18-2611

IN THE UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

MISSOURI BROADCASTERS ASSOCIATION, *et al.*,
Plaintiffs-Appellees,

v.

DOROTHY TAYLOR, *et al.*,
Defendants-Appellants.

Appeal from the United States District Court
Western District of Missouri,
The Honorable Douglas Harpool

REPLY BRIEF OF APPELLANTS

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INTRODUCTION

Plaintiffs' attempt to distinguish *Retail Digital Network, LLC v. Prieto*, 861 F.3d 839 (9th Cir. 2017) (en banc), is unpersuasive. The Ninth Circuit got it right: tied-house laws adopted by the federal government and nearly every state, and maintained for 90 years, satisfy the First Amendment. Affirming the district court would create a circuit split.

Plaintiffs do not dispute the history of undue influence that led nearly every jurisdiction to adopt tied-house laws. And they cannot challenge their common-sense concession that barring advertisements for the kind of alcohol most likely to induce binge drinking reduces consumption of that kind of alcohol.

Plaintiffs avoid responding to arguments about the State's interest in preventing undue influence in two ways: they 1) misidentify the State's interest and 2) make incorrect assertions about what arguments the State presented below. Plaintiffs' inaccurate assertions about the record not addressed here are addressed in the State's response to Plaintiffs' motion to strike, incorporated here by reference.

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COUNTERSTATEMENT OF PROCEDURAL HISTORY

Subsection 1, the core of Missouri's tied-house law, bars manufacturers and distributors from providing anything of value to liquor retailers. Mo. Rev. Stat. § 311.070.1. This Court's 2017 decision is not law-of-the-case for subsection 1. Plaintiffs do not dispute that they amended their complaint to challenge subsection 1 only after this Court's 2017 decision. Pet. Br. 7–10; *cf. Mo. Broadcasters Ass'n v. Lacy*, 846 F.3d 295, 298 (8th Cir. 2017) (identifying the challenged provisions as the two regulatory provisions and "§ 311.070.4(10)," not subsection 311.070.1).

The decision is relevant for the two regulatory provisions, which prohibit advertisements that include statements or prices for below-cost or discount alcohol. Mo. Code Regs. Ann. tit. 11, § 70-2.240(5)(G), (I). But Plaintiffs misinterpret that decision to mean they necessarily would prevail if they could prove three exceptions exist: 1) the State enforces the regulation only for outdoor advertisements; 2) the State does not enforce the regulation for vague statements like "happy hour"; and 3) the regulation makes an exception for some statements that offer rebates. Resp. Br. 11–12, 34–35.

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This court already rejected that interpretation. In the previous decision, Plaintiffs asked this Court to reverse both the dismissal and the denial of summary judgment. The State admitted that these three exceptions exist. State's Br., *Mo. Broadcasters Ass'n*, No. 16-2006, 2016 WL 3996196 at *14. So if Plaintiffs could prevail merely by showing that these exceptions exist, the district court's denial of summary judgment would have been "inextricably intertwined" with the dismissal, compelling this Court to grant summary judgment. *Mo. Broadcasters Ass'n*, 846 F.3d at 299 n.4.

This Court rejected that argument—and the district court held a trial—because establishing that these exceptions exist is not enough. This Court's "grant of the motion to dismiss does not impact the district court's denial of summary judgment," *id.*, because Plaintiffs must also show that the State cannot *justify* these exceptions. This Court declined to determine whether the State could factually justify the exceptions because it took "the facts in the light most favorable to Plaintiffs." *Id.* at 298.

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SUMMARY OF ARGUMENT

I. Plaintiffs never explain why they believe that subsection 1, which does not mention speech, affects speech more than incidentally. They instead assert that the State conceded that *Central Hudson* governs the statutory challenge, and they argue that the exception in subsection 4(10), which reduces the incidental effect of subsection 1 on speech, taints subsection 1. Subsection 4(10) does not, and the State correctly argued that *Central Hudson* does not govern the statutory challenge.

II. Regardless, the statute satisfies *Central Hudson*. The district court failed to defer to the State's determination that tied-house laws combat harms like the historical undue influence manufacturers and distributors exercised over retailers. Plaintiffs assert that deference is inappropriate for challenges subject to intermediate scrutiny under the First Amendment. But "[e]ven in the realm of First Amendment questions," the Supreme Court has held, "deference must be accorded to [the legislature's] findings as to the harm to be avoided and to the remedial measures adopted for that end."

Plaintiffs never dispute the history of undue influence or that nearly every jurisdiction adopted tied-house laws to redress that

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problem. So they instead misidentify the State's interest as maintaining a "*strict* three-tier system" allowing "no vendor support of any kind" ever. But the State's interest is maintaining separation between the tiers only to the extent needed to prevent undue influence and its associated harms.

