two companies, Anheuser-Busch InBev ("ABI") and SABMiller ("SAB") now control approximately 72% of the U.S. beer market.[7] In November 2015, ABI, the largest brewer in the world, announced that it had entered into an agreement to purchase

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(4), (5), and (6); 235 ILCS 5/6-5 and 5/6-6; IN Code §§ 7.1-5-5-10 and 7.1-5-5-11 and 905 IAC § 1-5.2 et seq.; IA Code § 123.45(2) and Iowa Admin. Code § 185-16; KSA § 41-703 and KS Admin. Code § 14-10-11; KRS § 244.590(2)(a) and (b) and 804 Ky. Admin. Regs. 11:010; LA Admin. Code § 55-317(C); 18-553 CMR Ch. 104, §2; MD Code, Alcohol Beverages, §§ 2-216(c) and 2-315(c) and COMAR §§ 03.02.05.10, 03.02.05.11, and 03.02.05.12; MCL § 436.1609; Minn. Stat. § 340A.308(a)(1); MCA § 16-3-241; Neb. Admin. R. & Regs. Tit. 237, Ch. 6, § 016; N.J.S.A. § 33:1-43.2 and N.J.A.C. § 13:2-24.2(b); New York State Liquor Authority Rules, § 86, et. seq.; 14B NCAC § 15C.0710 and 14B NCAC § 15C.0711; ND Cent. Code § 5-01-11 and NDAC § 81-12-01-10; ORC §§ 4301.22(E) and (F) and 4301.242; O.R.S. § 471.400 and O.A.R. §§ 845-013-0001—845-013-0110; 47 P.S. § 4-493(24)(i) and 40 Pa. Code §§ 13.51—13.56; SC Code Ann. § 61-4-940(C); SD Admin. R. §§ 64:75:08:02 and 64:75:08:03; TN Comp. R. & Regs. § 0100-06-.03; TX Alco. Bev. Code Ann. §§ 102.07(b) and 102.15(b) and 16 TAC § 45.113 and 16 TAC § 45.117; UT Code Ann. § 32B-4-705; VT Admin. Code § 14-1-8(9) and (15); VA Code. Ann. § 4.1-216.1 and 3 VAC § 5-30-60; RCW § 66.28.310 and WAC § 314-12-140(3); WV Code § 11-16-18(6) and W. Va. Code St. R. § 176-1-6.3.c; WI Stat. § 125.33(2); WY Stat. § 12-5-403(b).These limited exceptions are deemed to be incident to the function of the supplier and distributor tier and are generally of nominal value. Adopting the district court's position would dramatically expand these limited exceptions, permit slotting fees and "pay to play" arrangements in this socially sensitive industry and nullify state and federal statutes that prohibit industry members from providing anything of value to a retailer.

[7] Asher, Bernard, *Global Beer: The Road to Monopoly*, the American Antitrust Institute (2012), at 3.
Accessed at https://www.antitrustinstitute.org/content/global-beer-road-monopoly-0 (last accessed September 18, 2018).

Appellate Case: 18-2611 Page: 24 Date Filed: 10/26/2018 Entry ID: 4719586

SAB, the second largest brewer in the world for $106 Billion.[8] That merger has been reviewed by the Department of Justice ("DOJ") and a Modified Final Judgment embodying conditions designed to constrain ABI's ability to integrate the industry was recently signed by the United States District Court in the District of Columbia.[9] If tied-house prohibitions on pay to play arrangements are invalidated, craft suppliers will lack the resources to compete with global behemoths, consumer choice and variety will be reduced, and retailer independence to resist pressure to overmarket and promote will be eroded.

As supplier consolidation and vertical integration have progressed, efforts to unduly influence or control retailers by impermissible financial arrangements have increased in violation of tied-house laws. Accordingly, Federal and state enforcement of tied-house laws has also increased to insulate retailers from undue pressure. This is evidenced by continuing federal and state tied house enforcement actions in California, Illinois, Massachusetts and Missouri.[10]

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[8] http://money.cnn.com/2015/10/13/investing/ab-inbev-sabmiller-beer-merger/

[9] *See* https://www.justice.gov/atr/case/us-v-anheuser-busch-inbev-sanv-and-sabmiller-plc (last accessed September 18, 2018).

