No. 16-2006

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-Appellants,

v.

LAFAYETTE E. LACY, State Supervisor of Liquor Control, in his official capacity, and CHRIS KOSTER, Attorney General of the State of Missouri, in his official capacity,

Defendants-Appellees.

Appeal From The United States District Court, Western District of Missouri
Hon. Fernando J. Gaitan Jr., United States District Judge

BRIEF OF PLAINTIFFS-APPELLANTS

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

This case presents a First Amendment challenge to a Missouri statute and two Missouri regulations, all of which prohibit truthful advertising of alcoholic beverage prices. The statute also compels inclusion of certain content in lawful advertising, not for fraud-prevention purposes, but solely to achieve economic objectives of the state.

Plaintiffs, representing Missouri broadcasters and two sellers of alcoholic beverages, moved on summary judgment for a determination that the challenged laws were unconstitutional, under the Supreme Court's commercial speech doctrine. The District Court denied the motion, and sua sponte dismissed Plaintiffs' action without trial.

The case presents important constitutional issues concerning the right to publish truthful commercial speech, and application of the Supreme Court's recent "heightened scrutiny" standard of review for restrictions (like those in issue here) imposed on truthful and non-misleading commercial speech. *See Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011).

Because of the importance of these issues, Plaintiffs request oral argument of 20 or 30 minutes.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Plaintiffs-Appellants Missouri Broadcasters Association ("MBA"), Zimmer Radio of Mid-MO, Inc. ("Zimmer"), Meyer Farms, Inc. ("Meyer Farms"), and Uncle D's Sports Bar & Grill, LLC ("Uncle D's") 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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JURISDICTIONAL STATEMENT

This action challenges the constitutionality of two Missouri regulations, and one Missouri statute regulating alcohol advertising. The action arises under federal law, including the First Amendment of the United States Constitution and 42 U.S.C. § 1983, which provides a civil remedy for the deprivation of rights under color of state law. The District Court thus had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3). Declaratory relief is also sought under the provisions of 28 U.S.C. § 2201.

This appeal is from a final judgment entered on March 31, 2016, which disposed of all claims by all parties. Plaintiffs-Appellants timely filed their notice of appeal on April 15, 2016. The Court therefore has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether Missouri's regulations that forbid truthful media advertising of alcoholic beverage price discounts violate the First Amendment.

Authorities: *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173 (1999); *Central Hudson Gas & Electric Corp v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980); *Pitt News v. Pappert*, 379 F.3d 96 (3d Cir. 2004).

2. Whether Missouri's statute that forbids cooperative advertising of alcoholic beverages, unless the advertiser (a) does not disclose certain truthful information (prices), (b) minimizes mention of the retailer advertised, and (c) mentions a competing retailer as well, violates the First Amendment.

Authorities: *Central Hudson*, 447 U.S. 557 (1980); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995); *Retail Digital Network, LLC v. Appelsmith,* 810 F.3d 638 (9th Cir. 2016).

3. Whether the challenged regulations and statute, even if found to pass the traditional *Central Hudson* commercial speech test, can pass muster under the "heightened" scrutiny now required for content-based regulations of speech.

Authorities: *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011); *1-800-444-Pain Referral Serv., LLC v. Otto*, 744 F.3d 1045 (2014); *Retail Digital Network, LLC v. Appelsmith*, 810 F.3d 638 (9th Cir. 2016).

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4. Whether the challenged statute, which forces advertisers to associate with and identify multiple retailers in their advertisements, violates the First Amendment as compelled commercial speech doctrine.

Authorities: *Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277 (2012); *United States v. United Foods, Inc.*, 533 U.S. 405 (2001); *Pac. Gas and Elec. Co. v. Public Utils. Comm'n of Cal.*, 475 U.S. 1 (1986).

5. Whether the District Court erred in entering judgment for Defendants, based on a factual record, without trial, when Defendants had not moved for summary judgment and Plaintiffs were not afforded notice and opportunity to be heard as required by Rule 56(f).

Authorities: Fed. R. Civ. P. 56(f); *Kuhn v. Nat'l Ass'n of Letter Carriers, Branch 5*, 528 F.2d 767 (8th Cir. 1976).

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STATEMENT OF THE CASE

The Challenged Advertising Laws

This case challenges the constitutionality of two Missouri regulations, and one Missouri statute (collectively, the "Challenged Advertising Laws"), each of which prohibits truthful media advertising about the pricing of alcoholic beverage products.

The Regulations

The two regulations (the "Challenged Regulations") are fairly simple. The regulatory section in question, 11 C.S.R. 70-2.240, begins by prohibiting media advertisements of alcoholic beverages unless they conform to requirements set forth later. Subsection (5) then creates the two specific prohibitions on media advertising in issue in this case.

The first, in subsection (5)(G) (the "Discount Advertising Prohibition Regulation"), provides, in relevant part:

> No advertisement of intoxicating liquor or nonintoxicating beer shall contain … [a]ny statement offering any coupon, premium, prize, rebate, sales price below cost or discount as an inducement to purchase intoxicating liquor or nonintoxicating beer except, manufacturers of intoxicating liquor other than beer or wine shall be permitted to offer and advertise consumer cash rebate coupons and all manufacturers of intoxicating liquor may offer and advertise coupons for nonalcoholic merchandise … .

(JA-40). Essentially, this subsection prohibits media advertising of coupons or discounts for alcoholic beverage sales. It makes an exception of coupons

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offered by distillers, which are specifically allowed by statute, RS Mo. § 311.355.

The second regulation, in subsection (5)(I) (the "Below Cost Advertising Prohibition Regulation"), provides, in relevant part:

> No advertisement of intoxicating liquor or nonintoxicating beer shall contain … [a] price that is below the retailer's actual cost.

(JA-42). This prohibits media advertising alcoholic beverages at any price below the retailer's actual cost.

These regulations only cover media advertising. In-store and other non-media advertising is not affected, nor are sales practices. Alcoholic beverage retailers may sell alcohol at discounts, even below their cost, and they may promote those discounts within stores, restaurants and bars, and by other non-media means. But under the Challenged Regulations, they may not place truthful media ads about these discount prices (except for manufacturers' coupons for spirits).

The Statute

The statute-in-question (the "Challenged Statute"), begins by prohibiting distillers, wholesalers, brewers or winemakers from providing any financial aid to retailers, including through advertising. *See* RS Mo.

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§ 311.070.1.[1] Section 4, however, provides for exceptions to this rule, identifying activities that are allowed "[n]otwithstanding other provisions" of the statute. (JA-44). One of those exceptions, at section 4(10), states, in relevant part:

> The distiller, wholesaler, winemaker or brewer may in an advertisement list the names and addresses of two or more unaffiliated retail businesses selling its product if all of the following requirements are met:
>
> (a) The advertisement shall not contain the retail price of the product;
>
> (b) The listing of the retail businesses shall be the only reference to such retail businesses in the advertisement;
>
> (c) The listing of the retail businesses shall be relatively inconspicuous in relation to the advertisement as a whole; and
>
> (d) The advertisement shall not refer only to one retail business or only to a retail business controlled directly or indirectly by the same retail business.

(JA-46). Thus, under the Challenged Statute, a producer or wholesaler of alcoholic beverages may advertise on behalf of a retailer's advertising only under these conditions: (1) advertisements of alcohol by wholesalers and producers that refer only to one retail business, or two or more affiliated retailers, are prohibited, and,

---

[1] According to Defendants, "advertising by a producer or wholesaler benefiting retailers" is prohibited by RS Mo. § 311.070.1 "as the indirect provision money or property between different levels of the liquor industry that are statutorily required to be separate." (JA-207).

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(2) if any names of retailers are included in the ad, then the product's retail price may not be included.

The Parties

Plaintiff MBA, a non-profit corporation, is a trade association that promotes the interest and welfare of the broadcasting industry in Missouri. (JA-143, ¶ 2). Its members include operators of licensed broadcasting stations, most of which earn revenues from advertising. (*Id.* ¶ 3).

Retailer customers of MBA members have considered purchasing advertisements on member stations to advertise discounts or special prices for alcoholic beverages, but have decided not to do so because of the Challenged Regulations. (JA-146, ¶ 5). Missouri broadcasters have been discouraged from seeking or running truthful alcoholic beverage advertising for bars and restaurants if such ads could violate the Challenged Regulations. It hurts business if a broadcaster runs advertisements which get its customers into legal trouble. (JA-145-46, ¶¶ 3-6). Moreover, broadcasting stations, which are licensed by the Federal Communications Commission, and which must periodically renew their broadcast licenses, must take special care not to engage or assist in violations of law. (JA-144, ¶ 4).

Zimmer Radio, an MBA member, operates seven Missouri radio stations and generates revenues from paid advertisements on those stations. (JA-145, ¶ 2).

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Zimmer has been hurt by the Challenged Advertising Laws, because absent them, and the threat that they would be enforced against its customers, it would sell paid commercials containing truthful price information, including commercials that list only one retailer. (JA-145-46, ¶¶ 3-5).

Meyer Farms grows wine grapes at its Missouri farm, arranges with a winery for them to be made into wine, and then sells the wine. (JA-13, ¶ 10). Uncle D's is a bar and grill, which serves alcohol. (*Id.* ¶ 11). Both would like to place media advertising for alcohol discounts, but are prevented from doing so by the Challenged Regulations. (JA-21-22, ¶¶ 44-48).

Alcoholic beverage wholesaler customers of MBA members have considered purchasing advertisements on member stations to advertise the availability of one or more of their products at a specific retailer, and containing truthful pricing information for that retailer, but have decided not to do so because of the Challenged Statute, as its statutory requirement that another retailer be mentioned dilutes the effectiveness of such an ad for the wholesaler and retailer. (JA-146, ¶ 4).