Plaintiffs undermine their own argument when they concede that the federal tied-house statute is constitutional. Missouri's tied-house law is very similar to federal law. Both prohibit giving anything of value to retailers (other than merchandise to be sold), and both carve out exceptions whenever financial support is unlikely to create undue influence.

III. The district court's determination about compelled disclosures was advisory because it referenced only subsection 4(10), which prohibits nothing, not subsection 1. Even if subsection 4(10) could taint subsection 1, as Plaintiffs suggest, Plaintiffs never respond to the point that subsection 4(10) is lawful because it is "reasonably related to the State's interest" of minimizing the risk of undue influence. Nor do they respond to the point that subsection 4(10), even if unlawful, is severable because it was passed six decades after subsection 1.

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IV. Plaintiffs again misidentify the State's interest when they challenge the regulatory provisions. They assert that the State's interest is reducing the "total" amount of alcohol consumed. But the State made it clear that its interest is not reducing alcohol consumption in the aggregate, but a specific kind of alcohol: below-cost or discount alcohol. The State met that burden.

The provisions are lawful even if, as Plaintiffs contend, the State could better achieve its interests through other means. Because States balance many competing interests, courts must not declare a regulation invalid unless the exceptions are so overwhelming that they "entirely vitiate[]" the State's interest, preventing the regulation from advancing that interest "at all."

Again misidentifying the State's interest, Plaintiffs assert that the State's interest is reducing alcohol abuse by any *de minimis* amount, so the regulation is excessive. But the State seeks to reduce abuse as much as possible. Doing so requires many tools, including not only educational programming but also targeted advertising regulations.

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V. Plaintiffs did not satisfy their burden to obtain facial relief. They do not dispute that they facially challenged the two regulatory provisions. Their claim fails because they did not meet their burden.

As for the statute, they incorrectly dispute that they received facial relief. Although the district court did not enjoin all of subsection 1, it did grant relief that "reach[es] beyond the particular circumstances of these Plaintiffs." It enjoined the State from enforcing subsection 1 against advertising support even when the advertisements are misleading. Nor did Plaintiffs raise an overbreadth challenge.

ARGUMENT

I. Missouri's tied-house law affects speech at most incidentally.

Subsection 1, the core of Missouri's tied-house law, satisfies the Constitution because its effect on speech is at most incidental. "[T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011). Like antitrust laws, *id.*, subsection 1 is lawful because it targets economic conduct, not speech. It is "beyond dispute" that the First Amendment creates "no special immunity from

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the application of general laws." *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) (citation omitted).

The Supreme Court has never interpreted tied-house laws as speech restrictions. To the contrary, it has stressed that tied-house laws are "unquestionably legitimate," *S. Wine & Spirits of Am., Inc. v. Div. of Alcohol & Tobacco Control*, 731 F.3d 799, 806 (8th Cir. 2013) (quoting *Granholm v. Heald*, 544 U.S. 460, 489 (2005)), and carry "a strong presumption of validity," *North Dakota v. United States*, 495 U.S. 423, 433 (1990).

Each of Plaintiffs' responses fails. First, they contend that the State conceded that *Central Hudson* governs. Resp. Br. 27. Not so. The State argued that subsection 1—which was not at issue in this Court's previous decision—does not "implicate the First Amendment" because "Subsection 1 refers to conduct that is not speech." JA.154; *see also* Pretrial Tr.19 ("[Subsection 1] is a non-speech but a conduct kind of restriction."). Regardless, it is "[n]onsense" to suggest, as Plaintiffs do, that a court can apply an incorrect legal standard if the parties do not address the correct standard. *See, e.g.*, *McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076, 1099 (11th Cir. 2017).

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Second, Plaintiffs assert that the Supreme Court applied heightened scrutiny to other economic regulations. Resp. Br. 27–28. But those regulations were dissimilar: they targeted speech. A statute prohibiting "material support" to terrorist organizations implicated the First Amendment because it defined "material support" to include "expert advice," targeting "communicating a message." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 8, 28 (2010). A New York statute prohibiting merchants from imposing surcharges on credit-card purchases implicated the First Amendment because it "regulat[ed] the communication of prices rather than prices themselves." *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1151 (2017). And a Vermont provision prohibiting marketers from using certain data implicated the First Amendment because it "does not simply have an effect on speech, but is directed at certain content and is aimed at particular speakers." *Sorrell*, 564 U.S. at 567.

In contrast, subsection 1 affects speech at most incidentally. It does not even mention speech. It prohibits only conduct: transferring resources from manufacturers and distributors to retailers.

