No. 18-2611

United States Court Of Appeals

FOR THE EIGHTH CIRCUIT

MISSOURI BROADCASTERS ASSOCIATION, on its own behalf and on behalf of its members; ZIMMER RADIO OF MID-MO, INC.; MEYER FARMS, INC., and UNCLE D's SPORTS BAR & GRILL, LLC,

Plaintiffs-Appellees,

v.

DOROTHY TAYLOR, State Supervisor of Liquor Control, in her official capacity, and JOSHUA HAWLEY, Attorney General of the State of Missouri, in his official capacity,

Defendants-Appellants.

Appeal From The United States District Court, Western District of Missouri
Hon. M. Douglas Harpool, United States District Judge

BRIEF OF PLAINTIFFS-APPELLEES

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CASE SUMMARY AND REQUEST FOR ORAL ARGUMENT

Three Missouri laws prohibit or severely restrict truthful advertising of retail prices for alcoholic beverages. In a trial based on this Court's guidance in a prior ruling, and the Supreme Court's *Central Hudson* standard for commercial speech, the State produced essentially no evidence to meet its burden to justify these laws.

As to the two Challenged Regulations (prohibiting truthful media advertising of discount and below-cost prices) the State produced no evidence that the regulations directly advanced Missouri's interests in reducing excessive consumption or underage drinking. As to the Challenged Statute, the State produced no evidence that its prohibition of vendor support for retail advertising (except in the limited circumstance of State-mandated content, including a ban on truthful price advertising), directly advanced the State's interest in an orderly three-tier alcoholic beverage industry. As to both the regulations and the statute, the State did not rebut the availability of various non-speech-suppressive methods for meeting the State's interests.

The State relies on appeal primarily on outside-the-record factual assertions, and new theories never raised at trial.

Oral argument should be confined solely to the record in this case, and if so, ten or fifteen minutes per side will be more than sufficient.

APPELLEES' CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1A of the Local Rules of the United States Court of Appeals for the Eighth Circuit, Appellees file the following statements of corporate interests: Missouri Broadcasters Association, Zimmer Radio of Mid-MO, Inc, Meyer Farms, Inc., and Uncle D's Sports Bar & Grill, LLC each state that (a) it does not have a parent corporation and (b) no publicly held corporation owns 10% or more of its stock.

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STATEMENT OF THE ISSUES

1. Where the State allows discount and below-cost alcoholic beverage prices, and on-premises promotion of those prices, can the Challenged Regulations constitutionally ban truthful media advertising of those prices, when the State has no evidence that the ban on media advertising advances its asserted interests, affirmative evidence shows no effect on those interests, and the State's own witnesses verify the effectiveness of alternative means of meeting those interests?

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

Central Hudson Gas v. Public Service Comm'n of NY, 447 U.S. 557 (1980)

Greater New Orleans Broad. Ass'n, Inc. v. United States, 527 U.S. 173 (1999)

Rubin v. Coors Brewing Co., 514 U.S. 476 (1995)

2. In the absence of trial evidence meeting either the direct advancement, or lack of reasonable alternatives, requirements of *Central Hudson* for the Challenged Statute, can the State recast its case on appeal, raise new arguments including a different justification for its State interest, and rely on facts unasserted and untested at trial, mostly derived from different cases in different states involving different statutes?

Central Hudson Gas v. Public Service Comm'n of NY, 447 U.S. 557 (1980)

Wever v. Lincoln Cty., Nebraska, 388 F.3d 601 (8th Cir. 2004)

Macheca Transp. Co. v. Philadelphia Indem. Ins. Co., 737 F.3d 1188 (8th Cir. 2013)

3. May the State prohibit vendor support for private-sector advertising, except in cases of state-mandated advertising content (including a ban on truthful price information), not for safety, health, or consumer protection purposes, but merely to support a three-tier separation of the liquor industry, a separation that it has already punctuated with scores of exceptions?

Central Hudson Gas v. Public Service Comm'n of NY, 447 U.S. 557 (1980)

Greater New Orleans Broad. Ass'n, Inc. v. United States, 527 U.S. 173 (1999)

Knox v. Serv. Emps. Int'l Union, Local 1000, 567 U.S. 298 (2012)

INTRODUCTION

Two different cases are being presented to this Court: (1) the case that was tried on remand following this Court's decision, *Missouri Broadcasters Association v. Lacy*, 846 F.3d 295 (8th Cir. 2017) (the "*2017 Ruling*"), and (2) the case that the State *wishes* it had tried, which it presents in its brief. Plaintiffs' Statement of Facts, and Arguments, will separately address the evidence and arguments at trial and the State's non-record factual assertions and new theories on appeal.

Procedural History

Plaintiffs filed this action in 2013 and promptly moved for summary judgment. In March, 2015, District Judge Fernando J. Gaitan, Jr. *sua sponte* dismissed the case. That dismissal was appealed to this Court, which reversed, finding Plaintiffs' complaint plainly stated a viable claim, and providing guidance as to the issues. On remand, the case was reassigned to District Judge M. Douglas Harpool, who, after quoting the *2017 Ruling* at length, decided to "hear evidence and conduct a trial." Dkt 95,p.4. Trial took place on February 20-21, 2018.

After trial, the District Court found that the State failed to meet its burden of justifying the challenged laws and granted full relief to Plaintiffs. JA243.

STATEMENT OF THE CASE

The laws at issue have been described in shorthand as:

- the "Challenged Regulations" (11 CSR § 70.2.240(5) G & I – JA094-97). They prohibit truthful media advertising of alcoholic beverage discount or below-cost prices.

- the "Challenged Statute" (Mo.Rev.Stat. § 311.070.1 & .4(10)).

These provisions were challenged *to the extent* they prohibited vendor financial support for retail advertising, unless the advertisement complied with three conditions—no mention of price, no conspicuous mention of the retailer, and an unrelated retailer also named. JA098-105.

A. Truthful non-misleading ads are at issue

All parties agreed pre-trial that factor 1 of *Central Hudson Gas v. Public Service Comm'n of NY*, 447 U.S. 557, 563 (1980) ("*Central Hudson*"), concerning whether the ads were truthful and non-misleading, was not in issue:

> THE COURT: It appears to me based on the history of this case and in particular the Eighth Circuit's decision regarding Judge Gaitan's ruling on the motion to dismiss that the focus of the case is going to be on the third and fourth factors of the *Central Hudson* case. * * * So let's talk about the first factor, whether the commercial speech at issue concerns an unlawful activity or is misleading. There's no claim by the State that the ads that are regulated apply only to unlawful activity or misleading advertising, correct?
>
> MS. DODGE: That's correct.

Pre-trial Tr.-13-14. Missouri law deals with misleading alcoholic beverage ads in other unchallenged laws. 11 CSR 70-2.240(5)(A) ("No advertisement of intoxicating liquor or nonintoxicating beer shall contain: (A) Any statement that is false or misleading in any manner particular").

B. Evidence as to the Challenged Regulations

As to the two Challenged Regulations, Plaintiffs proved the three inconsistencies in Missouri law that were discussed in the *2017 Ruling*. Tr.-115-16; JA248. An expert testified that media alcohol advertising is not associated with increased alcohol consumption, much less alcohol abuse (excessive consumption and underage consumption). Tr.-34,59-60. Among other things, the expert, Professor Gary Wilcox, explained that during the last 40 years, while alcoholic beverage advertising expenditures increased fourfold, per capita alcohol consumption dropped substantially. Tr.-53.

Plaintiffs also presented evidence that discount or below-cost prices can be disseminated in various media; that truthful discount price ads are permitted in the eight states that border on Missouri; and that the State permits media advertising of very inexpensive alcoholic beverages. Tr.-104-06,118. They also submitted evidence about the value to consumers of price advertising. Tr.-155-56.

Finally, Plaintiffs submitted proof of multiple alternative non-speech-restrictive means for meeting the State's objectives, including education, taxation, and intervention. Tr.-25,54,61,79,122-23,153,172,299-300.

The State did not contest these inconsistencies. Nor did the State contest the availability of alternative means of addressing its objectives of reducing excessive consumption and underage drinking. The State's own witnesses attested to the efficacy of education for addressing those problems. Tr.-288,290-91,294-300.

C. Evidence as to the Challenged Statute

Plaintiffs submitted evidence on many inconsistencies and exceptions in the State's "three-tier" alcoholic beverage market which the Challenged Statute was designed to support. These included (1) allowing Missouri-based wineries, breweries, and distilleries to sell their own products at retail (Tr.-125-136); (2) allowing all Missouri-based producers to distribute their products (Tr.-128,133-134,136,139,252); allowing manufacturers to sell directly to customers at stadiums they own (Tr.-140-41,257); and allowing all wineries to ship directly to Missouri consumers (Tr.-139). These exemptions from the three-tier system cover about 60% of the wine sold by Missouri wineries, and about $1 billion annual economic impact related to wine sales. Tr.-126,144-47.

Plaintiffs also explained the many exceptions to the general rule against vendor direct support for retailers contained in section 311.070 (the "tied-house"

statute that includes the Challenged Statute provisions). Among other things: (1) vendors can provide retailers money for signs, product displays, and point-of-sale materials (Tr.-140); (2) they can provide equipment or supplies at cost (Tr.-141); (3) they can provide dispensing accessories, coils, sleeves, and coil cleaning services (Tr.-141), and (4) they can give retailers $1,000 in cash annually (Tr.-141). A State witness agreed that "the system works better with some connections." Tr.-266.

