Nos. 19-1075 & 19-1292

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

E.F. TRANSIT, INC.,

Plaintiffs-Appellants,

v.

INDIANA ALCOHOL & TOBACCO COMMISSION, ET AL.,

Defendants-Appellees.

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

BRIEF FOR THE UNITED STATES OF AMERICA AS AMICUS CURIAE SUPPORTING NEITHER PARTY

JOSEPH H. HUNT
Assistant Attorney General

MARK B. STERN
JAYNIE LILLEY
(202) 514-3542
Attorneys, Appellate Staff
Civil Division, Room 7321
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

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INTRODUCTION AND SUMMARY

This case concerns the interaction of the State of Indiana's statutes regulating permits for liquor, beer and wine wholesaling and the provision of the Federal Aviation Administration Authorization Act (FAAAA) that generally preempts state laws regulating a price, route, or service of a motor carrier.

Indiana law precludes the holder of a wholesale permit to sell beer from having "an interest" in a wholesale permit to sell liquor. The Monarch Beverage Company holds a permit to sell wine and beer. The owners of Monarch also own E.F. Transit, Inc. which provides transportation and related services. The Supreme Court of Indiana has established that in light of this common ownership and other features of their business relationship, Monarch has an interest in any permit acquired by E.F. Transit.

This case arises from a proposed contract under which E.F. Transit would provide storage and transportation services to the holder of a wholesale liquor permit, Indiana Wholesale. E.F. Transit sued the Indiana Alcohol and Tobacco Commission to enjoin the enforcement of the state statute, arguing that the state statute was preempted by the FAAAA. The district court concluded that the state law would be preempted, but that it was protected from preemption by the Twenty-First Amendment. This Court invited the views of the United States in light of the potential constitutional dimensions of the case.

To conclude either that a state law is preempted or that it is protected from preemption by the Twenty-First Amendment is a significant determination involving a difficult balancing of interests. We respectfully suggest that before undertaking this task, the Court should ascertain that Indiana law applies to the proposed contract in the manner assumed by the parties and the district court. It is clear that an "interest" in a permit held by E.F. Transit is to be treated as an interest also held by Monarch. The parties appear to have assumed that E.F. Transit would acquire an interest in Indiana Wholesale's permit by providing transportation and related services, and the district court made the same implicit assumption. As a result, there has been no explication of the threshold question in this case: would E.F. Transit, because of its common ownership with Monarch, acquire a prohibited interest in Indiana Wholesale's permit simply by E.F. Transit's entering into a contract with Indiana Wholesale to perform storage and delivery services.

The United States takes no position as to the correct answer to that question, but we respectfully urge that it should be definitively resolved before addressing sensitive questions of preemption and the Twenty-First Amendment. If existing case law does not authoritatively answer that question, the appropriate route may be certification to the Supreme Court of Indiana to definitively decide the issue. Certification would also furnish an opportunity for the Supreme Court of Indiana, if it concludes that E.F. Transit would acquire a prohibited "interest" in Indiana Wholesale by entering into the

transportation contract, to articulate the nature and strength of the State's interest in that application of its alcohol-control law. That would in turn inform the balancing under the Twenty-First Amendment of the purposed state interests and the application in this context of the FAAAA's requirement that motor carrier rates, routes, and services be free of state regulation.

STATEMENT

A. Statutory Background

1. To help effectuate the deregulation of the trucking industry, the Federal Aviation Administration Authorization Act of 1994, 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," 49 U.S.C. § 14501(c)(1). The Supreme Court has given the FAAAA's express preemption provision, and analogous provisions in similar statutes, broad effect and has recognized Congress's intent to "'ensure that the States would not undo federal deregulation with regulation of their own.'" *See Rowe v. New Hampshire Motor Transport Ass'n*, 552 U.S. 364, 368 (2008) (quoting *Morales v. Trans World Airlines*, 504 U.S. 374 (1992)).