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The Washington Legal Foundation argues that *any* restriction on funding implicates the First Amendment because money facilitates speech. WLF Br. 17–18 (citing *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010)). But generally applicable laws do not trigger the First Amendment simply because they affect speech incidentally. *Cohen*, 501 U.S. at 669. The statute in *Citizens United* implicated the First Amendment not because it simply affected money, but because it prohibited using "funds to make independent expenditures *for speech*." *Citizens United*, 558 U.S. at 318–19 (emphasis added).

Third, Plaintiffs assert that subsection 4(10) taints subsection 1. Because subsection 1 never mentions speech, Plaintiffs reformulate their suit as a challenge to the "combination" of subsections 1 and 4(10) and assert that subsection 4(10) "is not content neutral, because it prohibits vendor support" in which Plaintiffs want to engage. Resp. Br. 28, 44. But subsection 4(10) "prohibits" nothing. Subsection 1 prohibits providing financial support to retailers. Subsection 4(10) mentions speech, but only to carve out an exception to reduce the incidental effect of subsection 1.

Reducing that incidental effect does not render subsection 1 unlawful simply because it makes subsection 1 affect only some speech.

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A provision barring outdoor fires is "content neutral" because it is general, even though it prohibits some speech (flag burning) while allowing other speech (patriotic flag displays). *See Sorrell*, 564 U.S. at 567. So, too, with Missouri's statute.

Fourth, Plaintiffs try to salvage their challenge to subsection 1 by asserting that this Court should apply the test under *United States v. O'Brien*, 391 U.S. 367 (1968), because Plaintiffs believe that speech and conduct here are "comingled." Resp. Br. 28. But *O'Brien* applies "only to conduct that is inherently expressive." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006). Prohibiting a manufacturer from giving financial support to a retailer incidentally affects speech, but that conduct is not "inherently expressive." Where, as here, a generally applicable provision affects speech only incidentally, the Supreme Court regularly upholds government action without considering *O'Brien*. *E.g.*, *Cohen*, 501 U.S. at 672.

O'Brien would also ease the State's burden. A provision satisfies *O'Brien* "if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." *See Turner Broad. Sys., Inc. v.*

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F.C.C., 520 U.S. 180, 189 (1997) (citing *O'Brien*, 391 U.S. at 377). The State satisfied that standard because its interest in preventing harms associated with undue influence are unrelated to speech and the statute does not burden substantially more speech than necessary. *Infra* Parts II.B–C.

II. Missouri's statute satisfies *Central Hudson*.

When the country repealed the Eighteenth Amendment, the federal government and states rallied to ensure that the problems that justified that amendment would not recur. Pet. Br. 21–24, 33–35. One problem was the undue influence manufacturers and distributors exercised over retailers. Absentee companies, geographically separated from local harms, used financial transfers to pressure retailers to make decisions that generated massive profits for absentee companies but ravaged local communities. *Id.*

The federal government and the States "widely" understood that companies provided financial support not only directly, but also indirectly through "conceal[ed]" payments, including providing retailers with advertising support. Pet. Br. 34; *Retail Digital Network, LLC v. Prieto*, 861 F.3d 839, 843 (9th Cir. 2017) (en banc) (citation omitted)). The

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country agreed that "the best system" for limiting undue influence was by "flatly proscribing" financial support to retailers. *Id.* at 845 (citation omitted); Tr.249.

Plaintiffs do not dispute this history. Indeed, they admit that California's interest in avoiding this historical undue influence was sufficient for the Ninth Circuit to uphold California's tied-house law. Resp. Br. 24. But they ask this Court to ignore this history and instead increase the State's burden. In doing so, they misrepresent the State's interest and the record.

A. The district court erred because it failed to give the State deference.

Plaintiffs do not dispute that courts ordinarily must defer to "a judgment by the State" about the need for three-tiered statutes. *S. Wine & Spirits of Am.*, 731 F.3d at 811–12. And they do not dispute that the district court failed to give the State any deference. They instead assert that courts should not defer when plaintiffs bring a First Amendment claim subject to intermediate scrutiny. Resp. Br. 14 n.1.

But Plaintiffs overlook *Turner*, an intermediate scrutiny decision that compels "substantial deference." The State must submit evidence that a statute advances the State's interest, but once the State does so,

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courts must defer to the State's judgment unless completely unreasonable. "Even in the realm of First Amendment questions where [the legislature] must base its conclusions upon substantial evidence, deference must be accorded to its findings as to the *harm to be avoided* and to the *remedial measures adopted* for that end." *Turner*, 520 U.S. at 195–96 (emphasis added) (requiring "substantial deference"). Courts cannot consider whether the legislative conclusion is correct. The court's "sole obligation is 'to assure that, in formulating its judgments, [the legislature] has drawn reasonable inferences based on substantial evidence.'" *Id.* at 195 (citation omitted).

