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.)

REPLY BRIEF OF APPELLANT

A. SCOTT CHINN
BRIAN J. PAUL
FAEGRE BAKER DANIELS LLP
300 North Meridian Street, Suite 2700
Indianapolis, IN 46204
(317) 237-0300

AMY MASON SAHARIA
Counsel of Record
KATHERINE MORAN MEEKS
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000

TABLE OF CONTENTS

Page

INTRODUCTION....1

ARGUMENT....3

I. The Twenty-First Amendment Can Save a State Law from Preemption Only If the State Substantiates Its Claimed Twenty-first Amendment Interest. 3

A. The Federal Interest in Preemption Here Is Just as Strong, If Not Stronger, Than the Federal Interest in the Dormant Commerce Clause Context....6

B. Neither the Supreme Court Nor This Court Has Adopted a Rigid Distinction Between "Core" and "Noncore" Powers Under the Twenty-First Amendment. 11

C. The "Strong" Presumption of Validity that Allegedly Attaches to State Alcohol Regulation Is Not "Conclusive." 18

II. The Speculative State Interests Are Insufficient To Overcome the Powerful Federal Interest in Deregulating the Trucking Industry. 23

III. The Amicus Arguments in Support of the Judgment Below Are Meritless. 32

CONCLUSION....35

TABLE OF AUTHORITIES

Page

CASES

324 Liquor Corp. v. Duffy, 479 U.S. 335 (1987) 15, 16

44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) 7, 8, 9

Bacchus Imps., Ltd. v. Dias, 468 U.S. 263 (1984) 9, 10, 14

Bainbridge v. Turner, 311 F.3d 1104 (11th Cir. 2002) 10

Baude v. Heath, 538 F.3d 608 (7th Cir. 2008) 12

Borden's Farm Prods. Co. v. Baldwin, 293 U.S. 194 (1934) 21, 22

Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, 445 U.S. 97 (1980) ..... *passim*

Cap. Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984) ..... *passim*

Duncan Place Owners Ass'n v. Danze, Inc., — F.3d —, 2019 WL 2520411 (7th Cir. June 19, 2019) 3

Granholm v. Heald, 544 U.S. 460 (2005) 8, 9, 10

Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964) 4, 15

Ind. Alcohol & Tobacco Comm'n v. Spirited Sales, LLC, 79 N.E.3d 371 (Ind. 2017) 25, 26

Lebamoff Enters., Inc. v. Huskey, 666 F.3d 455 (7th Cir. 2012) ..... *passim*

Lebamoff Enters., Inc. v. Rauner, 909 F.3d 847 (7th Cir. 2018) ..... *passim*

Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992) 33

Mugler v. Kansas, 123 U.S. 623 (1887) 2

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

Page

Cases—continued:

Puerto Rico v. Franklin Cal. Tax-Free Trust, 136 S. Ct. 1938 (2016) 34

Rowe v. N.H. Motor Transp. Ass'n, 552 U.S. 364 (2008) 33, 34

S.C. Johnson & Son, Inc. v. Transp. Corp. of Am., 697 F.3d 544 (7th Cir. 2012) 24

Stawski Distrib. Co. v. Browary Zywiec S.A., 349 F.3d 1023 (7th Cir. 2003) 7, 9

Tenn. Wine & Spirits Retailers Ass'n v. Thomas, — U.S. —, No. 18-96 (June 26, 2019) .....*passim*

U.S. Airways, Inc. v. O'Donnell, 627 F.3d 1318 (10th Cir. 2010) 21

CONSTITUTION, STATUTE, AND RULE

U.S. Const. amend. XXI .....*passim*

Federal Aviation Administration Authorization Act of 1994, Pub. L. No. 103-305, 108 Stat. 1569 .....*passim*

49 U.S.C. § 14501 .....3, 24

Fed. R. Civ. P. 30(b)(6) 18, 27

INTRODUCTION

Just two days ago, the Supreme Court rejected the argument, made by Defendants here, that States enjoy "virtually complete" deference and cannot be required "to justify the chosen structure of their alcohol-distribution systems to federal courts." Brief of Appellees ("State Br.") 27. In *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, — U.S. —, No. 18-96 (June 26, 2019), the Supreme Court yet again confirmed that States must substantiate their interests with a factual record if the Twenty-first Amendment is to save a state law that otherwise conflicts with federal law.[1] Emphasizing that "mere speculation or unsupported assertions are insufficient," the *Tennessee Wine* Court rejected a Twenty-first Amendment defense because "the record [was] devoid of any 'concrete evidence'" that the state law at issue "actually promotes public health or safety." Slip op. 33. *Tennessee Wine* thus affirmed this Court's own recent pronouncement that a State must show that its law is "*necessitated* by permissible Twenty-first Amendment interests" and that

[1] E.F. Transit would not oppose the filing of a short supplemental opposition by Defendants addressing *Tennessee Wine*, but it requests the opportunity to file a supplemental reply if Defendants choose to do so. E.F. Transit proposes that Defendants have 14 days to file a supplemental brief and that E.F. Transit has 7 days after that to file a supplemental reply.

"evidence is crucial to evaluate the constitutionality of the statute." *Lebamoff Enters., Inc. v. Rauner*, 909 F.3d 847, 856 (7th Cir. 2018).