Testimony established that vendor-supported and cooperative advertising is common in most industries, that it is valuable to consumers and retailers, and that the three-tier system is unnecessary for public health or safety. Tr.-265. Testimony showed that the State prosecuted scores of retailers for participation in an event, the Springfield Pub Crawl, for a technical violation, even though many of the retailers did not even know a vendor was involved. Tr.-22,275-78.

Plaintiffs also offered evidence concerning alternative non-speech-suppressive means by which the State could maintain an orderly marketplace and prevent undue influence of vendors over retailers. These included: (1) allowing advertising support but maintaining the same level of limits on vendor support of retailers by repealing other exemptions (Tr.-152); (2) requiring vendors to disclose their advertising payments to retailers (Tr.-153-54); (3) enforcing existing laws which prevent undue influence by a manufacturer over a retailer (Tr.-152); and/or

(4) adopting the approach of federal law, which prohibits only vendor support that creates undue influence (Tr.-267-68; *see also* footnote 12 and accompanying text).

The State did not submit any evidence of any instances of undue influence of vendors over retailers, in Missouri or elsewhere. A State witness admitted the State "accepted" some undue influence. Tr.-257.

D. District Court's Conclusions

1. Challenged Regulations

As to the Challenged Regulations, the District Court found that Plaintiffs proved all of the inconsistencies identified in this Court's *2017 Ruling,* and referenced other evidence, including Professor Wilcox's testimony. The Court found that the State did not meet its burden of proof on direct advancement. It "failed to present any evidence contradicting the testimony, empirical studies, and statistical analysis relied upon by Plaintiffs' expert." JA234. And it "offered *no* empirical or statistical evidence, study, or expert opinion demonstrating how these regulations further protect the State's interest." JA234 (emphasis added). In short, the Court found the State "provided *no evidence* that the challenged regulations significantly advance a substantial State interest." JA235 (emphasis added).

The District Court found the State did not meet its burden of establishing that the Challenged Regulations were no more extensive than necessary to further the State's interest. JA236. The court noted available alternative methods,

including educational programs, increases in taxes on alcohol, direct controls on pricing, bans on promotions, enhancement of enforcement penalties, and implementation of one or more of these alternatives within a two-mile radius of colleges. JA237-38.

2. Challenged Statute

Although the District Court accepted the State's alleged interest in advancing an orderly marketplace met *Central Hudson* factor 2, it found the State did not meet its burden of proving that the Challenged Statute directly advanced that purpose. The Court held that the many exceptions to the three-tier system and the tied-house statute "contradict the State's asserted interest in maintaining a separate three-tier marketplace," and the State provided "no explanation" as to why advertising commingling would disrupt the State's already pockmarked regulatory scheme. JA241. The District Court also found the State has "alternative non-speech-suppressive alternatives" available to meet its objectives in maintaining an orderly marketplace. JA243.

ARGUMENT

SUMMARY OF ARGUMENT

The trial evidence overwhelmingly supports the District Court's conclusions. As to the Challenged Regulations, the ruling can be independently affirmed based on the State's failure to meet either factors 3 or 4 of *Central Hudson*. (Section III.) As to the Challenged Statute, it can be independently affirmed on any of four grounds—the State's failure to meet *Central Hudson* factors 2, 3, or 4, or because it is compels speech. (Sections IV and V.)

The State's arguments, primarily based on non-record factual claims and waived or belated arguments, cannot justify reversal. (Section II.)

I. The Law of the Case and the Standard of Review

A. Law of the Case: this Court's *2017 Ruling*

This case was tried pursuant to this Court's *2017 Ruling.* When this Court "decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Morris v. Am. Nat'l Can Corp.*, 988 F.2d 50, 52 (8th Cir. 1993). This "prevents the relitigation of settled issues in a case, thus protecting the settled expectations of parties, ensuring uniformity of decisions, and promoting judicial efficiency." *Little Earth of the United Tribes, Inc. v. HUD*, 807 F.2d 1433, 1441 (8th Cir. 1986). The Court's *2017 Ruling* made several determinations as to the governing law and application of the facts to the law:

- This case is governed by *Central Hudson's* four-part test, which the *2017 Ruling* quoted:

> "(1) whether the commercial speech at issue concerns unlawful activity or is misleading;
>
> (2) whether the governmental interest is substantial;
>
> (3) whether the challenged regulation directly advances the government's asserted interest; and
>
> (4) whether the regulation is no more extensive than necessary to further the government's interest." *2017 Ruling* at 300.

- With respect to factor 3 as to the Challenged Regulations, this Court identified three of Plaintiffs' allegations as showing fatal inconsistencies in the State's regulations, such that, if those allegations were proven, the Challenged Regulations could *not* meet the reasonable advancement test:

1. The allegations that the regulations "do not prohibit retailers from offering discounted prices or advertising within the retail establishment." *2017 Ruling* at 301-02.

2. The allegations that generic descriptions of promotions (*e.g.*, happy hours and ladies nights) were allowed, even though they "could also encourage irresponsible drinking." *2017 Ruling* at 302.

3. The allegations (the truthfulness of which was "apparent from the text of the regulation") that exempts manufacturers of intoxicating liquor other than beer and wine, *i.e*. spirits, from its ban on advertising rebate coupons. *2017 Ruling* at 302.

- For factor 3 applied to the Challenged *Statute*, the *2017 Ruling* noted the Challenged Statute, and particularly the subsection 4(10) exception, "does nothing to further the interest in maintaining an orderly marketplace and actually *weakens* the impact of the overall statutory scheme because this statute is an exemption to the restrictions preventing retailers, wholesalers and producers from becoming financially entangled." *2017 Ruling* at 302 (emphasis in original).

- As to factor 4, regarding alternative measures, this Court noted that it was not satisfied "if there are alternatives to the regulations that directly advance the asserted interest in a manner less intrusive to plaintiffs' First Amendment rights." *2017 Ruling* at 302. This Court found it "clear" that reasonable alternatives were available the challenged restrictions, citing to *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996), where the Supreme Court identified limits on alcohol purchases through taxation or regulations, or development of educational campaigns, as viable alternatives

to advertising price bans. *2017 Ruling* at 303. In the cited portion of *44 Liquormart*, the Supreme Court held:

> It is perfectly obvious that alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the State's goal of promoting temperance. As the State's own expert conceded, higher prices can be maintained either by direct regulation or by increased taxation. 829 F.Supp., at 549. Per capita purchases could be limited as is the case with prescription drugs. Even educational campaigns focused on the problems of excessive, or even moderate, drinking might prove to be more effective.

B. Standard of review

The trial court's factual and credibility determinations made in a bench trial are reviewed for clear error, and its legal determinations are reviewed de novo. *Richardson v. Sugg*, 448 F.3d 1046, 1052 (8th Cir. 2006).

II. The State's Non-Record Evidence and Newly Raised Arguments Cannot Save Its Case.

The State attempts to assert on appeal a much different case than it made at trial. This court should "not consider arguments raised for the first time on appeal." *Wever v. Lincoln Cty., Nebraska*, 388 F.3d 601, 608 (8th Cir. 2004). Moreover, the State expressly waived some of its new arguments by consenting to the case being tried under *Central Hudson*.

A. The State's belated assertion of a defective facial challenge cannot succeed, because Plaintiffs challenged section 311.070 as applied to advertising, and in any event they raised the statute's overbreadth.

1. The State's attempt to shift burdens on appeal, through its facial challenge argument, is improper, late and waived.

The record at trial is devoid of the State's argument on appeal that Plaintiffs' alleged failure to assert overbreadth requires them to establish that no set of circumstances exist under which the act can be valid. The State never so argued in its pre-trial pleadings, at trial (including opening and closing), or in trial briefs.

Having lost at trial under the agreed *Central Hudson* standard, the State cannot, on appeal, raise new arguments to shift its burden of proof to Plaintiffs. The State's burden, settled in the *2017 Ruling*, should not be re-litigated. *Macheca Transp. Co. v. Philadelphia Indem. Ins. Co.,* 737 F.3d 1188, 1194 (8th Cir. 2013) ("For over one hundred years, our court has repeatedly barred parties from litigating issues in a second appeal following remand that could have been presented in the first appeal.").[1]

[1] In addition to its facial challenge argument, the State also attempts to evade its *Central Hudson* burden by suggesting that this Court has set a "deferential scrutiny" standard. State Br. 37, citing *Southern Wine and Spirits of America v. Division of Alcohol and Tobacco Control*, 731 F.3d 799 (8th Cir. 2013). That decision, however, dealt with licensing, not advertising, and did not and could not change the *Central Hudson* standard, or the subsequent *2017 Ruling*.

2. The State's arguments misconstrue Plaintiffs' claims, and the District Court's ruling, each of which addressed only the *application* of section 311.070.1 to advertising.

In any event, Plaintiffs' Challenged Statute claim was tried as an as-applied challenge. Plaintiffs never challenged the entirety of section 311.070. Though Plaintiffs coined the term "Challenged Statute," it was used as shorthand for Plaintiffs' statutory claim, which covered only subsection 1 of section 311.070, *to the extent* it banned vendor support for advertising, and subsection 4(10), *to the extent* it allowed vendor advertising support only under circumstances of state-compelled content. While Plaintiffs at times referred to the Challenged Statute being facially unconstitutional, "facial" in that context was colloquial, since "Challenged Statute" referred only to certain applications of section 311.070. Judge Harpool brought this up in a hearing on July 5, 2017, and encouraged Plaintiffs to amend to clarify their specific allegations as to the Challenged Statute. Dkt#87.