Once the State submitted evidence of historical harms—harms Plaintiffs never dispute—the district court's "sole obligation" was to determine whether the State reasonably inferred that a tied-house law would address those harms. *Id.* Not only was Missouri's inference reasonable; the federal government and nearly every other State adopted the same inference. By itself, the district court's failure to defer justifies reversal.

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B. Tied-house laws advance the State's interest.

Plaintiffs avoid addressing the State's arguments that the tied-house law directly advances the interest of avoiding undue influence. And they never dispute that the district court erred by creating a balancing test unsupported by precedent. Pet. Br. 36. They instead misidentify the State's interest, inaccurately describe statutory exceptions, and misstate the record.

1. The State has made its interest clear. It is not interested in prohibiting companies from ever financially supporting retailers, but avoiding "the *kind* of financial support that creates antisocial harms" through undue influence. Pet. Br. 41. The State allows companies in one tier to support retailers in another tier financially whenever those exceptions "are not likely to cause undue influence." Tr.266.

Despite these clear statements, Plaintiffs continue to misidentify the State's interest, as they did before the district court. Pet. Br. 62 n.7. They assert that Missouri's interest is maintaining "a consistent *strict* three-tier system," allowing "no vendor support of any kind." Resp. Br. 49, 51 (emphasis added) (hyphens omitted).

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That Plaintiffs misidentify the State's interest as maintaining a "strict" three-tier system that never allows vendor support is telling. When considering the State's actual interest—maintaining a three-tier system only as much as needed to prevent undue influence and its associated harms—Plaintiffs make no argument. Take the exception allowing some manufacturers to sell at retail in their own communities. Plaintiffs do not even address the State's point that this exception tracks the State's interest because it eliminates the historical concern of absentee producers inducing socially harmful retail practices in geographically separate communities. Pet. Br. 38–39. Plaintiffs ignore this point and insist instead that the exception is fatal because it deviates from "strict" separation. Resp. Br. 49.

They similarly refuse to respond to the State's point that the federal government and nearly every state agree that tied-house laws are the best response to prevent undue influence over retailers. And when they assert that the exception to Missouri's tied-house law for some stadiums undermines the State's interest, Resp. Br. 50, they fail to acknowledge that the Ninth Circuit upheld California's tied-house law despite its "numerous exceptions" about "stadiums and arenas." *Retail Digital*

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Network, 861 F.3d at 850 & n.13. Because they misidentify the State's interest, they consider any deviation from "strict" separation fatal.

Just once, Plaintiffs argue that an exception undermines the State's actual interest of avoiding undue influence. They assert that the limited exception allowing companies to provide retailers *de minimis* tangible goods undermines the interest of avoiding undue influence because those goods can "add up." Resp. Br. 52. But the mere possibility of undue influence does not undermine the State's interest. The State allows some tangible goods exceptions because the State determined that they "are *not likely* to cause undue influence," Tr.266, a determination that warrants deference. Plaintiffs also disregard the similar exceptions in the California and federal statutes. Pet. Br. 43–45.

2. Plaintiffs next inaccurately describe many exceptions. For example, they assert that "[a]ny Missouri producer" can operate outside the three-tier system for "all its alcoholic beverages." Resp. Br. 50. But the exception they refer to applies only when manufacturers sell in their own communities, is subject to license-volume limits, and requires a special license. *E.g.*, Mo. Rev. Stat. §§ 311.195; 311.070.11. The State also

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may deny any application that raises appreciable risk of undue influence. *See id.*

Similarly, Plaintiffs assert that "[a]ny winery anywhere can ship wine directly to Missouri consumers, without going through a wholesaler." Resp. Br. 50. Not true. The exception applies only if companies meet many qualifications, it limits how much and for what purposes companies can sell alcohol, and the State again may deny any application for a special license under this exception if granting the license would risk undue influence. *See* Mo. Rev. Stat. § 311.185.

3. Plaintiffs compound their misidentifying the State's interest and their inaccurate description of the exceptions by misstating the record. They do not dispute the well-established historical problem of undue influence that led the federal government and nearly every state to adopt tied-house laws. Nor do they dispute that this history justified California's tied-house law. Resp. Br. 24. They instead say that they need not respond to the State's arguments because they insist that the State never discussed at trial arguments about the problems related to undue influence. Resp. Br. 22, 51.

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Not so. As further explained in the State's response opposing Plaintiffs' motion to strike, the record is replete with evidence that the principal purpose of Missouri's law "is to prevent the manufacturers and wholesalers from having an undue influence on the retailers." Tr.126; *accord* Tr.127–28, 169, 241–42, 249, 276–77.