But even if Defendants were somehow correct that they need not affirmatively introduce evidence to substantiate their claimed Twenty-first Amendment interest, that would not mean that evidence is irrelevant to the required balancing test. Here, E.F. Transit offered evidence—unrebutted by Defendants—that naked political favoritism, and not legitimate Twenty-first Amendment concerns, drove Defendants' actions. The State's own witnesses conceded that barring E.F. Transit from providing transportation services that the market desires would not advance *any* Twenty-first Amendment interest. Defendants simply ignore that evidence. Even if their actions were entitled to a presumption of validity under the Twenty-first Amendment—and *Tennessee Wine* says nothing about such a presumption—the record would rebut that presumption in spades.

The district court erred in sustaining Defendants' actions based on entirely speculative and hypothetical state interests. As *Tennessee Wine* makes clear, "mere pretenses" will not suffice to sustain a state law regulating alcohol. Slip op. 14 (quoting *Mugler v. Kansas*, 123 U.S. 623, 661 (1887)). "[R]ather, if a statute purporting to have been enacted to protect the public

health, the public morals, or the public safety, has no real or substantial relation to those objects, . . . it is the duty of the courts to so adjudge." *Id.*

The Court should so adjudge and reverse the district court's judgment.

ARGUMENT

Consistent with their approach in the district court, Defendants do not contest that the Federal Aviation Administration Authorization Act ("FAAAA"), 49 U.S.C. § 14501(c), preempts their enforcement of the prohibited-interest statutes against E.F. Transit to bar E.F. Transit from providing transportation services to liquor wholesalers. *See* E.F. Transit Br. 31-33. They have waived any argument to the contrary. *Duncan Place Owners Ass'n v. Danze, Inc.*, — F.3d —, 2019 WL 2520411, at *1 (7th Cir. June 19, 2019). Accordingly, the only question on appeal is whether the Twenty-first Amendment saves this application of the statutes from the FAAAA's preemptive force. On the record in this case, it does not.

I. THE TWENTY-FIRST AMENDMENT CAN SAVE A STATE LAW FROM PREEMPTION ONLY IF THE STATE SUBSTANTIATES ITS CLAIMED TWENTY-FIRST AMENDMENT INTEREST.

When federal law collides with state alcoholic beverage law, courts decide which law prevails by balancing "competing federal and state interests." *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, — U.S. —, No.

18-96 (June 26, 2019), Slip op. 23; *see also Lebamoff Enters., Inc. v. Huskey*, 666 F.3d 455, 458 (7th Cir. 2012). The Supreme Court has described this balancing inquiry as "a pragmatic effort to harmonize state and federal powers within the context of the issues and interests at stake in each case." *Cap. Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984); *see also Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97, 110 (1980) (requiring "careful scrutiny of those concerns in a concrete case"); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964) (similar).

This balancing test must be conducted in light of a concrete factual record. E.F. Transit Br. 34-39. A State may not prevail by offering speculative or purely hypothetical justifications for its laws. This Court emphasized last year that "*evidence is crucial* to evaluate the constitutionality of the statute." *Lebamoff Enters., Inc. v. Rauner*, 909 F.3d 847, 856 (7th Cir. 2018) (emphasis added); *accord Tenn. Wine*, Slip op. 33. This requirement makes sense: the balancing inquiry is conducted, if at all, only in cases where a court has found that *state law actually conflicts with federal law*. *See Huskey*, 666 F.3d at 458, 460. In these circumstances, the Supremacy Clause ordinarily requires that state law be set aside. Where alcohol regulation is concerned, the Twenty-first Amendment provides the State a potential escape hatch, but only if it carries

its burden of producing "concrete evidence" that the law "actually promotes public health or safety." *Tenn. Wine*, Slip op. 33.

Defendants resist the notion that they have any affirmative obligation to produce evidence justifying their application of Indiana law, and they urge this Court to decide the case under a highly deferential standard akin to rational basis review. But the dissenting Justices in *Tennessee Wine* proposed such a standard, and the majority emphatically rejected that approach. *Compare* Slip op. 11-12 (Gorsuch, J., dissenting) (stating that Tennessee's requirement was "one reasonable way of accomplishing" a legitimate Twenty-first Amendment interest and was based on a "commonsense rationale"), *with* Slip op. 33 (requiring "concrete evidence" of the law's effectiveness).

As Defendants acknowledge, a litany of other cases cited by E.F. Transit rejected a deferential standard as well. E.F. Transit Br. 34-39. They thus attempt to distinguish those cases on two principal grounds: first, that some cases involved the Dormant Commerce Clause and, second, that others did not involve a State's exercise of a "core" Twenty-first Amendment power. Neither distinction has merit.

A. The Federal Interest in Preemption Here Is Just as Strong, If Not Stronger, Than the Federal Interest in the Dormant Commerce Clause Context.

Defendants argue that *Rauner* and its sister cases (and presumably *Tennessee Wine*) are irrelevant because they involved challenges to state alcohol laws under the Dormant Commerce Clause, rather than the Supremacy Clause. But Defendants fail to explain why the Court should adopt a different analytical framework in dormant commerce and preemption cases. Such a distinction would make little sense. Adopting Defendants' position would mean that States have a lighter burden in cases where Congress has invoked its Commerce Clause powers to preempt state law *expressly* than in cases where the Dormant Commerce Clause *impliedly* preempts state law.

1. Defendants' counterintuitive argument finds no support in either the text of the Twenty-first Amendment or the cases interpreting it. "In determining state powers under the Twenty-first Amendment, the Court has focused primarily on the language of the provision rather than the history behind it." *Cal. Liquor Dealers*, 445 U.S. at 106-07; *see also id.* at 107 n.10 (observing that the Amendment's history is deeply contested); *Tenn. Wine*, Slip op. 11. The plain text of the Twenty-first Amendment suggests that it grants the States concurrent powers to regulate interstate traffic in alcohol

that would otherwise be reserved exclusively to Congress—but goes no further.

