Nos. 19-1075 & 19-1292

In the United States Court of Appeals for the Seventh Circuit

E.F. TRANSIT, INC., APPELLANT

v.

INDIANA ALCOHOL AND TOBACCO COMMISSION; DAVID COOK, CHAIRMAN OF THE INDIANA ALCOHOL AND TOBACCO COMMISSION; JOHN KRAUSS, VICE CHAIRMAN OF THE INDIANA ALCOHOL AND TOBACCO COMMISSION; DALE GRUBB, COMMISSIONER OF THE INDIANA ALCOHOL AND TOBACCO COMMISSION; AND MARJORIE MAGINN, COMMISSIONER OF THE INDIANA ALCOHOL AND TOBACCO COMMISSION, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA (CIV. NOS. 13-1927 & 15-940) (THE HONORABLE RICHARD L. YOUNG, C.J.)

BRIEF OF APPELLANT AND SHORT APPENDIX

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-1075, 19-1292

Short Caption: E.F. Transit, Inc. v. Indiana Alcohol and Tobacco Commission, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

E.F. Transit, Inc.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Williams & Connolly LLP

Faegre Baker Daniels LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ Amy Mason Saharia Date: 3/19/2019

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Attorney's Printed Name: A. Scott Chinn

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331, because appellant E.F. Transit, Inc. seeks injunctive and declaratory relief against defendants-appellees in their official capacities on the ground that Indiana law, as interpreted and enforced by defendants, is preempted by the Federal Aviation Administration Authorization Act of 1994, 49 U.S.C. §§ 14501-14505.[1]

The district court entered final judgment on December 12, 2018. App. 13. E.F. Transit filed a motion on December 20, 2018, to alter or amend the judgment under Federal Rule of Civil Procedure 59(e). App. 14. While that motion remained pending, E.F. Transit filed a notice of appeal on January 11, 2019, Dist. Ct. Dkt. No. 228, to become effective at such time as the district court disposed of the motion. Fed. R. App. P. 4(a)(4)(B)(i). The district court denied the Rule 59(e) motion on February 7, 2019, App. 14, and E.F. Transit filed an amended notice of appeal on February 15, 2018, Dist. Ct. Dkt. No. 235.

The jurisdiction of this Court rests on 28 U.S.C. § 1291.

[1] Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, E.F. Transit has revised the caption to reflect the current composition of the Indiana Alcohol and Tobacco Commission.

STATEMENT OF THE ISSUE

Whether the district court erred in holding that the Twenty-first Amendment to the U.S. Constitution permits enforcement, against a federally licensed motor carrier, of an Indiana alcoholic beverage law that would otherwise be preempted by the Federal Aviation Administration Authorization Act of 1994 when the State failed to show that its enforcement of that law advances an interest protected by the Twenty-first Amendment.

STATEMENT OF THE CASE

The Federal Aviation Administration Authorization Act of 1994 ("FAAAA") expressly forbids States from enforcing regulations that affect the services that motor carriers offer to their customers. *See* 49 U.S.C. § 14501(c)(1). The FAAAA advances the significant federal interest in deregulating our Nation's transportation industries and promotes competition, efficiency, and innovation in this critical sector of the economy. Plaintiff-appellant E.F. Transit, Inc. is a federally licensed motor carrier based in Indianapolis. E.F. Transit desires to provide arm's-length transportation services to Indiana liquor wholesalers. The Indiana Alcohol and Tobacco Commission, however, refuses to allow E.F. Transit to provide those services, on the purported ground that E.F. Transit's common

ownership with a beer wholesaler would render its proposed transportation services unlawful under Indiana's alcohol laws.

Defendants-appellees, the Commission's members, did not dispute below that the FAAAA's preemption provision covers the transportation services that E.F. Transit wishes to provide. Defendants instead argued that the powers reserved to Indiana by the Twenty-first Amendment save the otherwise-preempted law. Defendants produced no evidence to show that enforcing Indiana law to bar E.F. Transit from providing these transportation services furthers a legitimate interest protected by the Twenty-first Amendment. To the contrary, the Commission's own witnesses conceded that it does not. The district court, however, swept the evidence to the side, holding that defendants did not need to substantiate their asserted interests with evidence. That holding contravenes decades of case law from the Supreme Court, this Court, and other courts of appeals. When invoking the Twenty-first Amendment to override federal law, a State must prove that the challenged state law actually advances a state interest protected by that Amendment, and that the state interest outweighs the conflicting federal interest. Defendants' failure to make that showing here requires reversal.

This is the second appeal in this case. The district court initially declined to reach the merits of E.F. Transit's preemption claim by holding it unripe. This Court reversed. The district court's ruling on the merits on remand, which ignored all of the critical facts in the record, is just as flawed. This Court should again reverse the district court's judgment, and summary judgment should accordingly be entered in favor of E.F. Transit.

A. Statutory Background

1. Federal Aviation Administration Authorization Act

The FAAAA is one in a series of statutes enacted between 1978 and 1994 that brought sweeping changes to government regulation of the airline and trucking industries. During the Great Depression, when the nascent trucking industry was thought to need protection from "the deleterious effects of excessive competition," Congress placed motor carriers under the jurisdiction of the Interstate Commerce Commission ("ICC"), which exerted heavy-handed control over all aspects of their operations. Paul S. Dempsey, *Congressional Intent and Agency Discretion—Never the Twain Shall Meet: The Motor Carrier Act of 1980*, 58 Chi. Kent L. Rev. 1, 4-6 & n.8 (1981); Edward H. Rastatter, *Trucking Deregulation*, 315 TR News 33-34, 37 (May-

June 2018).[2] By the late 1970s, federal lawmakers had come to believe that this archaic regime stifled competition and innovation and that "deregulation would bring with it a healthy competitive process that would better advance consumer welfare." *S.C. Johnson & Son v. Transp. Corp. of Am.*, 697 F.3d 544, 548 (7th Cir. 2012); *see also* Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793, §§ 2-3. With passage of the Motor Carrier Act of 1980, Congress brought an end to four decades of "extreme micromanagement" by the ICC, *see* Rastatter, *supra*, at 34, and embraced a new federal policy of "maximum reliance on competitive market forces," *Costello v. BeavEx, Inc.*, 810 F.3d 1045, 1050 (7th Cir. 2016).

The Motor Carrier Act eliminated federal restrictions on the routes motor carriers could follow and the types of products they were allowed to carry on a single truck. *See S.C. Johnson*, 697 F.3d at 548. The certificates, or licenses, issued by the ICC had often granted motor carriers authority to haul products in only a single direction, resulting in wasteful "empty backhauls" (that is, return trips). *See* Message from the President, Trucking

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[2] This joint publication of the National Academies of Sciences, Engineering, and Medicine and the Transportation Research Board is available at http://onlinepubs.trb.org/onlinepubs/trnews/trnews315.pdf.

Competition and Safety Act, House Doc. No. 96-155, at IV-V (1979). The ICC would also "specify in detail the commodities a carrier [was] authorized to haul," and the restrictions would often "follow no logical pattern and serve no apparent purpose." *Id.* at VI-VII. Congress found these "excessively narrow limitations on the types of commodities" truckers could carry to be "fuel wasteful, inefficient, [and] contrary to the public interest," and, with passage of the Motor Carrier Act, ordered that they be lifted. H.R. Rep. No. 96-1069, at 17 (1980).

As relevant here, the history of the Motor Carrier Act demonstrates that the statute was specifically intended to deregulate the transportation of alcoholic beverages. When President Carter transmitted a draft of the legislation to Congress in 1979, he singled out a particular commodity restriction as especially illogical: trucking companies authorized to carry "foodstuffs" were permitted to carry wine but not beer. House Doc. No. 96-155, at VII. In President Carter's view, this restriction typified the type of irrational government interference that "needlessly raises prices and significantly aggravates the energy shortage," *id.*, and could no longer be "tolerated," *id.* at IV.

Fourteen years after relieving the trucking industry of burdensome federal oversight, Congress "decided to finish the job," *S.C. Johnson & Son*, 697 F.3d at 548, and set out to ensure that "the States would not undo federal deregulation with regulation of their own." *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 256 (2013). It thus enacted the FAAAA's express-preemption provision, which provides that "a State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C. § 14501(c). "Congress did so upon finding that state governance of interstate transportation of property had become unreasonably burdensome to free trade, interstate commerce, and American consumers." *Dan's City Used Cars*, 569 U.S. at 256 (brackets omitted). Indeed, the statute's conference report included a legislative finding that the "sheer diversity" of state regulatory schemes "is a huge problem for national and regional carriers attempting to conduct a standard way of doing business." H.R. Rep. No. 103-677, at 87 (1994). The conference report concluded: "State economic regulation of motor carrier operations causes significant inefficiencies, increased costs, reduction of competition . . . and curtails the expansion of markets." *Id.* Congress estimated that the savings

from preemption of the "patchwork" of state regulations would amount to $3 billion to $8 billion per year. *Id.* Estimates from private-sector researchers placed that figure far higher. *See* Rastatter, *supra*, at 38.

As the Motor Carrier Act had done with federal regulation, the FAAAA was intended to foreclose state regulation of the "types of commodities carried" by trucking companies. H.R. Rep. No. 103-677, at 86 (1994). The law thus prohibited "a State's direct substitution of its own governmental commands for competitive market forces in determining . . . the services that motor carriers will provide." *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 372 (2008); *see also* H.R. Rep. No. 103-677, at 88 ("Service options will be dictated by the marketplace; and not by an artificial regulatory structure.").

2. Indiana's Prohibited-Interest Statutes

Like virtually every other State, Indiana regulates the sale and distribution of alcoholic beverages through a "three-tier system" that separates the functions of manufacturers, wholesalers, and retailers. *See Granholm v. Heald*, 544 U.S. 460, 466 (2005). Manufacturers, such as breweries, wineries, and distilleries, sell their products to licensed, in-state wholesalers. *See* Ind. Code §§ 7.1-3-2-7, 7.1-3-7-7, 7.1-3-12-2. Wholesalers in turn sell those products to licensed retailers and dealers, such as liquor stores

and restaurants. *See id.* §§ 7.1-3-3-5, 7.1-3-8-3, 7.1-3-13-3. Finally, retailers and dealers sell the products to consumers. *See, e.g.*, *id.* §§ 7.1-3-4-6, 7.1-3-15-3. Except as provided in a host of legislatively approved exceptions, no entity may operate in more than one tier. *See id.* §§ 7.1-5-9-9, 7.1-5-9-10(a). This vertical separation of interests is a post-Prohibition innovation designed to insulate retailers and dealers from the overbearing influence of manufacturers. In pre-Prohibition America, manufacturers' influence over and even ownership of saloons—an arrangement known as a "tied house"—was widely blamed for contributing to intemperance. *See, e.g.*, *Lebamoff Enters., Inc. v. Rauner*, 909 F.3d 847, 850 (7th Cir. 2018); *Nat'l Distrib. Co. v. U.S. Treasury Dep't*, 626 F.2d 997, 1008-10 (D.C. Cir. 1980); Raymond B. Fosdick & Albert L. Scott, *Toward Liquor Control* 29 (Center for Alcohol Policy 2011).

In addition to mandating this vertical separation of interests—which is not at issue in this case—Indiana alone among the States requires horizontal separation among private wholesalers within the wholesaler tier. *See E.F. Transit, Inc. v. Cook*, 878 F.3d 606, 608 (7th Cir. 2018). Specifically, Indiana generally forbids any entity from wholesaling both beer and liquor. *See* Ind. Code §§ 7.1-3-3-1, 7.1-3-13-1, 7.1-3-8-1. This unique prohibition was originally

enacted in 1935, *see* H. 399, 79th Reg. Sess., 1935 Ind. Acts 1056, 1191 § 41(o), (p), to promote a patronage system in which state lawmakers controlled the issuance of liquor licenses and county lawmakers controlled beer licenses. *See* D. Ct. Dkt. 163-12, at 41. Separating the two businesses allowed politicians at different levels of state government to cultivate distinct bases of financial support. *See id.*

Collectively, the laws prohibiting vertical and horizontal integration in Indiana's alcohol industry are known as the prohibited-interest statutes.

3. Indiana's Regulation of Motor Carriers

Separately from its regulation of wholesalers, Indiana regulates motor carriers engaged in the transportation and delivery of alcoholic beverages. Any motor carrier that wishes to "haul, convey, transport, or import alcoholic beverages" on state highways must obtain a carrier's permit from the Commission. Ind. Code § 7.1-3-18-3. Unlike wholesaler's permits, carrier's permits are not restricted to certain types of alcoholic beverages. To the contrary, a carrier's permit enables a motor carrier to transport all three types of alcoholic beverages. *See* Ind. Code § 7.1-3-18-2; App. 37-38, 126-127, 211. Licensed carriers may transport products for multiple manufacturers or wholesalers and, except as detailed below, are permitted to carry beer, wine,

and liquor in the same truck. App. 37-38, 126-127, 211; D. Ct. Dkt. 163-3, at 23, 25-26.