Plaintiffs next assert that the State issued a smoking-gun admission that it does not care about undue influence. They insist that the State admitted "that coercion is inherent in *all* direct manufacturer sales, and Missouri *accepts those problems*." Resp. Br. 51 (emphasis in original). The State witness said no such thing. He agreed that selling alcohol always risks social problems, and he agreed that Missouri's tied-house law would accept problems with manufacturers selling at direct retail "*if* there is always a problem" with those transactions. Tr.256. But he stressed that he knew nothing about that issue. Tr.256 ("I don't know. I have never really researched that. I can't really speak to that."). And the rest of "the record taken as a whole," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986), establishes that Missouri does not "accept" undue influence; it creates exceptions to the tied-house

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law only when those exceptions "are not likely to cause undue influence." Tr.266.

Similarly, while complaining about a previous enforcement action that did not involve Plaintiffs and that neither the district court nor this Court found relevant, Plaintiffs assert that a State witness admitted that the purpose of that enforcement was solely to "maintain[] separation between vendors and retailers." Resp. Br. 55. The State witness actually said that the purpose was to "keep[] the retailers separate from the wholesalers *so there's not undue influence*." Tr.276.

C. The statute is not excessive at all, much less "substantially excessive."

Devoting just one page to the issue, Plaintiffs assert that the State could obtain its interest using means that affect speech less. Resp. Br. 57. That argument fails not only because Plaintiffs again misstate the State's interest, but also for many other reasons.

First, Plaintiffs overlook the legal standard. Even if the State could obtain its goals through means that affect speech less, a statute is unconstitutional only if it "curtail[s] *substantially* more speech than is necessary to accomplish its purpose." *Passions Video, Inc. v. Nixon*, 458 F.3d 837, 843 (8th Cir. 2006) (emphasis added) (citation omitted); *accord*

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Bd. of Trustees of State Univ. of New York v. Fox, 492 U.S. 469, 479 (1989) ("substantially excessive").

Second, this Court must defer to the State's "findings as to the harm to be avoided and to the remedial measures adopted for that end." *Turner*, 520 U.S. at 196. Plaintiffs have not proven that the determinations by the federal government and nearly every state that tied-house laws are necessary to redress problems in the liquor industry were unreasonable.

Third, Plaintiffs again fail to respond to the State's arguments. They parrot the district court's declaration that the State could obtain its goals by using other laws, which they do not identify, to police interactions between manufacturers and retailers. Resp. Br. 57. But they never acknowledge the Ninth Circuit's holding that other laws are insufficient for the problems that uniquely affect the liquor industry. Not only can investigations for other laws "interfere in the advertising process itself, and thereby create other First Amendment problems," but tied-house laws are necessary because without them it "would be impossible" to detect all instances of undue influence. *Retail Digital Network*, 861 F.3d at 845 (citation omitted). Companies use advertising payments "to conceal" their undue influence. *Id.* at 843; *accord Actmedia,*

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Inc. v. Stroh, 830 F.2d 957, 967 (9th Cir. 1986). And the State may "act[] to prevent offenses that 'are successful precisely because they are difficult to detect.'" *Wagner v. Fed. Election Comm'n*, 793 F.3d 1, 20 (D.C. Cir. 2015) (quoting *Burson v. Freeman*, 504 U.S. 191, 208 (1992)).

Fourth, Plaintiffs and *amici* concede that Missouri's tied-house law would be constitutional if it "mirror[ed]" federal law. WLF Br. 34; *accord* Resp. Br. 57. But Missouri's law does that. The federal law is "very similar to the state statute" and "mirrors" that statute. Tr.246.

Attempts to distinguish the federal tied-house law fail. Plaintiffs assert that federal law "prohibits only vendor advertising support that creates undue influence" but that Missouri's statute is a "blanket ban" on all vendor support. Resp. Br. 57. That assertion misstates federal law. Federal law defines giving any "things of value" to be unlawful inducement. 27 C.F.R. § 6.41. So federal law operates just like Missouri law: both prohibit manufacturers and distributors from giving anything of value to retailers (other than merchandise to be sold). 27 U.S.C. § 205(b); *accord* H.R. Rep. No. 1542, 74th Cong., 1st Sess. 11 (1935). ("Section 5(b) prohibits . . . the furnishing, giving, renting, lending, or selling to a retailer of equipment, fixtures, signs, supplies, money, or

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other thing of value, except as permitted under regulations"). And both create exceptions for circumstances unlikely to create undue influence. *E.g.*, Tr.246, 266; 27 U.S.C. § 205(b) (granting the Treasury Secretary authority to prescribe exceptions). Plaintiffs even admitted at trial that the advertising exception in "Missouri law is *similar* to one of many things that are allowed in federal law." Tr.268.