[10] *See,e.g.*, https://atc.dps.mo.gov/SuspensionFiles/Aug22Suspensions2018.pdf; https://www.ttb.gov/press/press-release-fy-17-09-illinois-auth-conduct-joint-tp-invest.shtml; https://atc.dps.mo.gov/SuspensionFiles/Aug22Suspensions2018.pdf; https://www.ttb.gov/press/press-release-fy-18-07-ttb-trade-practice-investigation-results-permit-suspension.shtml; https://www.ttb.gov/fo/compromise/2018/warsteiner-oic-redacted.pdf

3. The District Court Erred in Invalidating the Missouri Tied-House Law.

The Missouri Tied-House law provides in relevant part as follows:

> Distillers, wholesalers, winemakers, brewers or their employees, officers or agents shall not, except as provided in this section, directly or indirectly, have any financial interest in the retail business for sale of intoxicating liquors, and shall not, except as provided in this section, directly or indirectly, loan, give away or furnish equipment, money, credit or property of any kind, except ordinary commercial credit for liquors sold to such retail dealers.

Mo. Rev. Stat. § 311.070.1.

With little or no discussion or analysis, the District Court concluded that the Missouri Tied-House law constituted a restriction on protected expression rather than a restriction on economic activity. Furthermore, the District Court impermissibly imposed upon the State, rather than the Plaintiff, the burden of proving the constitutional validity of the law. Amici respectfully submits that the District Court erred with respect to this holding.

a. The Burden of Proof

In *United States v. North Dakota,* 495 U.S. 423, 433 (1990), the Supreme Court noted that challenged state liquor control policies promulgated pursuant to the Twenty-first Amendment must be accorded a strong presumption of validity. [11]

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[11] *Id.* at 433 (citing *Capital Cities Cable, Inc. v. Crisp,* 467 U.S. 691, 714 (1984). In *Capital Cities*, however, the Court concluded that "the application of Oklahoma's advertising ban to the importation of distant signals by cable television operators engages only *indirectly* the central power reserved by § 2 of the Twenty-first

Appellate Case: 18-2611 Page: 26 Date Filed: 10/26/2018 Entry ID: 4719586

Accordingly, a person challenging its validity necessarily bears the burden of proof.[12] Without allocating the burden of proof in this fashion, the "strong presumption" would have no meaning.[13] This conclusion flows from the *North Dakota* holding and from the unique history, context, and structure of regulatory authority under the Twenty-first Amendment.[14]

While it is true that laws that discriminate against speech based on its content "are presumptively invalid"[15] and therefore may shift the burden of proof to the governmental authority that enacted them, the Missouri Tied-House law clearly does not fall into that category. As discussed below, it is a restriction on economic activity, not a restriction on protected expression.

Amendment – that of exercising 'control over whether to permit importation or sale of liquor and how to structure the liquor distribution system.'" *Capital Cities*, 467 U.S. at 715 (emphasis added)(citations omitted). Unlike the Oklahoma regulation which banned advertising specifically, the Missouri Tied-House law constitutes an economic regulation which regulates inter-tier financial interests generally.

[12] *North Dakota*, 495 U.S. at 433.

[13] *Id.*

[14] *See generally* Michael D. Madigan, *Control Versus Competition: The Courts' Enigmatic Journey in the Obscure Borderland Between the Twenty-First Amendment and Commerce Clause*, Mitchell Hamline L. Rev, Vol. 44-5 (April 6, 2018), https://mitchellhamline.edu/law-review/2018/04/06/michael-d-madigan-control-versus-competition-the-courts-enigmatic-journey-in-the-obscure-borderland-between-the-twenty-first-amendment-and-commerce-clause/.

[15] *R.A.V. vs. St. Paul*, 505 U.S. 377, 382 (1992).