B. Factual Background

As established by the record at summary judgment, the undisputed facts are as follows:

1. E.F. Transit is an Indiana trucking company that has been in business since 1996. D. Ct. Dkt. 163-10, at 11-12. E.F. Transit holds a motor carrier's license issued by the U.S. Department of Transportation and a motor carrier's certificate issued by the State of Indiana. *Id.* at 27; D. Ct. Dkt. 163-13, 163-14. It is licensed by the Indiana Alcohol and Tobacco Commission to transport beer, wine, and liquor. *See* D. Ct. Dkt. 163-10, at 25; D. Ct. Dkt. 163-15. In addition to serving customers in Indiana, E.F. Transit operates in Illinois, Michigan, Kentucky, Ohio, and West Virginia. D. Ct. Dkt. 163-10, at 27.

E.F. Transit employs 380 people and provides transportation services to companies both inside and outside the alcoholic beverage industry. *See* D. Ct. Dkt. 163-10, at 24; App. 242-243, ¶ 5, ¶ 3; *see also Ind. Alcohol and Tobacco Comm'n v. Spirited Sales*, 79 N.E.3d 371, 379 (Ind. 2017) (describing E.F. Transit as "a public for-hire fleet"). Within the industry, it provides services

to companies in both the manufacturer and wholesaler tiers, including to MillerCoors, a major brewer. *See* D. Ct. Dkt. 163-10, at 12, 14-15. E.F. Transit's largest customer is Monarch Beverage Company, an Indiana beer and wine wholesaler. *See* App. 242-243, ¶ 5. In addition to providing transportation services to Monarch, E.F. Transit subleases space to Monarch in a warehouse it leases and operates in Indianapolis. D. Ct. Dkt. 163-10, at 23; App. 242-243.

E.F. Transit and Monarch are closely held by the same shareholders. *See* D. Ct. Dkt. 163-10, at 35. Despite their common ownership, E.F. Transit and Monarch are separate companies; they maintain separate bank accounts, payrolls, and records, and they file separate tax returns. *See id.* at 77-78. Monarch compensates E.F. Transit for its transportation services at market rates. *See* D. Ct. Dkt. 163-20, at 6-7. The Indiana Department of Revenue provides an exemption from sales tax to motor carriers on the condition that they demonstrate their independence from related companies for which they provide delivery services. *See* D. Ct. Dkt. 163-17. E.F. Transit and Monarch fully comply with the department's criteria for corporate separateness, and have done so every year since E.F. Transit has been in business. *See* App. 64-65.

2. In 2009, E.F. Transit entered an agreement to sublease space in its warehouse to Indiana Wholesale Wine & Liquor, an Indiana liquor and wine wholesaler. *See* D. Ct. Dkt. 163-18.[3] E.F. Transit also agreed to provide transportation services to Indiana Wholesale. D. Ct. Dkt. 163-19; D. Ct. Dkt. 163-10, at 55-56. Indiana Wholesale shares no common ownership with E.F. Transit or Monarch. App. 146.

Indiana Wholesale and E.F. Transit asked the Commission in May 2009 to review the proposed agreement and let them know whether the Commission would grant the required permit. *See* D. Ct. Dkt. 163-23, 163-25. The Commission's staff attorney, Melissa Coxey, evaluated the agreement and concluded that permitting E.F. Transit to sublease warehouse space and provide transportation services to Indiana Wholesale would not give Monarch a prohibited interest in Indiana Wholesale's liquor permit. *See* App. 233. In an e-mail to the Commission chairman and staff, she explained that Indiana Wholesale and Monarch "are operated independently and [would] merely utilize the same transportation company." *Id.* She added: "Since the

[3] Indiana law permits beer and liquor wholesalers to use space in the same warehouse as other wholesalers, as long as they have different addresses (even in the same building) and maintain physical separation of their products. *See* App. 32-33, 123-124, 213.

Commission allows the use of common carriers by multiple wholesalers, in this limited circumstance, I do not believe it rises to the level of a prohibited interest." *Id.*

The Commission determined that there was "no legal impediment" to the arrangement and notified E.F. Transit and Indiana Wholesale of that conclusion. *See* App. 235; D. Ct. Dkt. 163-10, at 41-43. The Commission gave Indiana Wholesale the "go ahead" to file its formal application to transfer its warehouse location. *See* App. 237; D. Ct. Dkt. 163-3, at 31-32; D. Ct. Dkt. 163-10, at 43.

Everything was going smoothly until July 2009, when Jim Purucker, the executive director of Wine & Spirits Distributors of Indiana ("Wine & Spirits"), approached the Commission's chairman, Thomas Snow, and expressed opposition to the arrangement. *See* App. 235. Wine & Spirits is an interest group that represents competitors of Monarch and Indiana Wholesale. *See* App. 156-157; D. Ct. Dkt. 163-7, at 22.[4] Wine & Spirits was

[4] Wine & Spirits unsuccessfully attempted to intervene in the proceedings below. *See* D. Ct. Dkt. 45. Together with another trade association representing competitors of Monarch, the Indiana Beverage Alliance, it also sought, and was granted, leave to file an amicus brief in support of defendants at the summary-judgment stage. *See* D. Ct. Dkt. 207.

well connected. Wine & Spirits' lawyer was the brother of then-Governor Daniels' deputy chief of staff, Betsy Burdick, and had represented Wine & Spirits in a previous Commission proceeding related to Monarch and E.F. Transit. *See* D. Ct. Dkt. 163-5, at 41-42; D. Ct. Dkt. 163-12, at 25. And Burdick was then in a relationship with, and later married, Joe Bill Wiley, who had lobbied the governor's office on matters of interest to Wine & Spirits. *See* D. Ct. Dkt. 163-5, at 41-42; D. Ct. Dkt. 163-30.

Following the meeting between Purucker and Chairman Snow, the Commission requested that Purucker prepare a memo setting out his arguments, which he did. *See* D. Ct. Dkt. 163-28. Upon receiving the memo, Snow forwarded it to Jessica Norris, a policy director in the governor's office. *See* App. 175; D. Ct. Dkt. 163-29. Norris's supervisor was Betsy Burdick. Norris was new to her position, and she testified that she had only limited knowledge of Indiana's alcoholic beverage laws. *See* D. Ct. Dkt. 163-5, at 30-32. For instance, she did not know about the prohibited-interest statutes and did not understand the difference between E.F. Transit (a motor carrier) and Monarch (a beer wholesaler). *See id.* at 31-32. Nevertheless, in a report circulated by Burdick two weeks later, Norris wrote:

> If Indiana Wholesale is allowed to benefit from using Monarch Beverage, the losers will be Olinger Distributing, National Wine

> and Spirits [*i.e.*, Wine & Spirits's members] and the rest of the liquor wholesalers in Indiana. . . . I've told Snow this is not something we want to allow, so he will be denying the request unless you have additional concerns.

App. 249; *see also* App. 100-103 (testimony of Commission's Rule 30(b)(6) witness that the governor's office opposed the agreement); D. Ct. Dkt. 163-4, at 53-54 (testimony of Commissioner Coxey that Norris and the governor's office opposed the agreement).

A few weeks later, Snow wrote to Norris, "we know with certainty where you folks stand and will honor your position." App. 237. In a contemporaneous e-mail to the other commissioners, Snow reported that the Commission had previously given "a green light" to the agreement on a preliminary basis, but "then the gov[']s office got involved after receiving a legal memo authored by Purucker[']s legal counsel" and the "gov[']s office is flat out against this happening." App. 240.

In September 2009, Indiana Wholesale filed a formal application to transfer its warehouse to the E.F. Transit facility. *See* D. Ct. Dkt. 163-33. In October 2009, an excise officer inspected the area that Indiana Wholesale would occupy in E.F. Transit's warehouse and found no problems. D. Ct. Dkt. 163-34. Then, after inexplicably sitting on the application for nearly six

months, the Commission ordered a new excise investigation in March 2010. *See* D. Ct. Dkt. 163-37, at 1; D. Ct. Dkt. 163-9, at 52-53.

The Commission released the report from the second investigation in April 2010. *See* D. Ct. Dkt. 163-40. The report was written by Richard Swallow, a state excise officer who had no experience investigating potential violations of the prohibited-interest statutes. D. Ct. Dkt. 163-9, at 38. Before Officer Swallow conducted his investigation, he did not seek any guidance regarding the scope of those statutes from the Commission's staff attorney, Melissa Coxey. *Id.* at 29. In fact, the only guidance he received was the legal memo written by Indiana Wholesale's and Monarch's competitors at Wine & Spirits. *Id.* at 38-41. Although Officer Swallow's supervisor, Major Robin Poindexter, had instructed him not to include legal conclusions in his report, *see* D. Ct. Dkt. 163-3, at 47-48, Officer Swallow nonetheless concluded that the arrangement would give Monarch a prohibited interest in Indiana Wholesale's liquor wholesaler permit, *see* D. Ct. Dkt. 163-37, at 4-8. According to testimony from Major Poindexter, who had assigned Swallow to the investigation, nothing would have persuaded the Commission to approve the application, because the governor's office opposed the proposed arrangement. *See* D. Ct.

Dkt. 163-3, at 76-77. Major Poindexter was the second highest-ranking member of the Excise Police at the time.

In September 2010, Indiana Wholesale withdrew its application. D. Ct. Dkt. 163-43. When the Commission chairman received Indiana Wholesale's withdrawal, he wrote to the governor's office to express his satisfaction at this "good news." D. Ct. Dkt. 163-44.

3. In 2012, E.F. Transit and Indiana Wholesale proposed a narrower agreement under which E.F. Transit would transport products for Indiana Wholesale in exchange for a flat, per-case fee, but would not lease warehouse space to Indiana Wholesale. D. Ct. Dkt. 163-46. Because the Commission does not ordinarily regulate transportation agreements between wholesalers and motor carriers, Indiana Wholesale and E.F. Transit did not need to file a formal application to proceed with that arrangement. Given the severe penalties for violating the prohibited-interest statutes, however, Indiana Wholesale and E.F. Transit sent a letter to the Commission requesting its guidance. *Id.*

Following an investigation, *see* D. Ct. Dkt. 163-20, the Commission's staff attorney advised the Commission that the transaction should be approved, *see* App. 150-152. Once again, however, the governor's office

opposed the proposed agreement. *See* App. 21; D. Ct. Dkt. 163-3, at 33-34. The Commission chairman forwarded E.F. Transit's letter to Jessica Norris in the governor's office immediately upon receipt. *See* D. Ct. Dkt. 173-7. When Norris forwarded the letter to her supervisor, Betsy Burdick, Burdick responded, "Better draft an objection." *Id.* The new Commission chairman, Alex Huskey, again told the governor's office that the Commission would honor its objections. *See* App. 21-22.

The Commission refused to approve the new arrangement, D. Ct. Dkt. 163-47, and has since repeatedly confirmed its view that the prohibited-interest statutes prohibit E.F. Transit from providing logistics services to liquor wholesalers, *see, e.g.*, D. Ct. Dkt. 212, at 8-9.

4. In discovery, the Commission's current chairman, defendant-appellee David Cook, testified that a mere contractual relationship between a carrier and a wholesaler does not give the carrier an interest in the wholesaler's permit. App. 212. Thus, if Indiana Wholesale had entered into a similar agreement with some other carrier—say FedEx or UPS—the agreement would have been perfectly consistent with Indiana law. App. 31-33, 95-96, 109, 154-155, 163-164, 216-217.

Chairman Cook and the Commission's two Rule 30(b)(6) witnesses nevertheless testified that the Commission's position is that the proposed arrangements between E.F. Transit and Indiana Wholesale would give Monarch an interest in Indiana Wholesale's liquor wholesaler permit, which would be prohibited under Indiana law. App. 60-61, 84-85, 166-167, 228; *see also E.F. Transit*, 878 F.3d at 610. According to the Commission's Rule 30(b)(6) witnesses, the Commission views Monarch and E.F. Transit as a single entity for purposes of alcohol regulation, even though they are separate and distinct entities as a matter of corporate law. App. 86-88, 148-149.