Section 2 of the Amendment provides:

> 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. Const. amend. XXI § 2 (emphasis added). The word "into" suggests that the Amendment specifically empowers States to regulate *imports* of "intoxicating liquors" from other jurisdictions, even though, under ordinary Commerce Clause principles, Congress has plenary power over interstate traffic in goods. That is how this Court has understood Section 2: "This language permits the states to restrict imports without regard to the 'dormant commerce clause.' It does not have any more sweeping effect." *Stawski Distrib. Co. v. Browary Zywiec S.A.*, 349 F.3d 1023, 1026 (7th Cir. 2003) (citation omitted).

The Supreme Court has repeatedly emphasized that, "although the Twenty-first Amendment limits the effect of the dormant Commerce Clause on a State's regulatory power over the delivery or use of intoxicating beverages within its borders, the Amendment does not license the States to ignore their obligations under other provisions of the Constitution." *44*

Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 516 (1996); *see also Granholm v. Heald*, 544 U.S. 460, 486 (2005) ("state laws that violate other provisions of the Constitution are not saved by the Twenty-first Amendment"). Importantly here, the Supreme Court has emphasized that "the Twenty-first Amendment *does not in any way diminish the force of the Supremacy Clause*." *44 Liquormart*, 517 U.S. at 516 (emphasis added) (setting aside a State's liquor-advertising regulation that violated the First Amendment). Nor does it "entirely supersede Congress's power to regulate commerce." *Tenn. Wine*, Slip op. 23. To the contrary, as the Court recognized in *Tennessee Wine*, "the Court has ruled against state alcohol laws that conflicted with federal regulation of the export of alcohol, federal antitrust law, and federal regulation of the airwaves." *Id.* (citations omitted).

This authority might be read to mean that the Twenty-first Amendment has no power to salvage a state alcohol regulation that conflicts with a federal statute. In practice, however, both the Supreme Court and this Court have given States the opportunity to justify their laws in cases where, absent the Twenty-first Amendment, those laws would necessarily be set aside. *See, e.g.*, *Tenn. Wine*, Slip op. 23 (observing that the preemption inquiry in Twenty-first Amendment cases involves "evaluating competing federal and state

interests"); *Huskey*, 666 F.3d at 458 (observing, in an FAAAA preemption case, that "a balancing of state and federal interests must be conducted"). At the very least, cases such as *Stawski* and *44 Liquormart* suggest that the States bear no less a burden of justifying their laws in express preemption cases than they do in dormant commerce cases—and may even bear a greater one.

2. In support of their supposed distinction between the Twenty-first Amendment analyses in preemption and dormant commerce cases, Defendants contrast the plurality opinion in *North Dakota v. United States*, 495 U.S. 423 (1990), a preemption case, with *Granholm* and *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), both dormant commerce cases. State Br. 28-29. Defendants point specifically to a passage in *North Dakota* recognizing that state liquor laws are "supported by a strong presumption of validity." 495 U.S. at 433; *see also Huskey*, 666 F.3d at 458 (quoting *North Dakota*). By contrast, they argue, *Granholm* and *Bacchus Imports* concluded that state alcohol laws that discriminate against out-of-state products are presumptively *invalid* and may be saved only if the State comes forward with evidence that nondiscriminatory alternatives are "unworkable." State Br. 29.

But *Granholm* and *Bacchus* did no more than recognize that the powers granted the States under the Twenty-first Amendment do not include the power to engage in "mere economic protectionism." *Bacchus Imps.*, 468 U.S. at 276; *see also Granholm*, 544 U.S. at 486-87. In essence, they hold that laws intended "to promote a local industry," rather than "to combat the perceived evils of an unrestricted traffic in liquor," are entitled to no weight in the Twenty-first Amendment balancing inquiry. *See Bacchus Imps.*, 468 U.S. at 276.

These cases in no way suggest that the Supreme Court has adopted a rigid doctrinal distinction between preemption and dormant commerce cases. To the contrary: *Bacchus Imports* quoted *Midcal Aluminum*, a preemption case, in describing the standard to be applied under the Twenty-first Amendment when federal law and state law conflict. *See Bacchus Imps.*, 468 U.S. at 275 (quoting *Midcal Aluminum*, 445 U.S. at 109); *see also Tenn. Wine*, Slip op. 23 (citing preemption cases); E.F. Transit Br. 51 (citing other examples of courts' citing cases across both contexts); *Bainbridge v. Turner*, 311 F.3d 1104, 1114 (11th Cir. 2002) (observing that "the two lines of cases have frequently intersected"). Defendants' attempts to distinguish the dormant commerce cases are thus meritless.

B. Neither the Supreme Court Nor This Court Has Adopted a Rigid Distinction Between "Core" and "Noncore" Powers Under the Twenty-First Amendment.

1. Defendants next attempt to distinguish *Midcal Aluminum* and *Capital Cities*, preemption cases that required States to substantiate their interests on a factual record, as involving "noncore" powers under the Twenty-first Amendment. According to Defendants, they cannot be required to show that their enforcement action against E.F. Transit is "actually addressing a concrete problem," State Br. 27, because it is an exercise of Indiana's "core" power to structure its system for alcohol distribution. But this Court's case law forecloses the argument that cases involving "core" and "noncore" powers require a different analytical framework. In any event, no Supreme Court case purports to establish a formal distinction between cases involving "core" and "noncore" powers under the Twenty-first Amendment.

