No. 19-1292

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

E.F. Transit, Inc., Plaintiff-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, Defendants-Appellees.	Appeal from the United States District Court for the Southern District of Indiana. Case No. 1:13-cv-01927 Honorable Richard L. Young, District Judge

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE

The International Municipal Lawyers Association ("IMLA") hereby files its motion for leave to file an amicus brief in support of Defendants-Appellees, Indiana Alcohol and Tobacco Commission, David Cook, John Krauss, Dale Grubb, and Marjorie Maginn "(Defendants-Appellees") and affirmance of the district court's decision in this action. In support, IMLA states:

1. IMLA has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters. IMLA's

mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the Supreme Court of the United States, the United States Courts of Appeals, and state supreme and appellate courts.

2. In this case, Plaintiff-Appellant challenges, on preemption grounds, the ability of the State of Indiana and its political subdivisions to regulate the importation, transportation, and use of alcoholic beverages. Defendants-Appellees posit, *inter alia*, that the district court's decision should be affirmed because regulation of the importation, transportation, and use of alcoholic beverages constitutes a fundamental state police power, particularly in light of the Twenty-first Amendment.
3. IMLA's amicus brief (attached hereto as "**Exhibit A**"), is desirable and will aid the Court because it addresses the history of the Twenty-first Amendment and the adoption of statutes in Indiana allowing for the regulation of alcohol, Congress's intent for states to regulate alcohol, federal and state court precedent reinforcing states' regulation of alcohol, and the impact on Indiana and its town and cities if the State were no longer able to regulate the importation, transportation, and use of alcohol.
4. IMLA is representing the interests of many towns and cities in Indiana as IMLA is keenly aware of the consequences if Indiana's Prohibited Interest statutes are preempted by the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"). IMLA believes that if Indiana's Prohibited Interest statutes are preempted, the State, as well as its towns and cities, will no longer be able to regulate alcoholic beverages and Clause 2 of the Twenty-first Amendment would be a dead letter. As such, this Court should affirm the district court's ruling.

WHEREFORE, IMLA respectfully requests that the Court grant it leave to file its amicus curiae brief in support of Defendants-Appellees, and further respectfully requests that the Court affirm the district court's decision.

Respectfully submitted this 13th Day of June 2019.

International Municipal Lawyers Association
Amicus Curiae in support of Defendants-Appellees

By: /s/ *Douglas D Church*
Douglas D. Church

CERTIFICATE OF SERVICE

I hereby certify that on this June 13th, 2019, I electronically filed the forgoing with the Clerk of the Court for the United States Circuit Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that services will be accomplished by the CM/ECF system.

By: /s/ *Douglas D Church*
Douglas D. Church

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BRIEF OF AMICUS CURIAE THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF DEFENDANTS-APPELLEES AND IN AFFIRMANCE OF THE DISTRCIT COURT'S DECISION

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STATEMENT OF INTEREST OF AMICUS CURIAE

The International Municipal Lawyers Association ("IMLA") is a non-profit organization dedicated to the interests and education of local government lawyers.[1] IMLA asserts that municipal advocacy is a necessary aspect of local governance and provides municipalities and their attorneys with a means to congregate, educate, and advocate for their interests. IMLA is concerned that if the Court finds that the Twenty-first Amendment preempts Indiana's Prohibited Interest statutes, as proposed by the Appellants in this case, it would spell an end to local control and regulation of alcohol, a fundamental state and local police power. Alcohol regulation is, in fact, a fundamental state and local police power. IMLA has a vital interest in the result of this case because it may directly affect local governments' ability to regulate for the health, welfare, and safety of their residents, including impacting the local zoning laws in regard to motor carrier warehousing and traffic regulations that restrict where motor carriers may be driven on local streets.

SUMMARY OF ARGUMENT

After prohibition, many states began regulating the importation, transportation, and use of alcohol under the compromise of the Twenty-first Amendment. *Lebamoff Enterprises, Inc. v. Huskey*, 666 F.3d 455, 459 (7th Cir. 2012) (see also *Lebamoff Enterprises, Inc .v Rauner*, 909 F.3d 847, 849 (7th Cir. 2018)). Section 2 of the Twenty-first Amendment reads, "The transportation or importation into any state, territory, or possession of the United States for

[1] More information about IMLA can be found on IMLA's website: http://www.imla.org/.

delivery or use therein of intoxicating liquors in violation of the laws thereof, is hereby prohibited." Const. Amend. XXI.