Although the Commission's Rule 30(b)(6) witnesses testified that the proposed arrangements between E.F. Transit and Indiana Wholesale would violate the prohibited-interest statutes, they were unable to identify any state interest that would be served by prohibiting those arrangements. App. 58-60, 160-161, 174. They conceded that it would not serve the State's interests in promoting temperance, bolstering the morals of its citizens, preventing underage drinking, improving public safety, and maintaining records of alcohol sales and transportation. *See* App. 58-60, 162-165. Similarly, the Commission's former staff attorney, Melissa Coxey—herself a commissioner at the time of her deposition—testified that, to the best of her knowledge,

barring the transportation services at issue in this case did not serve any purpose with respect to the regulation or distribution of alcohol in Indiana. D. Ct. Dkt. 163-4, at 62, 105.

Chairman Cook, whom the Commission belatedly offered as a deponent in an attempt to walk back the devastating concessions of its Rule 30(b)(6) and other witnesses, testified that the prohibition was necessary to prevent Monarch from engaging in "possible abuses." App. 219-220, 225. He conceded, however, that the abusive scenarios he hypothesized were "all speculative" and are prohibited by other provisions of Indiana's alcoholic beverages law. *See* App. 209, 228. He also conceded that applying Indiana law to bar E.F. Transit from providing transportation services to Indiana Wholesale would have no effect on the consumption of alcohol or the price at which alcohol is sold. App. 226, 228-229. And Chairman Cook—who had joined the Commission a mere eight months before his deposition and had no prior professional experience with alcohol regulation—characterized his own testimony as "uneducated to a certain degree." App. 201; *see also* App. 196, 197-198.

C. Procedural History

1. In 2013, E.F. Transit brought suit in the Southern District of Indiana seeking injunctive and declaratory relief against the Alcohol and

Tobacco Commission. *See* D. Ct. Dkt. 1. E.F. Transit alleged that, by applying Indiana law to bar it from providing transportation or warehouse services to Indiana Wholesale, the Commission had violated both the FAAAA and the Supremacy Clause of the U.S. Constitution. E.F. Transit did not contest the validity of either Indiana's three-tier system or the prohibited-interest statutes generally. It brought only an as-applied challenge to the Commission's enforcement of the statutes to bar E.F. Transit from providing arm's-length transportation services to unaffiliated liquor wholesalers.

While the parties' cross-motions for summary judgment were pending, E.F. Transit filed a second suit asserting the same claims against the commissioners in their official capacities in order to moot the Commission's Eleventh Amendment defense. The district court consolidated the cases and, after a brief additional discovery period during which defendants offered the deposition of Chairman Cook, the parties renewed their cross-motions for summary judgment. *See* D. Ct. Dkt. 147.

The district court granted summary judgment to defendants on the ground that E.F. Transit's preemption claim was unripe. This Court

reversed.[5] *See E.F. Transit*, 878 F.3d at 610. This Court held that "the regulatory red flags raised by the Commission" and the "threat" of prosecution for violation of the prohibit-interest statutes had deterred E.F. Transit from providing desired services to Indiana Wholesale, which was "easily enough for a ripe claim." *Id.* In reaching that conclusion, the Court highlighted the Indiana Supreme Court's then-recent decision in *Indiana Alcohol & Tobacco Commission v. Spirited Sales, LLC*, 79 N.E.3d 371 (Ind. 2017), where it upheld the Commission's decision to deny a liquor wholesaler's permit to Spirited Sales, LLC, a wholly owned subsidiary of E.F. Transit, because the "ties between EFT and Monarch were so extensive that EFT could reasonably be deemed to hold an interest in a beer wholesaler's permit," *id.* at 379. This Court concluded that *Spirited Sales* resolved any ambiguity about "how state regulators and the state courts will interpret and apply the prohibited-interest laws to the facts of E.F. Transit's shared ownership and management with Monarch Beverage." 878 F.3d at 609.

[5] The district court also granted summary judgment to the Commission, holding that the agency, but not its individual commissioners, was immune from suit under the Eleventh Amendment. App. 1. E.F. Transit did not appeal that ruling. App. 2. As a result, the commissioners are the only remaining defendants in this case.

2. On remand, the district court again denied E.F. Transit's motion for summary judgment and granted defendants' cross-motion for summary judgment. App. 1-12. The court observed, first, that the "parties agree" that the prohibited-interest statutes, as interpreted and enforced by defendants, conflict with the FAAAA. App. 7. The district court then noted that, while federal law would ordinarily override an incompatible state law, the Twenty-first Amendment reserves power to the States to regulate "the times, places, and manner under which liquor may be imported and sold." App. 7.

To determine whether the Twenty-first Amendment saved the Indiana statutes from preemption, the district court held that a balancing of interests was required. App. 8. Because it found that the prohibited-interest statutes implicate Indiana's "core power" under the Twenty-first Amendment, the court applied "a thumb on the scale in favor of the state." App. 8 (internal quotation marks omitted). The court then rejected E.F. Transit's argument that defendants were required to come forward with evidence that applying the prohibited-interest statutes to a federally licensed motor carrier actually advanced Indiana's purported interests. "Instead," it said, "the Seventh Circuit looks to whether the challenged statute is a reasonable effort to meet

the stated interests." App. 9 (citing *Lebamoff Enters. Inc. v. Huskey*, 666 F.3d 455, 459 (7th Cir. 2012)).

The district court held that the Twenty-first Amendment saved the prohibited-interest statutes from preemption because these laws, as generally applied to wholesalers, are a "central" component of Indiana's three-tier system of alcoholic beverage regulation. App. 10. The court credited the deposition testimony of Chairman Cook that "a wholesaler could circumvent [that] three-tier system by using a commonly owned motor carrier." App. 10. "And if one wholesaler held a monopoly," the court said, "the Commission's ability to regulate that wholesaler would be impeded." App. 10-11 (footnote omitted). It thus declined to "str[ike] down" the prohibited interest statutes. App. 11.

3. Shortly before the district court entered judgment, this Court decided *Lebamoff Enterprises, Inc. v. Rauner*, 909 F.3d 847 (7th Cir. 2018). In that case, this Court held that the Twenty-first Amendment can save an otherwise unconstitutional state law "only if" that law "is *demonstrably* justified by a valid factor unrelated to economic protectionism." *Id.* at 853 (emphasis added). The Court concluded that such an inquiry was "ill-suited

for the motion to dismiss stage" because "*evidence is crucial* to evaluate the constitutionality of the statute." *Id.* at 856 (emphasis added).

Relying on *Rauner*, E.F. Transit moved to alter or amend the judgment under Federal Rule of Civil Procedure 59(e). D. Ct. Dkt. 222. The district court denied the motion. App. 14-18. It distinguished *Rauner* as involving a dormant Commerce Clause challenge to a state alcoholic beverage regulation, rather than a preemption challenge. In preemption cases, the district court held, "the state regulation is entitled to a strong presumption of validity." App. 16. "Consequently, specific evidence of stated goals is not required." App. 16.

The district court further concluded that, even if specific evidence were required, Chairman Cook's deposition testimony addressing the general purposes of the three-tier system and the horizontal restriction on beer and liquor wholesalers satisfied that burden. App. 16-17 & n.1. The court did not address the unrebutted testimony of multiple Commission witnesses that application of the prohibited-interest statutes to E.F. Transit, a federally licensed motor carrier, did not further any state interest protected by the Twenty-first Amendment.

The district court also rejected E.F. Transit's argument that the judgment should be vacated because *Rauner* had made clear that state laws

receive no deference under the Twenty-first Amendment if they "constitute mere economic protectionism." 909 F.3d at 853. In the district court's view, *Rauner* withheld deference only from state "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors" in violation of the dormant Commerce Clause. App. 17 n.2 (citation omitted). It thus declined to address, as it has throughout this case, the undisputed evidence that the Commission rejected the transportation agreements at issue only after competitors of Monarch pressured the governor's office to block the transactions.

This appeal followed.[6]

SUMMARY OF ARGUMENT

I. There is no question that the FAAAA on its face preempts the application of the prohibited-interest statutes to a federally licensed motor carrier such as E.F. Transit. Defendants' efforts to prevent E.F. Transit from offering logistics services to liquor wholesalers is a regulation "related to a price, route, or service of any motor carrier . . . with respect to the

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[6] Because the Commission was dismissed from this case below and neither party appeals that dismissal, *see* App. 2, the caption should be updated to omit the Commission.

transportation of property." *See* 49 U.S.C. § 14501(c)(1). The point is so obvious that defendants declined to contest it in the district court. App. 7.

II. A. The only remaining question for this Court is whether section 2 of the Twenty-first Amendment saves the regulation from federal preemption. To answer that question, this Court must weigh defendants' Twenty-first Amendment interest in enforcing the regulation and determine whether it outweighs the federal interest in preemption.

The Supreme Court, this Court, and at least five other federal courts of appeals have held that a State must substantiate its Twenty-first Amendment interest in a regulation, including by showing evidence of a regulation's effectiveness. Evidence of the regulation's effectiveness "is essential to weigh the competing interests because the state's interests are weighed in the balance only insofar as they are actually advanced by the regulatory scheme." *TFWS, Inc. v. Franchot*, 572 F.3d 186, 194 (4th Cir. 2009).

B. The district court erred in holding that the State's asserted interest in enforcing the prohibited-interest statutes in the circumstances of this case trumps the federal interest in preemption. Defendants' attempt to cloak the prohibited-interest statutes, as applied in the narrow circumstances of this case, in the broader purposes of the three-tier system cannot save them.

Courts have repeatedly rejected attempts to justify a specific preempted regulation by reference to the regulatory scheme "as a whole," and have instead required States to show how a specific regulation, in particular, serves the State's interests.

The record is bereft of any evidence that the prohibited-interest statutes, as applied to E.F. Transit, serve any relevant purpose. On the contrary, the Commission's Rule 30(b)(6) witnesses conceded that the regulation serves no Twenty-first Amendment interest and that there is no evidence of the regulations' effectiveness in serving such an interest. The only evidence in the record that the district court considered helpful to defendants was the concededly "uneducated," "speculative," and conclusory testimony of Chairman Cook, who conceded that his blanket assertions were not based on any evidence. The actual evidence discloses why defendants object to E.F. Transit's proposals: Monarch's well-connected competitors convinced the governor's office to torpedo the proposals, causing the Commission's political appointees to overrule the conclusions of their career legal staff. That is not a permissible justification under the Twenty-first Amendment.

C. The district court declined to engage with the evidence, holding that the State need only explain that "the challenged law is a reasonable effort

to meet the stated interests" to override federal law. App. 9. That standard contradicts settled law, which require a State to proffer evidence of a challenged regulation's effectiveness to save the regulation under the Twenty-first Amendment. The district court ignored many of these cases and offered only flawed distinctions of others.

D. Without any substantiated state interest, there is nothing to balance against the substantial and unquestionable federal interest in preemption. But if this Court concludes that it must balance the interests, the federal interest in deregulating and promoting an efficient, competitive transportation industry clearly outweighs the unsubstantiated state interest.

STANDARD OF REVIEW

The district court's holding that the Twenty-first Amendment can save a state alcoholic beverage regulation from preemption even in the absence of a factual record substantiating the State's interest is a question of law that is reviewed *de novo*. *See Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980).

ARGUMENT

I. THE FAAAA PREEMPTS ENFORCEMENT OF THE PROHIBITED-INTEREST LAWS TO BAR E.F. TRANSIT FROM PROVIDING TRANSPORTATION SERVICES TO LIQUOR WHOLESALERS

Defendants did not dispute in the district court that the prohibited-interest statutes, as applied to E.F. Transit, fall squarely within the FAAAA's express preemption provision. The district court concluded that it did not need to analyze whether federal and state law conflict because the "parties agree" that they do. App. 7. Defendants thus have waived this point.

Any such argument would be meritless in any event. The FAAAA's express preemption clause provides that "a State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). That statutory language has "an expansive sweep," *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383-84 (1992),[7] superseding any state law that has "a significant impact related to Congress' deregulatory and pre-emption-related objectives," *Rowe*

[7] *Morales* interpreted the Airline Deregulation Act of 1978, but that statute's preemption provision "is in pertinent part identical" to the FAAAA's, and the two are "generally construed in pari materia." *Tobin v. Federal Express Corp.*, 775 F.3d 448, 454 n.4 (1st Cir. 2014).

v. N.H. Motor Transp. Ass'n, 552 U.S. 364, 371 (2008). Although laws having "only a tenuous, remote, or peripheral" effect on the trucking industry may escape preemption, the FAAAA overrides any state law or regulation implicating "essential details of a motor carrier's system for picking up, sorting, and carrying goods." *Id.* at 373.

