UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MISSOURI BROADCASTERS ASSOCIATION, *et al.*,	)	
Appellees,	)	
	)	Appeal No. 18-2611
v.	)	
DOROTHY TAYLOR, *et al.*,	)	Appeal from the U.S. District Court Western District of Missouri
Appellants.	)	
	)	No. 2:13-CV-04034-MDH

PLAINTIFFS-APPELLEES' *SUPPLEMENTAL* BRIEF SUPPORTING MOTION TO STRIKE NON-RECORD FACTS AND PREVENT REFERENCE TO NON-RECORD FACTS AT ARGUMENT

Plaintiffs' initial motion to strike objected to the State's use, in its merits brief, of out-of-the-record sources, and no record sources at all, for many claimed facts. But even *after* that motion was filed and briefed, the State continued, in its Reply Brief, to rely on facts from out-of-the record sources. And it even raised, in reply, new contentions, never made either at trial or in the State's opening brief, as well as a false characterization of the briefing in the prior appeal of this action (the 2016 appeal).

This supplemental brief seeks a Court order striking those out-of-the-record and false references, and belated new arguments contained in the State's Reply

Brief. Movants further request that the Court prohibit reference to such out-of-record factual claims, or untimely and waived contentions, at oral argument.

Out-of-Record References in Reply Brief

As in its opening brief, the State in its Reply Brief repeatedly asks this Court to rely on facts that the State, after five years of preparation, never put into evidence at trial. Those out-of-record references include:

Reply brief reference	Assertion	In trial court record?	Record citation in Reply brief?
p. 4	"State's determination that tied-house laws combat harms like the historical undue influence manufacturers and distributors exercised over retailers."	No	No
p. 12	"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."	No	No, cite to 9th Circuit case only

Reply brief reference	Assertion	In trial court record?	Record citation in Reply brief?
pp. 12-13	"The country agreed that 'the best system' for limiting undue influence was by 'flatly prescribing' financial support to retailers."	Tr. 249 cited. No reference to undue influence or prescribing financial support to retailers. Witness only said, "It's basically used by every state and how we – it seems like the best system to control alcoholic beverages," and that it was not as important as public health.	Primary cite is to 9th Circuit case
p. 14	State "submitted evidence of historical harms"	No	No
P. 18	"The well-established historical problem of undue influence that led the federal government and nearly every state to adopt tied-house laws. *** this history justified California's tied-house law."	No	No; cite to 9th Circuit case only
p. 21	"the determinations by the federal government and nearly every state that tied-house laws are necessary to redress problems in the liquor industry"	No	No

Reply brief reference	Assertion	In trial court record?	Record citation in Reply brief?
p. 21	"companies use advertising payments 'to conceal' their undue influence."	No	No; cite to two 9th Circuit cases which refer only to concerns about *possible* concealment, no actual instances of concealment
p. 23	"undue influence causes antisocial and anticompetitive injuries"	No	Cite to Pet. Brief. 21-26, full of out-of-record references
p. 25	"sometimes concealed their influence over retailers by paying retailers indirectly through advertisements."	No	No; cite to 9th Circuit cases only, which do not refer to any evidence of concealment
p. 32	"the State determined" that a [spirits] rebate "is not likely to cause undue influence"	No – State witness testified he did not know reason for exception, and can think of no reason other than industry lobbying. Tr. 116.	No
p. 33	"a method that curtails alcohol abuse more than other methods alone do"	No	No

Reply brief reference	Assertion	In trial court record?	Record citation in Reply brief?
p. 6	"The State seeks to reduce abuse as much as possible."	No – State officials testified that State could implement educational programs, Tr. 122, 173, 189, 219-20, but has spent little money of its own on the alcohol-related educational programs it views as effective. Tr. 285, 288-90. The State admitted it could do more through education. Tr. 290-92.	No

New Reply Brief Arguments

Additionally, the State in its Reply Brief raised two arguments not found in any pleadings during the case's 5-year history, or in the trial record:

At pages 27-28, the State asserted the new argument that the Court cannot address together two statutory exceptions enacted at different times. This argument never appeared in the opening brief and was never asserted in the district court. The timing of enactment of the statutory sections was never discussed at trial.

At page 30, the State asserted the argument that the Challenged Regulations "curbs consumption of the kinds of alcohol people consume

excessively." The State's witnesses did not claim this at trial (see Tr. 213-15), and the State provides no citation for it. And it is contrary to the State's assertion at trial that the State fully permits sale and promotion of discounted alcoholic beverages. Tr. 270 ("The information can get out. It just has to be in a certain way.")

The State Misrepresents the 2016 Appeal Record

Finally, the State's Reply Brief clearly misrepresents the record in the prior appeal in this Court. The State now claims that Plaintiffs brought a *different* Challenged Statute claim (a claim as to *only* section 4(10) and not the relevant part of section 1) in their 2016 appeal, and that this Court's discussion in the prior appeal is not relevant now. *See* State Reply Br. at 2, 10, and 24-25.

However, that is plainly wrong, as the State knows. Plaintiffs expressly stated throughout the course of the case, including prior to the first appeal, that they challenged *both* sections 1 and section 4(10). *See* District Court briefs, in 2013 (Dkt 22-1, p. 13), 2014 (Dkt 51, p. 28 fn.5; Dkt 55, p. 18), and 2017 (Dkt 85, p. 13-14). In the prior appeal, Plaintiffs even made their concern with both sections crystal clear in their briefs by defining the term "Challenged Statute" *to refer to both sections*, as they affected vendor ability to support retail advertising. *See* Brief of Plaintiffs-Appellants, Case No. 16-2006, pp. 5-7 (defining "Challenged Statute" to refer to both sections 1 and 4(10)), p. 9 (describing effect

of two provisions) and Reply Brief, p. 23 ("Accordingly, the Challenged Statute (not only the exception in § 311.070.4(10) but also § 311.070.1 to the extent it prohibits cooperative advertising) is unconstitutional.")

Moreover, at the pre-trial hearing on July 6, 2017, with an Assistant Attorney General present and participating, the parties engaged in a discussion of this issue, including the Plaintiffs' many prior references to their challenged to both statutory sections, and the District Court asked Plaintiffs to amend the pleadings simply to clarify that both parts of the statute were challenged—*i.e.*, to clarify, not to change, its arguments. In their brief so moving, Plaintiffs referred to the many prior references to their full statutory claim, and noted, "Defendants have long been aware that Plaintiffs seek to invalidate all aspects of section 311.070 that would bar retail advertising paid or supported by manufacturers or distributors." *See* District Court file, docket #89, p. 3.

Accordingly, the State's claims, at pages 2, 10, and 24-25 of its reply brief, suggesting that Plaintiffs' claims changed radically after the first appeal, and asserting that this Court's prior decision did *not* refer to both sections, is clearly wrong and highly deceptive.

Conclusion

This case is extraordinary for the State's repeated attempts to go outside the record. This abuse should not be allowed to infect oral argument as well, and for

that reason Plaintiffs-Appellees ask that the State's extra-record claims be stricken, barred at oral argument, and appropriately remedied, including any appropriate sanctions.

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Supplemental Brief complies with the length limit, typeface, and formatting requirements of Fed. R. App. P. 27 and 32, and contains 1,469 words using the word count feature of Microsoft Word. In addition, pursuant to the Local Rule 28A(h), this Supplemental Brief has been scanned for viruses and is virus-free.

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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 all counsel of record this 12th day of July, 2019. I further certify that on July 12, 2019, one paper copy of this Supplemental Brief was served on all parties of record by U.S. Mail.

/s/ Michael L. Nepple
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