Plaintiffs made those clarifications in their July 24, 2017, Second Amended Complaint. Specifically, in paragraph 99, Plaintiffs described the relief they sought with respect to section 311.070. They did not ask for a declaration of invalidity of the statute on its face. Rather, they asked for one of two declarations, as to *interpretation* of subsection 4(10), or *application* of subsection 1:

> 99. Specifically, Plaintiffs request a ruling that declares that the multiple-retailer and no-price provisions

> of section 311.070.4(10) are unconstitutional, and that that section *should be interpreted to allow* manufacturer and/or distributor support for retail advertisements even of single retailers, and even if price is mentioned in the advertisement. Alternatively, Plaintiffs request that the Court find the general prohibition of manufacturer and distributor support for retailers in section 311.070.1 unconstitutional *when applied to* advertising support.

JA091 (emphasis added). The prayer for relief is similar. JA092. Defendants answered the Second Amended Complaint, did not challenge Plaintiffs' clarification of its statutory claim, and never raised any issue as to "facial challenge" or "as-applied challenge" through trial. JA106-130.

It was the second, alternative request in paragraph 99 that Plaintiffs requested at trial and that the District Court followed. In closing argument, discussing the specific relief requested as to the statute, Plaintiffs' counsel stated:

> As to the Challenged Statute, several ways to go but we believe the right one is that opening paragraph of .070.1, should be declared unconstitutional because it's a ban on truthful speech, *to the extent* it prohibits vendors from placing, or prov[id]ing support for, truthful ads that mention a single retailer or a price.

Closing Tr.-9 (emphasis added). That is, Plaintiffs did not request that the statute or any part of it be declared invalid in all respects, but rather they requested a declaration that it was unconstitutional *to the extent* it prohibits vendors from placing, or providing support for, truthful ads that mention a single retailer or price. And the District Court used that same language, "to the extent"—the classic

language of an as-applied challenge—in its order of relief. *See* JA243 ("The Court further **ORDERS** that Defendants are permanently enjoined from enforcing Mo. Ann. Stat. § 311.070 to the extent it prohibits alcoholic beverage manufacturers and distributors from providing financial or other support for retail advertising of alcoholic beverages that does not meet the requirements of the exception set forth in Mo. Ann. Stat. § 311.070.4(10).").

Thus, the request for relief as to the statute was for section 311.070.1 to be found unconstitutional "when applied to advertising support." JA091-92. The statutory claim litigated and decided here was an as-applied challenge, concerning only the application of section 311.070.1 to vendor support of lawful, truthful retail advertising.

Plaintiffs litigated only these particular restrictions within section 311.070. They never claimed or sought any relief as to the statute as a whole, or any other applications of it, and certainly not concerning its application to deceptive or unlawful commercial speech. They sought relief solely affecting parties discussed in the record (vendors, retailers, broadcasters, or consumers) who wished to participate in truthful vendor-supported advertising). Thus, the State's arguments about facial challenges are irrelevant.

3. Even if this were a facial challenge, Plaintiffs' allegations and proof of chilling effects satisfied its burden of showing overbreadth.

Further discussion about a statutory facial challenge that Plaintiffs did not assert should be unnecessary, but because the State's brief misstates Plaintiffs' allegations, and because Plaintiffs' claims would be proper under a facial challenge analysis, Plaintiffs will address this issue.

"Overbreadth is a judicially created doctrine designed to prevent the chilling of protected expression." *Massachusetts v. Oakes*, 491 U.S. 576, 584 (1989); *Turchick v. United States*, 561 F.2d 719, 721 (8th Cir. 1977) ("A statute is overbroad in constitutional terms if it comprehends a substantial range of applications to activity protected by the First Amendment, in addition to the unprotected activities it legitimately prohibits."). The State's claim that "Plaintiffs did not bring an overbreadth challenge" (State Br. 20) is incorrect, considering the chilling effects that were repeated alleged in the complaint and testified to at trial. This Court recognized this doctrine. *2017 Ruling* at 300.

Missouri's alcoholic beverage laws, including those challenged here, primarily govern the conduct of manufacturers, wholesalers, and retailers of alcoholic beverages. But to the extent those laws prohibit retailers from engaging in certain conduct (like advertising their discount prices in the media) and manufacturers and wholesalers from engaging in other conduct (like vendor

support for retail advertising), these laws impose a chilling effect on expression useful to other parties, including consumers and media companies.

Plaintiffs' complaint raised that chilling effect. Two subheadings even included the phrase, "Chilling Effect." JA072-73. The Second Amended Complaint contained multiple allegations of chilling effects. *See, e.g.,* JA072 ("The Challenged Advertising Regulations have a chilling effect on speech by manufacturers and retailers of alcoholic beverages, such as UNCLE D'S."); JA074-75 ("the Division's past and threatened enforcement actions discouraged … Missouri broadcasters … from seeking or running truthful alcoholic beverage advertising …"). At trial, Plaintiffs' witnesses referred to the chilling effects. *E.g.*, Tr.-20-22.

By pointing to these chilling effects of the challenged laws, Plaintiffs raised the overbreadth of those laws. These chilling effect (overbreadth) allegations are important because in the case of a facial challenge in the First Amendment area, it is not necessary, as the State claims, for the challenger to prove that no circumstances exist where the challenged laws would be constitutional. Rather, in the First Amendment area, if (as here) the challenger raises a claim of overbreadth, it need only prove that a substantial number of a law's applications are unconstitutional. *Washington State Grange v. Washington State Republican Party,* 552 U.S. 442, 449 n.6 (2008) (cited in the *2017 Ruling,* at 300) (recognizing facial

challenge based on overbreadth where a substantial number of applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep); *Ada v. Guam Soc. of Obstetricians & Gynecologists,* 506 U.S. 1011 (1992) (Scalia, J., dissenting from denial of certiorari) (explaining First Amendment overbreadth exception to rule on facial challenges: "We have applied to statutes restricting speech a so-called "overbreadth" doctrine, rendering such a statute invalid in all its applications (*i.e.,* facially invalid) if it is invalid in any of them."). Evidence at trial shows that a substantial number of applications of the Challenged Statute are unconstitutional. *See* Section IV.C.2&3, *below*.

Thus, if the challenge is viewed as a First Amendment facial challenge, it would succeed, because the evidence showed substantial overbreadth (*i.e*., chilling effect on constitutionally protected commercial speech) when applied to vendors, retailers, broadcasters, or consumers who wished to participate in, or receive the benefits of, vendor-supported advertising.

4. The Supreme Court applies *Central Hudson*, not general principles regarding facial invalidity, to commercial speech cases.

In any event, the facial/as-applied issue will not allow the State to evade its *Central Hudson* burdens. The Supreme Court has repeatedly emphasized that commercial speech cases are governed by the *Central Hudson* standard, whether they make a facial attack or an as-applied challenge.

Central Hudson, *44 Liquormart*, *Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011), and *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), all involved facial attacks and resulted in the Supreme Court declaring the laws or regulations at issue unconstitutional. The Supreme Court did not apply a standard more friendly to the government than that of *Central Hudson.* Under the State's argument, the Supreme Court incorrectly decided each of these cases.

The Supreme Court does not demand that commercial speech challengers prove that no circumstances exist where the challenged laws would be constitutional. Rather, it has held many laws unconstitutional even when they cover some unprotected speech, a result inconsistent with strict application of the facial invalidity doctrine. *E.g., City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 427 (1993) (laws held unconstitutional even though they incrementally covered misleading speech); *Lorillard,* 533 U.S. at 567 (law that incidentally covered tobacco ads that entice children held invalid under *Central Hudson* despite this legitimate coverage).

* * *

Central Hudson is the correct standard. This Court so held in the *2017 Ruling*, the State so admitted in the trial court, and the District Court properly applied *Central Hudson* to the facts proven at trial. The State's attempt to avoid its burdens under *Central Hudson* must therefore be rejected.

B. The State's undue influence justification for the Challenged Statute was waived and it does not work.

1. This theory was not raised at trial, and cannot fairly be asserted now.

The State's primary argument on appeal concerning the Challenged Statute, an attempt to justify the statute based on concern about undue influence of vendors over retailers, was not raised by the State at trial. The State at trial aggressively offered not just one but *four* different justifications for its three-tier system—but not the "undue influence" justification. *See* Section IV.A *below*. Because this justification isn't supported in the trial record, the State has loaded its brief with many external references and asks this Court to rule based on outside-the-record "facts," first revealed in its appeal brief.

It would be highly unfair to allow a new theory on appeal. It is not for appeals courts to "supplant the precise interests put forward by the State" at trial. *Cf. Edenfield v. Fane,* 507 U.S. 761, 768 (1993). Among other things, the State's new theory, never raised at trial, circumvented testing at trial though cross-examination and testimony of other witnesses.[2]

[2] On cross-examination, the State's witness recanted his assertion on direct, that the three-tier system was needed to protect public health and safety. *See* section IV.A. *below*. The State's best justification offered at trial having blown up on a cross-examination, the State should not be allowed to sneak in a substitute justification post-trial, escaping that key truth-eliciting mechanisms of our adversary system.

2. The State's new appeal theory conflicts with the evidence.

The State's new undue influence arguments are not only *outside* the record; they also *contradict* the record.