Effect of the Challenged Advertising Laws

The Challenged Regulations both prohibit media advertising of truthful and non-misleading information, such as two-for-one specials on beer at the local

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grocery store, a going-out-of-business sale at a specialty wine shop, or a coupon for one free drink with the purchase of an entrée at a neighborhood bar and grill.

The Challenged Statute limits certain cooperative advertising (*i.e.* advertising on behalf of a retailer, paid for by a manufacturer or wholesaler). It prohibits cooperative advertising that mentions only a single retailer, and/or alcohol prices.

Violations of the Challenged Advertising Laws may result in the suspension or revocation of alcoholic beverage sales licenses, fines and penalties, and/or misdemeanor criminal prosecutions. *See* RS Mo. §§ 311.660, 311.868, 311.880. Prosecutions have occurred. Liquor licenses have been revoked or suspended in Missouri for unlawful advertising. *See Milgram Food Stores, Inc. v. Ketchum*, 384 S.W.2d 510 (Mo. 1964) (affirming suspension of Milgram's liquor license for violating predecessor of the Discount Advertising Prohibition Regulation); JA-152 (suspending Hilltop Bar's liquor license for, in part, "unlawful advertising"); JA-211, ¶ 5 (admitting that the Division provides warnings and penalties to those who violate the Challenged Advertising Laws).

Procedural History

Defendants initially moved to dismiss on various grounds, including standing, but Judge Wright denied the motions. (JA-105-121). Plaintiffs then filed a motion for summary judgment, which was fully briefed. (JA-4-5, ECF Nos. 16-

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19, 21-23). Judge Wright sua sponte denied the motion as moot on April 1, 2014, apparently in reaction to a motion about discovery timing. (JA-7, ECF No. 38). Shortly thereafter the case was transferred to Judge Gaitan. (JA-7). Plaintiffs moved for reconsideration of the dismissal of the summary judgment for mootness, but while Judge Gaitan agreed that the order was incorrect, he nonetheless required new briefing. (JA-8, ECF No. 44). A second summary judgment motion was then filed and briefed. (JA-139-142; JA-153-186).

On March 31, 2015, Judge Gaitan denied the motion in most respects, and, rather than allow the case to proceed to trial, he sua sponte reversed the earlier denial of Defendants' motion to dismiss, and granted that motion. (JA-243-263). The Court left one issue open, and after further briefing on it, on March 31, 2016, the Court entered final judgment against Plaintiff on all issues. (JA-301-305).

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ARGUMENT

SUMMARY OF ARGUMENT

"Everybody knows that it will be better for consumers not to be allowed to learn truthful pricing information." That, in essence, is the basis on which the District Court dismissed the Plaintiffs' constitutional challenges to the Missouri laws that prohibit or restrict truthful advertising of alcoholic beverage prices and discounts. The District Court's rationale, however, violates the commercial speech protections of the First Amendment, because:

1. The commercial speech doctrine, which the Supreme Court has elevated to a "heightened scrutiny" status, prohibits restrictions on truthful commercial speech, including pricing and discounts, unless the state presents compelling proof that narrowly tailored restrictions are necessary to directly advance significant governmental interests;
2. The Challenged Regulations restrict truthful commercial speech, and the rationale accepted by the District Court – that everybody knows advertising restrictions will lower binge drinking – is constitutionally insufficient, because convincing empirical proof is necessary, no convincing proof was submitted, and restrictions on truthful commercial speech can never be justified by a paternalistic governmental desire to keep consumers ignorant of the true facts;

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3. The Challenged Statute also restricts truthful commercial speech, but the government's justification of maintaining an "orderly marketplace" is not a substantial interest, the statute does not directly advance this aim, particularly in light of the multiple exceptions the State has permitted to its separation of the three tiers of the alcohol industry, and the government's objectives could be met by other means;
4. The Challenged Statute additionally involves compelled government speech, in that an advertiser is allowed to advertise on its own behalf only if it also promotes one of its competitors; and
5. Such content- and speaker-based bans and restrictions on truthful price advertising clearly violate the "heightened" standard set by *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011), and the strict scrutiny standard set by *Reed v. Town of Gilbert, Arizona*, 135 S.Ct. 2218 (2015).

Because the District Court rendered summary judgment (or ruled on a motion to dismiss), on purely legal issues, its Judgment is subject to de novo review by this Court. *See*, *e.g.*, *Graves v. Ark. Dept. of Fin. and Admin.*, 229 F.3d 721, 723 (8th Cir. 2000); *Grey v. Wilburn*, 270 F.3d 607, 608 (8th Cir. 2001).

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BACKGROUND: FIRST AMENDMENT PROTECTION FOR COMMERCIAL SPEECH

Commercial speech has been protected by the First Amendment since 1976, because of its significant value to society:

> Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976) (internal citations omitted). Since then, "paternalistic" advertising bans designed to "keep[] the public in ignorance," have been unconstitutional. *Id*. at 770.

Commercial speech analysis has been governed since 1980 by the "intermediate scrutiny" test of *Central Hudson Gas & Electric Corp v. Public Service Commission of New York*, 447 U.S. 557 (1980), which includes "direct advancement" and "reasonable fit" prongs that mandate a close fit between the challenged regulation and the targeted harm.

In a few decisions in the late 1980s, some deference was given to restrictions on advertising of so-called "vices" like alcohol and gambling, if those activities themselves could have been restricted, but the Supreme Court ultimately

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repudiated any such exceptions. For the last 20 years, it has been "no answer" to a commercial speech regulation that the products and services at issue could have been regulated, because "the First Amendment directs that government may not suppress speech as easily as it may suppress conduct." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 512 (1996).

More recently, in *Sorrell v. IMS Health, Inc.,* 564 U.S. 552, 563-72 (2011), the Supreme Court held that commercial speech restrictions must be subject to "heightened scrutiny," and perhaps even strict scrutiny, where the state targets a message because of its content or speaker. In *Reed v. Town of Gilbert, Arizona*, 135 S.Ct. 2218 (2015), the Court held that all content-based regulations are subject to strict scrutiny, the highest level of First Amendment protection.

The *minimum* standard for analyzing commercial speech restrictions is the four-part test of *Central Hudson,* which provides:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, [1] it at least must concern lawful activity and not be misleading. [2] Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine [3] whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest.

Central Hudson, 447 U.S. at 566 (bracketed numbers added).

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I. THE DISTRICT COURT FAILED TO PROPERLY APPLY THE *CENTRAL HUDSON* INTERMEDIATE SCRUTINY TEST TO THE CHALLENGED REGULATIONS.

Everything about the Challenged Regulations shows that they are classic violations of the right of commercial speech:

- They govern speech, and ban truthful speech. They keep consumers ignorant in advance of the true prices they will find when they enter retail establishments.
- The State's only empirical justification for these regulations was a single study that dealt with different liquor promotions (on-premises, non-media, and directed to college students), which Missouri does NOT prohibit. In essence, Missouri said, "We have evidence that something we *permit* may be harmful. Please assume therefore that *something else*, that we *prohibit,* may also be harmful, and disregard our duplicity as we ignore the documented problem and address only a speculative one."

Yet the District Court here denied Plaintiffs' motion for summary judgment and reached out of its way to dismiss Plaintiffs' claims without trial. In the following sections, Plaintiffs will review the key elements of the *Central Hudson* test, and the District Court's mistakes in applying the test to the two Challenged Regulations.

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A. Alcoholic Beverage Sales and Discount Pricing are Lawful, and Media Advertisements That Truthfully Report Liquor Discounts Would Not Be Misleading.

Alcoholic beverage sales are lawful in Missouri, and retailers may lawfully offer alcoholic beverages at discount prices, including prices below cost. Additionally, in this facial challenge to the constitutionality of the Challenged Regulations, it is presumed that Plaintiffs' advertising would be truthful and not misleading.

Advertising of alcohol and other "vice" products is fully protected by the Constitution. There is no exception for those areas of commerce where it is politically popular for legislatures to impose restrictions. The Supreme Court has stricken many advertising regulations on tobacco, alcohol and gambling advertising. *E.g.*, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (striking down some and sustaining some restrictions on tobacco advertising); *Greater New Orleans*, 527 U.S. 173 (striking down casino gambling advertising limitations); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995) (striking down beer advertising regulations), *44 Liquormart*, 517 U.S. at 512 (explicitly rejecting any lower standard for regulating "vice" advertising.).

One of the Supreme Court's most cited decisions, *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484 (1996), strongly affirms the protection for advertising

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of alcoholic beverage prices, and the positive values of advertising in American society:

> Advertising has been a part of our culture throughout our history. Even in colonial days, the public relied on "commercial speech" for vital information about the market. Early newspapers displayed advertisements for goods and services on their front pages, and town criers called out prices in public squares. Indeed, commercial messages played such a central role in public life prior to the founding that Benjamin Franklin authored his early defense of a free press in support of his decision to print, of all things, an advertisement for voyages to Barbados.

Id. at 495 (internal citations omitted). In *44 Liquormart*, the Court, foreshadowing *Sorrel* and *Reed*, suggested that even stronger protection than the intermediate scrutiny test may be appropriate "when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process." *Id.* at 501. The Court held that Rhode Island could not constitutionally prohibit such truthful alcohol price advertising. *Id*. at 489.

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

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> [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. The Twenty-first Amendment, therefore, cannot save Rhode Island's ban on liquor price advertising.

Id. at 513, 516. *Accord, Granholm v. Heald,* 544 U.S. 460, 486 (2005).

Accordingly, Plaintiffs satisfied the first prong of the *Central Hudson* test, because the media advertisements they wish to broadcast involve non-misleading messages about lawful activities.