The statute broadly defines a motor carrier's services to include "receipt, delivery, elevation, transfer in transit, . . . storage, handling, packing, unpacking, and interchange of . . . property." 49 U.S.C. § 13102(23)(B). It further specifies that protected modes of "transportation" include any "warehouse" or "yard" operated by a motor carrier and "equipment of any kind related to the movement of . . . property." 49 U.S.C. § 13102(23)(A). The FAAAA thus protects not only trucking itself, but the host of services that a motor carrier might provide to lower costs for shippers or improve the efficiency of its operations.

The statute squarely covers each of the activities that E.F. Transit seeks to provide to liquor wholesalers. Under the agreements it proposed with Indiana Wholesale, E.F. Transit would have received, stored, or picked up liquor products, sorted them at its warehouse, and delivered them to retailers and dealers. The proposed agreements would have achieved operating

efficiencies for both parties. Indiana Wholesale could have taken advantage of "the state-of-the-art conveyor system for sorting and loading pallets of alcoholic beverages onto trucks" that E.F. Transit installed at its Indianapolis warehouse, at a cost of millions of dollars. App. 242, ¶ 4. And E.F. Transit could have consolidated on the same truck beer, wine, and liquor products destined for the same retailers and dealers. App. 243 ¶ 7. These agreements would have saved fuel and lowered costs; they were, in other words, precisely the type of market-driven solutions that the FAAAA was designed to promote. *See* pp. 4-8, *supra*.

II. THE TWENTY-FIRST AMENDMENT DOES NOT ALTER THE OUTCOME OF THE PREEMPTION ANALYSIS

In the ordinary course, the preemption analysis would end there: Congress expressly exempted from state regulation the services that E.F. Transit wishes to provide to liquor wholesalers, and the Supremacy Clause requires that federal law prevail. *See, e.g.*, *Arizona v. United States*, 567 U.S. 387, 399 (2012). But the district court held that, because the prohibited-interest statutes constitute an exercise of the State's Twenty-first Amendment power to regulate traffic in alcoholic beverages, the FAAAA does not preempt those laws as applied to E.F. Transit. That holding was error. The Twenty-first Amendment does not alter the ordinary preemption analysis here,

because there is no evidence that enforcing the prohibited-interest statutes against E.F. Transit advances any legitimate state interest in regulating alcoholic beverages.

A. Defendants Must Prove That Their Twenty-first Amendment Interest Outweighs the Federal Interest

1. Where a state alcoholic beverage regulation is found to violate federal law, the Twenty-first Amendment may nonetheless "save" the regulation from preemption. *See Lebamoff Enters., Inc. v. Huskey*, 666 F.3d 455, 458 (7th Cir. 2012) ("*Huskey*"). But the Twenty-first Amendment's protection for state law is not absolute. To the contrary, the Supreme Court has repeatedly recognized that Congress "retains authority under the Commerce Clause to regulate even interstate commerce in liquor." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 713 (1984); *see also Granholm v. Heald*, 544 U.S. 460, 486 (2005). For the Twenty-first Amendment to salvage an "otherwise impermissible law," the State must show that its interest in enforcing the regulation outweighs the relevant federal interest. *Lebamoff Enters., Inc. v. Rauner*, 909 F.3d 847, 852 (7th Cir. 2018) ("*Rauner*").

Consistent with a long line of federal authority, this Court has instructed that a State cannot prevail in this balancing inquiry unless it presents evidence that its purported Twenty-first Amendment interest is actually served by the

regulation at issue. In a recent opinion, this Court held that a State "must *show* why its restrictions are necessary to further" an interest that "touches the core of the Twenty-first Amendment." *Rauner*, 909 F.3d at 856 (emphasis added). The Court emphasized that "*evidence is crucial* to evaluate the constitutionality of a statute." *Id.* (emphasis added). That conclusion only makes sense: "Any balancing approach . . . requires evidence," because it is "impossible" to balance two sets of interests "without understanding the magnitude of" those interests. *Baude v. Heath*, 538 F.3d 608, 612 (7th Cir. 2008). Thus, unlike in the equal-protection context, a hypothetical state interest will not suffice; the state's interest must be real and be supported by actual evidence. *See, e.g.*, *Dickerson v. Bailey*, 336 F.3d 388, 404-05 (5th Cir. 2003).

2. Not only this Court, but the U.S. Supreme Court and at least five other federal courts of appeals have uniformly recognized that "a determination of [the] effectiveness [of the regulation] is essential to weigh the competing interests because the state's interests are weighed in the balance only insofar as they are actually advanced by the regulatory scheme." *TFWS, Inc. v. Franchot*, 572 F.3d 186, 194 (4th Cir. 2009). Indeed, the Supreme Court has repeatedly declined to save state regulations where there is no record

evidence that the regulations actually advance the State's purported interest.

For example, in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), the Supreme Court considered whether the Sherman Act preempted California's wine price maintenance system. *See id.* at 113-14. The Court reaffirmed that state alcohol regulations are "subject to the federal commerce power in appropriate situations," and that "competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a 'concrete case.'" *Id.* at 110. California's attorney general, among others, argued that the price maintenance system promoted temperance by keeping prices high and preserved "orderly market conditions" by "protecting small licensees from predatory pricing policies of larger retailers." *Id.* at 112-13 (alteration omitted). Despite the self-evident importance of temperance and orderly alcohol distribution markets, the record revealed no evidence substantiating either purported interest: The State had not "demonstrated that the program [establishing minimum prices] inhibits the consumption of alcohol by Californians," and in fact a state study noticed by the Court "found little correlation between resale price maintenance and temperance." *Id.* And "[n]othing in the record . . . suggest[ed] that the wine pricing system helps sustain small retail establishments" and thus maintain orderly market

conditions. *Id.* at 113. The Court thus held that "[t]he *unsubstantiated* state concerns put forward in this case" failed to outweigh the concrete federal interest in a competitive marketplace. *Id.* at 114 (emphasis added).

Similarly, in *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987), the Court again confronted a claim that the Sherman Act preempted a State's regulation of liquor prices. As in *California Retail Liquor Dealers*, the Court considered whether the evidence in the record showed that the state regulation "actually helped" achieve the State's purported goal; it was not sufficient that the State could *conceive* of a purpose that the challenged law *might* serve. *Id.* at 350. The Court observed that there were "no legislative or other findings" demonstrating that the regulation "has been effective," and that "[t]he only relevant evidence in the record" indicated that the regulation had not succeeded in achieving its purpose. *Id.* The Court was "unwilling to assume on the basis of this record" that the state law was effective, and instead concluded that "the State's unsubstantiated interest . . . simply is not of the same stature as" the federal interest in ensuring a competitive marketplace. *Id.* (alteration and internal quotation marks omitted).

As required by *California Retail Liquor Dealers* and *324 Liquor*, every federal appeals court to consider the question has held that, when a State

seeks to salvage an alcoholic beverage regulation by reference to the Twenty-first Amendment, it must come forward with evidence that the regulation in fact serves its purported interest. *See, e.g.*, *Miller v. Hedlund*, 813 F.2d 1344, 1352 & n.7 (9th Cir. 1987) ("the court must examine . . . the extent to which, in reality, the state rule serves its avowed purpose[]," which "may ultimately rest upon findings and conclusions having a large factual component"); *TFWS*, 242 F.3d at 212, 213 (the State must "offer evidence" to "assert and substantiate its Twenty-first Amendment defense," including "whether, and to what extent, the regulatory scheme serves its stated purpose"); *US Airways, Inc. v. O'Donnell*, 627 F.3d 1318, 1331 (10th Cir. 2010) (a court must "evaluate the effectiveness of [the State's] regulatory scheme in furtherance of its interests protected under the Twenty-first Amendment," which "may ultimately depend upon factual findings and conclusions"); *Heald v. Engler*, 342 F.3d 517, 525-26 (6th Cir. 2003) (a court must evaluate "based on the evidence in the record," whether the state scheme "furthers any of the [Twenty-first Amendment] concerns" cited by the State), *aff'd sub nom. Granholm v. Heald*, 544 U.S. 460 (2005); *Bainbridge v. Turner*, 311 F.3d 1104, 1114-15 (11th Cir. 2002) ("Not only must the State raise a 'core [Twenty-first Amendment] concern,' but it must also show that its statutory scheme is genuinely needed

to effectuate the proffered core concern," including "*evidence* supporting a genuine need" for its laws).

A number of those cases have distilled the Supreme Court's balancing inquiry from *California Retail Liquor Dealers Association* and *324 Liquor* into a three-step framework:

> First, the court should examine the expressed state interest and the closeness of that interest to those protected by the Twenty-first Amendment. . . . Second, the court should examine whether, and to what extent, the regulatory scheme serves its stated purpose . . . . Simply put, is the scheme effective? . . . [T]he answer to this question may ultimately rest upon findings and conclusions having a large factual component. Finally, the court should balance the state's interest . . . (to the extent that interest is actually furthered by the regulatory scheme) against the federal interest.

US Airways, 627 F.3d at 1331 (quoting *TFWS*, 242 F.3d at 213) (alterations in original).

B. Defendants Have Not Substantiated Any Twenty-first Amendment Interest

The Twenty-first Amendment does not defeat the preemption claim in this case because there is no evidence that the prohibited-interest statutes, as applied to E.F. Transit, serve any legitimate state interest in regulating alcoholic beverages. *See 324 Liquor*, 479 U.S. at 350.

1. As an initial matter, the Court must closely "examine the expressed state interest" at stake in this case and identify it with specificity.

US Airways, 627 F.3d at 1331. In the district court, defendants attempted to obscure the specific regulatory interest at issue as part of the State's authority to regulate the "'times, places, and manner under which liquor may be imported and sold.'" Dkt. No. 212, at 15 (quoting *Capital Cities Cable*, 467 U.S. at 716). Defendants further attempted to cloak the regulation in Indiana's general interest in protecting its "three-tier system" and by citing the general purposes of "Title 7.1 of the Indiana Code." *Id.* at 15-16. Defendants thus suggested that, because the prohibited-interest statutes are part of a broader regulatory scheme, they must necessarily be assumed to further the interests inherent in that scheme. But E.F. Transit is not challenging Indiana's three-tier system in its entirety, or even its horizontal prohibition on wholesaling both beer and liquor. The *only* aspect of the State's scheme that E.F. Transit opposes here is defendants' application of the prohibited-interest statutes—which are designed to regulate *wholesalers*—to a federally licensed *motor carrier* that wishes to provide services that Congress expressly exempted from state oversight.

Unsurprisingly, defendants are not the first state regulators to attempt to defend a specific regulation by referring to the goals of the entire scheme. But in *324 Liquor* the Supreme Court specifically rejected efforts to justify a

narrow alcohol regulation merely by reference to the broader scheme in which it operates, without analyzing the work being done by the specific regulation. While the state regulation in that case, like other sections of the alcoholic beverage code, included a statement that it was enacted "for the purpose of fostering and promoting temperance," the Court rejected this statement as "not supported by specific findings, or by evidence in the record." 479 U.S. 351 n.13 (also noting the same conclusion in *California Retail Liquor Dealers Ass'n*). As the Sixth Circuit has noted, "the relevant inquiry is not whether [the State's] three-tier system *as a whole* promotes the [State's] goals . . . but whether the [preempted regulatory] scheme challenged in this case . . . does so." *Heald*, 342 F.3d at 526; *see also, e.g.*, *Cal. Retail Liquor Dealers Ass'n*, 445 U.S. at 113 (evaluating the State's price-fixing statute rather than the entire three-tier system); *accord Rauner*, 909 F.3d at 856 (distinguishing challenge to a specific regulation from challenge to "the three-tier system as a whole"). This Court must consider whether the Twenty-first Amendment justifies the particular application of the statutes at issue in this case—*i.e.*, the Commission's refusal to permit E.F. Transit to provide transportation services to liquor wholesalers.

2. The record demonstrates that applying the prohibited-interest laws to E.F. Transit does not advance Indiana's general interests in controlling how liquor is imported or sold in the State. To the contrary, Indiana law permits motor carriers to conduct all the activities that E.F. Transit would like to conduct. Indiana allows motor carriers to lease space in the same warehouse to both beer and liquor wholesalers, provided the wholesalers have separate suite numbers and maintain physical separation of their products. *See* App. 109, 213. And Indiana law authorizes carriers to transport beer, liquor, and wine products on the same trucks. *See* App. 126-127, 211.