At trial, the State's witness Michael Schler only briefly touched on the concept of "undue influence" and never offered it as a reason for the Challenged Statute. *See* Section IV.A., *below*; Tr.-269. Significantly, Judge Harpool, understanding that the State seemed to claim that vendor-supported advertising could somehow lead to untoward consequences, specifically asked what would happen if the Court allowed vendor-supported advertising. Mr. Schler replied, "I'd have to defer to the studies that have been done in that area. *I can't really speak to you*." Tr.-279 (emphasis added). The State cannot assert a purpose on appeal that was unknown and unspoken to at trial.

Moreover, as the State now attempts to use non-Missouri authorities to belatedly insert undue influence into the case, it has mischaracterized the similarity among those laws. Contrary to the State's claim in its brief that all tied-house laws are essentially the same, its witness admitted at trial that the federal tied-house and Missouri tied-house statutes are *opposites* of one another. Missouri's tied-house law categorically bans all vendor support for retailers, whether or not it involves

undue influence. The federal law, Mr. Schler admitted, is opposite: it *allows* all vendor support for retailers, *except* that which causes undue influence. [3]

3. The Ninth Circuit's ruling in *Retail Digital Networks* is not applicable or persuasive here.

The State may be arguing this new "undue influence" theory in this appeal because that theory succeeded, after the trial in this case, in *Retail Digital Networks LLC v. Prieto*, 861 F.3d 839 (9th Cir. 2017) (en banc). But that belated claim only highlights the fact that the State avoided the undue influence theory at trial (when that theory had lost in the Ninth Circuit), but suddenly embraced it on appeal (after it had become a winning theory in that circuit).[4] Litigants cannot change their facts based on popularity.

In any event, *Retail Digital Networks* is quite different from this case. The California tied-house provisions involved there, Cal. Bus. & Prof. Code §25503(f)-(h), for which there appears to be no Missouri counterpart, applied very narrowly,

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[3] Some very limited discussion of undue influence naturally occurred during this cross-examination. Tr.-267-68. These references, necessary to address the witness's false claim about federal-state similarity, cannot be used by the State to now support, on appeal, a new justification for the Challenged Statute, one it never offered at trial.

[4] The District Court did not, as the State claims, "rely" on the panel decision that was vacated two weeks before it ruled in this case. Rather, the District Court simply cited that panel decision for the very basic point that the State may police intra-tier advertising. JA242. The State admitted it could monitor intra-tier advertising in various ways. Tr.-153-54.

prohibiting vendor support only for advertising *within retail stores,* and did not affect outside media advertising (the subject of this case). 861 F.3d at 845. California has sections comparable to those challenged here, but they were not in issue in *Retail Digital Networks*. *Compare* Mo.Rev.Stat. §311.070.1 & .4(10) *with* Cal. Bus. & Prof. Code §25500(a) & 25500.1.

Expert testimony and a California-specific record supported California's claim that its law targeted undue influence. 861 F.3d at 843. Missouri, by contrast, submitted no such evidence, argued different justifications at trial, and now seeks to rely on the *California* record, having none of its own. As to whether the state has allowed exceptions and inconsistencies, a key issue for direct advancement, California's tied-house exceptions were limited and "do not apply to the vast majority of retailers" (861 F.3d at 850), while many of Missouri's multiple exceptions apply to *all retailers*. Tr.-268; JA098. Similarly, nothing in *Retail Digital Networks* suggested that California's three-tier separation had not been maintained; by contrast, the record here showed Missouri's system to filled with exceptions. *See* section IV.B.1, *below*. Additionally, nothing in *Retail Digital Networks* suggests the chilling effects experienced in Missouri from this State's ham-fisted literal enforcement in situations where no public harm occurred. *See* Section IV.B.3, *below*.

Because of all of these differences, the Ninth Circuit's holding, based on the different statute and different facts of *Retail Digital Networks*, does not apply here. Moreover, applying to Missouri another circuit's conclusions about a different statute in a different case in a different state would be contrary to our federalism system. Different states do things differently (California does things *much* differently from Missouri!), and we celebrate these different approaches as laboratories of democracy. Missouri's law should be addressed on its own terms, judged by the evidence submitted by Missouri officials, and the arguments made at trial by Missouri's attorney general.

4. Even if proven, the State's new justification would not change the result, because the State can address undue influence without suppressing speech.

Even if considered, the State's new theory still would not succeed. As the District Court explained, the State can separate vendors from retailers, in order to minimize vendor influence over retailers, without prohibiting or inhibiting truthful commercial speech. The State could monitor and track vendor advertising support to avoid undue influence. Alternatively, the State could readily revoke other existing exceptions to the tied-house statute, while allowing vendors to support truthful retail advertising, thereby maintaining its current overall level of allowed vendor support of retailers. JA242; *See* Section IV.D, *below*.

C. The State's claim that the Challenged Statute does not affect speech is too late, far-fetched, and wrong.

After arguing through trial that the Challenged Statute appropriately limited commercial speech, the State now on appeal argues that it isn't a speech restriction at all. This argument is too late, and wrong.

1. The State did not raise this argument at trial.

The State never claimed before or during trial that the Challenged Statute did not affect speech. Indeed, the State agreed throughout the proceedings that *Central Hudson,* which protects commercial speech, applies to this case. The *2017 Ruling* established the *Central Hudson* standard as law of the case. It is too late for the State to reverse course.

2. The Challenged Statute restricts speech.

The Supreme Court has repeatedly subjected laws that restrict commercial speech to the commercial speech doctrine, even when the laws purport to address action. In *Sorrell*, Vermont claimed that its law, restricting availability of certain data, was simply a commercial regulation with only an incidental effect on speech. The Supreme Court rejected this argument, finding that the Vermont law, both "on its face and in practical operation" imposed a burden based "on the content of the speech and the identity of the speaker." 564 U.S. at 567; *see also Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010) (speech was involved in terrorism support criminal law because it was "conduct triggering coverage under

the statute"). Indeed, in *Expressions Hair Design v. Schneiderman,* 137 S.Ct. 1144, 1151 (2017), the Court found economic regulations on payment methods to implicate commercial speech, and require application of the *Central Hudson* test, when, as here, they regulated "how sellers may communicate their prices."

Even apart from these on-point Supreme Court commercial speech precedents, whenever speech and action are alleged to be comingled, courts must apply the test of *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968). Under that test, where, as here, the challenged statute has more than an incidental impact on speech, it can withstand constitutional scrutiny only if it is content neutral and its restrictions on First Amendment freedoms are no greater than is essential. Missouri's regulation is not content neutral, because it prohibits vendor support of media advertising while allowing vendor support of ads with State-compelled content (subsection 4(10)), on-premises advertising (subsections 4(1),(2),(5),(9),(11),(14)&(15); *see* Tr.-140), and even some newspaper advertising (subsection 4(9)). *See City of Cincinnati v. Discovery Network, Inc.,* 507 U.S. 410, 429 (1993) (ban on the use of newsracks that distribute "commercial handbills," but not "newspapers" was not content neutral). It thus cannot be reasonably compared to a general law against fire which only incidentally affects flag burning, as the State suggests. State Br. 27. Nor is it narrowly tailored, since the State's objectives could be satisfied by other means. *See* Section IV.D *below*.

Finally, states cannot rely on the Twenty-first Amendment to justify restrictions on alcohol advertising. In *44 Liquormart,* the Court held that a state's Twenty-first Amendment regulatory powers over the sale of alcoholic beverages did not embrace the power to ban truthful advertising:

> [Rhode Island's] power to ban the sale of liquor entirely does not include a power to censor all advertisements that contain accurate and nonmisleading information about the price of the product.
>
> * * *
>
> [T]he Twenty-first Amendment does not qualify the constitutional prohibition against laws abridging the freedom of speech embodied in the First Amendment.

517 U.S. at 513, 516; *accord, Granholm v. Heald,* 544 U.S. 460, 486 (2005).

Advertising support can't be divorced from advertising, and the State's arguments in this regard only shows how far it must stretch to avoid the *Central Hudson* test which is fatal to the Challenged Statute.

D. The State's new direct advancement theory is based on improperly claiming pricing effects as advertising effects.

Having offered no evidence that the Challenge Regulation significantly advanced a substantial state interest, *see* Section IV.B, *below*, the State seeks to twist Plaintiffs' evidence to manufacture one. The State claims that the record contains a stunning admission "that advertisements for below cost or discount alcohol 'significantly' increase consumption of that kind of alcohol." State Br. 60,17,57.

This is false, and there is no record support for it. The State has improperly equated discount prices and discount price *advertising*. The cited reference refers to the effect of *price*, not advertising, on consumption. Tr.-62-63. Price and advertising are different. Price is a market incentive. Advertising is information describing marketplace opportunities. They are no more equivalent than a dictator's fiery commands and a news report of them. Indeed, the flawed assumption that low-price advertising must have some adverse effect on responsible drinking is precisely the error that was corrected in the previous appeal. *2017 Ruling* at 301.

The record shows that consumption levels are set by prices, and advertising merely allocates consumption among brands and varieties. Tr.-48,51,56. And the State's witness admitted at trial, under questioning by Judge Harpool, that the State had no evidence of effects of advertising low cost alcohol:

> THE COURT: Do you know of any studies that indicate the impact that advertising that cost as versus just providing below cost?
>
> THE WITNESS: I don't know anything that on point.

TR-279-80. The State's sophistry in now seeking to equate advertising and prices, and to ban advertising when the real problem is prices, merely shows that the State is engaged in the constitutionally forbidden tactic of trying to "achieve its policy

objectives through the indirect means of restraining certain speech by certain speakers." *Sorrell*, 564 U.S. at 577.