Appellate Case: 18-2611 Page: 27 Date Filed: 10/26/2018 Entry ID: 4719586

b. The Missouri Tied-House Law Does Not Implicate First Amendment Interests.

In *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 567 (2011), the United States Supreme Court acknowledged a distinction between "restrictions on protected expression" and "restrictions on economic activity, or, more generally, on nonexpressive conduct." The former trigger scrutiny under the First Amendment. The latter do not.

Restrictions on economic activity may nonetheless implicate First Amendment concerns in the following three circumstances: (1) where the activity itself communicates a message;[16] (2) where the activity has an "expressive element";[17] or (3) the activity bears a tight nexus to a protected First Amendment activity. [18] None of those circumstances exist here. The general prohibition on a supplier or distributor providing "a thing of value" to a retailer does not, in itself, prohibit the communication of a message, does not prohibit any "expressive element," and does not implicate "a tight nexus to a protected First Amendment activity." As such, the Missouri Tied-House law does not trigger First Amendment concerns.

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[16] *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010); *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 65-66 (2006).
[17] *See Clark v. Cmty for Creative Non-Violence*, 468 U.S. 288, 293 (1984).
[18] *See Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 585 (1983).

Appellate Case: 18-2611 Page: 28 Date Filed: 10/26/2018 Entry ID: 4719586

Several cases are instructive in this regard. In *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.,* the Court upheld a federal law that tied school funding to the education institution's willingness to allow military recruiters on campus. 547 U.S. at 65-66. Rejecting the First Amendment challenge to the law, the Court concluded that the law targeted conduct that was not "inherently expressive." Rather than restricting protected expression, it was designed to encourage educational institutions to treat all recruiters the same. *Id.* at 66.; *see Interpipe Contracting, Inc. v. Becerra*, 898 F.3d 879, 895 (9th Cir. 2018) (upholding a California law that permitted wage-credits for employer payments to an industry advancement fund only if the payments were made pursuant to a collective bargaining agreement).

Here, the Missouri Tied-House law broadly prohibits an industry member from providing *any* value to a retailer that is not incident to its function as either a supplier or distributor, regardless of whether that value takes the form of providing cash, free services, free goods, or paying for the obligations of retailers. The purpose of the prohibition is to regulate the economic relationships of industry members. The purpose is *not* to regulate the content or means of advertising. *See Minority Television Project, Inc. v. FCC*, 763 F.3d 1192 (9th Cir. 2013) (*en banc*).[19]

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[19] The *Sorrell* Court indicated that the challenged Vermont statute might have likely survived First Amendment scrutiny if the State had demonstrated that the law had a neutral justification rather than a motivation to regulate content.

Appellate Case: 18-2611 Page: 29 Date Filed: 10/26/2018 Entry ID: 4719586

Appellee mischaracterizes the Missouri Tied-House law as a restriction on protected expression, rather than a regulation of economic activity. However, the law merely prohibits a supplier or distributor from engaging in "pay-to-play" or "commercial bribery" arrangements in the socially sensitive and highly regulated liquor industry. It is designed to inhibit vertical integration in the industry. In this regard, it is no more an infringement on First Amendment interests than the Sherman Act. *Giboney v. Empire Storage & Ice Co*., 336 U.S. 490, 504 (1949) (validating a prohibition on agreements in restraint of trade). The Tied-House law does not relate in any way to political contributions. *See McCutcheon v. FEC*, 572 U.S. 185 (2014). It does not single out "the press for special treatment." *Minneapolis Star & Tribune Co.*, 460 U.S. at 582-85. As such, the First Amendment is not implicated or, if it is, Missouri's economic regulation imposes a mere incidental burden on that interest that does not abrogate its substantial interests in the effective regulation of alcohol.

> Here, however, Vermont has not shown that its law has a neutral justification . . . [or that] the provision challenged here will prevent false or misleading speech . . . [citation omitted] The State's interest in burdening speech of retailers instead turns on nothing more than a difference of opinion.