Defendants maintain that E.F. Transit is barred from doing what other motor carriers concededly may do because of its corporate ties to Monarch. Not only have they failed to present evidence that this restriction serves any core Twenty-first Amendment interest, but the Commission's *own witnesses* testified that the restriction was pointless. The Commission's Rule 30(b)(6) witnesses were Officers Brian Stewart and Scott Bedwell of the State Excise Police; at the time of their depositions, they had nearly a half-century of experience between them enforcing Indiana's alcoholic beverage laws. App. 23, 110. Both officers candidly conceded that prohibiting E.F. Transit from

providing arm's-length, market-rate transportation services to a liquor wholesaler at commercially reasonable rates would not bolster public morals, discourage overconsumption of alcohol, prevent underage drinking, improve public safety, or assist the Commission in overseeing the movement of alcohol around the State. *See* App. 58-60, 161-165; *cf. North Dakota v. United States*, 495 U.S. 423, 432 (1990) (plurality opinion) (recognizing those interests as core Twenty-first Amendment interests).

Officer Stewart could not even identify a single reason why Indiana prohibits *wholesalers* from distributing both liquor and beer, and he conceded that repealing the prohibition would not adversely affect the Commission's ability to enforce any other alcohol regulations. *See* App. 116, 117-118. As he put it during his deposition, the core prohibition on joint wholesaling is enforced only because "that's the law." App. 116. Although Officer Bedwell hypothesized that the prohibited-interest statutes as applied to separating beer and liquor wholesaling might originally have been intended to serve the State's purported interest in ensuring that an individual wholesaler does not acquire "too much control over a product that was being used by the citizens of the State of Indiana," App. 28-29, he conceded that there is no evidence that

applying these statutes to E.F. Transit, a carrier, actually serves that purpose, *see* App. 29-30.

3. Following those damaging concessions by Officers Stewart and Bedwell, defendants sought to rehabilitate their case through the deposition testimony of Chairman Cook. At the time, Chairman Cook had only recently been appointed to the Commission and had no previous professional experience with alcohol regulation or economics; he freely conceded that his testimony was "uneducated to a certain degree," given his lack of relevant experience. App. 201.

Chairman Cook offered only the hopelessly vague assertion that the Commission had barred E.F. Transit from transporting products for liquor wholesalers in order to prevent certain "abuses." App. 219-220. Like defendants' other witnesses, Chairman Cook could not identify any evidence that the restriction "actually serves that purpose." App. 205; *see also* App. 228. And he conceded that the "abuses" purportedly prevented by defendants' interpretation of state law are already prohibited by other provisions of law. App. 209. That every speculative scenario Chairman Cook hypothesized about is already forbidden by a separate prohibition "necessarily casts considerable doubt upon the proposition" that the Commission's restriction of E.F.

Transit's services actually serves to prohibit those very same abuses. *See U.S. Dep't of Agriculture v. Moreno*, 413 U.S. 528, 536-37 (1973); *accord Rauner*, 909 F.3d at 856.

Chairman Cook's testimony neither substantiates any state interest in the prohibited-interest statutes as applied, nor suffices to create a genuine dispute of fact as to those interests that would preclude entry of summary judgment for E.F. Transit. Chairman Cook did not testify to any facts, and certainly not any facts in his personal knowledge. *Stagman v. Ryan*, 176 F.3d 986, 995 (7th Cir. 1999) ("[S]tatements outside the affiant's personal knowledge or statements that are the result of speculation or conjecture or merely conclusory" cannot prevent summary judgment); *Visser v. Packer Eng'g Assocs., Inc.*, 924 F.2d 655, 659 (7th Cir. 1991). Rather, he admittedly offered only speculation and conjecture. "It is well-settled that speculation may not be used to manufacture a genuine issue of fact." *Amadio v. Ford Motor Co.*, 238 F.3d 919, 927 (7th Cir. 2001).

At the summary-judgment stage, "[i]nferences supported only by speculation or conjecture will not suffice." *Johnson v. Advocate Health & Hosps. Corp.*, 892 F.3d 887, 894 (7th Cir. 2018). Chairman Cook repeatedly conceded that he did not have any *factual evidence* supporting his speculation.

See, e.g., App. 205. In such circumstances, his deposition testimony is wholly insufficient to substantiate any state interest, and it certainly cannot erase from the record the contrary concessions from the Commission's own Rule 30(b)(6) witnesses.

4. It is not surprising that the commissioners struggled to justify their restrictions on E.F. Transit. That is because the evidence in this case—evidence defendants have never disputed—discloses the Commission's actual, illegitimate reason for prohibiting E.F. Transit from serving liquor wholesalers. Although the Commission and its staff initially blessed the agreement between E.F. Transit and Indiana Wholesale as fully consistent with state law, they reversed course after well-connected competitors of Monarch convinced the governor's office to torpedo the proposal. *See* pp. 13-19, *supra*.

"[E]conomic boosterism" of favored competitors "in the guise of a law aimed at alcoholic beverage control" is not a permissible Twenty-first Amendment interest. *Beskind* v. *Easley*, 325 F.3d 506, 517 (4th Cir. 2003); *see also Rauner*, 909 F.3d at 853 ("State laws enacted to combat the perceived evils of an unrestricted traffic in liquor are worthy of [Twenty-first Amendment] deference, but laws that constitute mere economic protectionism

are not." (internal quotation marks omitted)). In fact, the "protection of industry incumbents" through "control of the regulatory apparatus" is precisely the evil Congress intended to preempt when it enacted the FAAAA. *See S.C. Johnson & Son, Inc. v. Transp. Corp. of Am.*, 697 F.3d 544, 548 (7th Cir. 2012).

On this record, the Twenty-first Amendment can provide no relief to defendants. Without a shred of evidence that defendants have any legitimate interest in prohibiting the transportation agreements at issue in this case, there is simply nothing to balance against the indisputable federal interest in deregulating the trucking industry.

C. The District Court Erred in Holding that the Evidence Is Irrelevant

The district court did not consider any of the preceding evidence in determining whether defendants had satisfied their burden under the Twenty-first Amendment. Breaking from the long line of federal authority, *see* pp. 35-39, *supra*, the district court held that defendants were not required to present *any* evidence substantiating Indiana's purported interest in barring the transportation agreements at issue. App. 8. Applying a standard akin to rational-basis review, the court held that the prohibited-interest statutes survived a preemption challenge so long as they were "a reasonable effort to

meet the stated interest." App. 9. That is not the law. As another court of appeals succinctly put it, "a rational-basis" test "ignor[es] in [its] entirety the central modern Supreme Court cases addressing the issue of the relationship between the Commerce Clause and the Twenty-First Amendment." *Dickerson*, 336 F.3d at 404-05; *see also TFWS*, 572 F.3d at 194 (a "rational basis test" "is simply irrelevant in this context"); *Miller*, 813 F.3d at 1352 n.7 (explaining that determining whether "the regulations were reasonably related to state statutory purposes" is "quite different" from the Twenty-first Amendment test, which considers "the extent to which, in reality, the state rule serves its avowed purposes" (citing *California Liquor Dealers Association*)).

1. In a footnote, the district court attempted to distinguish *California Retail Liquor Dealers* and *324 Liquor*, the Supreme Court cases holding that evidence is required for Twenty-first Amendment balancing. It said those cases were "inapposite" because they addressed state laws that "regulate[d] the price of alcohol," not, as in this case, state laws that "regulate the manner in which alcohol may be sold." App. 9 n.2. That reasoning is unpersuasive.

To the extent the district court meant that regulating "the manner in

which alcohol may be sold" is a more central interest than regulating the price of alcohol, that distinction makes no sense. As an initial matter, establishing minimum prices for alcohol is unquestionably part of "regulat[ing] the manner in which alcohol may be sold." The court did not explain why regulating whether motor carriers can provide arm's-length trucking services to both beer and liquor wholesalers is more a regulation of how alcohol is sold than regulations of the minimum price of alcohol. Indeed, in both the Supreme Court's cases and this case, the States have suggested that the exact same interests are at play: promoting temperance and maintaining orderly markets.

Moreover, the district court did not explain why one interest would require substantiation with evidence and the other would not. The question for Twenty-first Amendment purposes is how to balance the federal and state interests "in the context of the issues and interests at stake in any concrete case." *California Retail Liquor Dealers Ass'n*, 445 U.S. at 109. The district court cited no authority for the proposition that certain types of regulations are presumed, without any evidence, to serve legitimate Twenty-first Amendment interests. At least one court of appeals has emphatically rejected such an argument. *See Dickerson*, 336 F.3d at 404-06 (stating that "[i]t is only

by outrightly ignoring the central Supreme Court" cases that such an argument is possible).

2. In its order denying E.F. Transit's motion to alter or amend the judgment, the court distinguished this Court's recent decision in *Rauner* on the ground that the case involved a dormant Commerce Clause challenge rather than a preemption claim. Although the Twenty-first Amendment can "save" an otherwise impermissible regulation in both dormant Commerce Clause and statutory preemption cases, the district court held that evidence is required to substantiate a state interest only in the former. App. 15-16. That distinction is meritless. For one thing, it ignores that *California Retail Liquor Dealers Association* and *324 Liquor*—both of which turned on the lack of evidence substantiating a state interest—arose in the Supremacy Clause preemption rather than dormant Commerce Clause context, and that at least three circuits have required evidence of effectiveness in preemption cases. *See, e.g.*, *TFWS*, 242 F.3d at 212, 213; *Miller*, 813 F.2d at 1352 & n.7; *US Airways*, 627 F.3d at 1331.

In addition, neither *Rauner* nor any other Twenty-first Amendment case cited by the district court draws a distinction between preemption claims arising under the Supremacy Clause and claims under the dormant Commerce

Clause. To the contrary, when States attempt to avoid preemption by invoking their Twenty-first Amendment powers, courts rely liberally on dormant Commerce Clause cases, and vice versa. *See, e.g.*, *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 275 (1984) (dormant Commerce Clause case quoting *California Retail Liquor Dealers Association* and *Hostetter*, two preemption cases); *TFWS*, 242 F.3d at 212 (preemption case citing *Bacchus Imports*, 468 U.S. 263, a dormant Commerce Clause case); *Miller*, 813 F.2d at 1352 (same). At least one court has expressly rejected as "unpersuasive" the distinction between dormant Commerce Clause and preemption cases, noting that "the two lines of cases have frequently intersected." *Bainbridge*, 311 F.3d at 1114 (citing examples); *see also, e.g.*, *Dickerson*, 336 F.3d at 404-07. *Rauner* itself, although it arose in the dormant Commerce Clause context, cites *Hostetter*, a preemption case, in explaining the modern Twenty-first Amendment test. 909 F.3d at 852.

The district court's purported distinction between preemption and dormant Commerce Clause cases lacks any persuasive rationale. Many preemption cases—including this one—involve federal statutes enacted pursuant to Congress' authority under the Commerce Clause. *See Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 263 (2013) (noting that the FAAAA

regulates interstate commerce); *see also* David E. Engdahl, *Preemptive Capability of Federal Power*, 45 U. Colo. L. Rev. 51, 52 (1973) ("Preemption doctrine has developed chiefly in cases involving the commerce clause"). It would make no sense to conclude, as the district court did here, that the Twenty-first Amendment applies with more vigor in cases where a state alcohol regulation is *impliedly* preempted under the dormant Commerce Clause as compared to cases where such regulation *directly* conflicts with Congress' affirmative exercise of its power under the Commerce Clause to preempt state law. If anything, the federal interest is at its peak where, as here, Congress has expressly spoken. *See Bacchus Imports*, 468 U.S. at 279-80 n.5 (Stevens, J., dissenting) ("it is not at all incongruous to assume that the power delegated to Congress by the Commerce Clause is unimpaired while holding the inherent limitation imposed by the Commerce Clause on the States is removed with respect to intoxicating liquors by the Twenty-first Amendment").

3. In holding that the commissioners did not need to support Indiana's purported interests with a factual record, the district court drew two incorrect lessons from this Court's decision in *Huskey*—a case, unlike this Court's decision in *Rauner*, that did not confront or discuss the role of evidence

in the balancing inquiry: First, the district court claimed that *Huskey* did not require evidence of a regulation's effectiveness before upholding that regulation under the Twenty-first Amendment. Second, it suggested that *Huskey*'s reference to a state alcohol regulation's "strong presumption of validity" explains why certain regulations are presumed effective even without any evidence. 666 F.3d at 458 (quoting *North Dakota*, 495 U.S. at 433).

Huskey does not stand for the proposition that a State need not substantiate its interest. Rather, in *Huskey* this Court closely analyzed the regulatory scheme and concluded based on simple logic and noticeable facts that the challenged regulation was necessary for the scheme to achieve its purpose of preventing underage drinking. *See id.* at 458-59. The plaintiff was a wine retailer that sought to ship its wine directly to consumers using third-party motor carriers. The retailer invoked the FAAAA's preemption provision to attempt to enjoin the regulation barring such third-party shipments.