The case that rejected this argument was *Lebamoff Enterprises v. Huskey*. Although Defendants quote and cite this case throughout their brief, they conspicuously omit the actual rule it adopted: "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." 666 F.3d at 458 (brackets omitted and emphasis added). As

E.F. Transit noted in its opening brief, "[a]ny 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). *Huskey*'s recognition that balancing is necessary even in "core power" cases wholly undermines Defendants' position that they enjoy "virtually complete" deference and cannot be required "to justify the chosen structure of their alcohol-distribution systems to federal courts." State Br. 27.

In apparent recognition that *Huskey* forecloses their position, Defendants spend an entire section of their brief advocating for the approach outlined in Judge Hamilton's concurring opinion in that case. State Br. 21-25. Judge Hamilton argued that federal interests need not be considered at all when a State is exercising a core power, and that the state law "should be upheld even if . . . its actual benefits are minimal and its burdens on federal interests are significant." *See* 666 F.3d at 462. To state the obvious, the majority opinion in *Huskey*, not Judge Hamilton's concurring opinion, is the law of the Circuit.

What is more, the Supreme Court specifically rejected Judge Hamilton's approach in *Tennessee Wine*. Far from suggesting that state alcohol laws must prevail even when the burden on federal interests is substantial, the

Court collected multiple cases in which it "has ruled against state alcohol laws that conflicted with federal regulation." *Tenn. Wine*, Slip op. 23. It also made plain that judicial review in these cases is searching and requires scrutiny of "the actual purpose and effect of a challenged law." *Id.* at 31. Where a State's law has "no demonstrable connection" to its legitimate interest in controlling "the public health and safety effects of alcohol use," it must be rejected. *Id.* at 31-32. After *Tennessee Wine*, there can be no doubt that Judge Hamilton's expansive view of state power under the Twenty-first Amendment is not the law.

2. Neither *Tennessee Wine* nor any other Supreme Court case draws a bright line between cases involving "core" and "noncore" powers. In fact, the Supreme Court has not recognized "noncore" powers as a category at all. Tellingly, when Defendants quote *Midcal Aluminum* as supposedly recognizing a distinction between "core" and "noncore" powers, they are forced to insert the latter term in brackets, because it appears nowhere in the Supreme Court's actual opinion. *See* State Br. 24 ("In *Midcal Aluminum*, the Court held that the Sherman Act preempted a California price-maintenance scheme . . . because it constituted 'other [non-core] liquor regulations'").

To be sure, some Supreme Court cases contain references to the "core" powers or interests that the Twenty-first Amendment was designed to serve. And the Court has defined "the core § 2 power" as a State's power "to regulate the sale or use of liquor within its borders." *Cap. Cities*, 467 U.S. at 713; *see also Tenn. Wine*, Slip op. 31-32 (Twenty-first Amendment gives States "leeway" to pass laws "address[ing] the public health and safety effects of alcohol use"); *Midcal Aluminum*, 445 U.S. at 110 (Twenty-first Amendment gives States control over "whether to permit importation or sale of liquor and how to structure the liquor distribution system"); *North Dakota*, 495 U.S. at 432 (Twenty-first Amendment interests include "promoting temperance, ensuring orderly market conditions, and raising revenue").

Defendants err, however, in suggesting that this descriptive language drives the Supreme Court's analysis. The Court does not decide how much deference to grant by asking what power the State purports to be exercising and whether that power is "core." The question in every case is "whether the principles underlying the Twenty-first Amendment are *sufficiently implicated*" by the regulation at issue that the state interest "outweigh[s]" the federal interest. *Bacchus Imps.*, 468 U.S. at 275 (emphasis added); *see also*

Tenn. Wine, Slip op. 24-25; *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 347 (1987); *Cap. Cities*, 467 U.S. at 714.

The Supreme Court has instructed time and again that this inquiry must be conducted "in the context of the issues and interests at stake in any *concrete case*." *Hostetter*, 377 U.S. at 332 (emphasis added); *see also Cap. Cities*, 467 U.S. at 714 (similar). And a "concrete case" is one with a factual record that permits the Court to assess whether the asserted state interests are in fact being promoted. *See Tenn. Wine*, Slip op. 32-33 (requiring a "demonstrable connection" to and "concrete evidence" that the state law at issue "actually promotes public health or safety"); *Rauner*, 909 F.3d at 856 (balancing is "ill-suited for the motion to dismiss stage" because "evidence is crucial to evaluate the constitutionality of the statute").

In *324 Liquor Corp.*, for example, New York asserted that a state law requiring a minimum markup on the retail price of wine was intended to "preserv[e] small retail establishments." 479 U.S. at 350. But the Court noted that "[t]he only relevant evidence in the record" indicated that the number of retail stores had declined while the law was in effect. *Id.* According to the Court, "the State's *unsubstantiated interest* in protecting small retailers simply is not of the same stature as the goals of the Sherman Act," *id.*

(brackets omitted and emphasis added), and the Twenty-first Amendment could not save the New York law from preemption.