Sorrell, 564 U.S. at 579. That is clearly not the case here where the Missouri Tied-House law broadly prohibits an industry member from providing *any* value that is not incident to its function.

Appellate Case: 18-2611 Page: 30 Date Filed: 10/26/2018 Entry ID: 4719586

The First Amendment "does not establish a free-floating right to receive the funds necessary to broadcast one's speech." *See Interpipe Contracting,* 898 F.3d at 894. As expressed by the Supreme Court, "although government may not place obstacles in the path of a [person's] exercise of ... freedom of [speech], it need not remove those not of its own creation." *Harris v. McRae,* 448 U.S. 297, 316 (1980); *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 549-50 (1983).

The case at bar is analogous to the *Rumsfeld*, *Regan* and *Interpipe* cases. In essence, Appellees assert that advertisements should be exempt from the general Tied-House economic prohibitions. However, neither the Appellee nor any Missouri retailer has a constitutional entitlement to have alcohol advertisements paid for by suppliers or distributors. An exemption from a general prohibition is indistinguishable, for constitutional purposes, from a subsidy. *Id.* The mere fact that the Legislature has created exceptions to the tied-house prohibition which permit an industry member to provide goods and services to retailers that are incident to the function of their tier does not alter the applicable constitutional analysis. *See* note 6 *supra* and accompanying text.

In essence, the District Court concluded that the exceptions to the Tied-House law swallowed the general rule and held that the State thereby failed to meet its burden of proof that the law advances a "legitimate governmental purpose." Appellants' Addendum at 15-16. However, the majority of those exceptions relate

to functions incident to the respective tiers. *See* note 6 *supra* and accompany text. Furthermore, to the extent that the exceptions were afforded to small craft suppliers, presumably in an effort to nurture new business, create jobs, and expand consumer choice, the alcohol flowing through those craft suppliers represents less than 1% of the alcohol sold in Missouri.[20] Under these circumstances, it can hardly be said that the exceptions have swallowed the rule.[21]

c. Assuming arguendo that First Amendment interests are implicated, the Missouri Tied-House law meets the four requirements established by *Central Hudson*.

Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980) established a four-part test for evaluating restrictions on commercial speech:

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First

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[20] https://atc.dps.mo.gov/documents/fy18-revenues-and-licenses.pdf (last visited 10/21/18); *See also* similar federal data https://www.ttb.gov/statistics/2017/201712beer.pdf.

[21] The Eighth Circuit has acknowledged the authority of the state to promulgate alcohol regulations and to create exceptions to those regulations consistent with local norms and standards:

> There is no archetypal three-tier system from which the "integral" or "inherent" elements of that system may be gleaned. States have discretion to establish their own versions of the three-tier system, and *Granholm* itself announced the unquestionable legitimacy of the three-tier system in a case involving two different versions of that system from New York and Michigan.

Southern Wine & Spirits, 731 F.3d at 810. In this regard, three-tier laws and exceptions are no different that tied-house laws and exceptions.

Appellate Case: 18-2611 Page: 32 Date Filed: 10/26/2018 Entry ID: 4719586

> Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id. at 566.

As set forth above, Amici assert that the economic restriction embodied in the Missouri Tied-House law, at best, imposes an incidental burden on speech and, accordingly, does not implicate First Amendment concerns. However, assuming arguendo that it does, the law passes muster under the *Central Hudson* standard.

A recent *en banc* decision of the Ninth Circuit is indistinguishable from the case at bar and is instructive here. In *Retail Digital Network, LLC v. Prieto*,[22] the Ninth Circuit assessed the constitutionality of a California tied-house law that prohibited an industry member from directly or indirectly providing anything of value to a retailer, including without limitation, paying for a retailer's advertising. Based in part on a prior Ninth Circuit decision[23], the *en banc* court concluded that the challenged law satisfied the four-part *Central Hudson* test and upheld the constitutionality of the law.

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[22] 861 F.3d 839 (9th Cir. 2017). The District Court erroneously relied on *Retail Digital Networks, LLC v. Applesmith*, 810 F.3d 638 (9th Cir. 2016) which was overruled *en banc* by *Retail Digital Networks, LLC v. Prieto,* 861 F.3d 839 (9th Cir. 2017).