B. Missouri Asserts A Substantial Interest In Preventing Binge Drinking.

To justify abridgements on commercial speech, the State must at the outset identify a substantial interest. In *44 Liquormart*, the state's proffered interest was in reducing alcohol consumption. Missouri's claimed interest is "to promote responsible consumption, combat illegal underage drinking, and . . . maintain[] an orderly marketplace." RS Mo. § 311.015.

Thus, the Challenged Regulations should be assessed under *Central Hudson* with reference to the "promote responsible consumption" rationale.[2] Plaintiffs

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[2] While "combat[ting] illegal underage drinking" was generally identified by Defendants in the District Court, Defendants never attempted to justify the Challenged Advertising Laws based upon this interest. This is likely because the Challenged Advertising Laws are generally applicable to the entire population, not just underage drinkers, and thus could never withstand scrutiny under the third and fourth *Central Hudson* factors based on this rationale. Significantly, the Supreme

concede that this interest may be considered a substantial state interest. Notably, however, Missouri's interest is narrower than that of Rhode Island in *44 Liquormart,* 517 U.S. at 504, which asserted an interest in temperance or reducing consumption of alcohol. (JA-202, n.1). In Missouri, according to Defendants, it is acceptable if the overall sale and consumption of alcohol increases, as long as the consumption is "responsible" – that is, not "binge drinking" or other "such alcohol abuse." (JA-203-04).

C. The Challenged Regulations Do Not Directly Advance The Purported State Interests in Promoting Reasonable Consumption.

Any determination that commercial speech regulations directly advance the state objective must be grounded in hard evidence and empirical data. *44 Liquormart* toughened the *Central Hudson* standard: "The need for the State to make such a showing [direct advancement "to a material degree"] is particularly great given the drastic nature of its chosen means—the wholesale suppression of truthful, nonmisleading information." *44 Liquormart* at 505. *Accord, Greater New Orleans Broadcasting Association, Inc. v. United States,* 527 U.S. 173, 188 (1999) ("mere speculation or conjecture" not allowed, rather, "a governmental body seeking to sustain a restriction on commercial speech must demonstrate that

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Court has repeatedly made clear that "the government may not 'reduce the adult population … to reading only what is fit for children." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 73 (1983) (quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957)).

the harms it recites are real and that its restriction will in fact alleviate them to a material degree."). In *Edenfield v. Fane,* 507 U.S. 761, 767 (1993), the Supreme Court explained that this means that the challenged regulation advances the government's interest "in a direct and material way."

1. The Regulations Ban Media Advertising That Is Remote from the Targeted Conduct and Thus Do Not Directly Advance the State Interests.

The Challenged Regulations ban *media advertising* of alcoholic beverage price discounts, but they do not ban price discounts themselves. On retail premises, where buying and consumption decisions are actually made, retailers may boldly and repetitively promote discounts. *See* 11 C.S.R. 70-2.240 (a ban on media advertisements, not retail practices); 11 C.S.R. 70-2.240(5)(G) and (5)(I) (bans solely on advertisements [meaning *media* advertisements, by reference to subsection (1)], not practices). *See also* District Court Opinion (JA-257) ("within a retail establishment advertisements of sales and promotions may state the price of alcohol"). By banning neither the discounts nor on-premises promotions of them, the rules operate two steps away from the targeted consumption of alcoholic beverages. Thus, they provide at most "indirect," not direct, support for that state interest. As in *44 Liquormart,* even if some reduction in consumption is assumed, this remote mechanism cannot be shown to significantly reduce consumption *44 Liquormart* at 406.

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Indirect advancement even of a substantial government interest cannot satisfy the direct advancement prong of *Central Hudson*. In fact, in *Central Hudson* itself, the Supreme Court explained that "[u]nder the first criterion, the Court has declined to uphold regulations that only *indirectly advance* the state interest involved," or that "provide[] only ineffective or remote support for the government's purpose." 447 U.S. at 564 (emphasis added). In this case, the District Court erred by not even acknowledging or addressing this indirectness.

2. The State's Only Empirical Evidence Did Not Support The Challenged Regulations.

Central Hudson requires that the State offer valid empirical evidence showing the direct connection between the regulations-at-issue and the state purpose. Missouri offered no empirical evidence upon which the General Assembly and the Division relied in enacting the Challenged Advertising Laws. And even the after-the-fact study offered by the State's lawyers was clearly insufficient.

The State's proffered study was Meichun Kuo, *et al.*, *The Marketing of Alcohol to College Students* (AM. J. PREV. MED. 2003). This study established no causation even from the on-premises advertising it studied, because it was admittedly a "correlational study" from which "causality cannot be determined."

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(JA-221).[3] Also, it did not broadly study consumers or retailers, but limited its analysis to only college students, and only establishments within a two-mile radius of colleges. (JA-215-16). Most importantly, it tested only *on-premise* advertising (*e.g.*, advertising at or inside the bar or retail establishment). *Id*. Missouri's Challenged Regulations apply only to *media* advertising not *on-premises* advertising (which is unrestricted). Thus, the Kuo study involves advertising that is permitted in Missouri and says nothing about the Challenged Regulations, which prohibit media (off-premises) advertising.

The Kuo study supports, if anything, a total *reversal* of Missouri's alcohol promotion scheme. It suggests that alcohol discounts should not be promoted *within* a retail establishment or within two miles of a college campus, because such in-store college-proximate ads could lead to irresponsible consumption. The Kuo study tells *nothing* about any effects of alcohol discounts advertised in the *media* on irresponsible or underage consumption, even as to college students, let alone the general population. An on-premise beer promotion ("$4 PITCHERS!") at a bar adjoining the Mizzou campus in Columbia is quite different from an advertisement in the Kansas City *Star* about a wine offer ("*20% off our featured Bordeaux*

[3] The Kuo study explicitly acknowledged that instead of discount prices driving increased consumption, it may be that "heavy drinking by students . . . induce[s] bars and restaurants to cater to and compete for their patronage through price lowering promotions." (JA-221).

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wines") at a Country Club Plaza restaurant. The Kuo article neither studies nor presents any evidence of any adverse effect of media advertising.

The Kuo study of in-store discount displays near college campuses cannot meet Defendants' heavy burden to show a "reasonable fit" with the different and far broader media advertising ban at issue here. For that ban, Missouri has no studies or empirical evidence to show any direct advancement of its stated objectives.[4]

3. The District Court Improperly Relied on Speculation.

Although the District Court gave lip service to *Central Hudson*'s exacting reasonable-fit standard, it ultimately relied on a "common sense" or "everybody knows" rationale rather than the exacting non-speculative evidence that the intermediate scrutiny test requires. The District Court pulled the phrase "simple

[4] Even apart from the particulars of the Kuo study, a single study can never justify a reasonable fit finding as to a contentious heavily studied and debated issue like the relationship between advertising and alcohol consumption. *See*, *e.g.*, *44 Liquor Mart, Inc. v. Racine*, 829 F. Supp. 543, 546 (D.R.I. 1993) ("At the outset, I note a pronounced lack of unanimity among researchers who have studied the effects of alcohol advertising. No less than twelve different conclusions have been reached regarding the impact of advertising on the general consumption of alcoholic beverages."); *Mich. Beer & Wine Wholesalers Ass'n v. Attorney General*, 370 N.W.2d 328, 336 (Mich. App. 1985) ("several studies… in reported cases from other jurisdictions conclude that there is no significant relationship between direct price control of alcohol and its consumption"). Far more than one isolated study would be needed to credibly meet the direct advancement proof requirement.

common sense" out of Supreme Court dictum. (JA-252). None of the holdings, however, support the meaning the District Court took from this dictum.

The case the District Court cited for the "simple common sense" rule (which was found two layers down in a quotation), *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), did not rely on "common sense"; the reasonable fit of the regulation there was assessed based upon numerous studies and other evidence from the FDA, which were judged sufficient to pass the third prong of *Central Hudson*. *See id.* at 557, 561.

Similarly, *Florida Bar v. Went For It, Inc.,* 515 U.S. 618, 628 (1995), quoted in *Lorillard*, did not rely on "common sense"; it upheld a restriction on solicitation of accident victims within thirty days of an accident, based on two-year study and written report analyzing statistically and anecdotally the impacts of such solicitation—a record that showed "a concrete, nonspeculative harm." *Id*. at 626-29.

Finally, the non-commercial speech decision in turn quoted in *Florida Bar*—*i.e.*, the origin of the phrase "common sense" on which the District Court relied—relied on an extensive historical record. In that case, *Burson v. Freeman,* 504 U.S. 191 (1992), the Court considered the constitutionality of restrictions on expressive activity near polling places. The Court based its ruling on an extensive record of the history of voting, going back to colonial days, with citations to historical and

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scholarly studies including nine books and three articles, as well as a historical review of the evolution of voting laws in Tennessee. *Burson*'s conclusion was based on this evidence, not mere speculation. It never endorsed "common sense" as a sole measure for a constitutional analysis. Indeed, it used the term simply to say that "[a] long history, a substantial consensus, and simple common sense" *together* supported the Court's conclusion. *Id.* at 211.

The holdings of *Lorillard, Florida Bar* and *Burson* all show that when regulations are challenged under the First Amendment, the State must bring forward convincing empirical proof, not speculation, in support of the laws. The mantra of "common sense" cannot avoid these constitutional requirements.