Ordinarily, when a state law conflicts with a federal statute, the federal statute will preempt the state law through operation of the Supremacy Clause. Notwithstanding the Supremacy Clause, the Twenty-first Amendment reserves the power to the states to regulate "the times, places, and manner under which [alcohol] may be imported and sold." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 717 (1984). "So whereas ordinarily a federal law preempts a conflicting state law, if the state law regulates alcoholic beverages the court must balance the federal and state interests; for just as the federal interests derive constitutional protection from the supremacy clause, the state interests derive constitutional protection from the Twenty–first Amendment." *Huskey*, 666 F.3d at 458.

In addition to the Twenty-first Amendment, Congress has expressed support for state regulation of alcohol. After enacting the Federal Aviation Administration Authorization Act ("FAAAA"), Congress enacted the Sober Truth on Preventing Underage Drinking ("STOP") Act; which reads, "States have primary authority to regulate alcohol distribution and sale . . . and the responsibility to fight youth access to alcohol and reduce underage drinking." *Lebamoff Enterprises, Inc. v. Snow*, 757 F.Supp.2d 811, 829 (S.D. Ind. 2010) (see also 42 U.S.C. §290bb).

The Twenty-first Amendment, however, is not boundless. *Rauner*, 909 F.3d at 849. Preemption will still apply to a state statute that "directly or indirectly – [has] a significant and adverse impact in respect to the federal Act's ability to achieve its preemption related

objectives."[2] *Snow*, 757 F.Supp.2d at 826. State laws that only have a "tenuous, remote, or peripheral relationship to the rate, route, or service of a motor carrier" will not be preempted. *Id*. at 826. With regard to the FAAAA, not every state law regulating alcohol relates to the objectives of FAAAA.[3] *Id*. In fact, courts have identified the following interests in regulating the importation, transportation, and use of alcohol, as primary responsibilities of the states:

(1) To fight youth access;
(2) to reduce underage consumption of alcohol;
(3) promote illegal access to alcohol both commercially and non-commercially;
(4) maintain industry integrity and on orderly marketplace;
(5) to promote temperance;
(6) further effective state tax collection.

Snow, 757 F.Supp.2d at 828; *see also Rauner*, 909 F.3d at 855.

Municipalities in Indiana have sufficient interests in regulating the importation, transportation, and use of alcohol within their jurisdictional borders. If this Court reverses the district court, cities and the states in which they fall will no longer have the ability to regulate within their "unquestionably legitimate" alcohol regulation scheme. *Snow*, 757 F.Supp.2d at 818 (citing *Granholm v. Heald*, 544 U.S. 460, 489 (2005)); s*ee also North Dakota v. United States*, 495 U.S. 423, 432 (1990). In particular, this Court should explicitly affirm the district court's recognition that under preemption analysis, where the state's core power under the Twenty-first Amendment is at issue, the state regulation is afforded a strong presumption of validity, therefore, specific evidence of stated goals is not required. See *Huskey*, 666 F.3d at 458.

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[2] In *Capital Cities Cable, Inc.*, the Supreme Court struck down an Oklahoma statute that forbid television advertisements that displayed alcoholic beverages. The Court held, Congress, in passing the Communications Act of 1934, gave the FCC broad regulatory discretion to consolidate, diversify, and increase the viewing of America's television broadcast networks. Oklahoma's statute directly frustrated FCC's regulatory mission.

[3] The *Snow* court gave an example of a state statute regulating the *method* of alcohol delivery and not the common carriers themselves. In *Snow*, the Indiana law at issue, Ind. Code §7.1-3-15-3(d), regulated the method of delivery. The statute, as the court later found, did not regulate common carriers themselves. That is, the statute did not impose price, route, or service on any common carrier.

ARGUMENT

A. The history of both the Twenty-first Amendment and Indiana's alcohol regulatory scheme demonstrates the vital interests both Indiana and its municipal governments have in regulating the importation, transportation, and use of alcohol.

In 1933, the United States decided to end prohibition. It did so through a compromise set out in the Twenty-first Amendment, "providing unique constitutional protection for state laws regulating alcoholic beverages." *Huskey*, 666 F.3d at 463. The aim of the Twenty-first Amendment was to "allow [s]tates to maintain an effective and uniform system for controlling [alcohol] by regulating its transportation, importation, and use." *Id*. at 459. As such, the Twenty-first Amendment has a "unique effect of elevating the covered states laws and regulations to the status of federal constitutional law."[4] *Id*.