E. The State's reliance on Kuo is misplaced because that reference is not in the record and it is unscientific and irrelevant.

The State relies an academic study, the Kuo study, concerning alcohol sales and promotions within alcohol-selling premises close to college campuses. The State cites it twice (State Br. 11,61) and reproduces it in its Addendum, even though the study was never admitted (or even offered) into evidence at trial, and was strongly disputed on summary judgment.[5] Professor Wilcox testified that the study was unscientific and unreliable if applied to media advertising. Tr.-63-64,77-78. The State never offered testimony from Professor Kuo or any of her co-authors. The State cannot rely on this unscientific, unreliable, outside-the-record study.

[5] The State tries to justify its references because the trial court relied on some matters outside the trial record. But this reliance was limited to "undisputed material facts presented in the summary judgment briefing," JA-227, and the Kuo study was strongly contested. *E.g.,* Dkt#55, p.7 ("The Kuo study tells *nothing* about any effects of alcohol discounts advertised in the *media*…") (emphasis in original).

III. The District Court's Finding That the Challenged Regulations Were Unconstitutional Is Well Supported By the Record.

The State could not meet its burdens of justifying the Challenged Regulations under either prongs 3 or 4 of *Central Hudson*.[6] The regulations did not advance the State interests in prohibiting excessive or underage drinking, and those objectives could effectively be addressed by other means, including educational campaigns, or direct or indirect restrictions on alcoholic beverage sales.[7]

A. The State did not meet its burden of justifying the regulations.

The State bore the burden of justifying the Challenged Regulations. *Edenfield v. Fane*, 507 U.S. 761, 770, (1993) ("well established that '[t]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it.'"); *ACORN v. Municipality of Golden*, 744 F.2d 739, 746 (10th Cir.

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[6] Plaintiffs believe, as they previously asserted (Appeal No. 16-2006, Appellants' Brief, pp. 52-58), that *Sorrell* requires the challenged laws to be subjected to a heightened scrutiny. In light of the *2017 Ruling*, at 300 n.5, Plaintiffs do not reargue this point, but they preserve it for all of their claims in the event of any further proceedings.

[7] At trial and throughout the pre-trial period, the State advanced, as to the Challenged Regulations, only the interests of reducing excessive consumption and underage drinking, as set forth in Mo.Rev.Stat. §311.015. Pretrial Tr.-14. This Court recognized those asserted interests. *2017 Ruling* at 300, n.6. Plaintiffs acknowledged those interests as substantial. Pre-trial Tr.-14. Incredibly, the State on appeal attempts to assert a different interest—"the State's goal is not to reduce 'overall' consumption, but instead to reduce consumption of one specific kind of alcohol: alcohol sold below cost or at discount." (State Br. 58) This interest was never asserted at trial and is contrary to the State's admissions during and before trial. It therefore cannot be entertained.

1984) (usual burdens are switched in First Amendment context; "government 'bears the burden of establishing [the law's] constitutionality.'"). As the District Court noted, the State presented "no evidence that the challenged regulations significantly advance a substantial State interest." JA235. Similarly, the State "provided no evidence to contradict the possible effectiveness of these alternatives [alternative methods identified by Plaintiffs]." JA238.

Notably, the State did *not* present any evidence tying media advertising of alcohol prices to alcohol abuse. None of the State's general evidence about alcohol abuse tied that abuse to truthful media advertising of alcohol prices. *See*, *e.g.*, Tr.-293-94. And the government cannot justify content burdens on commercial speech based on a general "fear that people would make bad decisions if given truthful information." *Sorrell*, 564 U.S. at 577, quoting *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374 (2002); *accord, GJJM Ent., LLC v. City of Atlantic City*, 2018 WL 6050629, at *5 (D.N.J. Nov. 19, 2018) (state may regulate conduct, but not truthful speech about that conduct).

Accordingly, even without consideration of evidence submitted by Plaintiffs, judgment was proper for Plaintiffs, as to the Challenged Regulations, based on the State's total default in meeting its burden of proof on direct advancement and lack of reasonable alternative measures.

B. The regulations banning truthful media advertising of prices did not directly advance the State's interests.

Plaintiffs' evidence affirmatively showed that the ban on truthful advertising of discount and below-cost prices did not directly advance the State's interests in preventing excessive and underage drinking.[8]

When a state scheme is pock-marked with inconsistencies, it cannot meet the direct advancement test. *Greater New Orleans Broad. Ass'n, Inc. v. United States,* 527 U.S. 173, 190 (1999) (state cannot show direct advancement or a reasonable fit between an advertising restriction when the state's regulations are "so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it"). This Court's *2017 Ruling* noted that if Plaintiffs proved the inconsistencies they alleged, those inconsistencies would deal a death blow to the constitutionality of the Challenged Regulations. *2017 Ruling* at 301-02. Plaintiffs proved at trial all of the inconsistencies identified in their allegations and the *2017 Ruling*. (Section 1, below.)

[8] The State asserted these two interests to justify the Challenged Regulations. Pre-trial Tr.-14. As this Court noted in the *2017 Ruling,* at 300 n.6, the only State interest reasonably at issue here is the interest in reducing excessive consumption, since nothing in the Challenged Regulations targets underage drinking. However, the State introduced evidence about youth and drinking and thus appears to claim some involvement of that interest, so we mention that interest as well.

Plaintiffs also submitted additional evidence showing that the Challenged Regulations did not directly advance the State's interests, including thirty years of scholarly studies, explained by a leading expert. (Sections 2 and 3, below.)

1. All of the fatal inconsistencies identified in the *2017 Ruling* were proven.

In *Greater New Orleans,* the government banned broadcast advertising of casino gambling, and attempted to justify it on the basis of reducing social costs associated with gambling, and assisting States that restrict or prohibit casino gambling. 527 U.S. at 185. But neither justification could hold water, because the government had already permitted advertising of tribal, Government-operated, nonprofit and "occasional and ancillary" casinos. *Id*. at 190. These exceptions undercut the Government's justifications for its advertising ban. In a concurrence, Chief Justice Rehnquist noted that while Congress can often impose different regulations on different activities, no such inconsistencies were allowable in the regulation of advertising: "when Congress regulates commercial speech, the *Central Hudson* test imposes a more demanding standard of review." *Id.* at 196-97.

In this case, the Challenged Regulations are pockmarked with exceptions and inconsistencies.

a. The State allows discount and below cost sales of alcohol on site, but prohibits media advertising of those facts.

Missouri permits advertising and promotion of discount and below-cost prices, on premises (such as bars and restaurants), even after customers have already been drinking and may have impaired judgment. Tr.-112,205-06. It permits very, very low prices, such as penny pitchers of beer. Tr.-205-06. Those prices, and on-premises promotions and sales to potentially impaired customers, create a greater risk of excessive consumption than truthful media advertising of prices. *2017 Ruling* at 302.

This inconsistency is similar to the one that the Supreme Court found fatal in *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 488 (1995). There, the Court held that the federal government's limited prohibition of alcoholic strength on beer labels did not advance its asserted interest in preventing strength wars, since the information appeared on labels for other alcoholic beverages. The government could not "overcome the irrationality of the regulatory scheme" because it was unable to offer "convincing evidence that the labeling ban has inhibited strength wars." *Id*. at 490. Here, similarly, Missouri never provided convincing evidence that its discount advertising ban has curtailed excessive consumption. Indeed, the State's counsel admitted at opening, "The evidence will show that Missouri has not

achieved its goals of combatting illegal underage drinking and promoting responsible consumption." Opening Tr.-15.

b. The State allows indirect media advertising of discount and below-cost prices.

The State also acts inconsistently in banning explicit media ads about discounts, but allowing media advertisements of discounting code words, such as "Happy Hour" or "Ladies Night." *See* Def. Br. 14,50,59. That is, it claims media ads can *hint* at discounts, just not disclose them outright. This loophole is also fatal to the State's direct advancement case. In *Greater New Orleans*, despite the direct ban on broadcast advertising of casinos, the FCC let broadcasters "tempt viewers with claims of 'Vegas-style excitement' at a commercial 'casino,' if 'casino' is part of the establishment's proper name and the advertisement can be taken to refer to the casino's amenities, rather than directly promote its gaming aspects." 527 U.S. at 190-91. The Supreme Court held that because of this allowance of indirect advertising, "the agency's practice is squarely at odds with the governmental interests asserted in this case." *Id*. at 191. In the same way, Missouri's allowance of indirect but not direct ads about discounts is fatal to direct advancement.

c. The State permits discount advertising of distilled spirits, solely because of the industry's lobbying power.

Plaintiffs also proved the third inconsistency specifically addressed in this Court's *2017 Ruling*—the law that "exempts manufacturers of intoxicating liquor

other than beer and wine from its ban on advertising rebate coupons." *2017 Ruling* at 302. Mo.Rev.Stat. §311.355. The State admitted the exception, and offered no explanation other than the lobbying influence of the spirits industry. Tr.-116. This inconsistency in advertising of discounts (coupons banned for beer and wine, allowed for spirits) is fatal to direct advancement. *Rubin*, 514 U.S. at 488 (upholding constitutional challenge based on irrational and inconsistent scheme regarding disclosure of alcohol content); *Utah Licensed Beverage Ass'n v. Leavitt*, 256 F.3d 1061, 1072-74 (10th Cir. 2001) (finding Utah's advertising restrictions of wine and liquor "irrational" and unconstitutional because there were no comparable restrictions on beer).