2. Like many states, Indiana has an alcoholic beverage regulatory system dividing distribution into three tiers—manufacture, wholesale, and retail. *See Granholm v. Heald*, 544 U.S. 460, 466 (2005) (three-tier system is "unquestionably legitimate") (citation omitted). Within each tier, the State regulates separately beer, wine, and liquor through

statutes known as prohibited-interest laws. *See, e.g.*, Ind. Code §§ 7.1-3-2-1; 7.1-3-12-1; 7.1-3-7-1 (manufacturing tier).

As particularly relevant here, "[i]t is unlawful for the holder of a brewer's or beer wholesaler's permit to have an interest in a liquor permit of any type under this title." Ind. Code § 7.1-5-9-3(b). Similarly, "[i]t 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." Ind. Code § 7.1-5-9-6(a). "This aspect of Indiana's regulatory scheme is apparently unique to the state." *Monarch Beverage Co. v. Cook*, 861 F.3d 678, 680 (7th Cir. 2017). In general, state law regulating motor carriers permits a duly licensed motor carrier to transport all types of alcoholic beverages. *See generally* Ind. Code. § 7.1-3-18-2; *see also* App. 3.

B. Facts and Prior Proceedings

1. E.F. Transit is a federally-licensed trucking company that holds a state license to transport alcohol in Indiana. App. 3. The same shareholders who own E.F. Transit also own Monarch Beverage Company, which holds an Indiana beer wholesaler's permit. App. 3. E.F. Transit reached agreements to store, transport, and deliver liquor for Indiana Wholesale, which holds a wholesale liquor permit. App. 3-4.

After indications from the Indiana Alcohol and Tobacco Commission that it would not approve a first contract that included both warehousing and transportation services, the parties proposed a contract limited to transportation. App.4. The Commission "refused to approve or disapprove of" the second agreement but indicated that the

proposed transactions might violate Indiana's prohibited-interest laws by giving E.F. Transit interests in both a beer wholesaler's permit (through its common ownership with Monarch) and a liquor wholesaler's permit (through its dealings with Indiana Wholesale). App. 3-4.

E.F. Transit filed suit in federal court, claiming that this application of Indiana's prohibited-interest laws would be preempted by the FAAAA, which provides in relevant part 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." 49 U.S.C. 14501(c)(1). The district court initially dismissed the claim on the ground that the Commission had not ruled definitively on whether a proposed business relationship involving transportation services between E.F. Transit and a liquor wholesaler would violate the prohibited-interest laws.

2. On appeal, this Court reversed, *E.F. Transit, Inc. v. Cook*, 878 F.3d 606 (7th Cir. 2018), stressing that an intervening Indiana Supreme Court decision had held that an attempt by an E.F. Transit subsidiary to obtain an actual liquor wholesaler's permit, would violate the prohibited-interest laws. *See Indiana Alcohol & Tobacco Comm'n v. Spirited Sales, LLC*, 79 N.E. 3d 371, 378 (Ind. 2017). This Court concluded that the Indiana Supreme Court's "ruling—and the standing threat of prosecution—are enough to remove any ripeness barrier to this suit." 878 F.3d at 607, and remanded the case to the district court.

C. District Court Decision on Remand

1. On remand, the district court held that "the proposed contract between [E.F. Transit], 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." App. 6 (citing 878 F.3d at 610). But the court did not further evaluate whether a company acquires an interest in a liquor wholesaler's permit by contracting to perform transportation services that are otherwise lawful. As the court further noted, given their common assumption, the parties "agree[d] that Indiana's Prohibited Interest Statutes and the FAAAA conflict." App. 7.

The court observed that the Supremacy Clause "[o]rdinarily . . . 'would invalidate a state law that conflicted with a federal statute.'" App. 7 (quoting *Lebamoff Enter., Inc. v. Huskey*, 666 F.3d 455, 458 (7th Cir. 2012)). An otherwise-preempted law might nevertheless be "valid," *id.*, under Section Two of the Twenty-First Amendment, which provides that "[t]he 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."