Upon passage of the Twenty-first Amendment, many states, including Indiana, adopted a tiered system for regulating alcohol within jurisdictional bounds. *See generally* Ind. Code §7.1-3 *et seq*. Indiana differs from other states in that it has enacted both vertical and horizontal integration restrictions, in addition to its three tiers, in order to further its purpose "[t]o protect the economic welfare, health, peace, and morals of the people of the state . . . [t]o regulate and limit the manufacture, sale, possession, and use of alcohol and alcoholic beverages . . . [to] provide for the raising of revenue." Ind. Code §7.1-1-1-1.[5]

Title 7.1 contains other restrictions, namely restrictions governing the relationships between permit holders. *Indiana Alcohol and Tobacco Commission v. Spirted Sales, LLC.*, 79

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[4] Congress, for example, could not pass a law requiring states to allow direct shipments of interstate wine to consumers in the state even though Congress could set this requirement for any other article of commerce. *Granholm*, 544 U.S. at 488-89.

[5] Illinois and Wisconsin both have a three-tiered alcohol regulatory scheme that will also be affected by the decision made in this case. See 235 ILCS 5/6-1.5 and W.S.A. 135.066.

N.E.3d 371, 377 (Ind. 2017). These statutory restrictions are referred to as Indiana's Prohibited Interest statutes. *Id*. Indiana's Prohibited Interest statutes are neutral in nature, as they apply evenhandedly to all applicable entities operating in the State of Indiana.[6] Additionally, these statutes are not overly burdensome. In *Capital Cities, Inc.*, Oklahoma restricted alcohol advertisements on television and required that each commercial wishing to air in Oklahoma was deleted if it advertised alcoholic beverages. 467 U.S. 706-09. The Supreme Court found this requirement not practical as either the statute required (1) the loss of compulsory licensing protections; or (2) the frustration of Congress's intent behind the Communications Act.

Through Indiana's Prohibited Interest statutes, Indiana's interests in regulating the importation, transportation, and use of alcoholic beverages in the State align with those interests in which courts have found sufficient to avoid preemption under the Twenty-first Amendment. *Snow*, 757 F.Supp.2d at 828; *see also Rauner*, 909 F.3d at 855. Indiana, including those towns and cities therein, have an inherent interest in regulating alcohol importation, transportation, and use. A reversal of the district court's order, or the preemption of Indiana's Prohibited Interest statutes, would strip the State, as well as its cities and towns, of its regulatory authority. In other words, the State would be powerless to take legislative or regulatory actions in regard to its interests in regulating alcohol if its Prohibited Interest statutes are preempted.[7]

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[6] Indiana's Prohibited Interest statutes are applied evenhandedly and are unlike those found in *Capital Cities, Inc*. There, the Oklahoma restriction on advertising alcoholic beverages did not apply to newspapers, magazines, and other print publications. 104 S.Ct. at 2704-05. Nor are Indiana's Prohibited Interest statutes like those in *Rauner*, where Illinois law required a physical presence in the state for those wishing to ship alcoholic beverages throughout the state but refused to offer the same opportunity to out-of-state businesses. 909 F.3d at 849.

[7] Indiana's interests under its Prohibited Interest statutes, as advanced by David Cook, are (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 at 45.

B. Congress's intent is for states to retain broad authority over the regulation of alcoholic beverages within their jurisdictional borders.

When the Supreme Court of the United States moved to restrict state authority over the regulation of alcohol sales, Congress stepped in and passed the Wilson Act allowing states to regulate imported liquor as they would domestic liquor.[8] Congress enacted the Twenty-first Amendment in 1933 and included explicit language that states, not the federal government, retain the authority to restrict the "transportation or importation [of intoxicating liquors]." Const. Amend. XXI. This principle is so fundamental that in 1953, Congress enacted 18 U.S.C. §1161, which authorizes states to require Indian traders operating on Indiana reservations and selling alcohol to obtain a state issued liquor license. *Rice v. Rehner*, 463 U.S. 713, 723 (1983) (see also *North Dakota v. United States*, 495 U.S. 423, n. 6 (1990)).

Then, in 2000, Congress enacted the 21st Amendment Enforcement Act which authorizes state attorneys general to sue wineries in federal courts to enjoin violation of state law.[9] *Granholm*, 544 U.S. at 492. Congress continued to give broad authority to the states when it enacted the STOP Act in 2006. 42 U.S.C. §290bb-25b. Tellingly, in the STOP Act, Congress stated, "Alcohol is a unique product and should be regulated differently than other products by the States and the Federal Government. States have *primary* authority to regulate alcohol distribution for sale, and the Federal Government should support and supplement these state efforts."[10] (emphasis added).