* * *

Plaintiffs thus proved the three exceptions explicitly discussed in the *2017 Ruling*, and they proved more.

2. Plaintiff's expert witness testimony showed the lack of evidence of effects of media price advertising effects on alcohol abuse.

Professor Wilcox's testimony foreclosed any reasonable conclusion that the State's media advertising ban directly advanced its interests. He based his testimony on 30 years of studies of alcohol advertising, by himself and others, published in peer-reviewed journals, all of which found no association, or only the

tiniest of associations, between alcohol advertising and alcohol consumption. Tr.-42-43.

More tellingly—since the State's objective was only to reduce alcohol *abuse*—Professor Wilcox testified that researchers, including the FTC and the Surgeon General, have found *no association* between alcohol advertising and alcohol abuse. Tr.-42-43,59-60.[9]

Professor Wilcox's research, based on marketplace data (Tr.-35), showed that during the period 1971-2012, when alcoholic beverage advertising expenditures increased fourfold, per capita alcoholic beverage consumption in America *dropped* substantially. Tr.-53 (15% decline in consumption despite 400% increase in advertising expenditures). Of all of the studies he discussed, the greatest correlation found between alcohol advertising and alcohol sales was an association of a $10 million increase in spirits advertising with about a teaspoon of increased per capita alcoholic beverage consumption annually. Tr.-45.[10]

Professor Wilcox personally conducted two studies on price advertising which indicated "that the presence of price advertising had no significant effect on

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[9] Professor Wilcox also noted that the Surgeon General, in a recent report on alcohol abuse, never recommended any restrictions on alcohol advertising as a means of combating alcohol abuse. Tr.-78-79.

[10] Even this tiny association might have been due to changing attitudes and behaviors, or because advertisers, foreseeing such changes, increased their advertising budgets to reflect expected increased sales. Tr.-47.

beer consumption." Tr.-44,57. He also explained that bans on price advertising hurt businesses and consumers, by preventing retailers to effectively use low-price strategies, and by increasing consumers' search costs for information about the product." Tr.-58-59.

For those who wonder why companies advertise, if advertising does not increase overall demand, Professor Wilcox explained that in mature markets, most advertising focuses on "brand market share and one competitor stealing market share from another competitor." Tr.-48. Even when a new advertising market (television) opened up for spirits, the resulting advertising did not increase total consumption, but it increased the shares of existing consumption by the companies that advertised most effectively. Tr.-50-51. "Advertising impacts the brand market share, it does not impact total consumption." Tr.-56.[11]

3. Additional inconsistencies show that the Challenged Regulations could not directly advance the State's objectives.

There are even more inconsistences. The Challenged Regulations do not prohibit media advertising of very inexpensive alcoholic beverages. An ad in the

[11] This is consistent with the Supreme Court's comment in *Greater New Orleans*, 527 U.S. at 189, that even if some advertising might affect overall demand for gambling, it is nonetheless clear that "much of that advertising would merely channel gamblers to one casino rather than another." Notably, even in the case of some effect on overall demand, the Supreme Court held in *Greater New Orleans* that an advertising ban could not meet the direct advancement test. *Id.*

Post-Dispatch promoting six wine offerings under $5 a bottle was allowable. Tr.-106; JA916. But a similar ad in the *Washington Post*, featuring more expensive wine ($6.99 to $44.97) would *not* be allowable, because it contained a "15% off" reference. Tr.-104-05; JA758. That is, Missouri's regulations allow media advertising of ultra-cheap alcohol products, but not more expensive ones subject to discount—a scheme inconsistent with combatting excessive consumption.

Also, as the District Court noted, truthful discount advertising is permitted in the eight states that border on Missouri, exposing Missouri residents to media advertising of discounts from those states. JA235; Tr.-118.

Plaintiffs also offered evidence that consumers found media advertising of prices useful. Tr.-22. A State witness admitted that the ban on media advertising of discounts prevents some consumers from buying at the lowest price. Tr.-155. Consumers thus bear the costs—higher prices, and higher search costs—from the Challenged Regulations' prohibition of discount price advertising. Tr.-156.

This additional evidence further showed the irrationality and non-direct advancement of the State's ban on media advertising of discount and below-cost prices. The Challenged Regulations deprive consumers of useful information, and increase their costs, even while allowing super-cheap alcohol to be sold and advertised. These regulations are more irrational and inconsistent than the state schemes struck down by the Supreme Court in *Greater New Orleans* and *Rubin*.

C. The evidence showed multiple effective alternative means of addressing the State's interests.

Because "regulating speech must be a last—not first—resort," *Thompson*, 535 U.S. at 373, states cannot regulate truthful commercial speech if reasonable and effective alternative methods for addressing the state's interest are available. Such alternatives were available here. Witnesses from both Plaintiffs and the State verified the availability of the alternatives identified by the Supreme Court in *44 Liquormart*, and others:

Ban on very low prices. State official Hendrickson acknowledged that the State could ban discounts or extremely low prices Tr.-123,172-73.

Higher prices or taxes for alcohol. The State can control prices of alcoholic beverages, directly or through taxes. Tr.-119,122. Professor Wilcox testified that price had a strong negative correlation with consumption—"as prices increase[d], consumption decreased." Tr.-46. Taxation similarly decreases consumption because it increases prices to the consumer. Tr.-54,61-63,79.

Education. Professor Wilcox testified that educational campaigns can effectively steer people away from consumption of products that are harmful or potentially abused. Tr.-39,61. The State admits this. State Br. 71; Tr.-122. "The Government may … counteract what it views as dangerous messages with 'more speech, not enforced silence.'" *Tracy Rifle and Pistol LLC v. Harris*, 2018 WL 4362089, at *8 (E.D. Cal. Sept. 11, 2018). These educational efforts can be highly

effective, as the famous broadcast public service ad campaign concerning designated drivers showed. Tr.-25,291.

Intervention. Intervention can prevent alcohol abuse. Tr.-61.

Multiple techniques. The state can use several methods together—for example, increasing taxes on alcoholic beverages, which would raise revenue, which could fund intervention or educational programs. Tr.-79.

Other alternatives. The State could increase penalties for operating motor vehicles under the influence of alcohol, or lower the blood-alcohol level for operating under the influence. Tr.-122-23. It could require lower alcohol content in beer. Tr.-123. It could target offering of discounts, generally or at certain times or places, like college campuses. Tr.-123,128,153. It could limit the density of alcohol outlets in particular places. Tr.-123.

The State admitted that these alternatives were all possible. Tr.-122-23,153. Its assertion on appeal that alcohol abuse will never be fully eliminated (State Br. 71) is irrelevant; its goal is to reduce abuse, and these techniques are available to do so, without suppressing truthful speech. In these circumstances, the District Court correctly found that the State failed to meet its burden under *Central Hudson* of proving that the Challenged Regulations were no more extensive than necessary to further its interests.

IV. The District Court's Finding That the Challenged Statute Was Unconstitutional Is Well Supported By the Record.

The Challenged Statute relates to the combination of two provisions within the "tied house" portion of Missouri's three-tier system, section 311.070 of the Missouri Revised Statutes. Subsection 1 is a "blanket prohibition" on non-exempted vendor support. Tr.-268. In the absence of a specific exemption, all vendor support of retailers is illegal.[12] So vendor advertising support is allowed in Missouri only under subsection 4(10), which sets three conditions: no conspicuous mention of the retailer, no price term, and mandatory mention of a retail competitor. Plaintiffs challenged the combination of both sections to the extent they barred vendor support to retailers for truthful ads. *See* Second Amended Complaint, JA064-093, ¶¶ 20,21,26,32-40,53-54,89-100.

This application of the Challenged Statute was properly found unconstitutional and indeed fails the *Central Hudson* test for even more reasons than the District Court provided. Initially, the State never met its burden of identifying a substantial interest at stake. (Section A, below.) The State defaulted on its burden of showing direct advancement or lack of alternative methods.

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[12] This is different from federal law, which only outlaws vendor support that constitutes undue influence. Tr.-266-68; *see also, Foremost Sales Promotions, Inc. v. Director, Bureau of Alcohol, Tobacco and Firearms,* 860 F.2d 229 (7th Cir. 1988); *National Distributing Co. v. U.S. Treasury Dep't*, 626 F.2d 997 (D.C.Cir. 1980).

(Section B, below.) Moreover, the statutory scheme is so riddled with exceptions and inconsistencies that the provisions in question could not directly advance the State's objectives. (Section C, below.) Finally, the State has many effective non-speech-suppressive measures available. (Section D, below.)

Because the State and its supporting amicus parties suggest that the Nation is at risk if the "Tied House Acts" of many jurisdictions fall because of this case, it is important to emphasize the limited scope of Plaintiffs' claim. Plaintiffs did not seek to generally void section 311.070, the Missouri "tied house" statute. That Missouri statute has 87 sections and subsections. JA98-105. Plaintiffs' claim was directed solely to one aspect of one section (the ban on vendor advertising support, which is a part of section 1) and its connection with another subsection (subsection 4(10)). Plaintiffs have never attacked all of section 311.070; their claim addresses only the application of these two subsections together, as they prohibit vendor advertising support of retailers, except under mandated-content requirements.

Oddly, when not claiming that entire tied-house provision is at risk, Defendants sometimes claim that Plaintiffs directed their claim only to subsection 4(10) and not to the prohibition in section 1 that affects vendor advertising support. This too is incorrect. *See* JA091 and Section I.A.2, *above*.