Indeed, the contrast between *Florida Bar* and *Edenfield v. Fane*, 507 U.S. 761 (1993), another Florida case, is telling. Both cases dealt with state bans on solicitation by professionals (lawyers in *Florida Bar*, certified public accountants in *Edenfield*). In *Florida Bar*, the Supreme Court upheld the ban, not because of any mere "common sense," but because of a two-year empirical study. In *Edenfield*, by contrast, Florida offered no evidence in support of its speech restriction, and the Supreme Court found that evidentiary deficit decisive:

> the Board has failed to demonstrate that the ban advances those interests in any direct and material way. A governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree. *Here, the Board's suppositions about the dangers of personal solicitation by CPA's in the business context are*

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> *not validated by studies, anecdotal evidence, or Fane's own conduct;* and its claims are contradicted by a report of the American Institute of Certified Public Accountants and other literature.

Edenfield, 507 U.S. at 762 (emphasis added).

To the same effect, in *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), the Supreme Court found that the government did *not* meet its burden to justify advertising restrictions on alcohol when it simply "point[ed] to current developments in the consumer market" for beer and urged the Court to use its "common sense" and "turn to history as a guide." *Id.* at 487. The Court similarly refused to allow mere "conjecture" or "speculation" to justify alcohol advertising restrictions in *44 Liquormart*, stating, "As is evident, any conclusion that elimination of the ban would significantly increase alcohol consumption would require us to engage in the sort of 'speculation or conjecture' that is an unacceptable means of demonstrating that a restriction on commercial speech directly advances the State's asserted interest." 517 U.S. at 507.

Similarly, in *Pitt News v. Pappert*, 379 F.3d 96 (3d Cir. 2004), then-Judge Alito found that the Pennsylvania failed the *Central Hudson* test, because its reasoning that the elimination of ads would slacken demand for alcohol was "counterintuitive and unsupported by any evidence that the Commonwealth has called to our attention." *Id*. at 107-08.[5]

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[5] As Justice Alito's comment suggests, reliable research disproves the District Court's apparent theory that people will stop drinking or drink less, if alcohol

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The District Court relied upon *Educational Media Co. v. Swecker*, 602 F.3d 583, 590 (4th Cir. 2010), to support "a common sense link between advertising and demand." (JA-254). In doing so, it ignored the Supreme Court's decision in *44 Liquormart* and Justice Alito's decision in *Pitt News*, which are both directly to the contrary (as pointed out in *Educational Media*'s dissent). *See Educational Media*, 602 F.3d at 592-93. The District Court also ignored the fact that the governmental interest in *Educational Media* was "combatting … underage drinking and abusive drinking by college students" and the challenged regulation narrowly applied to "student newspapers." *See* 602 F.3d at 589. That narrower focus in *Educational Media* was key, because "the correlation between advertising and demand alone is insufficient to justify advertising bans in every situation." *Id.* at 590. The narrow college student focus of the *Educational Media* ban at least corresponded to the underage drinking that was targeted, and this connection allowed the majority to justify the State's lack of empirical evidence. In this case, however, the Challenged Regulations apply to all media and the general population, so no inferential connection is even possible.

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prices are kept from them. In *Michigan Beer & Wine Wholesalers Association v. Attorney General*, 370 N.W.2d 328, 336 (Mich. App. 1985), the court noted that "several studies… in reported cases from other jurisdictions conclude that there is no significant relationship between direct price control of alcohol and its consumption." *Id*. (*citing Rice v. Alcoholic Beverage Control Appeals Bd.*, 579 P.2d 476 (1978) and *Seagram & Sons v. Hostetter*, 209 N.E.2d 701 (1965)).

Moreover, the ban in *Educational Media* was ultimately found unconstitutional, in a subsequent appeal from an as-applied challenge, based on empirical evidence. The evidence showed that the majority of readers of the college newspaper were over the legal drinking age, and the State could not constitutionally deprive them "from receiving truthful information about a product that they are legally allowed to consume." *See Educational Media Co. v. Insley*, 731 F.3d 291, 301 (4th Cir. 2013) ("*Educational Media II*"). This later *Educational Media* decision illustrates the hazard of a state banning commercial speech without a solid empirically based justification.

All of these precedents show that the District Court erred in pulling the phrase "common sense" out of context and out of dictum, and relying on it. *See* JA-254-55 (four references to "common sense" as justification for the Challenged Regulations).

The District Court's other rationalizations for finding that the Challenged Regulations directly advanced the State's purpose were also incorrect and improper inferences. The Court suggested that the fact of Plaintiffs' challenge proved that the regulations were lowering alcohol sales. (JA-255). This speculative jump, using the assertion of a legal claim as evidence of facts harmful to the claimant, is wrong for multiple reasons. Half the Plaintiffs are broadcasters or their representatives; their objective is to strike down an unconstitutional ban on

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truthful advertising, and hopefully increase their advertising sales. They have no objective of increased alcohol sales, and certainly not of promoting binge drinking. If they can carry discount alcohol advertising, it may simply shift retailers' expenditures from other areas (for example, the in-store activities described by Kuo) to broadcast advertising. Even for the alcoholic beverage selling Plaintiffs, the District Court's argument, including its analogy to electricity advertising, is wrong. (*See* JA-254). Advertising of electricity, a regulated industry with geographic monopolies, is clearly intended to increase consumption. But in competitive industries, like alcohol, advertising serves mainly to allocate consumers among competitors. *See 44 Liquormart*, 517 U.S. at 506 n.16 (noting that price competition among retailers may not cause increased consumption, but only a reallocation of existing alcohol customers). Plaintiffs Uncle D's and Meyer Farms simply seek to promote their distinctive products and services as superior to those of their competitors.

Moreover, the District Court's focus in this part of its decision on increased alcohol sales had no bearing on the State's purported rationale for the Challenged Regulations, which was not to decrease alcohol sales, but to promote responsible drinking.[6] None of these arguments by the District Court ties the regulations in

[6] The District Court, moreover, has no right or power to help the State or modify the identified substantial interest. The Supreme Court has clearly stated that courts

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any way, much less a "direct advancement" way, to promotion of responsible drinking, avoidance of binge drinking, or avoidance of underage drinking.

4. The Inconsistencies Within the Challenged Regulations Show That They Do Not Directly Advance the State's Interest in Promoting Responsible Drinking.

A state cannot show direct advancement or a reasonable fit between an advertising restriction and an alleged state regulatory interest when the state's regulatory interest "is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it." *Greater New Orleans Broad. Ass'n, Inc. v. United States,* 527 U.S. 173, 190 (1999).

In *Greater New Orleans,* the government had banned broadcast advertising of casino gambling, and attempted to justify that ban on the basis of two interests: "(1) reducing the social costs associated with 'gambling' or 'casino gambling,' and (2) assisting States that 'restrict gambling' or 'prohibit casino gambling' within their own borders." *Id.* at 186. But that justification could not hold water, because of the many exceptions that the government had already permitted. It permitted advertising of tribal casinos, as well as Government-operated, nonprofit and "occasional and ancillary" casinos. *Id*. at 190. In light of all of these exceptions to the advertising ban, the Supreme Court found unconvincing Government's

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may not "supplant the precise interests put forward by the State with other suppositions." *Edenfield v. Fane*, 507 U.S. 761, 768 (1993).

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attempted justification for its advertising ban. In his 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, which undermine the State's purported interest of promoting responsible consumption. For example, the Discount Advertising Prohibition Regulation allows manufacturers of intoxicating liquor other than beer or wine to advertise "consumer cash rebate coupons," while beer and wine manufacturers, as well as all retailers and wholesalers, are prohibited from doing so. *See* 11 C.S.R. 70-2.240(5)(G). (*See* JA-40). It hardly promotes responsible consumption to allow promotion of the most potent alcohol while banning promotion of weaker alcohol. If advertising really increases consumption (as the District Court claimed, but which is factually incorrect and legally irrelevant), then this hard-liquor discount advertising loophole is entirely counterproductive.

The exception for spirits was carved out by the legislature. *See* RS Mo. 311.355 (providing that "[m]anufacturers of intoxicating liquor other than beer or wine shall be permitted to offer consumer cash rebate coupons . . ." and those "[c]onsumer cash rebate coupons may be published or advertised by manufacturers

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in newspapers, magazines and other mass media."). Defendants' explanation for this exception was that the distilled spirits industry lobbied the legislature for it, so that it could participate in national cash rebate coupon programs. (JA-265). But the fact that the legislature has handed out an exception in response to special-interest lobbying does not dispel the irrationality and inconsistency of the regulations; rather, it *proves* that irrational inconsistency (as well as the State's own low regard for its own alleged "substantial" interests).

Accordingly, this evidence of "the overall irrationality of the Government's regulatory scheme," in its inconsistent and irrational treatment of beer and wine versus hard liquor (and manufacturers versus wholesalers and retailers), further demonstrates the lack of a reasonable fit between the Discount Advertising Prohibition Regulation and the State's proffered interest in promoting responsible consumption. *See Rubin v. Coors Brewing Co.*, 514 U.S. 476, 488 (1995) (holding that while the prohibition of alcoholic strength on beer labels succeeded in keeping that information from the public, that limited prohibition did not advance the asserted interest in preventing strength wars since the information appeared on labels for other alcoholic beverages); *Utah Licensed Beverage Ass'n v. Leavitt*, 256 F.3d 1061, 1072, 74 (10th Cir. 2001) (finding "irrational" and unconstitutional

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Utah's advertising restrictions on wine and liquor because there were no comparable restrictions on beer advertising under *Central Hudson*).[7]

5. The Paternalistic Assumption that Banning Truthful Advertising Will Benefit Consumers Is Not Constitutionally Permissible.