D. The State's interest is substantial.

Plaintiffs do not dispute that both the district court and the Ninth Circuit held that states have a substantial interest in maintaining tied-house laws, including to prevent undue influence. *Retail Digital Network*, 861 F.3d at 844 (citation omitted); JA.231. But they ask this Court to create a circuit split by holding otherwise.

Plaintiffs' own concession undermines their argument. They admit that protecting the health, welfare, or safety of citizens is a substantial interest. Resp. Br. 46. But tied-house laws do that. They prevent manufacturers and distributors from exercising undue influence over retailers because undue influence causes antisocial and anticompetitive injuries. Pet. Br. 21–26.

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Plaintiffs' sole argument in response again misstates the record. They repeat their assertion that the State conceded that it does not care about undue influence. Resp. Br. 47. That argument is wrong for the reasons already discussed on pages 18 to 19. And they insist that the State conceded that "the three-tier system was unnecessary to protect public health and safety." Resp. Br. 46–47. But the single citation they include in support undermines their assertion. The State witness remarked only that he was unaware of public safety problems for distribution outside the three-tier system. Tr.265. Those distributions lie outside the three-tier system precisely because Missouri determined that they "are not likely to cause undue influence." Tr.266. That witness's statement says nothing about alcohol sold inside the three-tier system.

III. Subsection 4(10) does not unlawfully compel disclosures, and even if it did, that subsection is severable, leaving Plaintiffs with no relief.

1. Plaintiffs try to rescue the district court's advisory opinion that subsection 4(10) compels disclosures by asserting that they challenged the "combination" of subsections 1 and 4(10) and that the latter subsection taints the former. Resp. Br. 58. But Plaintiffs cannot

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retroactively alter the district court's holding, which relied on this Court's 2017 decision to hold only subsection 4(10) unconstitutional. JA.242.

That holding was advisory because subsection 4(10) does not prohibit or compel anything. It is subsection 1 that prohibits manufacturers from providing financial support to retailers. Subsection 4(10) merely creates an exception that allows for more speech, decreasing the incidental effect of subsection 1. Enjoining subsection 4(10) does nothing to redress Plaintiffs' asserted injury.

2. Plaintiffs also fail to respond to other relevant arguments. Even if subsection 4(10) compelled anything and could taint subsection 1, it is lawful because it is "reasonably related to the State's interest" and is not "unjustified or unduly burdensome." *1-800-411-Pain Referral Serv., LLC v. Otto*, 744 F.3d 1045, 1053 (8th Cir. 2014) (quoting *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985)); Pet. Br. 54–55. Manufacturers and distributors sometimes concealed their influence over retailers by paying retailers indirectly through advertisements. *Retail Digital Network*, 861 F.3d at 843; *Actmedia*, 830 F.2d at 967. Subsection 4(10) redresses that historical concern by

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allowing only advertisements that minimize the potential for undue influence. Pet. Br. 55.

Tellingly, Plaintiffs never apply the *Zauderer* test. They simply assume that the tied-house law is unconstitutional if it compels disclosure. The closest Plaintiffs come to responding to this argument is to dispute this Court's determination that the standard for reviewing compelled disclosures is "akin to rational-basis review." *Otto*, 744 F.3d at 1061 (quoting *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1212 (D.C. Cir. 2012)). Plaintiffs assert that this holding was "dictum" because "*Otto* invalidated a statute under *Central Hudson*," not *Zauderer*. Resp. Br. 59 n.13. That assertion is incorrect. *Otto* invalidated no statute at all. *Otto*, 744 F.3d at 1063 (affirming denial of preliminary injunction for all challenged provisions). And the determination that *Zauderer* is "akin to rational-basis review" cannot be dictum because this Court, having determined that *Zauderer* is akin to rational-basis review, "conclude[d] that [the two challenged provisions] satisfy *Zauderer*." *Id.* at 1062.

Plaintiffs also try to undermine the D.C. Circuit decision that this Court cited when holding that the standard of review is "akin to rational-basis review." But even if they were right, the D.C. Circuit cannot

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overrule *Otto*. Moreover, they misread the D.C. Circuit decision. They assert that *R.J. Reynolds* "was overruled on this point." Resp. Br. 59 n.13. But the D.C. Circuit overruled *R.J. Reynolds* only to the extent *R.J. Reynolds* "limit[ed] *Zauderer* to cases in which the government points to an interest in correcting deception" instead of "other government interests." *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 21–22 (D.C. Cir. 2014). The dissenting opinion even criticized the decision for adopting a standard "even more relaxed than rational basis review." *Id.* at 47 (Brown, J., dissenting).