The significance of the full tied-house statute, section 311.070, is that it (and the State's overall three-tier system, of which it was a part) have many

inconsistencies, and thus the vendor advertising support ban contained within it did not directly advance the State's objectives.

A. The State's interest in a three-tier industry, unnecessary for public health or safety, is not a "substantial" interest under *Central Hudson*.

Central Hudson requires the State to identify a "substantial" interest. Here, the State identified an interest in "orderly regulation of the marketplace," for the purposes of (1) "accountability," (2) easier tax collection, (3) protecting consumers from products being pushed at retail by manufacturers, and (4) public safety. Pre-trial Tr.-14; Tr.-241-42,254-55. But most of these rationales disappeared on scrutiny.

Government interests are "substantial" for *Central Hudson* purposes where the state seeks to protect citizens. *E.g.*, *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 485 (1995) (protecting citizens' health, safety, and welfare); *1-800-411 Pain Referral Service, LLC v. Otto*, 744 F.3d 1045, 1061 (8th Cir. 2014) (protecting accident victims from misleading and false advertising). But the three-tier system is not needed for public safety. The State's first witness, Mr. Schler, a retired manager of the Division of Alcohol and Tobacco Control, initially claimed that tier system "ensure[d] that there's public health and safety monitor[ing], controlled through all three tiers through the manufacturing, distribution and sales of alcoholic beverages." Tr.-242. But on cross-examination, Mr. Schler admitted that

the three-tier system was unnecessary to protect public health and safety. The State fully protects against unsafe alcohol in Missouri's many one-tier situations:

> Q. …[I]s there any problem of taint or public safety in products manufactured, distributed and sold at retail outside the three-tier system in Missouri? That's my question. Any public safety problems that you know of?
>
> A. Not that I know of.

Tr.-265.

As to a consumer protection purpose, the State claimed that under a three-tier system, product is "not pushed as hard by them [retailers] as it would be by the manufacturers and perhaps some of the wholesalers." Tr.-241-42,254. But that problem occurs "whenever you have manufacturers selling the product themselves," and Missouri has *accepted* that problem, by allowing manufacturers to sell directly to consumers, and use their advertising power to "push the product a little bit more." Tr.-257. Finally, accountability to State officials, and convenience in tax collection (both of which can be readily accomplished outside the three-tier system), are matters of mere convenience.

Thus, the three-tier liquor distribution system is not a "substantial" interest under *Central Hudson—i.e.*, a state interest so strong as to possibly justify restrictions on truthful speech essential to the functioning of the marketplace. *Dana's R.R. Supply v. Attorney General, Fla.*, 807 F.3d 1235, 1250 (11th Cir. 2015) (questioning substantiality of interest involved in economic regulation law,

especially considering the "shifting sand" of multiple exemptions); *Int'l Dairy Foods Ass'n v. Amestoy,* 92 F.3d 67, 73 (2d Cir. 1996) (finding no substantial interest in absence of an effect on public safety).

While the District Court recognized a substantial state interest, it did so merely by speculating that "maintaining a distinct three-tier system … could provide benefits to Missouri consumers by maintaining competition at the retail level," a purpose the State did not even claim. JA239. No deference need be afforded to that conclusion, and the absence of a substantial State interest provides an independent reason for affirmance as to the Challenged Statute.

B. The State failed to meet its burden of justifying the Challenged Statute.

The State defaulted in meeting its burden of proving that the Challenged Statute directly advances the State's interest in an orderly marketplace, and it provided no evidence to contradict the possible effectiveness of alternative measures for meeting its objectives. JA241-42. Accordingly, because of this default, as with the Challenged Regulations (*see* section III.A, *above*), even without consideration of Plaintiffs' evidence, judgment was proper on the Challenged Statute.

C. Because of many exceptions, the District Court properly found that the Challenged Statute did not directly advance the State's objectives.

The Challenged Statute, consisting of the general prohibition of vendor advertising support in section 1, combined with the highly restrictive requirements for allowed vendor advertising support in section 4(10), does not directly advance the State's objectives. The State's alleged "three-tier" system is pock-marked with exceptions, and its enforcement of these provisions highlights the lack of direct advancement of the State's proclaimed objectives.

1. Multiple inconsistencies in the 3-tier system and the tied-house provisions establish a lack of direct advancement.

Initially, the Challenged Statute is inconsistent on its face. In one respect it bans vendor advertising support (subsection 1) and another one it allows some of it (subsection 4(10)), as this Court noted. *2017 Ruling* at 302. But that is only one of many inconsistencies.

Practically everything about the State's three-tier system is inconsistent and irrational. The State cannot even explain why it is needed. Section IV.A., *above*. And Missouri does not follow a consistent strict three-tier system; it allows many substantial exclusions:

- Missouri-based wineries, breweries, and distilleries are allowed to sell their own manufactured alcoholic beverages at retail. Tr.-125-136. Indeed, one-tier wineries sell more than half their output in direct retail sales, and the State, through its wine board, brags

about the $1 billion economic impact from direct retail wine sales of Missouri wineries. Tr.-146.

- Any Missouri producer with a wine license can operate as its own wholesaler for all its alcoholic beverages. Tr.-128,252,133-134 ("Q. So every product that Anheuser-Busch manufacturers could bypass the three-tier system and Missouri has said that's fine if they make 200 gallons of wine? A. As I understand it, yes, sir.").

- A Missouri brewery, winery, or distillery can occupy all three tiers, if it gets the right combination of permits. Tr.-136,138.

- At Busch Stadium, a 50,000+-person venue where a lot of beer is sold, Anheuser-Busch, the country's largest brewer, could, during its stadium ownership, sell its own beer at retail. Tr.-140-42,253.

- Any winery anywhere can ship wine directly to Missouri consumers, without going through a wholesaler. Tr.-139.

The specific tied-house provisions of section 311.070 are also riddled with inconsistencies and exceptions. Though this statute theoretically seeks to remove vendor influence from retailers, it allows vendors to supply value to retailers in many ways (Tr.-265):

- Money for signs. Tr.-140.

- Product displays. Tr.-140.

- Point of sale materials, permanent and temporary. Tr.-140.

- Sale of equipment or supplies at cost. Tr.-141.

- Dispensing accessories, coils, sleeves, coil cleaning services. Tr.-141).

- $1,000 annually and $500 per event. Tr.-141; JA102.

- There are 19 itemized exemptions in subsection 4 of section 311.070, and another 6 in subsections 7 through 12. JA053-60.

The State even admitted—contrary to the no-vendor-support-of-any-kind command of section 311.070.1— that "the system works better with some connections." Tr.-266.

The State claims on appeal that direct advancement should be inferred from an alleged "consensus" among states about limiting vendor financial support to retailers, and a related "history"—neither proven at trial. State Br. 33-34.

Similarly, having not made, or supported with evidence, the "close proximity," "absentee owner," "low volume," or "antisocial effects" justifications it now offers for the exceptions (State Br. 38-41), those belated justifications cannot support reversal. Especially because evidence contradicts those claims. A State witness testified that coercion is inherent in *all* direct manufacturer sales, and Missouri *accepts those problems*; it is not, as the State claims on appeal, that the problems don't exist in the case of Missouri manufacturer-retailers. Tr.-256. And the exceptions are not negligible; the *winery exceptions alone* involve about $1 billion in commerce. Tr.-146.

Similarly, the State's new-found "tangible goods" distinction between allowed vendor-retailer advertising ties (on-premises signs, samples, etc.) and disallowed media advertising (State Br. 43) (another all-new on appeal claim) is

ineffective as well as late. Tangible donations add up, as a state witness admitted at trial (Tr.-151) and if the problem is "too much" vendor influence (State Br. 44), they certainly count. Nor did the State provide any credible distinction between disallowance of *media advertising* support and allowance of *on-premises advertising* support. Finally, as the District Court noted, the State has many ways to adjust vendor influence; it simply cannot sacrifice commercial speech while allowing other forms of influence.

There are other reasons why an absolute prohibition on vendor support for retail advertising does not make sense. Influence of a vendor over retailers "would depend on the volume," meaning that many small vendors (like Meyer Farms) could have little or no influence over retailers that sell ten thousand or more products. Tr.-127. Moreover, state law already prevents undue influence of manufacturers over retailers, without affecting advertising. Tr.-152,169-70.

In these circumstances—the Swiss-cheese-like three-tier system riddled with exceptions, the equally exception-filled tied-house provisions, the admissions that influence depends on volume and circumstances, and the State's own embrace of "connections" between vendors and retailers—the speech-suppressive ban on vendor support for advertising, except under crippling State-compelled content restrictions, cannot meet the direct advancement test.

The inconsistencies and exceptions here are far greater than those in *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 488 (1995) (alcohol strength claims allowed for some forms of alcohol but not others); *Greater New Orleans* (direct but not indirect broadcast advertising of casinos banned); or *Utah Licensed Beverage Ass'n v. Leavitt*, 256 F.3d 1061, 1072-74 (10th Cir. 2001) (finding Utah's advertising restrictions on wine and liquor "irrational" in the absence of comparable restrictions on beer). In these cases, courts found just one or a few exceptions and inconsistencies fatal to direct advancement. Here, the Missouri three-tier system has more holes than most Swiss cheese.

2. The Challenged Statute prevents informative and useful commercial speech that carries no threat of undue influence.

The Challenged Statute severely limits a Missouri winery, like plaintiff Meyer Farms, from getting its message to consumers. Ms. Bell, president of Meyer Farms, testified that vendor advertising support is commonplace for many consumer retail products. Tr.-22. Meyer Farms would like to partner with Springfield retailers—tailoring different ads for Macadoodles, a store that appeals to a younger clientele, and Brown Derby, which caters to an older clientele. But the Challenged Statute prohibits wineries like Meyer Farms from paying for such ads ("vendor-supported ads") or assisting with their cost ("cooperative advertising").