Tennessee Wine is of a piece. Tennessee argued that its residency requirement, among other things, "would promote responsible alcohol consumption," Slip op. 35—which is surely a core Twenty-first Amendment interest. The Court, however, did not presume the regulation to be valid merely because Tennessee invoked a legitimate interest. Rather, it struck down the Tennessee law because "[n]o evidence has been offered that durational-residency requirements actually foster [responsible] sales practices, and in any event, the requirement . . . is very poorly designed to do so." *Id.*

Defendants' suggestion that *Midcal Aluminum* and *Capital Cities* required States to substantiate their interests because only "noncore" powers were at stake is mistaken. *Midcal Aluminum* involved state price controls for wine at the point of sale to consumers, *see* 445 U.S. at 99, while *Capital Cities* concerned state restrictions on television ads for alcoholic beverages. Defendants fail to explain why laws regulating the price at which alcohol is sold or the way in which it is marketed to consumers do not fall within "the

core § 2 power" "to regulate the sale or use of liquor" within state borders. *Cap. Cities*, 467 U.S. at 713.

More to the point, in both cases, the Court examined the record before it and concluded that the state interests were insubstantial compared to the federal interests. *See, e.g.*, *Cap. Cities*, 467 U.S. at 715 (concluding that the advertising ban "engages only indirectly the central power reserved by § 2 of the Twenty-first Amendment"). Defendants confuse the *result* of the Court's balancing inquiry with the standard of review it applied in the first instance.

3. In this case, Defendants argue that they need not justify their action against E.F. Transit because they are exercising the "core" power to structure the distribution of alcohol within Indiana. State Br. 26. But Defendants' action cannot survive preemption merely because it has the *effect* of restricting the distribution of liquor. Instead, Defendants bear the burden of showing that their restriction of the transportation services provided by E.F. Transit is "so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that [their] requirements directly conflict with express federal policies." *Cap. Cities*, 467 U.S. at 714.

Defendants cannot seriously maintain that they have satisfied that standard here. They failed to produce any evidence that barring E.F. Transit from carrying liquor products, as every other licensed carrier may do, would promote temperance or orderly market conditions. The State's own Rule 30(b)(6) witnesses *conceded* that applying the prohibited-interest laws to E.F. Transit would not serve either of these goals. E.F. Transit Br. 42-44. The record in this "concrete case," *Midcal Aluminum*, 445 U.S. at 110, permits only one conclusion: there is no "concrete evidence" showing that Defendants' action "actually promotes" a legitimate interest. *Tenn. Wine*, Slip op. 33.

C. The "Strong" Presumption of Validity that Allegedly Attaches to State Alcohol Regulation Is Not "Conclusive."

1. Defendants argue that this case may be decided on nothing more than the "strong presumption of validity" that they say attaches to state laws that represent an exercise of a "core" power under the Twenty-first Amendment. State Br. 26. Even if such a presumption applied, the record would rebut the presumption in this case.

Defendants principally rely on two cases to argue that their enforcement of the prohibited-interest statutes is entitled to a "strong presumption of validity." The first, *North Dakota v. United States*, 495 U.S. 423 (1990), arose in a procedural posture considerably different from this one. The issue there

was whether a federal law requiring that the military purchase from the most competitive source *impliedly* preempted a state law that imposed certain reporting requirements on liquor distillers and thus increased the cost of doing business. *Id.* at 427-30. Unlike in this case, the federal law at issue did not contain an express preemption provision. *Id.* at 441. When the *North Dakota* plurality recognized that "state liquor control policies . . . are supported by a strong presumption of validity," *id.* at 433, it did so in the course of holding that *no conflict existed* between the federal and state laws at all, *id.* at 441. The *North Dakota* Court thus had no occasion to engage in the balancing of interests required by the Twenty-first Amendment when state and federal law are actually at odds. The plurality opinion did *not* conclude, as Defendants argue here, that the Twenty-first Amendment affords state law a presumption of validity in the balancing analysis. Read in context, the "presumption" was merely a recognition that courts should be circumspect in finding a clash between federal and state law in the first instance, especially where those state laws regulate alcohol.

Huskey, the second case on which Defendants rely, *did* conclude that States receive a "presumption of validity," or "thumb on the scale," in the

Twenty-first Amendment balancing inquiry.[2] 666 F.3d at 458 (quoting *North Dakota*, 495 U.S. at 433). But *Huskey* held that the presumption attaches only upon a finding that "the state interests are within the core powers that the Twenty-First Amendment confers on the states." *Id.* (emphasis omitted). That is, the presumption obtains only after the State has made a showing that its regulation *actually implicates* a legitimate Twenty-first Amendment interest. *See Cap. Cities*, 467 U.S. at 714. Indeed, the State made such a showing in *Huskey*, offering the affidavits of two excise officers detailing how it would be more difficult for police to keep alcohol out of the hands of minors if the state law at issue were preempted. *See* Brief of Appellees, No. 11-1362, ECF No. 17, at 29-30.

Defendants point to language in *Huskey* in which this Court noted that state interests "*could*" be undermined if state law were set aside, and they argue that *Huskey* must have been applying a deferential standard akin to rational basis review. State Br. 30 (quoting *Huskey*, 666 F.3d at 459). But the State in fact presented evidence in *Huskey* to substantiate its asserted interest

[2] In Defendants' brief, this "thumb on the scale" transmutes into a "*heavy* thumb on the scale. State Br. 14 (emphasis added). No case Defendants cite uses that language.

in preventing motor carriers from delivering alcohol directly to consumers. The conditional "could" is but a recognition that the State need not prove to a certainty that its interests would be undermined if its law were preempted.