The Court noted that motor carriers, unlike wine retailers, were not trained to verify the ages of consumers to whom wine was delivered. The Court additionally noted that if retailers were able to ship directly to consumers without any approved method of age verification, minors could simply order wine delivered, which could "undermine the state's efforts to

prevent underage drinking." *Id.* at 459. There is no similar analysis in this case that could potentially justify concluding that the prohibited-interest statutes, as applied, serve a legitimate interest.

The closest either defendants or the district court came to offering a similar analysis was the baseless speculation that, unless the Commission barred E.F. Transit from offering arm's-length transportation services protected by the FAAAA, its sister company Monarch could somehow "circumvent" the prohibited-interest statutes and become a "monopoly" so powerful as to impede "the Commission's ability to regulate" it. App. 10-11; *see also* D. Ct. Dkt. 212, at 16-17. There is, of course, no fact in the record to support this wildly speculative theory, which, notably, has not become reality in the many other States that lack the at-issue prohibition. The Commission's own witnesses *contradicted* this theory in their testimony. *See* pp. 42-44, *supra*. E.F. Transit seeks to offer only market-rate, arm's-length trucking services to liquor wholesalers. It is undisputed that E.F. Transit would not gain any control over the wholesaling functions of its customers. App. 93, 94, 187-191, 233; Dkt. No. 163-3, 65:2-8. And it—and its clients—would remain subject to Commission oversight and regulations intended to prevent abusive sales practices. *Huskey* certainly did not suggest that such unreasoned

speculation suffices to "override the federal policy" here. *Capital Cities Cable*, 467 U.S. at 712.

Additionally, *Huskey* is inapposite because this Court concluded that the case did not directly implicate the federal interest in the FAAAA. The Court noted that the FAAAA claim was not brought, or even supported, by a motor carrier seeking to deliver wine to consumers, but by a retailer seeking to use an unpermitted motor carrier. *Id.* The Court noted that "[w]e might have a different case if a motor carrier were asking the state to allow it to opt into the same training requirement imposed on drivers employed by retailers of wine," and therefore to obtain the proper permitting to verify ages and deliver alcoholic beverages. *Id.* As this Court noted, in such a case the federal interest would be much stronger. This case is more like the alternative fact pattern contemplated in *Huskey*: here, a motor carrier seeks to offer logistics services to wholesalers, subject to all regulations typically imposed on a motor carrier providing such services.

The district court also misunderstood *Huskey*'s reference to "a strong presumption of validity" for regulations implicating a State's core Twenty-first Amendment interests. The district court suggested that this presumption always applies to alcohol regulations allegedly involving a core power and

appeared to conclude that so long as it considered the regulation "reasonable" any contrary evidence was irrelevant. *See* App. 7, 8-11. Neither is true. *Huskey* was quoting *North Dakota v. United States*, 495 U.S. 423 (1990) (plurality op.). In that case, the Supreme Court did refer to a presumption of validity—but only for regulations for which the State had substantiated its Twenty-first Amendment interests. The Court applied the presumption only after concluding that the regulations were "necessary components of the regulatory regime," addressed a public health problem that was "both substantial and real," and "unquestionably serve[d] valid state interests." *Id.* at 432-433. The Court based its conclusion on specific facts in the record, including an affidavit setting forth examples of the specific misconduct the regulations would address. *Id.* at 432-433 & n.5. Only at that point did the Court conclude that the statute is "supported by a strong presumption of validity and should not be set aside lightly." *Id.* at 433.

Even then, the *North Dakota* Court upheld the regulation only after finding that the federal regulations *did not* conflict with or preempt the state regulations. *Id.* at 440. And for the "strong presumption" proposition, the Court cited a case—*Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984)—that *struck down* the state regulation as preempted. These cases

hardly suggest that any conceivably "reasonable" state regulation outweighs a strong federal interest. To the contrary, *Huskey* itself acknowledged that a strong presumption "is not conclusive." 666 F.3d at 458 (internal quotation marks omitted). Even if a court could balance a merely "reasonable" regulation without any evidence of its actual effectiveness (and it cannot), that proposition would not permit the district court to do what it did here—completely ignore the copious evidence that affirmatively undermines the State's purported interest.

D. The Federal Interest in Preemption Outweighs Indiana's Unsubstantiated Interest in Enforcing the Prohibited-Interest Statutes Against E.F. Transit

In the absence of any substantiated state interest, there is nothing for this Court to balance against the clear federal interest in FAAAA preemption. *See Cal. Retail Liquor Dealers*, 445 U.S. at 113-14; *324 Liquor*, 479 U.S. at 350. But if this Court concludes that it must balance the federal interest in FAAAA preemption against the State's unsubstantiated interest in prohibiting E.F. Transit from providing arm's-length, market-rate logistics services to liquor wholesalers, the answer is clear: the substantial federal interest prevails. This result is dictated not only by the record in this case, but by the "recent" trend in Supreme Court cases "emphasiz[ing] federal interests to a greater degree."

Bacchus Imports, 468 U.S. at 276.

1. The state interest in prohibiting a motor carrier from providing arm's-length, market-rate logistics services to both beer and liquor wholesalers is exceedingly weak. It is telling that defendants' primary argument below was that they did not need to substantiate their interest.

Even Indiana's interest in prohibiting *wholesalers* from distributing both beer and liquor is questionable; the undisputed evidence in this case is that these horizontal restrictions were enacted to further a 1930s-era political patronage system. *See* pp. 9-10, *supra*. But putting that prohibition to the side, even more dubious is the State's specific, narrow application of that regulation to forbid E.F. Transit—a *motor carrier*, not a *wholesaler*—from providing market-rate transportation services to both liquor and beer wholesalers. No regulation expressly requires such a result. No provision of Indiana law holds that the provision of transportation services to a wholesaler gives a carrier an "interest" in that wholesaler's permit; if that were so, no carrier could transport both beer and liquor. E.F. Transit's proposed services were, in fact, initially approved by Commission staff. The regulations were interpreted to interfere with E.F. Transit's plans only at the urging of Monarch's politically connected competitors. *See* pp. 13-19, *supra*. At no point

has any Commission witness offered a legitimate, nonspeculative justification for declining E.F. Transit's proposed agreements with Indiana Wholesale. *See* pp. 42-45, *supra*.

2. Balanced against that minimal state interest in the regulation is a powerful federal interest in deregulation of a vitally important industry. The FAAAA's express preemption provision must be understood through the lens of Congress' decades of engagement on transportation deregulation. Beginning in 1978, Congress began to deregulate both the airline and trucking industries. Both industries are vitally important to the national economy: Commercial aviation supports more than 10 million American jobs, contributes $846.3 billion to the national economy, and accounts for 4.9% of domestic GDP. Federal Aviation Administration, *The Economic Impact of Civil Aviation on the U.S. Economy* 23-24 (2016). Meanwhile, nearly 71% of the Nation's freight travels through trucking—a system that generates $738.9 billion in annual gross revenues, and employs more than 7.4 million people.[8] According to the U.S. Department of Transportation, there are more than 770,000 for-hire

[8] American Trucking Associations, Reports, Trends & Statistics, https://www.trucking.org/News_and_Information_Reports_Industry_Data.aspx (last visited Mar. 15, 2019).

motor carriers in the United States, with 91% operating six or fewer trucks.[9] *Id.* Congress' interest in deregulating these industries—to bring innovation, expansion, market-oriented solutions, and benefits to consumers—is a significant national priority. *See* p. 7, *supra*.

In 1980, Congress passed the Motor Carrier Act, eliminating federal regulations on the trucking industry with the goal of reinvigorating competition and innovation. In the ensuing decade, however, Congress determined that merely eliminating federal regulations was not enough. In the conference report for the FAAAA, Congress found that "[c]urrently, 41 jurisdictions regulate, in varying degrees, intrastate prices, routes and services of motor carriers," including the "types of commodities carried." H.R. Rep. No. 103-677, at 86 (1994) (Conf. Rep.). Congress concluded that this "patchwork" of state economic regulation of motor carrier operations causes "significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology and curtails the expansion of markets," leading to billions lost per year. *Id.* at 87.

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[9] *Id.*

Notably, it was not any one regulation that created the problem: after extensive hearings, Congress concluded that "[t]he sheer diversity of these regulatory schemes is a huge problem for national and regional carriers attempting to conduct a standard way of doing business." *Id.* "Lifting of these antiquated controls will permit our transportation companies to freely compete more efficiently and provide quality service to their customers. Service options will be dictated by the marketplace; and not by an artificial regulatory structure." *Id.* at 88. Congress included similar findings in the legislation itself:

> Congress finds and declares that (1) the regulation of intrastate transportation of property by the States has—(A) imposed an unreasonable burden on interstate commerce; (B) impeded the free flow of trade, traffic, and transportation of interstate commerce; and (C) placed an unreasonable cost on the American consumers; and (2) certain aspects of the State regulatory process should be preempted.

Pub. L. No. 103-305, § 601(a)(1), 108 Stat. 1605.

The Supreme Court has already recognized that when the federal government announces its intention expressly to preempt state regulation of an entire industry, *any* state regulation impermissibly burdens the federal interest. In *Capital Cities Cable*, the Court confronted an Oklahoma regulation requiring "cable television operators in that State to delete all

advertisements for alcoholic beverages contained in out-of-state signals that they retransmit by cable to their subscribers." 467 U.S. at 694. That regulation directly conflicted with a regulation issued by the Federal Communications Commission that expressly preempted all state regulation of cable signals. *Id.* at 701. The Court concluded that "[t]o accomplish [its] regulatory goal, the Commission has deemed it necessary to assert exclusive jurisdiction over signal carriage by cable systems." *Id.* at 714. Permitting "state and local governments . . . to regulate in piecemeal fashion" would undermine that national policy. *Id.* The same is true here: Congress' judgment is that, because every regulation "related to a price, route, or service of any motor carrier" contributes to the larger, debilitating patchwork of regulations, each and every covered regulation must be preempted. *See* 49 U.S.C. § 14501(c). As the Supreme Court has noted, "[i]t is Congress . . . which is best situated to evaluate whether the federal interest . . . outweighs the State's legitimate [Twenty-first Amendment] interest." *North Dakota*, 495 U.S. at 444. In this case, Congress' judgment could not be clearer.

Defendants would need to show an extraordinarily powerful state interest to outweigh the important federal interests at stake in this case. In light of the actual record before this Court, it is clear they have not done so.

CONCLUSION

For these reasons, the district court's judgment should be reversed and summary judgment should accordingly be granted to E.F. Transit.

Respectfully submitted,

/s/ Amy Mason Saharia

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MARCH 19, 2019

CERTIFICATE OF COMPLIANCE
WITH TYPEFACE AND WORD-COUNT LIMITATIONS

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 7th Cir. R. 32(c) because it contains 12,627 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f); and

2. 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) and 7th Cir. R. 32(b) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point font.

/s/ Amy Mason Saharia
AMY MASON SAHARIA

MARCH 19, 2019

CERTIFICATE OF SERVICE

I, Amy Mason Saharia, counsel for appellant and a member of the Bar of this Court, certify that, on March 19, 2019, copies of the attached Brief of Appellant, Short Appendix, and Separate Appendix were filed with the Clerk and served on the parties through the Court's electronic filing system. I further certify that all parties required to be served have been served.

/s/ Amy Mason Saharia
AMY MASON SAHARIA

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STATEMENT OF COUNSEL

I, Amy Mason Saharia, counsel for appellant and a member of the Bar of this Court, certify that all of the materials required by 7th Cir. R. 30(a) and (b) are included in appellant's Short Appendix and Separate Appendix.

/s Amy Mason Saharia
AMY MASON SAHARIA

MARCH 19, 2019

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

E.F. TRANSIT, INC., Plaintiff,	)	
v.	)	1:13-cv-01927-RLY-MJD
DAVID COOK, *et al.* Defendants.	)	

ENTRY ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

E.F. Transit, Inc. ("EFT") is a federally licensed motor carrier that is engaged in the business of transporting alcoholic beverages and has a carrier's permit issued by the Indiana Alcohol and Tobacco Commission ("the Commission"). EFT shares common ownership with Monarch Beverage Company, Inc. ("Monarch"), a state licensed beer and wine wholesaler. EFT seeks to provide transportation services to Indiana Wholesale Wine & Liquor Company ("Indiana Wholesale"), but the Commission has blocked it from doing so under state laws which prohibit a holder of a beer wholesaler's permit from having an interest in a liquor wholesaler's permit. Ind. Code § 7.1-5-9-3(b).