Tr.-20-21. It thereby prevents Meyer Farms from sending, and its consumers from receiving, useful and informative tailored advertisements.

As to the State's new-on-appeal justification of undue influence, there is no risk of undue influence when Meyer Farms helps support ads by retailers who sell products from many, many different producers. Tr.-22 ("I truly cannot imagine a situation where any type of advertising campaign or marketing campaign that I would present would sway the owners of International Wine one way or the other."). The State offered no evidence of actual or possible undue influence from vendor advertising support.

Ads meeting the highly restrictive content of section 4(10) are insufficient to serve the needs of vendors, retailers, and consumers. Price, prohibited by section 4(10), is important to retailers and consumers. Prices "can drive traffic into the retailers" by letting consumers know "where to go to get the best deal for what it is that they're trying to buy anyway." Tr.-22. Consumers care so much about prices that prices appear in a large portion of radio ads, variously estimated at 66% (Tr.-24) or 50% (JA895).

3. The State's enforcement campaigns highlight the irrationality of the Challenged Statute.

Evidence showed that the State enforced the Challenged Statute mechanistically, without regard to any valid purposes. In the Springfield Pub Crawl enforcement effort, an example of a number of similar enforcement efforts

focused on civic events, scores of Springfield retailers were charged and ultimately sanctioned. Tr.-272-76; JA337-741. Their offense? They had participated in a downtown-association sponsored pub crawl, which, in some cases *unbeknownst to them,* had been partly financially supported by a beer distributor, and the event, in turn, had been advertised, with ads mentioning the participating retailers. Tr.-273-76. In the State's eyes, that constituted vendor-supported advertising, with conspicuous retailer names, in violation of section 311.070.4(10). As a result, in the Pub Crawl and at least five similar civic events, many if not all of the participating retailers were charged, risked the loss of their liquor licenses, and ultimately paid fines. Tr.-275-276. In addition, the Division sent letters informing the Greene County Prosecutor of the opportunity for criminal charges. Tr.-281.

These prosecutions, of innocent retailers who merely participated in "a civic event" (Tr.-273), did not advance any legitimate, much less "substantial" state interest. When asked how they benefitted the public, the State's witness replied only that they maintained separation between vendors and retailers (Tr.-276)—a strange and strained answer, given that many of the retailers did not know about the vendor involvement, and the State allows many "connections" between vendors and retailers. Tr.-266.

This enforcement record shows that the State uses the Challenged Statute to suppress speech irrationally. Asked if vendor-supported advertising would present

any problem to Missouri, a State witness responded only that it "violates the three-tier system," admitting he would have "speculate" to identify any underlying problem. Tr.-150-51. Nor could he explain why the value of vendor-supported advertising would have any greater impact on the retailer than any of the other valuable consideration that Missouri law allows vendors to bestow on retailers. Tr.-151. Rather, the state blindly enforces the Challenged Statute:

> Q. So basically your division applies the Challenged Statute very strictly; even if there is more than two retailers mentioned, even if the price isn't mentioned, if the retailers aren't inconspicuous, that's a violation? Even though have no evidence that any retailer was under undue influence by the wholesaler, many of these retailers not even knowing a wholesaler's involved, correct?
>
> A. Correct.

Tr.-277-78.

4. Conclusion regarding direct advancement

Missouri's vendor-supported advertising restrictions do not directly advance the State interest in an orderly marketplace, given the many inconsistences and exceptions in the three-tier separation; the informational costs to vendors, retailers and consumers; and the effects of blind and purposeless enforcement. This evidence prevents the State from meeting its burden under *Central Hudson* factor 3.

D. The District Court properly found that effective non-speech-suppressive alternatives to the Challenged Statute were available.

Plaintiffs submitted evidence about many different non-speech-suppressive methods for meeting the State's objective in maintaining an orderly marketplace.

If the State believes that any additional allowance of vendor support of retailers would be too much, the State could address that issue, without suppressing advertising. It could reinforce the three-tier system, by repealing exceptions that allow Missouri breweries, wineries, and distilleries to integrate all three functions. Tr.-152. It could alternatively limit vendor influence over retailers by repealing or limiting one or more of the 18 exceptions in section 311.070.4, which allow many different kinds of vendor support of retailers. It could require vendors to disclose their advertising payments to retailers, just as it now requires manufacturers to disclose production. Tr.-153-54.

The State can enforce existing laws which prevent undue influence by a manufacturer over a retailer. Tr.-152. It could follow the approach of federal law, which prohibits only vendor advertising support that creates undue influence, rather than the meat-hammer "blanket" ban of the Challenged Statute, which leads to such bizarre injustices as the Springfield Pub Crawl enforcement actions and referrals of Springfield merchants for prosecution. Tr.-86,196-98,271-77,281.

The District Court properly found that the State failed to meet its burden under *Central Hudson* of proving that no reasonably effective alternative methods existed. JA241-42.

V. The Compelled Speech and Association Inherent in the Challenged Statute Further Support the District Court's Ruling.

Through the combination of subsections 1 and 4(10) of section 311.070, the State dictates the content of vendor-supported advertising. That is, Missouri allows vendor-supported advertising only pursuant to government-mandated content: (1) barring valuable speech (prices), (2) restricting other useful information (retailer names), and (3) even compelling unwelcome speech (names of competing retailers).

Consider a winery that wanted to support a retailer (a practice common in most industries (Tr. 22)) with the following ad:

> **"Buy our refreshing new 2017 Missouri Norton at The Delightful Wine Shop for only $15.99 a bottle**."

The Challenged Statute requires the following changes:

> **"Buy our refreshing new 2017 Missouri Norton at** The Delightful Wine Shop* ~~**for only $15.99 a bottle**~~ **and also at Joe's Hangout Liquor Store**."
>
> **Retailer name can't be "conspicuous."*

This censorship weakens the ad and removes useful content. The State admits it makes the ad almost useless to the featured retailer. State Br. 42.

The First Amendment protects "the decision of both what to say and what not to say." *Riley v. National Federation of Blind of N.C., Inc.*, 487 U.S. 781, 797 (1988). Similarly, it protects the right to decide who one does or does not associate. *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 309 (2012). Laws that contradict these basic notions are subject to "exacting First Amendment scrutiny," even for "mundane" commercial speech. *Id.* at 309-10.[13]

The compelled speech inherent in the combination of subsections 1 and 4(10) is unconstitutional under *Knox* and *United States v. United Foods, Inc*., 533 U.S. 405 (2001).[14] That combination, allowing vendor-supported advertising only subject to the unconstitutional conditions of compelled speech and associations, and censorship of price information, violates freedoms of association and speech. *See Knox*, 567 U.S. at 309-10, and *United Foods*, 533 U.S. at 413. *See* Tr.-22-24,58-59,155-56 (value of price information).

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[13] The State's assertion that compelled speech review is "akin to rational-basis review" is based on an overruled precedent. That phrase, quoted in *1-800-411-Pain Referral Service, LLC v. Otto*, 744 F.3d 1045 (8th Cir. 2014), in dictum (since *Otto* invalidated a statute under *Central Hudson*), came from *R.J. Reynolds Tobacco Co. v. FDA,* 686 F.3d 1205, 1214 (D.C. Cir. 2012), which was overruled on this point by *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 22 (D.C. Cir. 2014) (en banc).

[14] The State's argument II (State Br. 51-55) ignores the fact that the compelled speech argument involves the *combination* of sections 1 and 4(10). The State's argument against something the District Court did not do—invalidate subsection 4(10) in isolation—is irrelevant.

The District Court, relying on the *2017 Ruling*, held that the combination of subsections 1 and 4(10) in section 311.070 compels speech and association in violation of the First Amendment. JA242. It then properly prohibited application of section 1 to vendor-supported advertising, thereby removing the compulsory nature of the limitations in subsection 4(10). The District Court's statutory ruling is fully supported solely on this basis.

CONCLUSION

The District Court's ruling should be affirmed. Affirmance will affect only three speech-suppressive measures that are so irrational that, after five years of litigation, the State of Missouri could produce no evidence to justify them under *Central Hudson*.

Affirmance will leave intact 99+% of Missouri's alcoholic beverage laws. The District Court's ruling only bars enforcement of those portions that prohibit (1) truthful media advertising of discount and below-cost prices, and (2) vendor support for truthful, informative, and non-misleading retail advertising. All of the State's industry structures, and all other regulations, including scores of tied-house provisions, are untouched. All laws against illegal and misleading advertising remain, as do federal and Missouri laws prohibiting vendors from exerting undue influence over retailers.

Affirmance here will have only two effects, constitutional and practical. The State will be required to comply with the First Amendment's command that it let its citizens receive truthful and informative commercial speech. And the State will be incentivized to proceed with the alcohol abuse educational programs that its own officials believe are effective.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,836 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman style.

In addition, pursuant to the Court's Local Rule 28A(h), this brief and appellee's addendum have been scanned for viruses and are virus-free.

/s/ Mark Sableman
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December 10, 2018

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CERTIFICATE OF SERVICE

A copy of the foregoing was filed electronically with the Clerk of Court to be served by operation of the Court's electronic filing system upon the following attorneys for Defendants-Appellants this 10th day of December 2018.

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