The District Court's opinion is filled with suggestions that a ban on alcoholic beverage price and discount advertising will be good for consumers and society. The Court suggested that the truthful ads banned by the Challenged Regulations may be characterized as "aggressive sales tactics," thereby suggesting that truthful ads exert "undue influence" and motivate consumers to act against their own interest. (JA-257-58). The Court opined that greater advertising always leads to greater demand, despite the lack of evidence on that issue, and took a

[7] The District Court asked the parties to separately brief this issue, after denying the majority of Plaintiffs' motion for summary judgment. The District Court then found that Plaintiffs had failed to specifically plead in their complaint a challenge to "11 C.S.R. 70-2.240(5)(G)'s disparate treatment of manufacturers of intoxicating liquor other than beer or wine." (JA-304). The District Court apparently did not understand Plaintiffs' argument. They did not and are not requesting that the exception regarding "rebate coupons" itself be found unconstitutional. Instead, Plaintiffs pointed to that exception as evidence of the irrationality of the entire regulation, which is a relevant consideration suggestive of unconstitutionality under *Greater New Orleans*, *Rubin*, and the third prong of *Central Hudson*. The Federal Rule of Civil Procedure's notice pleading regime requires a plaintiff set forth a plausible claim; it does not require the identification of every piece of evidence and legal argument that will eventually be made in summary judgment briefing.

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position, contrary to the First Amendment, that consumer demand based on knowledge is a "harm" or evil of some kind. (*See* JA-254-255).

To the extent, however, that the District Court may have concluded that the Challenged Regulations should remain in force because they will be good for consumers or society, that conclusion was constitutionally impermissible. The Supreme Court has decisively rejected such information-depriving paternalistic justifications for restricting commercial speech. "The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." *44 Liquormart*, 517 U.S. at 503.

In *44 Liquormart* the Court emphasized its long-standing doctrine that "a State's paternalistic assumption that the public will use truthful, nonmisleading commercial information unwisely cannot justify a decision to suppress it." *Id*. at 497. Similarly, "The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." *Id*. at 503. The Court strongly reemphasized this position in *Sorrell v. IMS Health, Inc.,* 564 U.S. 552, 577 (2011), noting, "The fear that people would make bad decisions if given truthful information cannot justify content-based burdens on speech."

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Accordingly, for this additional reason this Court should reverse the District Court's decision, based on such constitutionally impermissable reasoning. *Compare* Opinion (JA-254) (arguing that limiting truthful advertising of discount prices will lessen alcohol consumption) *with 44 Liquormart*, 517 U.S. at 497 (commercial speech cannot be suppressed because the State thinks "that the public will use truthful, nonmisleading commercial information unwisely").

D. The Challenged Regulations Are Not Reasonably and Narrowly Tailored to the State's Asserted Interests.

The fourth prong of *Central Hudson*, the narrow tailoring requirement, ensures that restrictions on speech are permitted only as a last resort, when other forms of regulation have proven ineffectual. As the Court stated in *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002), "[i]n previous cases addressing this final prong of the *Central Hudson* test, we have made clear that if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so." *Id.* at 371. Put simply, government must regulate conduct first, and speech only as a last resort.

Thus, the narrow tailoring analysis should focus primarily on what conduct the State could have regulated instead of speech. And in this case, where the Challenged Regulations ban a particular kind of price advertising—specifically, advertising of price discounts, which could be considered standard pricing in

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today's age of pervasive discounting—there is a ready reference to alternative ways the State could meet its objective, by regulating conduct rather than speech.

Specifically, in *44 Liquormart*, the Supreme Court itself suggested multiple such alternatives to a ban on price advertising. Among them:

(1) The state could prohibit alcohol altogether.

(2) It could heavily tax or regulate alcohol.

(3) It could impose direct controls on pricing.

(4) It could develop educational campaigns concerning the problems of excessive drinking.

44 Liquormart, 517 U.S. at 507-08. These alternatives suggested by the Supreme Court should be the starting point for the narrow tailoring analysis. Yet the District Court improperly brushed them off. The Court simply opined that Plaintiffs would not like those alternatives, and therefore refused to consider their significance. (*See* JA-258). However *44 Liquormart*, makes it clear that courts *must* consider the existence of these narrower alternative means, even when (as in *44 Liquormart*) the challengers are sellers or advertisers of alcoholic beverages, who may well not benefit from or like any of those alternatives. The constitutional interests at play here are the interest of buyers (consumers) in receiving truthful information, and the rights of sellers (and their media partners) to disseminate truthful information. Plaintiffs, media entities and alcoholic beverage retailers, brought this case to

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vindicate those constitutional rights, and their claims must be decided based on those constitutional rights, even if vindication of those rights might ultimately lead to some economic detriment to all or some of them. The history of the First Amendment includes many litigants who never personally benefitted from the rights their cases established.

When the alternatives listed in *44 Liquormart* are considered, it is apparent that any one of them, or some combination of them, could meet the State's professed interest in promoting reasonable consumption and preventing underage drinking at least as well as the Challenged Regulations' ban on truthful price advertising:

(1) Clearly binge drinking would be eliminated or substantially reduced if the state banned alcohol sales.

(2) Taxation or other price or sales regulations could also substantially reduce binge drinking, and such controls could even be flexibly applied, to target particular areas of concern such as college towns.

(3) Direct controls on pricing or sales could also reduce binge drinking.

(4) Educational campaigns would clearly be more effective in preventing or minimizing binge drinking, and/or preventing underage drinking, since

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they would be targeted to that problem. They could even be targeted to particular times and places where the risk of binge drinking is highest.[8]

In sum, the *44 Liquormart* conduct regulation alternatives are all available, as advantageous non-speech-suppressive alternatives to the Challenged Regulations. The District Court clearly erred in not considering them, and failing to conclude that because of them, the Challenged Regulations failed the narrow tailoring prong of *Central Hudson*.

Moreover, the record below contained proof of additional alternative regulations, even beyond those listed in *44 Liquormart.* Ironically, those alternatives were apparent based on the Kuo study that Defendants submitted. In addition to supporting two of the *44 Liquormart* alternatives (taxes and sales prices), the Kuo study suggests these other less intrusive methods for meeting the State's objective of minimizing binge drinking:

(5) Banning promotions on alcohol (JA-215, JA-221). This would be the "most direct and perhaps the only effective approach" if promotions cause binge drinking. *Metromedia Inc. v. City of San Diego,* 453 U.S.

[8] Contrary to the District Court's assertion, this alternative would be favorable to the business interests of the media Plaintiffs. Missouri broadcasters would likely benefit through paid broadcast advertising if the State "develop[e]d educational campaigns concerning the problems of excessive drinking."

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490, 508 (1981). Because this ban would be directed at sales practices, not truthful speech, it would be constitutionally permissible.

(6) Banning advertisements on-premises (JA-216, JA-221). If the problem is binge drinking it is best addressed on-premises. Binge drinking (consumption of five or more drinks in a row) occurs on-premises, not when media advertising is viewed.

(7) Implementing alternatives 2, 3, 4, 5 or 6 within a 2-mile radius of colleges instead of the entire state.

All of these alternative non-truthful-speech-suppressive alternatives were laid out in the summary judgment briefs, and neither the State nor the District Court had any valid rebuttal their availability and effectiveness, as more direct and narrow ways to address the State's interest in promoting reasonable consumption. Accordingly, the State failed to meet its burden to prove that the regulations were no more extensive than is necessary to serve that interest.

E. Summary: The Challenged Regulations Are Unconstitutional Based on *Central Hudson* and its Intermediate Scrutiny Test.

The Challenged Regulations fail both the direct advancement/reasonable fit (prong 3) and narrow tailoring (prong 4) parts of the *Central Hudson* test. For these reasons, summary judgment should have been granted, and the Challenged Regulations stricken as unconstitutional infringements on the commercial speech right.

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II. THE DISTRICT COURT FAILED TO PROPERLY APPLY THE *CENTRAL HUDSON* INTERMEDIATE SCRUTINY TEST TO THE CHALLENGED STATUTE.

The Challenged Statute is an inherently troubling restriction on truthful speech, applying to a commonplace kind of advertising—"cooperative advertising," in which a manufacturer or distributor pays for retail advertising that will promote its product. *See*, *e.g.*, *Scott Pub. Co. v. Columbia Basin Publishers, Inc.*, 293 F.2d 15, 22 n.14 (9th Cir. 1961) (explaining "cooperative advertising"). In particular, the Challenged Statute imposes three different governmental limits on such truthful advertising:

1. The ad is prohibited from including certain truthful content (about prices);
2. The retailer being promoted must keep its own profile low (with a "relatively inconspicuous" listing); and
3. Incredibly, a competitor of the retailer being promoted must also be mentioned in the ad.

See RS Mo. § 311.070.4(10).

The District Court accepted these statutory limitations on advertising, apparently viewing them as justified by the traditional three-tier separation of liquor sellers into manufacturers, wholesalers, and retailers. But that separation,

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which is exception-ridden to begin with, can hardly justify government dictation of the contents of advertisements, under the speech-protective standards of the *Central Hudson* test. And surely a complete ban on advertising "the retail price of the product" (*see* RS Mo. § 311.070.4(10)(a)) does not support the three-tier system and cannot possibly pass muster, as this was the exact prohibition found unconstitutional in *44 Liquormart*. *See* 517 U.S. at 489.

In the following sections, Plaintiffs will review the key elements of the *Central Hudson* test, and the District Court's mistakes in applying the test to the Challenged Statute.

A. Alcoholic Beverage Sales and Discount Pricing are Lawful, and Media Advertisements that Truthfully Report Liquor Prices and Discounts Would Not Be Misleading.

As explained more fully in section I.A. above, alcoholic beverage sales are lawful in Missouri, and it is also fully lawful for retailers to offer alcoholic beverages at discount prices, including prices below their cost. Also, it is presumed that Plaintiffs' advertising would be truthful and not misleading. Accordingly, the first prong of *Central Hudson* is satisfied.