Huskey does not suggest that a State may prevail in the Twenty-first Amendment balancing inquiry by offering purely hypothetical or speculative rationales for its laws. Because that position diverges so significantly from the approach of the Supreme Court and other Circuits, *see* E.F. Transit Br. 34-39, one would expect this Court to have been explicit had it intended to adopt such a position. To the contrary, *Huskey* affirmatively relied on *U.S. Airways, Inc. v. O'Donnell*, 627 F.3d 1318 (10th Cir. 2010)—which recognized that Twenty-first Amendment balancing "may ultimately depend upon factual findings and conclusions," *id.* at 1331. In any event, *Tennessee Wine* reaffirms that hypothetical interests do not suffice. Slip op. 33.

2. Even if Defendants were correct that state laws may escape preemption in *some* cases based on nothing more than a background "presumption of validity," that presumption plainly cannot satisfy a State's burden in cases where, as here, the plaintiff has presented evidence that legitimate Twenty-first Amendment concerns did not motivate the State's enforcement of its alcohol laws. *See Borden's Farm Prods. Co. v. Baldwin*,

293 U.S. 194, 209 (1934) ("the presumption which attaches to the legislative action . . . is not a conclusive presumption, or a rule of law which makes legislative action invulnerable to constitutional assault").

The district court decided this case after two rounds of discovery in which the parties exchanged hundreds of documents and deposed eleven fact witnesses. The evidence established that the Alcohol and Tobacco Commission was poised to approve E.F. Transit's proposal to provide transportation services to an Indiana liquor wholesaler in arm's-length arrangements—and then changed course only after entrenched, well-connected liquor interests pressured a sympathetic governor's office to intervene. *See* E.F. Transit Br. 13-18. Confronted with this evidence during their depositions, the Commission's own witnesses conceded that barring E.F. Transit's proposed transportation and warehousing agreements did not advance any state interest protected by the Twenty-first Amendment. *See* E.F. Transit Br. 42-44.

As they did in the district court, Defendants leave this devastating evidence unanswered. Instead, they invite the Court to ignore the factual record and decide this case on the basis of the speculative and unsupported interests cited in their brief. But E.F. Transit is not aware of a single case,

other than the decision below, in which a court has disregarded the actual evidence before it and upheld the State's laws under a mere "presumption of validity." Defendants' position flouts *Rauner*, which held such evidence to be "crucial." It is also at odds with *Huskey*, which recognized that even a "strong" presumption of validity is not "conclusive." 666 F.3d at 458. Defendants fail to explain why E.F. Transit has not overcome the supposed presumption with unrebutted evidence that Defendants' application of state law was driven by naked political favoritism, rather than any legitimate interest protected by the Twenty-first Amendment.

II. THE SPECULATIVE STATE INTERESTS ARE INSUFFICIENT TO OVERCOME THE POWERFUL FEDERAL INTEREST IN DEREGULATING THE TRUCKING INDUSTRY.

A. Turning to the balancing inquiry required under the Twenty-first Amendment, Defendants argue that the federal interest in this case is narrow. They do not contest the general importance of the FAAAA, which was the capstone in a comprehensive federal effort to deregulate both the airline and trucking industries. *See* E.F. Transit Br. 4-8, 59-62. Instead, they argue that this case scarcely implicates the federal interest because Indiana's law restricts the services of only a single motor carrier—E.F. Transit—by virtue of its corporate ties to a beer wholesaler. State Br. 36-37. All other licensed

carriers, they concede, may carry beer, wine, and liquor together on the same truck. *Id.* This argument lacks merit.

The fact that Defendants have singled out one disfavored motor carrier in no way minimizes the federal interests at stake. The FAAAA explicitly precludes the States not only from *enacting* laws "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property," but also from "*enforc[ing]*" them. 49 U.S.C. § 14501(c) (emphasis added). Enforcement actions, by their nature, often apply to only a single entity. Indeed, the provision preempts enforcement of state laws related to a price, route, or service of "any" motor carrier. *Id.* Just one affected motor carrier suffices.

As E.F. Transit previously explained, moreover, Congress enacted the FAAAA precisely to combat the "protection of industry incumbents" through "control of the regulatory apparatus." *See* E.F. Transit Br. 47 (quoting *S.C. Johnson & Son, Inc. v. Transp. Corp. of Am.*, 697 F.3d 544, 548 (7th Cir. 2012)). Here, industry incumbents—well-connected liquor wholesalers—have usurped the regulatory apparatus to bar E.F. Transit from providing transportation services to a competitor of those industry incumbents. Their

conduct is no less harmful to the federal interest in deregulation merely because they have aimed their fire at one prospective competitor.

B. If anything, Defendants' argument demonstrates how slight the *state* interest is. Defendants maintain that E.F. Transit will acquire a prohibited interest in a liquor wholesaler's permit if it is permitted to carry products for Indiana Wholesale Wine & Liquor, an independent entity. But Defendants fail to explain why merely storing beer, wine, and liquor in the same warehouse or transporting those products on the same truck would give E.F. Transit an interest in a liquor wholesaler's permit. If mere carriage of goods were sufficient to create a prohibited interest, then *no* trucking company would be to able ship beer, wine, and liquor together. Yet Indiana law permits that activity, as Defendants acknowledge. *See* State Br. 5.

Defendants argue that E.F. Transit is no ordinary motor carrier—it is, in their view, "a beer wholesaler who also happens to have a motor carrier license." State Br. 2. Defendants base this argument on the Indiana Supreme Court's decision affirming the Commission's denial of a liquor wholesaler's permit to a wholly owned subsidiary of E.F. Transit. In *Indiana Alcohol & Tobacco Comm'n v. Spirited Sales, LLC*, 79 N.E.3d 371 (Ind. 2017), the court concluded that the liquor permit would create a prohibited interest because

the "ties" between E.F. Transit and its sister company, Monarch Beverage, "were so extensive that EFT could reasonably be deemed to hold an interest in a beer wholesaler's permit." *Id.* at 379.