Similarly, Plaintiffs offer no response to the argument that this Court must save subsection 1 even if subsection 4(10) is unlawful. Pet. Br. 53. The intent of the Missouri legislature is that "[t]he provisions of every statute are severable" unless "it cannot be presumed the legislature would have enacted the valid provisions without the void one." Mo. Rev. Stat. § 1.140. If subsection 4(10) unlawfully compels speech, it must be severed, keeping subsection 1 intact. No court could conclude that subsections 1 and 4(10) are inseparable because Missouri adopted the subsection 4(10) exception six decades after adopting the prohibition in subsection 1. Mo. S.B. No. 933 (1996); *Northcutt v. McKibben*, 159 S.W.2d

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699, 704 (Mo. Ct. App. 1942). Severing subsection 4(10) would leave in place subsection 1, which prohibits the activity in which Plaintiffs want to engage. So Plaintiffs are entitled to no relief.

IV. The regulation satisfies *Central Hudson*.

A. The regulation advances the State's interest in combatting overconsumption and underage drinking.

1. As with the statute, Plaintiffs' argument against the regulatory provisions rests on misidentifying the State's interest. Plaintiffs assert that the State "default[ed]" on its evidentiary burden by not submitting evidence that increasing aggregate advertising would "increase total consumption." Resp. Br. 33, 40. But as the State already made clear, its interest is not reducing "aggregate," "overall," or "total" consumption; it is reducing "consumption of one specific kind of alcohol: alcohol sold below cost or at discount." Pet. Br. 58. The State met its burden by proving that prohibiting price advertisements about this kind of alcohol reduces consumption of this kind of alcohol. Pet. Br. 58–63.

Plaintiffs try to evade discussing this interest by asserting that price advertising has *no* effect on consumption rates. Resp. Br. 30. But that argument contradicts the Supreme Court's determination that companies do not advertise a specific product unless they expect

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advertising to increase consumption of that product. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 569 (1980). It also contradicts the Kuo study.[1] Pet. Br. 61.

In fact, Plaintiffs' own statements undermine their argument. Plaintiffs state that consumption rates decrease as the cost of acquiring a product increases, Resp. Br. 30, but then they admit that the regulation imposes "higher prices and higher search costs," Resp. Br. 41. And at trial, they admitted that "higher prices will be associated with *significantly* lower consumption." Tr.62–63.

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[1] Plaintiffs dismiss the Kuo study because it was not submitted during trial. But the State elicited testimony about the facts and conclusions in the study. Tr.67–72. And the district court at trial said that it was relying on the summary judgment materials. The district court said that closing arguments and post-trial briefing were unnecessary because the issues had "been briefed a lot" and that the court would rely on the "summary judgment briefs." Tr.302.

Plaintiffs emphasize a footnote where the district court limited its reliance on the summary judgment briefing to the "undisputed material facts" in that briefing. Resp. Br. 31 n.5. But they fail to mention that this limit applies only to the three pages of "factual findings," not the entire order. JA.227 n.2.

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Unable to undermine the common-sense link between increased advertising and increased consumption, Plaintiffs contend that the State never asserted an interest in reducing the kind of alcohol more likely to cause underage consumption[2] or overconsumption. Resp. Br. 32 n.7. But Plaintiffs concede that the State asserted an interest in "reducing excessive consumption." *Id.* Doing so necessarily requires curbing consumption of the kinds of alcohol people consume excessively. The State also made the common-sense argument that the regulation is needed because people can purchase and consume more below-cost or discount alcohol in one sitting than alcohol priced normally. Tr.73–74.

2. Plaintiffs next assert that the State could better pursue its interest through other measures, like legislatively hiking the price of alcohol or enforcing the regulation when advertisers issue statements like "happy hour." Resp. Br. 36–41. But even if Plaintiffs were correct, a

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[2] This Court determined that the regulatory provisions "are not targeted at underage drinkers," but it did so because it construed all "facts in the light most favorable to plaintiffs." *Mo. Broadcasters Ass'n*, 846 F.3d at 300 n.6, 303. Unlike Plaintiffs, the district court never determined that this statement barred the State from asserting an interest in combatting underage consumption at trial. *See* JA.233–34.

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provision "is not invalid [simply] because the [State] might have gone further than it did." *S. Wine & Spirits of Am.*, 731 F.3d at 812. Even under the First Amendment, "[a] State need not address all aspects of a problem in one fell swoop." *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1668 (2015) (quoted in *Wagner*, 793 F.3d at 27).

Because States must balance many interests, courts will not declare a provision unlawful unless the exceptions are so overwhelming that they "entirely vitiate[]" the State's interest, *Wagner*, 793 F.3d at 28, preventing the regulation from advancing that interest "at all," *Mo. Broadcasters Ass'n*, 846 F.3d at 301.