[23] *Actmedia, Inc. v. Stroh*, 830 F.2d 957 (9th Cir. 1986)

Appellate Case: 18-2611 Page: 33 Date Filed: 10/26/2018 Entry ID: 4719586

The majority of the court's analysis was focused on the fourth factor, observing that the fourth factor "does not require satisfaction of a 'least- -restrictive-means standard', but rather requires a 'fit between the legislature's ends and the means chosen to accomplish those ends, . . . a fit that is not necessarily perfect, but reasonable[.]'" *Retail Digital,* 861 F.3d at 846 (*quoting Bd. of Trs. Of State Univ. of N.Y. v. Fox,* 492 U.S. 469, 477, 480 (1989)). This has been referred to as intermediate scrutiny as opposed to strict scrutiny.

Applying that standard to the challenged law, the *en banc* court found that the challenged California tied-house law directly and materially advanced the state's three-tier regulatory structure and upheld the law on that basis. In pertinent part, the Ninth Circuit stated:

> [W]e concur that Section 25503(h) is sufficiently tailored to advance [the state's interest in the three-tier system]. Section 25503(h) serves the important and narrowly tailored function of preventing manufacturers and wholesalers from exerting undue and undetectable influence over retailers. Without such a provision, retailers and wholesalers could side-step the triple-tiered distribution scheme by concealing illicit payments under the guise of "advertising" payments. Although RDN argues that the numerous exceptions to Section 25503(f)–(h) undermine its purpose,[13] RDN fails to recognize that the exceptions do not apply to the vast majority of retailers, and they therefore have a minimal effect on the overall scheme.

Retail Digital, 861 F.3d at 850. On that basis, the *en banc* court reversed the panel decision (on which the lower court here relied). The law challenged here is indistinguishable from the law upheld in *Retail Digital,* prohibiting suppliers and distributors from providing items of value to a retailer outside of those services

Appellate Case: 18-2611 Page: 34 Date Filed: 10/26/2018 Entry ID: 4719586

incidental to their respective tiers. *Compare* Cal. Bus. & Prof. Code § 25503(f)-(h) *with* Mo. Rev. Stat. § 311.070. Furthermore, like the statutory provision upheld in *Retail Digital,* the Missouri Tied-House law "serves the important and narrowly tailored function of preventing manufacturers and wholesalers from exerting undue and undetectable influence over retailers." *Retail Digital*, 861 F.3d at 850. As a result, pursuant to the applicable *Central Hudson* analysis, the Missouri Tied-House law is valid and enforceable.

4. Impact and Scope of Affirmance.

Affirming the decision of the District Court invalidating the Missouri Tied-House law would substantially undermine the legitimacy and effectiveness of all federal and state tied-house laws that prohibit "pay to play" practices in the industry.[24] By channeling payment through an intermediary or characterizing the payment to a retailer as an allowable "advertising" or "marketing" expense, an industry member could circumvent these laws. Industry members would then be permitted to purchase expensive full-page newspaper ads, radio ads, or television ads featuring a retailer or retail chain; pay a retailer "slotting fees" to place point-of-sale advertising materials along eye-level shelf space or end caps in store accounts; or pay cash to a bar to install a brand-identified tap handle. All of these practices are

[24] *See* fn. 1 *supra*.

Appellate Case: 18-2611 Page: 35 Date Filed: 10/26/2018 Entry ID: 4719586

the equivalent of "pay-to-play" arrangements or slotting fees, which have always been prohibited in this heavily regulated, socially sensitive industry.

Such a large, unmanageable loophole in tied-house laws would lead to a damaging imbalance in the alcohol market, retailer outlets becoming "tied" to one supplier,[25] an erosion of accountability and responsibility in distribution channels, and a lack of consumer choice and variety. The creative minds and nearly unlimited resources of powerful industry members would exploit this loophole to those undesirable effects.