Although the Indiana Supreme Court found the "ties" between Monarch and E.F. Transit sufficiently strong to deny a liquor wholesaler's permit to E.F. Transit's subsidiary, the court did not hold that E.F. Transit is, in fact, a beer wholesaler. And nothing in the record of this case indicates that E.F. Transit performs any functions of a beer wholesaler, including, perhaps most importantly, the actual *sale* of beer. To the contrary, the evidence in this case is that E.F. Transit and Monarch observe corporate formalities and have consistently been recognized as separate companies by Indiana agencies other than the Alcohol and Tobacco Commission. *See* E.F. Transit Br. 12; App. 148.

More fundamentally, however, even if E.F. Transit is deemed to hold an interest in Monarch's beer wholesaler's permit, Defendants fail to explain why E.F. Transit would have a prohibited interest in the liquor wholesaler's permit of Indiana Wholesale, an independent entity. Defendants imagine a parade of horribles that may result if E.F. Transit is permitted to transport both beer and liquor. State Br. 33-34. Defendants base these speculative outcomes on the assumption that E.F. Transit would be acting as both a beer wholesaler

(by virtue of its relationship with Monarch) *and* as a liquor wholesaler under the proposed agreement with Indiana Wholesale. Defendants hypothesize that this arrangement would create "a large wholesaler of both beer and liquor" that could "dominat[e] the distribution chain" and engage in various abuses. *Id.* at 33. And this consolidation could, in turn, reduce alcohol prices and create a climate of intemperance among consumers. *Id.* at 36.

The actual record in this case defeats this chain of speculation. Multiple Commission witnesses, including the Rule 30(b)(6) witnesses, acknowledged that E.F. Transit *would not perform any functions unique to a liquor wholesaler* under the proposed agreements:

> Q: We've established IWWL performs all of the functions of a wholesaler under this agreement; correct?
>
> A: Correct.
>
> Q: E.F. Transit does not perform the functions of a wholesaler under this agreement; correct?
>
> A: Correct.
>
> Q: It doesn't have the ability to dictate the functions of the wholesaler under this agreement; correct?
>
> A: Correct.

App. 94 (Bedwell); *see also* App. 144-147 (Stewart). As the State's witnesses conceded, the wholesaling functions would remain entirely with Indiana Wholesale. App. 215. Defendants fail to explain how the proposed

arrangement would give E.F. Transit an interest in a liquor wholesaler's permit or lead to consolidation in the wholesaler tier when E.F. Transit would not, in fact, be doing the work of a liquor wholesaler.

The Commission's chairman, moreover, admitted that Indiana law contains other provisions that prohibit the abuses about which Defendants speculate. *See* App. 209 ("Q: And the abuses that you talked about all have statutory prohibitions against them. A: Sure, yes."). In *Tennessee Wine*, the Court dismissed Tennessee's attempt to justify a state law that conflicted with federal law when Tennessee's purported objective could "easily be achieved by ready alternatives." Slip op. 33; *see also id.* at 36 ("there are obvious alternatives that better serve that goal without discriminating against nonresidents"). The Commission's chairman conceded that such alternatives are readily available here.

C. Defendants suggest that permitting E.F. Transit to store liquor products at its warehouse or carry them on its trucks would undermine the three-tier system in Indiana. E.F. Transit is not challenging the three-tier system, or even the separation of liquor and beer generally at the wholesale tier—it is merely seeking to do what other licensed motor carriers may do under Indiana law. Permitting E.F. Transit to provide *transportation*

services to liquor wholesalers, as the FAAAA permits it to do, will not eviscerate Indiana's prohibition on joint beer and liquor *wholesaling*. As the Supreme Court explained in *Tennessee Wine*, Defendants cannot justify their preempted action by referencing the three-tier system writ large; the Twenty-first Amendment does not sanction "every discriminatory feature that a State may incorporate into its three-tiered scheme," and each State's variation of the three-tier system "must be judged based on its own features." Slip op. 28.

Defendants' historical account of the separation of beer and liquor wholesaling is misleading in any event. Like many other States, Indiana created the three-tier system in the aftermath of Prohibition to prevent the return of the "tied house"—that is, to prevent *vertical* integration between powerful manufacturers and the retailers and detailers that sold alcohol products directly to consumers. *See Tenn. Wine*, Slip op. 13 n.7; E.F. Transit Br. 9. There is no evidence that Indiana historically was concerned about *horizontal* integration among beer and liquor wholesalers. To the contrary, the historical record reflects that the separation of beer and liquor at the wholesale level was enacted in the post-Prohibition era to create separate sources of patronage for state and county politicians. E.F. Transit Br. 9-10. Defendants have not rebutted that historical account.

Defendants cite a 2012 book by Marc Carmichael and Harold Feightner that supposedly supports their assertion that the horizontal prohibited-interest statutes were "an effort to keep wholesalers from becoming too large and powerful." State Br. 32. But the original, unpublished Feightner manuscript contains no such assertion—it was added later by Mr. Carmichael, the president of the Indiana Beverage Alliance, a trade association of beer wholesalers that compete with Monarch and that moved, unsuccessfully, to file an amicus brief in this Court.