On September 13, 2016, the court issued an Order denying EFT's Motion for Summary Judgment and granting the Defendants' Motion for Summary Judgment, holding that EFT's claims were not ripe for adjudication. The court also held that the Commission is entitled to Eleventh Amendment immunity, but that the Commissioners are not. Notably, the court did not address EFT's argument that the Prohibited Interest

Statutes are preempted by the Federal Aviation Administration Authorization Act ("FAAAA").

EFT appealed the court's judgment. On appeal, neither party challenged the court's holdings under the Eleventh Amendment. On January 2, 2018, the Seventh Circuit reversed the court's judgment holding that EFT's claim is ripe. *See E.F. Transit v. Cook*, 878 F.3d 606, 609-610 (7th Cir. 2018) ("The state high court's decision in *Spirited Sales* eliminates any concern that E.F. Transit's preemption claim may be unripe."). The Seventh Circuit's mandate was issued on January 24, 2018.

Before the court are the parties' cross-motions for summary judgment[1] on the sole remaining claim in this litigation: preemption. For the reasons stated below, the court **GRANTS** the Commission's cross-motion for summary judgment and **DENIES** EFT's motion for summary judgment.

I. Background

Indiana maintains a three-tier distribution system for alcoholic beverages consisting of manufacturers, wholesalers, and retailers. Ind. Code §§ 7.1-3 *et seq*. Permits are both issued and required in order to participate in any of the three tiers. *Id.* There are no permits to sell alcoholic beverages in all three tiers. *Id.* Rather, at any given tier, a business must obtain a specific permit to sell beer, liquor, or wine respectively. *Id.* §§ -3(1), -8(1), -13(1).

[1] In addition, the Indiana Beverage Alliance and Wine & Spirits Distributors of Indiana filed amicus curiae briefs. The court took both amicus curiae briefs into consideration when forming its opinion.

This case focuses on the wholesaler tier: a wholesaler cannot hold an interest in both a beer and liquor permit and vice versa. *Id.* § 7.1-5-9-3(b) ("It is unlawful for the holder of a . . . beer wholesaler's permit to have an interest in a liquor permit of any type under this title."); *id.* § 7.1-5-9-6 ("It is unlawful for the holder of a . . . liquor wholesaler's permit to have an interest in a beer permit of any type under this title."); *see also id.* § 7.1-1-2-5 ("[W]henever a person is prohibited from doing a certain act or holding a certain interest directly, he shall be prohibited also from doing that act or holding that interest indirectly."). These statutes are known as the Prohibited Interest Statutes. If the Prohibited Interest Statutes are violated by a liquor wholesaler, it can result in the revocation of that wholesaler's permit. *Id.* § 7.1-3-23-23(b) ("The commission shall revoke the permit of a brewer or beer wholesaler who holds an interest in another permit in violation of IC 7.1-5-9-3.").

EFT is a trucking company licensed by the Commission to transport beer, wine, and liquor. (Filing No. 163-10, Phillip Terry ("Terry Dep") at 12, 25; Filing No. 163-15, Carrier's Permit). EFT subleases space in its warehouse to Monarch, a beer and wine wholesaler, for which it also provides delivery services. (Terry Dep. at 23). Although EFT and Monarch are separate corporate entities, the two companies share the same CEO, the same shareholders, the same board of directors, and approximately 20 employees. (*Id.* at 11, 35-36).

In 2009, EFT reached a tentative agreement to warehouse and ship alcoholic beverages for Indiana Wholesale. (Filing No. 163-18, 2009 Lease Agreement; Filing No. 163-19, 2009 Services Agreement). Because Indiana Wholesale is a licensed liquor

wholesaler, Indiana law requires it to obtain the Commission's approval before moving its warehouse. *See* Ind. Code § 7.1-5-9-12. In 2010, following an investigation into the Indiana Wholesale/EFT Transit agreement, the Commission indicated to Indiana Wholesale that it would reject Indiana Wholesale's application to move its warehouse. (Terry Dep. at 96). The findings of the investigation concluded that "Monarch Beverage and EFT Transit operate as one entity" and that "if the transfer is allowed, Monarch Beverage would have an interest in Indiana Wholesale Wine & Liquor, which is prohibited by IC 7.1-5-9-3(b)." (Filing No. 163-37, Swallow Report at 8). As a result of these findings, Indiana Wholesale withdrew its application to move its warehouse to EFT's location. (*See* Filing No. 163-43, Rusthoven Letter dated 9/9/2010).

In 2012, EFT and Indiana Wholesale proposed a revised (and limited) service agreement, wherein EFT trucks would simply pick up shipments from Indiana Wholesale's existing warehouse and deliver those shipments to Indiana Wholesale's customers. (Filing No. 163-46, Letter from Terry dated April 20, 2012). The proposed agreement was contingent on the Commission either providing written approval of the agreement or failing to object within 60 days of receiving the agreement. (*Id.*). The Commission refused to either approve or disapprove of the agreement, although it warned that it "has some concerns about prohibited interests." (Filing No. 163-47, Letter from Chairman Huskey dated June 19, 2012). As a result of the Commission's tepid response, Indiana Wholesale withdrew from the agreement—fearing that the Commission's response sufficed as a written objection, and that it could have sanctions imposed upon it by the Commission. (*See* Filing No. 163-51, Letter from Indiana Wholesale's President,

James Howard, dated November 12, 2012). To date, the Commission has refused to approve EFT's agreement with Indiana Wholesale.

II. Summary Judgment Standard

Summary judgment is appropriate if the movant shows that "there is no genuine dispute as to any material fact" and the moving party is "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Carmody v. Board of Trustees of Univ. of Ill.*, 893 F.3d 397, 401 (7th Cir. 2018). In the instant case, the material facts are undisputed, making summary judgment particularly appropriate. *See Celotex Corp. v. Catrett,* 106 S.Ct. 2548, 2550 (1986).

III. Discussion

A. Application of Indiana's Prohibited Interest Statutes to EFT

The Indiana Supreme Court's decision in *Indiana Alcohol & Tobacco Comm'n v. Spirited Sales, LLC*, 79 N.E.3d 371 (Ind. 2017) bears mention. There, Spirited Sales LLC, an aspiring liquor wholesaler, sought a liquor wholesaler's permit. *Id.* at 371. Spirited Sales, however, was wholly owned by EFT, and EFT was owned by the same five shareholders as Monarch. *Id.* at 379. Thus, the Commission denied Spirited Sales' application, finding it ran afoul of the Prohibited Interest Statutes. *Id.* at 383.

On petition to transfer, the Indiana Supreme Court interpreted the term "interest" broadly, and upheld the Commission's denial. *Id.* at 379. The Court reviewed the business relationship between EFT and Monarch, and found the ties between them so close that "they were practically one in the same." *Id.* Indeed, the "ties between EFT and Monarch were so extensive that EFT could reasonably be deemed to hold an interest in a

beer wholesaler's permit—an interest prohibited by a combined reading of [the Prohibited Interest Statutes]." *Id.* Given the extent of those ties, Spirited Sales' application for a liquor wholesaler's permit was barred by virtue of EFT's interest in a beer wholesaler's permit. *Id.*

Based on this holding, the court finds the proposed contract between EFT, which holds an interest in a beer wholesaler's permit, and Indiana Wholesale, which holds an interest in a liquor wholesaler's permit, would violate the Prohibited Interest Statutes. *See E.F. Transit v. Cook*, 878 F.3d 606, 610 (7th Cir. 2018) ("And the Indiana Supreme Court has now construed the prohibited-interest statutes to forbid E.F. Transit from entering into an agreement like the one it negotiated with Indiana Wholesale (or any similar company)."). The court now turns to the issue of preemption.

B. Preemption

The FAAAA preempts state laws "having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." *See* 49 U.S.C. § 14501(c)(1). EFT argues that enforcing the Prohibited Interest Statutes against it falls within the scope of FAAAA preemption by limiting EFT's motor carrier services. The Commission argues that Indiana's Prohibited Interest Statutes are protected from preemption by virtue of the Twenty-first Amendment. Section 2 of the Twenty-first Amendment reads, "The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors in violation of the laws thereof, is hereby prohibited." U.S.C.A. Const.Amend. 21.

The parties agree that Indiana's Prohibited Interest Statutes and the FAAAA conflict. Ordinarily, the Supremacy Clause "would invalidate a state law that conflicted with a federal statute." *Lebamoff v. Enter., Inc. v. Huskey,* 666 F.3d 455, 458 (7th Cir. 2012) (citing *Capital Cities Cable, Inc. v. Crisp, supra*, 467 U.S. 691, 716 (1984)). However, state laws that involve a "core power" of the state under Section 2 of the Twenty-first Amendment are presumptively valid. *Id.* In *Capital Cities*, the Supreme Court defined the state's "core power" as the power to "regulat[e] the times, places, and manner under which liquor may be imported and sold." *Capital Cities*, 467 U.S. 716. Thus, Section 2 of the Twenty-first Amendment "reserves to the States the power to impose burdens on interstate commerce in intoxicating liquor that, absent the Amendment, would clearly be invalid under the Commerce Clause." *Id.* at 712.

1. The Challenged Statutes Are Within the State's Core Power and Are Entitled to a Strong Presumption of Validity

In *Lebamoff*, the Seventh Circuit addressed whether an Indiana alcohol regulatory statute fell within the state's "core power." There, a liquor retailer and two consumers challenged the constitutionality of an Indiana state law that prevented retail wine shipping to customers via a motor carrier. 666 F.3d at 456. The company argued that the Indiana statute was preempted by the FAAAA. *Id.* at 457. The Seventh Circuit observed that an important "core power" of the state under Section 2 of the Twenty-first Amendment is the power to regulate the time, place, and manner under which liquor may be imported and sold. *Id.* at 458 (quoting *Capital Cities*, 467 U.S. 716). The Court held that "Indiana's prohibition of the delivery of wine by motor carriers is within that [state's]

[core] power, because it is an aspect of 'regulating the manner under which [wine] may be … sold.'" *Id.* Similarly here, the Prohibited Interest Statutes "regulate and limit the manufacture, sale, possession, and use of alcohol." *See* Ind. Code § 7.1-1-1-1(2). Therefore, the court finds that the Prohibited Interest Statutes fall within Indiana's core powers.

2. The State Interests Outweigh the Federal Interests

This is not the end of the inquiry though. "Even though [the challenged statute] represents the exercise of a core state power pursuant to the Twenty-first Amendment, a balancing of state and federal interests must be conducted." *Lebamoff*, 666 F.3d at 458. Because the Prohibited Interest Statutes fall within the state's core power, "there is a thumb on the scale" in favor of the state. *Id.*

When balancing the state and federal interests at play, the Seventh Circuit has not required specific evidence of stated goals being met through the challenged statute. Rather, the Seventh Circuit in *Lebamoff* noted that "[a]llowing motor carriers to deliver wine could . . . undermine the state's efforts to prevent underage drinking, the state having decided not unreasonably that requiring face-to-face age verification by someone who has passed a state-certified training course should reduce the prevalence of drinking." *Id.* at 459. No further evidence was required to show that the statute did prevent underage drinking, or that it advanced its intended purpose through any other

means.[2] Instead, the Seventh Circuit looks to whether the challenged law is a reasonable effort to meet the stated interests. *Id.* at 459.

David Cook, as chairman of the Commission, advanced the following state interests of the Prohibited Interest Statutes: (1) ensuring there is a stable marketplace at the retail level; (2) temperance; (3) encouraging competition among diverse wholesalers; (4) controlling the size of organizations to prevent undue influence on the system and regulators; and (5) discouraging monopolistic business models. (Filing No. 167-6, Dep. David Cook ("Cook Dep.") at 45). These same purposes have also been advanced for maintaining the three-tiered system in other states. *See, e.g., North Dakota v. United States,* 495 U.S. 423; *Dickerson v. Bailey*, 336 F.3d 388, 397 (5th Cir. 2003); *Cal. Beer*

[2] Notwithstanding *Lebamoff*, EFT argues that in order for a state's alcohol regulation to trump the FAAAA, the state must substantiate its Twenty-first Amendment interest with evidence that the alcohol regulation at issue actually advances the state's purported interest. In support of its argument, EFT cites two Supreme Court cases, *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.,* 445 U.S. 97 (1980) and *324 Liquor Corp. v. Duffy,* 479 U.S. 335 (1987).

In *Cal. Retail Liquors Dealers Ass'n*, the Court held that California's system for resale price maintenance was a Sherman Act violation "because the wine producer holds the power to prevent competition by dictating the prices charged by wholesalers." *Cal. Retail Liquor Dealers Ass'n*, 100 S.Ct. at 939. Similarly, in *324 Liquor Corp.,* the Court held that the New York Statute "allows 'vertical control' by wholesalers of retail prices. Such industrywide resale price fixing is virtually certain to reduce both interbrand and intrabrand competition." *324 Liquor Corp.,* 107 S.Ct. at 721 (citing *California Retail Liquor Dealers Ass'n,* 100 S.Ct. 937).