B. Missouri's Interest in an Orderly Marketplace is Not Substantial for Purposes of *Central Hudson* Analysis.

Of the State's proffered justifications—"to promote responsible consumption, combat illegal underage drinking, and . . . maintain[] an orderly marketplace" [RS Mo. § 311.015]—the first two have no rational connection to the

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Challenged Statute. The statute hardly promotes reasonable consumption or combats illegal underage drinking, when it actually compels multiple retailers to be advertised instead of just one, whenever cooperative advertising is involved. And the last justification—while it may have some theoretical relationship to the Challenged Statute—simply does not qualify as a substantial governmental interest under *Central Hudson*.

While the state always has some interest in promoting an orderly marketplace, that vague and general interest is not the kind of "substantial" special interest which would ever trump the right to advertise truthfully. Indeed, the decision cited by the District Court, *North Dakota v. United States*, 495 U.S. 423 (1990), does not find a state's three-tier system of liquor distribution to be a "substantial" interest for purposes of *Central Hudson* intermediate scrutiny, but only a "legitimate" interest for purposes of standard rational basis analysis. The same is true for *Southern Wine & Spirits of America, Inc. v. Division of Alcohol & Tobacco Control*, 731 F.3d 799 (8th Cir. 2013), also cited by the District Court. Neither the Court nor Defendants raised below any authority to support that an interest judged "legitimate" in the deferential context of a broad grant of power is necessarily also a "substantial" interest for purposes *Central Hudson*.

Notably, both *North Dakota* and *Southern Wine* rely on the states' "virtually complete control" under the Twenty-first Amendment over their liquor distribution

systems. 495 U.S. at 431; 731 F.3d at 805. That "virtually complete control," however, does not exist where free speech interests are at stake. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996) ("[W]e now hold that the Twenty-first Amendment does not qualify the constitutional prohibition against laws abridging the freedom of speech embodied in the First Amendment."); *Granholm v. Heald,* 544 U.S. 460, 486 (2005) ("state laws that violate other provisions of the Constitution [including the First Amendment] are not saved by the Twenty-first Amendment"). Moreover, the Court in *44 Liquormart* explained "[t]hat the State has chosen to license liquor retailers does not change the analysis. Even though government is under no obligation to provide a person, or the public, a particular benefit, it does not follow that conferral of the benefit may be conditioned on the surrender of a constitutional right." *Id.* at 513.

The three-tier liquor distribution system set up after Prohibition to address pre-Prohibition concerns (*i.e.*, concerns of more than a century ago) is not a "substantial" interest that can support restricting truthful speech. *Authentic Beverages Co. v. Tex. Alcoholic Beverage Comm'n*, 835 F. Supp. 2d 227, 243 (W.D. Tex. 2011) (holding that Texas failed to demonstrate a substantial interest for its regulations that "prevent[] malt beverage producers and resellers from advertising which retailers sell their products"); *Retail Digital Network, LLC v. Appelsmith*, 810 F.3d 638, 652 (9th Cir. 2016) ("we cannot say on the record

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before us that the State's Prohibition-era concern about advertising payments leading to vertical and horizontal integration, and thus leading to other social ills, remains an actual problem in need of solving"). The Supreme Court by imposing *Central Hudson*'s requirement of a "*substantial*" government interest (notably, not just "*a*" government interest, or a "*reasonable*" or "*legitimate*" one) clearly meant something more than an ordinary vague government interest in an orderly market, or legacy laws addressing century-old concerns.

Although Plaintiffs do not believe the "maintain an orderly marketplace" rationale has been properly presented by the State, they will in an abundance of caution address that rationale as well; but they have not conceded, and do not concede, that it represents a substantial state interest.[9]

C. The Challenged Statute Does Not Directly Advance The Purported State Interest.

As noted in section II.C. above, the Supreme Court's commercial speech decisions require hard evidence and empirical data to demonstrate that a statute *directly advances* a substantial state interest. To use other terms found in the case law, the State must demonstrate a *"reasonable fit"* between its regulation and its substantial interest.

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[9] Plaintiffs' summary judgment reply brief below noted that Plaintiffs did not concede that the State's vague asserted interests in "maintaining an orderly marketplace" and in "the separation of the levels of the liquor industry" were substantial. (JA-229, n. 4).

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1. The Challenged Statute Does Not Directly Advance the State's Interest in an Orderly Marketplace.

Even if promotion of an orderly alcoholic beverage marketplace were a "substantial" state interest, the Challenged Statute does not directly advance that interest, and the State has not met its burden of showing such a reasonable fit with hard evidence and empirical support.

The three-tier system was created, after Prohibition, to keep organized crime from dominating the liquor business, and to keep the higher tiers from dominating the retail tier. *Dickerson v. Bailey*, 212 F. Supp. 2d 673, 680 (S.D. Tex. 2002), aff'd, 336 F.3d 388 (5th Cir. 2003). Realistically, those purposes no longer hold water. More than eighty years after the end of Prohibition, there is no longer an imminent danger of Al Capone and his associates reasserting their domination of the liquor business. And the separation of the three tiers has weakened considerably, particularly with retail sales by domestic wineries and microbreweries. But even if the three-tier system were not hanging on through the slender thread of history, and one were to take the leap of assuming that the Prohibition Era concerns behind it are still valid today, eighty years later, the Challenged Statute does not directly advance those concerns.

The challenged portion of the statute does nothing to prevent organized crime from controlling the alcohol industry. And it makes little inroad in the

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separation of the three tiers, particularly compared to the many incursions that Missouri has itself allowed in that system (described in detail in section 2 below).

The State may argue that the three-tier system keeps the three tiers separate, and cooperative advertising, in which a manufacturer or wholesaler pays for advertising to benefit a retailer, blurs that distinction. But this misses the point. The three-tier system is not, in itself, the state objective. The State's objective is the protection of the retail sector from domination by liquor manufacturers and distributions. Limits on cooperative advertising do not directly advance that objective, particularly in today's system (described in section 2 below) in which retailers are often owned and operated by manufacturers. (And even if the existence of the three-tier system were viewed incorrectly as the State's end in itself, rather than correctly as a means to other objectives, limits on cooperative advertising at most advance that end very indirectly, and certainly not "directly" as required by *Central Hudson*'s third prong.)

2. The Irrationality and Inconsistencies in the State's Three-Tier "Separation" Further Shows that the Challenged Statute Does Not Directly Advance the State's Interest in an Orderly Alcoholic Beverage Marketplace.

As discussed in Section I.C.1(b), a state cannot show direct advancement or a reasonable fit between an advertising restriction and an alleged state regulatory interest when the state's regulatory interest "is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it." *Greater New*

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Orleans, 527 U.S. at 190. Missouri's three-tier system of regulating the alcohol industry is pierced with even more exemptions and inconsistencies than the federal government's casino advertising restrictions struck down in *Greater New Orleans*.

Missouri based wineries are allowed to comingle all three tiers – they not only produce wine, but they also serve as wholesalers and retailers. *See* RS Mo. § 311.190.1 and 311.070.11. Because of the exceptions they gave to their own state's wineries, states have to allow direct retail sales by out-of-state wineries as well. *Granholm v. Heald*, 544 U.S. 460 (2005). Distillers of hard liquor are allowed to sell their liquor on premises—again commingling the tiers. *See* RS Mo. § 311.070.1. The same comingling of all three tiers is allowed for Missouri based microbrewers. *See* RS Mo. § 311.195.3.

Given the growth of the Missouri wine industry, and the increasing popularity of microbreweries, this means that millions of alcoholic beverage sales in Missouri are made by entities that cover all three tiers. This court can take judicial notice of the Missouri Wine and Grape Board, a state board authorized by RS Mo. § 262.835, which among other things promotes the Missouri wine industry. A study it commissioned reported that the 97 Missouri wineries in 2010 had an economic impact on the state of $1.6 billion annually. Stonebridge Research, "The Economic impact of Wine and Grapes in Missouri" (October 2010), available at http://gwi.missouri.edu/publications/mo-winery-impact.pdf.

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The study indicated that a majority of Missouri winery sales revenue came from outside the three-tier system. *Id*. at 5.

There are other exceptions as well. Brewers (and other manufacturers) are allowed to sell liquor at entertainment facilities that they own. *See* RS Mo. § 311.070.10. A distiller, wholesaler, winemaker or brewer may provide a "coil cleaning service" to a retailer. *See* RS Mo. 311.070.4(6). They may also give retailers "newspaper cuts, mats or engraved blocks" for use in advertisements. *See* RS Mo. 311.070.4(9). Additionally, distillers are allowed to provide, and advertise, coupons redeemable at retail for their product—a kind of indirect manufacturer support for retailers not much different from cooperative advertising. *See* RS Mo. 311.355.

With all of these holes and exceptions, Missouri's three-tier system could be renamed its "Swiss cheese" system. The "separation" of the three tiers is riddled with exceptions. Even on the narrow issue of indirect support of retailers by one of the higher tiers, there are inconsistencies – distiller manufacturer support through coupons are allowed, but otherwise support for retailers is allowed only with heavy censorship of the challenged statute. All of this further demonstrates the lack of a reasonable fit between the Challenged Statute and the State's proffered interest in an orderly marketplace. *Rubin v. Coors Brewing Co.,* 514 U.S. 476, 489 (1995) (finding "little chance" that a law "can directly and materially advance its aim,

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while other provisions of the same Act directly undermine and counteract its effects").