Congressional intent in the realm of alcohol regulation among the states is clear. In 1933, during the drafting of the Twenty-first Amendment, Congress put forward a proposed "concurrent provision" which read, "Congress shall have concurrent power to regulate or

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8 See *Granholm*, 544 U.S. at 461 (referencing *Leisy v. Hardin*, 135 U.S. 100 (1890)).

9 27 U.S.C. §122. This statute was enacted, in part, to protect states from lost tax revenue.

10 42 U.S.C §290bb-25b(b)(7).

prohibit the sale of intoxicating liquors to be drunk on the premises to be sold." Congressional Record, Vol. 76, Part 4, 4138-39 (February 15, 1933).[11] Notably, the adopted Amendment did not include this "concurrent provision." Thus, Congress explicitly removed language that would have given it jurisdiction concurrent with the states.

Consistent with Congress's intent to provide states with broad—and primary—authority to regulate the importation, transportation, and sale or use of alcoholic beverages within their jurisdictional borders, Indiana has long regulated alcoholic beverages. In 1935, the General Assembly passed the Liquor Control Act in an attempt to regulate alcohol post-prohibition.[12] After the ratification of the Twenty-first Amendment, Indiana established a three-tiered system for regulating alcohol; regulation which has been found constitutional.[13]

C. Precedent reinforces the principle that states retain broad authority to regulate the importation, transportation, and use of alcoholic beverages.

In regard to in-state alcohol regulation, courts have long held that states retain broad regulatory powers; both federal and state law supports the district court's conclusion that Indiana's statutes are not preempted by the FAAAA. In *Midcal Aluminum*, the Supreme Court held the Twenty-first Amendment "grants states virtually complete control over whether to permit importation or sale of liquor and how to structure [a] liquor distribution system."[14] Ten years later, in *North Dakota*, the Supreme Court again reiterated this principle and held states

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[11] Government publishing officer, available at https://www.govinfo.gov/content/pkg/GPO-CRECB-1933-pt4-v76/pdf/GPO-CRECB-1933-pt4-v76-10-2.pdf (last accessed on June 6, 2019).

[12] Indiana Alcohol & Tobacco Commission, available at https://www.in.gov/atc/isep/2580.htm. (last accessed June 7, 2019).

[13] *North Dakota*, 495 U.S. at 432; see also *Monarch Beverage Co., Inc. v. Cook*, 48 N.E.3d 325, 328 (Ind.Ct.App. 2005).

[14] *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). See discussion herein at 107-8; see also *Granholm*, 544 U.S. at 488-9 ("A State which chooses to ban the sale and consumption of alcohol altogether could bar its importation; and, as our history shows, it would have to do so to make its laws effective. States may also assume direct control of liquor distribution through state-run outlets or funnel sales through the three-tier system").

have "virtually complete control over the importation and sale of liquor and the structure of the liquor distribution system."[15]

In recent decisions, courts have specifically upheld Indiana's three-tier alcohol regulation scheme and the State's interests in its three-tier system.[16] In *Snow*, the Southern District of Indiana held "state laws that only have a tenuous, remote, or peripheral relationship to the rate, route, or service of a motor carrier are not preempted." 757 F.Supp.2d at 826-7 (S.D. Ind. 2010). Further, the *Snow* court found that while Indiana Code §7.1-3-15-3(d) prohibited permit holders from using common carriers to make their deliveries, the statute only regulated the *method* of delivery; not the common carriers themselves and it was therefore not preempted by the FAAAA. *Id.*[17]

In *Huskey*, this Court held that when the interests of the state are within the *core* powers that the Twenty-first Amendment confers on the states, there is a thumb on the scale—that is, there is a "strong presumption of validity." 666 F.3d at 458.[18] Tellingly, even though the statute(s) in question in *Huskey* discriminated against out-of-state wine retailers, this Court upheld the regulations and found the 'discrimination' a "lawful advantage." *Id.* at 462.

In 2017, the Indiana Supreme Court addressed Indiana's alcohol permit regulatory system. The Court held the "Twenty-first Amendment [] authorizes states to regulate the production, distribution, and sale of alcoholic beverages." *Spirited Sales, LLC.*, 79 N.E.3d at 383. Further, the Indiana Supreme Court stated, "deciding whether the regulatory scheme in place is

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15 *North Dakota*, 495 U.S. at 431.