The district court concluded that Indiana's application of its prohibited-interest laws to E.F. Transit was "protected by the Twenty-first Amendment." App. 11. Relying on *Huskey*, the district court held that the prohibited-interest laws are "within Indiana's core powers" under the Twenty-First Amendment. App. 8. The court then "balanc[ed]

the state and federal interests at play." *Id.* The court stated that the prohibited-interest laws "regulate the ownership and control of the distribution of alcohol within Indiana's borders so as . . . to limit influence and economic power of alcoholic beverages permittees" and to "encourage[], among other things, temperance." App. 10-11. The court concluded that "the state's interests protected by the Twenty-first Amendment, and carried out through reasonable means, outweigh the federal interest advanced by" E.F. Transit. App. 11.

2. E.F. Transit appealed. After briefing was complete, the Court "certifie[d] to the Attorney General that the decision of the district court shows a potential conflict between 49 U.S.C. § 14501(c)(1) and the Twenty-First Amendment." Order of 8/13/19. The United States subsequently notified the Court that it would not intervene at this point but would explain its views in an amicus brief.

ARGUMENT

Before Considering Questions of Preemption and the Application of the Twenty-First Amendment, This Court Should Ascertain Whether Monarch and E.F. Transit Would Acquire an Interest in Indiana Wholesale's Liquor Permit by Performing the Contract for Transportation Services.

A. The parties assumed, as did the district court, that the proposed contract would give E.F. Transit and Monarch an interest in Indiana Wholesale's liquor permit. That premise, which forms the basis of this suit, has never been adequately explained. The *Spirited Sales* decision makes clear that an interest acquired by E.F. Transit is also acquired by Monarch for purposes of the Indiana statute. That case does not, however, resolve the

question whether a company acquires an interest in the liquor permit of a wholesaler for which it contracts to provide trucking services.

The Indiana prohibited-interest laws make it "unlawful for the holder of a . . . beer wholesaler's permit to have an interest in a liquor permit of any type." Ind. Code § 7.1-5-9-3(b); *see also* Ind. Code § 7.1-5-9-6(a). In *Spirited Sales*, the Indiana Supreme Court addressed the question whether E.F. Transit (through Spirited Sales, its wholly-owned subsidiary) could obtain a liquor wholesaler's permit even though the same shareholders also owned Monarch, which held a beer wholesaler's permit. 79 N.E.3d at 375-76 (The "[i]ssue is whether a privately held limited liability company may be granted a liquor wholesaler's permit . . . when it is wholly owned by another company, which shares directors, officers, and all shareholders with the holder of a beer wholesaler's permit."). The court observed that the term "interest" has a "broad scope" that would extend the prohibition on holding a liquor permit to closely-related corporate entities (and not just the entity which held the other type of wholesaler's permit) because an ownership "interest" would extend up the corporate family tree in some circumstances. *Id.* at 378-79. In light of the interlocking ownership of the companies and their intertwined nature, the Court concluded that Monarch would have an interest in a permit acquired by Spirited Sales and that the award of the permit would thus fall within the scope of the statutory prohibition.

The parties and the district court mistakenly assumed that *Spirited Sales* resolved the question whether the contract proposed here would fall within the prohibited-interest statutes. As this Court recognized, *Spirited Sales* resolved a critical threshold question: E.F. Transit and Monarch cannot be treated as if they were separate entities for purposes of the prohibited-interest laws. *Cook*, 878 F.3d at 607. Thus, Monarch would have had an interest in a permit granted to E.F. Transit's subsidiary. *Spirited Sales* sheds no light, however, on whether E.F. Transit (and Monarch) would acquire a prohibited "interest" in the permit of a liquor wholesaler by contracting to transport its liquor.