3. The Challenged Statute Does Not Directly Advance the Interest in Promoting Reasonable Consumption.

If the State raises its interest in promoting reasonable consumption as a justification for the Challenged Statute, that justification clearly fails. The statute does not in any direct way promote reasonable consumption. If anything, by requiring mention of multiple retail outlets in all alcoholic beverage cooperative advertising, it essentially encourages the purchase and consumption of alcoholic beverages. (*"If you can't find this product at Retailer A, try Retailer B!"*)

The State has offered no study or empirical evidence whatsoever that the Challenged Statute promotes this state interest. The Kuo study, for example, refers only to promotion of discounts on premises, and does not address any of the characteristics of the Challenged Statute: (a) media advertising, (b) paid for by wholesalers or manufacturers, (c) mentioning multiple retailers, and (d) not including pricing information. If the State were to contend that the Challenged Statute, by making cooperative advertising less appealing to retailers, thereby leads to less use of cooperative advertising, and thereby less advertising all together, that would clearly not support a "reasonable fit" between the state action and the state interest, because a state cannot constitutionally meet its interests simply by

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discouraging truthful advertising. *44 Liquormart*, 517 U.S. at 503; *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 564 (2001).

D. The Challenged Statute Is Not Reasonably and Narrowly Tailored to the State's Asserted Interests.

As noted in section I.D. above, the fourth prong of *Central Hudson*, the narrow tailoring requirement, ensures that restrictions on speech are permitted only as a last resort, when other forms of regulation have proven ineffectual.

The Challenged Statute is not narrowly tailored to any substantial state interest. It doesn't directly or narrowly govern whether retailers are owned or controlled by a higher tier; other aspects of Missouri's liquor code already do that, with multiple exceptions. It doesn't directly address the imagined and unstated bad effects of manufacturer or wholesaler influence over retailers. Instead, it affects cooperative advertising, and, even so, in inconsistent and partial ways (in that it limits some cross-tier advertising cooperation but another statute nonetheless permits distillers to advertise and provide coupons redeemable at retailers.)

There are certainly other narrower non speech-suppressive ways to ensure that top-tier entities do not control retailers. *Retail Digital Networks, LLC v. Appelsmith,* 810 F.3d 638, 653 (9th Cir. 2016) (state may police rather than ban intra-tier advertising arrangements).

For all these reasons, the Challenged Statute is anything but a narrowly tailored "last resort" regulation aimed at the purposes of the three-tier system.

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E. Summary: The Challenged Statute Is Unconstitutional Based on *Central Hudson* and its Intermediate Scrutiny Test.

The Challenged Statute is not supported by a substantial state interest (prong 2), and in addition it fails both the direct advancement/reasonable fit (prong 3) and narrow tailoring (prong 4) parts of the *Central Hudson* test. For each of these reasons, summary judgment should have been granted, and the Challenged Statute stricken as an unconstitutional infringement on the commercial speech right.

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III. THE CHALLENGED ADVERTISING CANNOT SURVIVE THE HEIGHTENED SCRUTINY APPLICABLE TO CONTENT-BASED REGULATIONS.

As explained above, the Challenged Advertising Laws are unconstitutional under *44 Liquormart* and *Central Hudson*'s intermediate scrutiny standard. However, in *Sorrell v. IMS Health, Inc*., 564 U.S. 552 (2011), the Supreme Court set an even higher level of scrutiny, "heightened" scrutiny, for content-based and/or speaker-based regulation of truthful commercial speech.

In *Sorrell*, a Vermont statute prohibited pharmaceutical companies from purchasing or selling prescriber-identifying information collected from pharmacists. *Id*. at 559-60. Vermont enacted the statute in order to prevent pharmaceutical companies from using such information in marketing to physicians, a practice known as "detailing." Specifically, it felt that "detailing" sales pitches, using prescribing data, would be effective and would convince physicians to prescribe brand-name, and often more expensive, pharmaceuticals. *Id.* at 557-58, 576-77. Thus, the statute's objective was to prevent the pharmaceutical companies from making certain proven and effective truthful sales pitches. (Missouri's purpose with respect to the Challenged Advertising Laws is similar; Missouri wants to keep truthful price discounts from consumers, so alcoholic beverage retailers will be less effective at selling at those discount prices.)

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The Supreme Court ruled in *Sorrell* that the Vermont statute was an unconstitutional restriction on truthful commercial speech. Applying a traditional *Central Hudson* analysis, it held the state could not meet *Central Hudson's* third and fourth prongs, based on Vermont's asserted interests in protecting medical privacy and reducing health care costs. *Sorrell*, 564 U.S. at 571-72.

But in addition to the traditional *Central Hudson* analysis, the Court held that a "heightened" scrutiny was appropriate as well, because the regulations imposed content- and speaker-based restrictions on truthful commercial speech. The Court held that "heightened scrutiny" applied whenever the government attempts to regulate speech because of disagreement with the message it conveys. *Id.* at 566. Both *Sorrell* and this case involve such disagreement with the messages. Vermont disagreed with the pharmaceutical companies' detailing (because generic sales would improve in their absence), just as Missouri disagreed with media advertising of price discounts (because fewer purchases will be made if consumers can't learn of discounts through the media). In both situation, the truthful content restricted was valuable to consumers. *Id.* at 578 ("many listeners find detailing instructive"). Consumers clearly appreciate discount price information.

In *Sorrell*, the Court did not explain the exact contours of the "heightened" scrutiny it applied. However, Justice Breyer, in his dissent, noted that whatever

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heightened scrutiny was, it was certainly "stricter than *Central Hudson* …." *Id.* at 588. And the Court's citations suggested that at least where particular viewpoints or speakers are targeted, that heightened scrutiny should be strict scrutiny.

The Court made it clear that the "heightened" scrutiny applies to content-based regulation of truthful commercial speech. Specifically, government may not ban or restrict truthful speech based on a fear of how people may act when they hear that truthful speech:

> The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good … The State can express its views through its own speech … But a State's failure to persuade does not allow it to hamstring its opposition. The State may not burden the speech of others in order to tilt public debate in a preferred direction.

Sorrell, 564 U.S. at 577-79 (internal citations and quotations omitted). *Sorrell* rejected reasoning like that of the District Court, which classified truthful advertising as an "aggressive sales technique." *Compare* Opinion Below (JA-257-58) *with Sorrell*, 564 U.S. at 575-76 (rejecting Vermont's view that detailing imposed improper pressure on physicians; "speech remains protected even when it may 'stir people to action'…").

The Challenged Advertising Laws are speaker-based, and thus inherently suspect under *Sorrell*. In *Sorrell*, the Vermont statute allowed researchers and others to gather and use prescriber information; it banned only use of that

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information in *marketing to physicians*. *Id.* at 562. Similarly, Missouri's Challenged Regulations allow discount prices to be reported on retail premises, in research (like the Kuo study), or in word of mouth among consumers; they ban only *media advertising* of those same discount prices. And California law similar to the Challenged Statute was found to be "a content- and speaker-based restriction on commercial speech" in *Retail Digital Network, LLC v. Appelsmith,* 810 F.3d 638, 650 (9th Cir. 2016). This speaker-based burden of the Challenged Advertising Laws, under *Sorrell*, invokes heightened scrutiny. *Sorrell* at 571 ("speaker- and content-based burden on protected expression … is sufficient to justify application of heightened scrutiny"). Regulations that prevent only certain persons from saying certain things on certain occasions inherently raise viewpoint/content discrimination concerns—unlike, for example, content-neutral fraud prevention regulations, which ban false or misleading statements regardless of who says them and where they are said.

The Challenged Regulations are also clearly content-based. They prohibit truthful media advertisements regarding discounts, coupons, and below actual costs sales that retailers are in fact offering. Similarly, the Challenged Statute severely restricts cooperative advertising of alcoholic products, by requiring State-imposed mandatory content (*e.g.*, another retailer) and content bans (*e.g.*, price information).

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Missouri does not ban the ads for any fraud protection or consumer protection reason. It bans the ads simply because it does not want consumers to be fully informed about legal alcoholic beverage products. Missouri is concerned that absent its restrictions on truthful speech, state residents, when given truthful information, may actually go ahead and … purchase the products. This distaste for how people will handle the truth cannot support speech-suppressive laws. *Sorrell* determined that "fear that people would make bad decisions if given truthful information" is not a "permissible way" for the state to advance policy goals with a content-based regulation. *Sorrell*, 564 U.S. at 577.

Because the Challenged Advertising Laws impose speaker- and content-based restrictions on truthful speech, based on a state objective to prevent exposure to truthful advertising, they are subject to *Sorrell's* heightened scrutiny and they cannot survive it. Even if the regulations could survive a *Central Hudson* analysis, the many serious concerns set forth in our arguments I and II above clearly establish hurdles that cannot be overcome on a heightened scrutiny analysis.

This court and other circuits have recognized and applied *Sorrell's* heightened analysis with respect to content-based regulations like those at issue here. This court applied *Sorrell* (as well as *Central Hudson*) in *1-800-444-Pain Referral Service, LLC v. Otto*, 744 F.3d 1045 (2014), concerning Minnesota's limits on advertising to motorists injured in automobile accidents. Although that

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case involved misleading advertising, and disclosures needed to make advertising non-misleading—situations different from the truthful non-deceptive advertising at issue here—the decision recognized the enhanced *Sorrell* standard. The court determined *Sorrell* required an initial review of whether the challenged regulations were speech- or speaker-based and, if so, "then it is subject to 'heightened scrutiny.'" *Id*. at 1055. *Sorrell*'s heightened scrutiny was to be applied through the traditional *Central Hudson* framework. *See id*. at 1055 ("The upshot is that when a court determines commercial speech restrictions are content- or speaker-based, it should then assess their constitutionality under *Central Hudson*.").