16 *Supra* at page 6

17 The *Snow* court distinguished this Indiana statute from those in *Rowe*. There, two provisions in Maine required tobacco retailers to utilize a *specific* delivery service and imposed civil liabilities upon the carrier for failing to inspect *every* package. (Emphasis added) (See *Rowe v. N.H. Motor Transp. Ass'n.*, 552 U.S. 364 (2008)).

18 This Court distinguished between statutes that are applied evenhandedly and those which discriminate. *Huskey*, 666 F.3d 461.

still relevant or still necessary or in need of overhaul are matters to be resolved through the political process . . .” *Id*.

The foregoing reinforces the district court’s conclusion here that the FAAAA does not preempt Indiana’s statutes.

D. The state and municipal governments of Indiana must not lose the capacity to fully regulate the importation, transportation, and use of alcohol.

Should this Court reverse the district court’s decision, the state and municipal governments of Indiana will be stripped of the capacity to adequately regulate the importation, transportation, and use of alcohol within state and political subdivision jurisdictional borders. The capacity to adequately regulate the importation, transportation and use of alcohol is a vital component of the State’s authority over public health, welfare, and morals. In fact, the Twenty-first Amendment has been recognized as conferring “something more than the normal state authority over public health, welfare, and morals.” *California v. Larue*, 409 U.S. 109, 114 (1972) *abrogated on other grounds by Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 485 (1996).

The state and municipal governments of Indiana typically exercise the power to regulate alcohol directly, through the three-tiered system, but it also exercises the power to regulate alcohol indirectly, through zoning laws and traffic regulations. Therefore, if this Court reverses the lower court and concludes that the FAAAA preempts any state or municipal law that impairs the efficiency of a motor carrier’s operations, the state and municipal governments of Indiana would lose the ability to both directly and indirectly regulate alcohol and, more specifically, motor carriers.

Local governments have certain zoning laws and traffic regulations that may be preempted by the FAAAA if this Court reverses. For example, Article 5 of the City of Carmel Unified Development Ordinance (“UDO”) provides for development standards for residential

and commercial buildings within the city.[19] Carmel, Indiana, UDO §5.02. If the FAAAA preempts any local law that impairs the efficiency of a motor carrier's operations, Carmel and other local governments in Indiana with similar ordinances, could lose the ability to impose development standards on the commercial properties of motor carriers.

Traffic regulations are an additional example of how a municipal government could lose the capacity to indirectly regulate alcohol and motor carriers. For example, §8-55 of the Carmel City Code states, "No person shall drive any vehicle on a residential street if that vehicle has gross weight of more than 5,000 pounds." Carmel, Indiana, Municipal Code art. Chapter 8, art. VI, §8-55 (2019).[20] If the FAAAA preempts this provision, then the City of Carmel could no longer regulate the traffic routes motor carriers must take within the City of Carmel limits.

There are over 1,600 general purpose local governments in Indiana alone that will be impacted by this Court's decision. Each of those local governments has an interest in preventing unwarranted preemption of Indiana's three-tiered system as well as the potential unintended consequences that could flow from finding the FAAAA preempts regulatory action such as local traffic and zoning codes.

CONCLUSION

For the foregoing reasons, IMLA urges the Court to protect state and local regulation of the importation, transportation, and use of alcoholic beverages in Indiana by affirming the lower court's ruling in this case.

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[19] Carmel's UDO is available at http://carmel.in.gov/home/showdocument?id=13185 (last accessed June 13th, 2019).

[20] Carmel's City Code is available at http://library.amlegal.com/nxt/gateway.dll/Indiana/carmel/cityofcarmelcodeofordinances?f=templates$fn=default.htm$3.0$vid=amlegal:carmel_in (last accessed on June 13, 2019).

CERTIFICATE OF COMPLAINCE

Undersigned counsel of record for Amicus Curiae, IMLA, certifies as follows:

1. This document complies with Circuit Rule 29 because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), the Brief contains 3,729 words.
2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32(b) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 12-point font in the text and 11-point font in the footnotes.

Date: June 13th, 2019

By: /s/ *Douglas D Church*
Douglas D. Church

CERTIFICATE OF SERVICE

I hereby certify that on this June 13th, 2019, I electronically filed the forgoing with the Clerk of the Court for the United States Circuit Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that services will be accomplished by the CM/ECF system.

By: /s/ *Douglas D Church*
Douglas D. Church