D. Defendants argue, finally, that Indiana's interests should prevail in the balance because the "prohibited-interest statutes are effective: witness the absence of the problems they aim to curb." State Br. 34. Notably, Defendants do not support this assertion with any citation to the record, nor do they identify any evidence that the many States that permit joint wholesaling of beer and alcohol have suffered such problems.

It would be especially improper for the Court to rely on Defendants' *ipse dixit* assertion that they have successfully kept wholesalers from "becoming too large and powerful," State Br. 32 (citation omitted), when liquor wholesaling is dominated by the Indiana affiliates of two large national interests—Southern Glazer's Wine & Spirits of America, Inc. and Republic

National Distributing Co. Southern Glazer's is by far the country's largest wine and spirits distributor, with operations in 44 states and the District of Columbia.[3] Republic National Distributing is also one of the nation's largest wine and spirits distributors, with operations in 22 states and the District of Columbia.[4] These powerful, entrenched interests are the very same that pressured the governor's office to intervene to block the proposed transportation agreement between E.F. Transit and Indiana Wholesale, their much smaller competitor. *See* E.F. Transit Br. 14-19.

E. As E.F. Transit argued in its opening brief, this case directly implicates the substantial federal interests embodied in the FAAAA. Congress passed that law with the aim of lifting state restrictions on the type of goods that could be carried on a single truck to save fuel and promote more efficient trucking routes. Contrary to Defendants' baseless accusations, this case is not part of a "campaign" to "dominate the wholesale market." State Br. 6 n.2. Rather, E.F. Transit attempted to provide transportation services to Indiana Wholesale to create efficiencies for one of Monarch's and Indiana Wholesale's suppliers, Gallo. *See* ECF No. 167-2, at 40. The arrangement that

[3] http://www.southernglazers.com/about-us/.

[4] https://www.rndc-usa.com/locations.

E.F. Transit desires to pursue with Indiana Wholesale is precisely the kind of market-driven solution that the FAAAA aims to protect.

By contrast, the state interests in this case are meager at best. The record undermines any suggestion that the transportation agreements at issue would lead to consolidation of liquor and beer interests at the wholesale tier, and the State's own witnesses conceded that barring the arrangement would serve none of the interests at the core of the Twenty-first Amendment. Under these circumstances, the balance tips decisively in favor of preemption.

III. THE AMICUS ARGUMENTS IN SUPPORT OF THE JUDGMENT BELOW ARE MERITLESS.

This Court should discount the arguments of amicus Center for Alcohol Policy ("CAP"). Although its name might suggest that CAP is an impartial friend of the Court, it was founded by, receives funds from, and shares an address in Alexandria, Virginia, with the National Beer Wholesalers Association.[5]

CAP argues that the Court need not engage in Twenty-first Amendment balancing because the FAAAA does not preempt the prohibited-interest statutes in the first instance. As CAP acknowledges, Defendants did not

[5] *See* https://www.centerforalcoholpolicy.org/about/.

advance this argument either in the district court or in their brief, nor did the district court address it. CAP's brief thus marks an attempted end-run around the ordinary rule that arguments not raised in the district court or in a party's briefing are waived. *See* p. 3, *supra*.

The Center's position is meritless in any event. It principally argues that the FAAAA does not displace the State's enforcement of the prohibited-interest statutes against E.F. Transit because those laws are "directed at" wholesalers, not motor carriers. CAP Br. 12. But it has long been recognized that the FAAAA has a "broad" scope, *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 370 (2008) (internal quotation marks omitted), and preempts laws *not specifically addressed to the trucking industry* if they have a direct or indirect effect on the prices, routes, or services offered by a motor carrier with respect to the transportation of property, *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 386 (1992) (preempting enforcement of general consumer protection statutes against airlines).

This is just such a case, which is no doubt why Defendants waived this argument. Defendants have threatened to enforce Indiana law to prohibit E.F. Transit, a motor carrier, from providing transportation services to liquor wholesalers. Defendants' actions were *specifically directed at* E.F. Transit

and its proposed customer for those transportation services, Indiana Wholesale. And the direct effect of Defendants' actions is to "substitut[e] . . . [their] own governmental commands for competitive market forces in determining (to a significant degree) the services that motor carriers will provide"—"the very effect that the federal law sought to avoid." *Rowe*, 552 U.S. at 372. This is hardly a case where the connection to transportation services is merely peripheral.

Finally, CAP urges the Court to invoke the presumption against preemption to hold that the FAAAA does not apply in this case. CAP Br. 7-8. But the Supreme Court has held that the presumption does not apply in cases, like this one, involving express preemption clauses. *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016).

CONCLUSION

For the reasons set forth above and in E.F. Transit's opening brief, the district court's judgment should be reversed and summary judgment should be granted to E.F. Transit.

Respectfully submitted,

/s/ Amy Mason Saharia

A. SCOTT CHINN
BRIAN J. PAUL
FAEGRE BAKER DANIELS LLP
300 North Meridian Street
Suite 2700
Indianapolis, IN 46204

AMY MASON SAHARIA
Counsel of Record
KATHERINE MORAN MEEKS
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000

JUNE 28, 2019

CERTIFICATE OF COMPLIANCE
WITH TYPEFACE AND WORD-COUNT LIMITATIONS

I hereby certify that:

1. This brief complies with the type-volume limitation of Seventh Circuit Rule 32(c) because it contains 7,000 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

JUNE 28, 2019

CERTIFICATE OF SERVICE

I, Amy Mason Saharia, counsel for appellant and a member of the Bar of this Court, certify that, on June 28, 2019, copies of the attached Reply Brief of Appellant 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