Similarly, in addressing a California statute similar to the Challenged Statute here, the Ninth Circuit held in *Retail Digital Network, LLC v. Appelsmith*, 810 F.3d 638 (9th Cir. 2016), that because *Sorrell* sets a higher standard than *Central Hudson*, laws found to pass under *Central Hudson* must be reexamined under *Sorrell*. *Id*. at 648, 650-51 ("*Sorrell* requires a more demanding form of scrutiny of content- or speaker-based regulations on commercial speech than we have previously applied."). *Retail Digital* strongly suggests that California's counterpart of the Challenged Statute cannot survive a *Sorrell* analysis. *Id.* at 650-53. Finally, the Third Circuit has interpreted *Sorrell* to require strict scrutiny of content-based regulations. *See King v. Governor of the State of New Jersey*, 767 F.3d 216, 236 (3d Cir. 2014).

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Additionally, the Supreme Court's recent decision in *Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2227-28 (2015), states that all content-based regulations of speech are subject to strict scrutiny. The Challenged Advertising Laws clearly cannot withstand this very stringent standard, the highest applied under the First Amendment. While lower courts are currently struggling with the breadth and application of *Reed*, at the very least *Reed* teaches, consistent with *Central Hudson* and *Sorrell*, and inconsistent with the District Court's approach below, that content-based regulations of speech, and different speech limits on different speakers, are highly disfavored, and require robust and convincing justifications, which are lacking here.

The *Sorrell* heightened scrutiny standard, applicable to the content- and speaker-based restrictions here on truthful commercial speech, is yet another reason why summary judgment should have been granted and Missouri's Challenged Advertising Laws should have been ruled unconstitutional.

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IV. THE CHALLENGED STATUTE VIOLATES THE FIRST AMENDMENT BECAUSE IT COMPELS SPEECH AND ASSOCIATIONS.

The Challenged Statute, including and RS Mo. § 311.070.1, takes the highly unusual approach of dictating the content of advertising by Missouri alcohol distributors and retailers. It does not do so to prevent fraud or consumer protection; the covered advertising is truthful and non-deceptive.

The Challenged Statue provides that a distiller, winemaker, brewer, or wholesaler (hereinafter "producer/wholesaler") can only advertise the names and addresses of retail businesses selling its products when (1) the names and addresses of at least two or more unaffiliated retail businesses are provided; (2) the retail price of the product is not included; (3) the listing of the retail businesses is the only reference to the businesses in the advertisement and (4) the listing is relatively inconspicuous. For example, because the following advertisement would likely violate at least prongs (1) and (2) of the Challenged Statue (RS Mo. § 311.070), a winemaker cannot place a truthful advertisement stating:

> ***"You can find our new 2015 Missouri Norton at The Delightful Wine Shop for only $15.99 a bottle***."

The statute requires the following changes to this truthful advertisement:

> ***"You can find our new 2015 Missouri Norton at The Delightful Wine Shop ~~for only $15.99 a bottle~~ and also at Joe's Hangout Liquor Store***."

This blatant content censorship and compelled speech is unconstitutional.

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A. The First Amendment Protects Against Compelled Speech Content and Associations.

"The First Amendment creates 'an open marketplace' in which differing ideas about political, economic, and social issues can compete freely for public acceptance without government interference." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2288 (2012). "The government may not prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas that it approves." *Id.* That is, the First Amendment protects "the decision of both what to say and what not to say." *Id.* (internal citation omitted). Similarly, the First Amendment provides the right to decide who one associates (or does not associate with) "for the purpose of expressing commonly held views." *Id.* Laws that contradict these basic notions are subject to "exacting First Amendment scrutiny." *Id.* at 2289. These principles are not limited to political or ideological speech, and extend even to "mundane" commercial speech—such as mushroom advertising in *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), or alcohol advertising, as in the present case. *Knox*, 132 S. Ct. at 2288-89 (discussing *United Foods*).

In *United Foods*, the Supreme Court held that the First Amendment does not permit state-compelled advertising content in order to discourage one product and encourage another. There, mushroom producers challenged a federal law that required them to pay a financial assessment to be used for "projects of mushroom promotion, research, consumer information, and industry information," to benefit

the mushroom industry. 533 U.S. at 408. Most of the assessed revenue was spent on advertising to promote mushroom sales. *Id*.

United Foods objected to paying the assessment. The Supreme Court, applying strict scrutiny, found the regulation unconstitutional, because the First Amendment prevents the government from compelling persons to express certain views, or from compelling certain persons to pay for speech to which they object. *Id.* at 410, 414-16.

B. The Challenged Statute Impermissibly Compels and Censors Advertising Content, and Improperly Mandates an Advertiser To Associate with a Competitor.

The Challenged Statute is unconstitutional under *Knox* and *United Foods*. The statute forces producers/wholesalers to associate with at least two retailers, prohibiting them from associating with only the one of their choice. Thus, the Challenged Statute violates producers/wholesalers' right to freedom of association. *See Knox*, 132 U.S. at 2288-89. In addition, the Challenged Statute compels speech. Its forces, an advertiser that wants to feature one retailer to advertise a different retailer that it does not want to feature. This is closely similar to *United Foods*, where United Foods was forced to pay for an advertising message with which it did not agree. (Finally, in yet another heavy-handed step, the statute censors the ad by stripping it of truthful price information.)

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The District Court's and Defendants' only answer is to essentially argue that the Challenged Statute doesn't compel speech, because producers/wholesalers can simply choose to remain silent and not advertise at all. (*See* JA-261 (Opinion); JA-207 (Defs. Opp. to MSJ)). This is no answer under the First Amendment. The government cannot prohibit speech unless the speaker says what the government wants it to say.

In *Wooley v. Maynard*, 430 U.S. 705 (1976), the Supreme Court found New Hampshire's statute making it a crime to obscure the words "Live Free or Die" on state license plates. (Under the District Court's reasoning, this would not have been compelled speech, because New Hampshire residents could simply have decided not to drive a car.) Similarly, in *Pacific Gas and Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1986), the Supreme Court found that California could not force Pacific Gas to include in its in its mailings to consumers a government-written message, which it did not agree with, and which were designed to counteract the utilities' own newsletter. (Pacific Gas, of course, could have avoided the entire issue by terminating its newsletter, but self-censorship is not a satisfactory answer to illegal government actions.). The Supreme Court prohibited the compelled government speech in *Pacific Gas*.

Because the Challenged Statute dictates who an advertiser must associate with in order to advertise (at least two retailers) and forces the advertiser to add

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state-required content (the identity of the second retailer), it fails under the First Amendment. Summary judgment should have been granted as to the Challenged Statute on this additional ground.

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V. THE COURT ERRED BY ENTERING JUDGMENT FOR DEFENDANTS.

The District Court clearly erred in granting judgment to Defendants. The District Court purported to reconsider and grant Defendants' motion to dismiss (which had earlier been properly denied), but it actually effectively granted a summary judgment motion that Defendants never made.

The Court clearly did not rule based on Defendant's previous Motion to Dismiss. Defendants moved to dismiss on grounds of (1) abstention, (2) standing, (3) that the challenged statute does not implicate the First Amendment, and (4) that the challenged regulations are "time, place and manner" restrictions. (JA-59-70). The District Court did not rule on any of these grounds. If it were a ruling on the motion to dismiss, the Court's decision is erroneous and reversible, since it did not fairly address the substance or arguments of the motion.

In reality, the District Court ruled as if the State had moved for summary judgment. It clearly considered matters outside of the pleadings, such as the Kuo study. (*See* JA-254, -55, and -57). Thus, the dismissal should be treated as summary judgment. *See*, *e.g.*, *Kuhn v. Nat'l Ass'n of Letter Carriers, Branch 5*, 528 F.2d 767, 770 n. 4 (8th Cir. 1976) (treating dismissal as summary judgment because matters outside the pleadings were considered). It was improper for the District Court to grant summary judgment to defendants, since Plaintiffs were entitled to additional notice before a grant of summary judgment. *See* Fed. R. Civ.

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P. 56(f). Moreover, summary judgment for Defendants, without even a motion by them or an opportunity for Plaintiffs to be heard in opposition, was manifestly erroneous. Even if Plaintiffs did not prevail on their limited summary judgment motion, they still should have had the opportunity to present their full case at trial.[10]

[10] Plaintiffs did not raise on their summary judgment motion all evidence that they would raise at trial. At trial, Plaintiffs would raise further evidence, including, for example, their own testimony about the effects on them of the Challenged Advertising Laws and cross-examination of Defendants, including Defendant Lafayette Lacy, the State Supervisor of Liquor Control (whose deposition testimony revealed that the state had no explanation for Missouri's "three tier" system other than, essentially, because that's the way it has always been done). Also, Plaintiff should have had the ability to try its claim that the Challenged Advertising Laws were being enforced unequally, which clearly raises issues of disputed fact. (*See* JA-32, ¶¶ 53-75). By dismissing the case, however, the District Court prevented Plaintiffs from trying those claims.

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CONCLUSION

Because summary judgment should have been granted to Plaintiffs, Plaintiffs request that this Court reverse the judgment of the District Court, and remand the case with instructions to enter judgment in Plaintiffs' favor, and for appropriate post-judgment proceedings. *See Republican Party of Minn. v. White*, 416 F.3d 738, 744-45 (8th Cir. 2005) (en banc) (reversing summary judgment in favor of appellees, and ordering district court to enter summary judgment in favor of appellants, in First Amendment case).

Alternatively, this Court should reverse the District Court's judgment and remand for further proceedings, because the decision below did not address the issues raised in the motion to dismiss, and was procedurally improper as a summary judgment for Defendants.

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 13,658 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 has been scanned for viruses and is virus-free.

/s/ Mark Sableman
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June 20, 2016

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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 persons this 20th day of June 2016.

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