CONCLUSION

In his concurring opinion in *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 197 (2d Cir. 2009), Judge Calabresi warned against the dangers of judicial interpretation

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[25] The leading treatise that created much of the rationale for American alcohol policy noted the correlation between tied-houses, the number of retail outlets, consumption, and abuse:

> The 'tied house' system also involved a multiplicity of interests, because each manufacturer had to have a sales agency in a given location. In this respect, the system was not unlike that now used in the sale of gasoline, and with the same result: a large excess of sales outlets. Whether or not this is of concern to the public in the case of gasoline, in relation to the liquor problems it is a matter of crucial importance because of its effect in stimulating competition in the retail sale of alcoholic beverages. "Tied houses" should, therefore, be prohibited, and every opportunity for the evasion of this system should, if possible, be foreseen and blocked.

Raymond B. Fosdick and Albert Scott, Toward Liquor Control, (Center for Alcohol Policy, 2011), Harper & Brothers, at 29 (1933).

Appellate Case: 18-2611 Page: 36 Date Filed: 10/26/2018 Entry ID: 4719586

designed to "update" what some view as anachronistic state laws, particularly when those laws are promulgated pursuant to the Twenty-first Amendment:

> It may permit courts, especially well-meaning ones, to substitute their own notions of modern needs for those of the majority. Moreover, when a rereading results in the erection of a constitutional barrier, it may remove serious issues from the democratic process and from legislative deliberation. . . . Additionally, this sort of updating presents another problem, and one that is especially apparent in the context of the Twenty-First Amendment: It can leave state legislatures and lower federal courts with no firm understanding of what the law actually is.

Id. at 200 (citations omitted).

When faced with a constitutional challenge to state liquor laws, courts should begin with the premise that the law is valid unless proven otherwise. A presumption of validity and the imposition of the burden of persuasion and proof on the party challenging the law provides the proper deference to the state's constitutional authority under the Twenty-first Amendment and to the policymaking function of state legislatures. It also preserves the Court's ultimate role as the adjudicator of constitutional issues.

The tumultuous history of liquor regulation should serve as a warning to courts against traveling too far down the road of policymaking under the guise of judicial review. Incrementally invalidating key provisions of a state's liquor regulatory scheme can lead to unintended consequences by pulling a thread that threatens to unravel the entire regulatory fabric. It can also undermine or perhaps even cripple the ability of the state to effectively regulate the industry. It would likely

Appellate Case: 18-2611 Page: 37 Date Filed: 10/26/2018 Entry ID: 4719586

result in excessive retail capacity, overstimulated sales, and ultimately to an increase in intemperate consumption and alcohol abuse. A vertically integrated enterprise, with combined manufacturing, distribution, and retailing, would be less responsive to community norms and standards and less susceptible to effective enforcement by state and local regulators. Amici respectfully requests the Court to reverse the District Court's invalidation of the Missouri Tied-House law.

Respectfully submitted,

Dated: October 25, 2018

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Appellate Case: 18-2611 Page: 38 Date Filed: 10/26/2018 Entry ID: 4719586

STATEMENT OF RELATED CASES

So far as is known to *Amici Curiae* National Beer Wholesalers Association, Wine & Spirits Wholesalers of America, Inc., Missouri Beer Wholesalers Association, the Missouri Craft Brewers Guild, and the American Beverage Licensees, there are no related cases pending in the Eighth Circuit Court of Appeals.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Pursuant to Fed. R. App. P. 32(a)(7)(B), this brief contains 6,489 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Office Word 2013, in 14 points, Times New Roman, including footnotes.

Date: October 25, 2018

/s/Michael D. Madigan
Michael D. Madigan

Appellate Case: 18-2611 Page: 39 Date Filed: 10/26/2018 Entry ID: 4719586

CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2018, I electronically filed the foregoing *Amici Curiae* brief with the Clerk of the Court for the U.S. Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/Michael D. Madigan
Michael D. Madigan

Appellate Case: 18-2611 Page: 40 Date Filed: 10/26/2018 Entry ID: 4719586