These cases are inapposite. In contrast to the challenged price maintenance statutes in *Midcal* and *324 Liquor*, the Prohibited Interest Statutes are intended to facilitate competition among wholesalers, not restrict it. (Cook Dep. at 4). In other words, the laws at issue here do not attempt to regulate the price of alcohol; instead, they regulate the manner in which alcohol may be sold. As noted by the *Lebamoff* court, this is "a field emphatically occupied (since 1933) by the states." *See Lebamoff*, 666 F.3d at 458. For this, and for the other reasons advanced by the Commission, the court finds the Commission is not required to come forward with evidence demonstrating that the Prohibited Interest Statutes actually further the state's purported interests.

Wholesalers Ass'n v. Alcoholic Bev. Control Appeals Bd., 487 P.2d 745, 747–50 (Cal. 1971); *Neel v. Texas Liquor Control Bd.*, 259 S.W.2d 312, 316–17 (Tex. Ct. App. 1953). The federal interest advanced by EFT is the deregulation of the domestic airline and trucking industry.

The Prohibited Interest Statutes are central to the three-tier system in Indiana, as *Spirited Sales* makes clear, and effect core Twenty-first Amendment interests. 77 N.E.3d at 377. As noted, the Prohibited Interest Statutes regulate the ownership and control of the distribution of alcohol within Indiana's borders so as to ensure the strict separation of business interests both vertically between tiers (suppliers, wholesalers, and retailers) and horizontally between product categories (beer, wine, liquor) to limit influence and economic power of alcoholic beverages permittees. (*See* Cook Dep. at 123; *see also id.* at 70) (testifying that the Prohibited Interest Statutes ensure "[t]hat you don't create [an] environment that allows for tied houses vertically or undue influences horizontally"). These statutes are not directed at price, route, or service of interstate motor carriers. *See* 49 U.S.C. § 14501(c)(1) (preemption).

Because the transportation function is a particularly critical and far-reaching aspect of alcohol supply and distribution in this state, a wholesaler[3] could circumvent Indiana's three tier system by using a commonly owned motor carrier. (Cook Dep. at 120, 130). And if one wholesaler held a monopoly, the Commission's ability to regulate

[3] For example, Indiana Code section 7.1-3-8-3(c) authorizes a liquor wholesaler to "sell, *transport*, and *deliver* liquor." Likewise, Indiana Code section 7.1-3-2-7 authorizes a brewer to "manufacture beer, place beer in containers or bottles, *transport* beer, [and] sell and *deliver* beer."

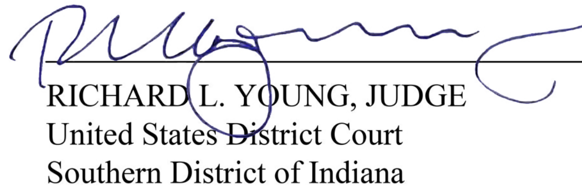
that wholesaler would be impeded due to a lack of transparency and industry watchdogs, where one oversized wholesaler could unduly influence regulators through its dominant market share. (*Id.* at 63, 123-24, 127-28). Furthermore, liquor or spirits are treated differently due to their high alcohol content. "Distilled liquors are thus seen to be in a class by themselves, with an alcoholic strength far in excess of wines and beers," with the argument being that that "difference should be made the basis of a radical difference in treatment under the law." Scott Fosdick, TOWARD LIQUOR CONTROL 20 (The Center for Alcohol Policy, ed. 2011). Indiana's legislators choose to distinguish, through differentiated permitting, beverages with an alcohol content (like beer) from those with a heavier alcohol content (like liquor). This differing treatment encourages, among other things, temperance.

Indiana's intricate regulatory system that relies, in part, on the separation of liquor wholesalers from beer wholesalers, would be unable to regulate the "times, places, and manner under which liquor may be imported and sold," *Capital Cities*, 467 U.S. at 716, if the challenged statutes were struck down. The court therefore finds that the state's interests protected by the Twenty-first Amendment, and carried out through reasonable means, outweigh the federal interest advanced by EFT.

IV. Conclusion

For the reasons above, the court **GRANTS** the Commission's Cross-Motion for Summary Judgment (Filing No. 212) and **DENIES** EFT's Motion for Summary Judgment (Filing No. 161).

SO ORDERED this 12th day of December 2018.



RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

Distributed Electronically to Registered Counsel of Record.

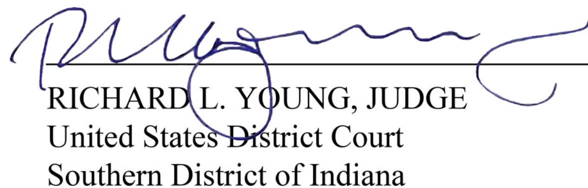
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

E.F. TRANSIT, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	1:13-cv-01927-RLY-MJD
	)	
DAVID COOK, *et al.*	)	
	)	
	)	
Defendants.	)	

FINAL JUDGMENT

Today, the court denied the Plaintiff's Motion for Summary Judgment and granted the Defendants' Cross-Motion for Summary Judgment. All issues have been resolved. The court now enters final judgment in favor of the Defendants and against the Plaintiff.

SO ORDERED this 12th day of December 2018.



RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

Laura Briggs, Clerk
United States District Court

__Tina M. Doyle____
By: Deputy Clerk

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

E.F. TRANSIT, INC., Plaintiff,	)	
v.	)	1:13-cv-01927-RLY-MJD
INDIANA ALCOHOL AND TOBACCO COMMISSION, Defendant.	)	

ENTRY ON PLAINTIFF'S MOTION TO ALTER OR AMEND JUDGMENT

On January 20, 2018, E.F. Transit, Inc. ("EFT") filed a motion under Federal Rule of Civil Procedure 59(e) to alter or amend the court's prior judgment that was entered in favor of the Indiana Alcohol and Tobacco Commission ("the Commission") on December 12, 2018. EFT argues that the Seventh Circuit's recent opinion in *Lebamoff Enter., Inc., v. Rauner*, 909 F.3d 847 (7th Cir. 2018), which was issued on November 28, 2018, conflicts with the court's decision. For the reasons stated below, the court **DENIES** EFT's motion to alter or amend the judgment.

I. Legal Standard

A motion to alter or amend judgment under Rule 59(e) requires the moving party to direct the court's attention to either newly discovered material evidence or to a manifest error of law or fact. *Oto v. Metropolitan Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000); *Johnny Blastoff, Inc. v. Los Angeles Rams Football Co.*, 188 F.3d 427, 439 (7th Cir. 1999). It is not the appropriate vehicle for "rehashing previously rejected

arguments or arguing matters that could have been heard during the pendency of the previous motion." *Caisse Nationale de Credit Agricole v. CBI Indus., Inc.*, 90 F.3d 1264, 1270 (7th Cir. 1996) (citing *In re Oil Spill*, 794 F. Supp. 261, 267 (N.D. Ill. 1992), *aff'd*, 4 F.3d 997 (7th Cir. 1993)).

II. Discussion

A. Whether the State is Required to Present Evidence that the Prohibited Interest Statutes Further the State's Twenty-First Amendment Interests

In the court's December 12 Entry, it stated: "When balancing the state and federal interests at play, the Seventh Circuit has not required specific evidence of stated goals being met through the challenged statute." (Filing No. 220, Entry on Cross-Mot. for Summ. J. at 8). EFT argues that, under *Rauner*, the State must present specific evidence that its purported Twenty-first Amendment core interests are furthered by the state regulation at issue. The Commission disagrees, arguing that *Rauner* involved a Commerce Clause challenge, and not, as here, a preemption challenge—i.e., whether the Prohibited Interest Statutes are preempted by the Federal Aviation Administration Authorization Act.

Commerce Clause analysis and preemption analysis differ. "[S]tate laws violate the Commerce Clause if they mandate differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Rauner*, 909 F.3d at 851 (quoting *Granholm v. Heald*, 544 U.S. 460, 489 (2005) (internal quotation marks and citation omitted). "Laws that directly discriminate against interstate commerce are 'generally struck down . . . without further inquiry,' while those that only indirectly affect

interstate commerce are subject to a balancing test.'" *Id*. Unlike a Commerce Clause analysis, in a preemption analysis where a state's core power under the Twenty-first Amendment is at issue, the state regulation is entitled to a strong presumption of validity. *Lebamoff Enter., Inc. v. Huskey*, 666 F.3d 455, 465 (7th Cir. 2012) (citing *North Dakota v. United States,* 495 U.S. 423, 433 (1986)) ("Given the special protection afforded to state liquor control policies by the Twenty-First Amendment, they are supported by a strong presumption of validity and should not be set aside lightly."); *see also id.* at 465 (Hamilton, J., concurring in the judgment) ("I agree with my colleagues that a 'strong presumption' is not a conclusive presumption, but the Supreme Court itself has never held such a state's exercise of its core Twenty-First Amendment power to be preempted by federal law, nor has it ever subjected such a law to the sort of balancing applied by my colleagues."). Consequently, specific evidence of stated goals is not required. *See id.* at 458.

Even if specific evidence is required, the State has satisfied its burden. For example, David Cook, Chairman of the Commission, explained that the statute: (1) ensures there is a stable marketplace at the retail level; (2) [promotes] temperance; (3) encourages competition among diverse wholesalers; (4) controls the size of organizations to prevent undue influence on the system and regulator; and (5) discourages monopolistic business models. (Entry on Cross-Mot. for Summ. J. at 9 (citing Filing No. 167-6, Deposition of David Cook ("Cook Dep.") at 45)). Chairman Cook also testified that requiring a wholesaler to have an interest in exclusively either a beer or liquor permit "[m]aintain[s] independence to discourage or defeat abuses that can take place when

there's . . . common interest." (Cook Dep. at 71). He also added that the three-tier system is "designed to promote or create business models that don't allow indirect or direct improper influences horizontally, that can have negative impacts on retailers . . ." (*Id.* at 72). Accordingly, the record contains evidence[1] that forbidding liquor and beer wholesalers from holding dual permits supports the State's core Twenty-first Amendment interests.

B. Whether the Prohibited Interest Statutes Constitute Economic Protectionism

Next, EFT argues the court's ruling does not take into account *Rauner*'s holding that state laws are entitled to no deference under the Twenty-first Amendment if they constitute "mere economic protectionism.[2]" *Rauner,* 909 F.3d at 853.

The Illinois law at issue in *Rauner* "allow[ed] retailers with an in-state physical presence to ship alcoholic beverages to consumers anywhere within Illinois[, but it] refuse[d], however, to give out-of-state businesses the opportunity even to apply for a similar shipping license." *Id.* at 849. These issues are not present in this case. EFT did not and could not argue that there is some unequal or discriminatory treatment to EFT

[1] Relatedly, EFT argues the state interests advanced by Chairman Cook are insufficient because they reference the entire three-tier system. But as noted above, he advanced several state interests supporting the Prohibited Interest Statutes. The court finds his testimony adequately supported the link between those statutes and Indiana's three-tier system. In any event, Chairman Cook testified that two of the objectives of the Prohibited Interest Statutes are ensuring a stable marketplace at the retail level and encouraging competition at the wholesale level. (Entry on Cross-Mot. for Summ. J. at 9 (citing Cook Dep. at 45)).

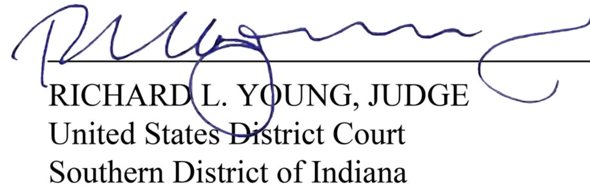
[2] Economic protectionism means "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Trustees of Ind. Univ. v. Prosecutor of Marion Cty,* 289 F.Supp.3d 905, 925 (S.D. Ind. 2018) (citing *McBurney v. Young*, 569 U.S. 221, 235 (2013)).

that would violate the Commerce Clause. As noted above, EFT brought a claim that Indiana's Prohibited Interest Statutes should be struck down because they violate a federal statute, not because they violate the Commerce Clause. Accordingly, the court rejects EFT's "economic protectionism" argument.

III. Conclusion

For the reasons stated above, the court **DENIES** EFT's Motion to Alter or Amend Judgment (Filing No. 222).

SO ORDERED this 7th day of February 2019.



RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

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