Plaintiffs do not try meet this demanding standard. Just the opposite: they conceded that the regulation imposes "higher prices and higher search costs" on consumers. Resp. Br. 41. Those higher costs decrease consumption of below-cost or discount alcohol, advancing the State's interest.

Unable to prove that the exceptions "entirely" undermine the State's interests, Plaintiffs ask this Court to dismantle the provisions because of evidence that somebody lobbied for the rebate exception. But a provision is not invalid simply because people exercise their

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constitutional rights to "make their wishes known" to the government. *See E.R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961). The State considered those wishes and created the rebate exception not "solely because of . . . lobbying," Resp. Br. 37–38, as Plaintiffs contend, but because the State determined that a rebate granting a discount weeks or months after a transaction is "not likely to cause undue influence." Tr.266.

B. The regulation is not substantially excessive.

Plaintiffs do not dispute that a statute is constitutional under the fourth factor of *Central Hudson* unless it is substantially excessive. So they instead assert that the State could entirely obtain its interests without regulating speech at all. Resp. Br. 42–43.

Yet again, Plaintiffs' argument misidentifies the State's interest. They assert that the State's goal is to "reduce abuse" of alcohol, even if the reduction is minimal. Resp. Br. 43. But the State's goal is to eliminate abuse as much as possible, not simply reduce it by any nonzero amount.

The targeted regulation is necessary because the State cannot reduce alcohol abuse to the same extent without the regulation. A regulation that touches on speech is lawful if the State's interest "would

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be achieved less effectively absent the regulation." *Rumsfeld*, 547 U.S. at 67 (citation omitted). Non-speech initiatives like educational programs help reduce alcohol abuse, so the State uses these methods. *E.g.*, Tr.167–68. But as Plaintiffs admit, "us[ing] several methods together" is more effective. Resp. Br. 43. Plaintiffs would deprive the State of a method that curtails alcohol abuse more than other methods alone do.

Plaintiffs do not, because they cannot, argue that the State could achieve its interest—reducing abuse as much as possible—without the regulation. But even if the State could do so using only non-speech initiatives like educational programs, Plaintiffs overlook the State's unrebutted evidence that resource constraints prevent it from implementing more of those programs. *E.g.*, Tr.167, 219–22. And even if the State could obtain its interest equally well through other means, "[t]he issue is not whether other means . . . might be adequate." *Rumsfeld*, 547 U.S. at 67. Courts must defer to the judgment of the legislature even when there is "some imaginable alternative that might be less burdensome on speech." *Id.*; *accord Turner*, 520 U.S. at 196.

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V. Plaintiffs did not satisfy their burden to obtain facial relief.

Plaintiffs do not deny that they raised a facial challenge to the two regulatory provisions. Their challenge fails because they have not met their burden. Pet. Br. 56.

As for the statute, Plaintiffs have no basis for disputing that they sought and obtained facial relief. They contend that they never sought facial relief because they challenged only some subsections of section 311.070, not the whole statute. Resp. Br. 15. But a challenge is still facial if the relief would "reach beyond the particular circumstances of these Plaintiffs." *John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010). Plaintiffs asked for an injunction against enforcement of subsection 1 whenever a distributor or manufacturer provides media advertising to a retailer. JA.91. They did not limit their relief to non-misleading advertisements. Nor did the district court. JA.243. Because the relief they obtained goes "beyond the[ir] particular circumstances, . . . [t]hey must therefore satisfy [the] standards for a facial challenge." *Reed*, 561 U.S. at 194.

Plaintiffs try to salvage their injunction by asserting that they raised an overbreadth challenge. They contend that they necessarily asserted an overbreadth argument because they alleged that the

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challenged statute would create a "chilling effect." Resp. Br. 18–19. But asserting factual allegations that could support a legal argument is different from presenting the legal argument. And any overbreadth argument would fail for the reasons stated above.

CONCLUSION

This Court should reverse the judgment of the district court.

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CERTIFICATE OF SERVICE

I hereby certify that on January 4, 2019, an electronic copy of this Brief was filed via the Court's electronic filing system and served upon all counsel of record.

I further certify that on January 4, 2019, one paper copy of Appellant's Reply Brief was served on all parties of record of record by mail.

/s/ Joshua M. Divine
Deputy Solicitor

CERTIFICATION OF COMPLIANCE

CERTIFICATION OF TYPE VOLUME LIMITATION

I hereby certify that the text of the foregoing document contains 6,444 words of proportionally spaced text as determined by the automated word count of the Microsoft Word 2016 word-processing system and has a 14-point, serif font.

/s/ Joshua M. Divine
Deputy Solicitor

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