The text of the statute does not provide a ready resolution to the question. The Indiana prohibited-interest laws make it "unlawful for the holder of a . . . beer wholesaler's permit to have an interest in a liquor permit of any type." Ind. Code § 7.1-5-9-3(b). It is by no means clear that a company that performs services of any kind for a liquor permittee acquires an "interest" in its permit. That is true as well for the sub-category of contracts to transport liquor. If contracting to provide transportation services for a liquor-permit holder gives the carrier an "interest" in the liquor permit, no carrier could provide transportation for both a beer permittee and a liquor permittee, notwithstanding the state law that generally allows a licensed carrier to transport all types of alcohol. *See* Ind. Code. § 7.1-3-18-2.

B. In mistakenly concluding that *Spirited Sales* resolved the application of the Indiana statute, the district court also briefly cited to this Court's decision concluding that

this case was ripe in light of the Indiana decision. App. 6 (quoting *E.F. Transit, Inc. v. Cook*, 878 F.3d 606, 607 (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)."). Notwithstanding this seemingly broad language, it does not appear that this Court actually determined that the proposed contract between E.F. Transit and Indiana Wholesale would give E.F. Transit an interest in Indiana Wholesale's permit, a question not before the Court. Rather, the Court observed that the Indiana Supreme Court's decision in *Spirited Sales* had answered the threshold question of whether Monarch could be treated as an entity separate from E.F. Transit. *See id.* at 607 (explaining that the Indiana Court addressed "the predicate state-law question: In light of their shared ownership and management, does E.F. Transit hold an interest in Monarch's beer wholesaling permit under Indiana's prohibited-interest laws?"). As this Court recognized, *Spirited Sales* resolved that initial question. The Court held that "[t]hat ruling—and the standing threat of prosecution—are enough to remove any ripeness barrier to this suit," *id.* at 607, and noted that the decision was "enough" to create a threat of prosecution and sufficient for a ripe, live controversy. *Id.* at 610.

Particularly in light of the constitutional questions potentially presented by this case, it is important that the state law question presented here, which was not addressed in *Spirited Sales*, be answered authoritatively. In the absence of authority providing

definitive guidance, it may be appropriate to certify to the Indiana Supreme Court the question whether or when a company that contracts to perform transportation services for a wholesale liquor permittee acquires an interest in that permit within the meaning of the prohibited-interest laws. *See* Indiana Rule of Appellate Procedure 64(A) (permitting a U.S. court of appeals to certify a "question of Indiana law" when it appears that a state law issue is determinative of the case and on which there is no "clear controlling Indiana precedent."). If the Indiana Supreme Court were to hold that the proposed contract is not prohibited by state law, there would be no need to address delicate questions of preemption and the Twenty-First Amendment. If the Court concludes that the contract would fall within the scope of the prohibition, its interpretation of the prohibited-interest laws and articulation of the state interests underlying that application of those laws would in turn inform the views of the United States and this Court's balancing of the state and federal interests under the Twenty-First Amendment. *See, e.g.*, *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 111-13 (1980) (looking to state court interpretations to examine the relevant state interests for Twenty-First Amendment balancing).

CONCLUSION

Before addressing questions of preemption and the Twenty-First Amendment, this Court should obtain an authoritative determination that a company that contracts to perform transportation services for a wholesale liquor permittee acquires an interest in

that permit within the meaning of the prohibited-interest laws, and do so, if the Court believes appropriate, by certifying the question to the Indiana Supreme Court.

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

MARK B. STERN
(202) 514-3542

s/ Jaynie Lilley
JAYNIE LILLEY
(202) 514-3542
Attorneys, Appellate Staff
Civil Division, Room 7321
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

DECEMBER 2019

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing amicus brief complies with the requirements of Fed. R. App. P. 32(a)(5) and Seventh Circuit Rules 29, 32(b) because it has been prepared in 12-point Palatino Linotype, a proportionally spaced typeface.

I further certify that this brief complies with the type-volume limitations of Fed. R. App. P. 29(a) and Circuit Rule 39 because it contains 2,732 words, excluding the parts of the brief exempted under Rule 32(f), according to the count of Microsoft Word.

/s/ Jaynie Lilley
JAYNIE LILLEY

CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Jaynie Lilley
JAYNIE LILLEY