Case No. 16-2006

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MISSOURI BROADCASTERS ASSOCIATION, et al.,

***Plaintiffs-Appellants*,**
v.
LAFAYETTE E. LACY, State Supervisor of Liquor Control, and CHRIS KOSTER, Attorney General of the State of Missouri,

***Defendants-Appellees*.**

Appeal from the United States District Court
Western District of Missouri,
The Honorable Fernando J. Gaitan Jr.

APPELLEES' BRIEF

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Summary of the Argument and Request for Oral Argument

The State of Missouri has enacted the Liquor Control Law pursuant to the authority granted to the states by the Twenty-first Amendment to the United States Constitution. Chapter 311 RSMo. The State Supervisor of Liquor Control has promulgated regulations pursuant to statutory authority for the purpose of implementing this Chapter.

The plaintiffs brought suit against the Supervisor and Attorney General in their official capacities. They alleged that a subsection of the statute and two regulations were facially in violation of the First Amendment of the United States Constitution. The statute and regulations plaintiffs challenged relate to commercial speech by persons or entities licensed by the State pursuant to Chapter 311 RSMo.

The District Court dismissed plaintiffs' complaint for failure to state a claim. Plaintiffs' appeal and their facial challenge, that would strike the statute and regulations in their entirety, implicate significant interests of the State of Missouri. For this reason, the State requests oral argument; twenty minutes would be sufficient.

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Statement of the Issues Presented for Review

1. Whether the District Court correctly denied plaintiffs' motion for summary judgment that State regulations 11 C.S.R. 70-2.240(5)(G) and 11 C.S.R. 70-2.240(5)(I) and § 311.070.4(10) RSMo are facially in violation of the First Amendment because plaintiffs had not established that they were entitled to judgment as a matter of law under the standard enunciated by the Supreme Court in *Central Hudson.*

Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, 447 U.S. 557 (1980)

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

North Dakota v. United States, 495 U.S. 423, 432 (1990)

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2. Whether the District Court correctly dismissed plaintiffs' complaint as insufficient to state a claim that (1) Missouri administrative regulations 11 C.S.R. 70-2.240(5)(G) and 11 C.S.R. 70-2.240(5)(I), restricting aggressive advertising techniques such as discount pricing of alcoholic beverages, and (2) § 311.070.4(10) RSMo, which is part of a statute that generally forbids financial ties between

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separate tiers of the alcoholic beverage industry, are facially in violation of the First Amendment under the standard enunciated by the Supreme Court in *Central Hudson.*

Washington State Grange v. Washington State Republican Party, 552 U.S. 442 (2008)

1-800-411-Pain Referral Service, LLC v. Otto, 744 F.3d 1045 (8th Cir. 2014)

Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, 447 U.S. 557 (1980)

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Statement of the Case and Relevant Facts

Plaintiffs brought suit against the State Supervisor of Liquor Control and the Attorney General of the State of Missouri, in their official capacities (State). Joint Appendix (J.A.) pp. 13-14.

Plaintiffs' complaint contended that Missouri regulations 11 C.S.R. 70-2.240 (5)(G) and 11 C.S.R. 70-2.240(5)(I) and Missouri statute § 311.070.4(10) RSMo are facially unconstitutional restrictions on commercial speech in violation of the First Amendment. J.A. pp. 32, 34, 35 and 245. State regulation 11 C.S.R. 70-2.240(5)(G) provides that advertisements for alcoholic beverages shall not contain statements offering coupons, prizes, rebates, sales prices below cost, or discount as an inducement to purchase intoxicating liquor. J.A. pp. 40 & 245. State regulation 11 C.S.R. 70-2.240(5)(I) provides that advertisements for alcoholic beverages shall not contain a price below the retailer's actual cost. J.A. pp. 40 & 245.

Section 311.070.4(10) RSMo provides that manufacturers and wholesalers of alcoholic beverages may list in an advertisement the names and addresses of two or more unaffiliated retail businesses selling its product if (1) the advertisement does not contain the retail

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price of the product, (2) the listing of the retail businesses is the only reference to the businesses in the advertisement, (3) the listing of the businesses is relatively inconspicuous, and (4) the advertisement does not refer to only one retail business or to a business that is controlled directly or indirectly by the same retail business. J.A. pp. 46 & 245.

The statute does not apply to advertising by a retailer. It applies to manufacturers and wholesalers. Subject to the above restrictions, it allows them to list retail business in their advertising without being in violation of § 311.070.1 RSMo which prohibits manufacturers and wholesalers from having financial interests in retail sales and from, directly or indirectly, loaning, giving away or furnishing equipment, money, credit, or property of any kind. J.A. pp. 43, 245-6 & 261.

The District Court denied the plaintiffs' motion for summary judgment. In so doing the District Court did not accept as "undisputed facts" much of what plaintiffs include in their statement of the case.

> "[A]s discussed in defendants' opposition to the motion for summary judgment, plaintiff's statement of undisputed material facts contains many statements that are actually hearsay or conclusions without a factual basis. See Doc. Nos. 51 and 52, ¶¶

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13-32. Included in these purported undisputed facts are claims from the MBA that certain of its unnamed members would have accepted advertising from unnamed third party wholesale or retail sellers of alcohol that would violate the statutes (Doc. No. 51 at ¶ 13-16); hearsay descriptions of investigations undertaken by Division of Alcohol and Tobacco Control related to non-parties to this action. (Doc. No. 51 at ¶¶ 18-22); legal conclusions regarding application of the challenged regulations and statutes (Doc. No. 51 at ¶¶ 23-27); printouts of Groupon advertisements sent to plaintiffs' counsel in this case (Doc. No. 52 at ¶¶ 28-29); and unsupported hearsay claims that the state does not enforce these regulations against Internet advertisements (Doc. 51 at ¶¶ 30-32). The Court, therefore, does not consider these assertions as 'undisputed facts.'" J.A. p. 243.

The District Court found that the stated purpose of Missouri's Liquor Control Law is "to promote responsible consumption, combat illegal underage drinking and . . . maintaining an orderly market place." § 311.015 RSMo. J.A. p. 251. The advertising regulations promulgated pursuant to this law that are challenged by plaintiffs do

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not ban ads for liquor, do not ban ads stating the price of liquor. And according to the State's evidence, the regulations have not been interpreted to ban all references to the availability of sales or discount prices---ads can say "Specials," "Happy Hour," and "Ladies Night." J.A. pp. 212 & 257. And inside retail businesses ads for sales and promotion may state the price. J.A. pp. 213 & 257.

In addition to the above evidence as to how State law has been interpreted by the Division of Liquor Control, the State offered a study generally supporting the link between advertising and promotion of discount liquor prices and an increased rate of alcohol abuse in the form of binge drinking. J.A. p. 215. Plaintiffs did not offer contrary evidence in either their original motion for summary judgment or their reply to the State's response. J.A. pp. 139-186 & 223-242.

The District Court denied plaintiffs' motion for summary judgment, holding that the state regulations and statute did not violate the First Amendment. J.A. pp. 259 & 262. The District Court *sua sponte* reconsidered the court's earlier denial of the State's motion to dismiss for failure to state a claim and, for the most part, dismissed plaintiffs' complaint. J.A. pp. 259 & 262. After further briefing on a limited issue,

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the District Court dismissed plaintiffs' complaint in its entirety. J.A. pp. 301-304.

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Summary of the Argument

The District Court denied the plaintiffs' motion for summary judgment and granted the State's motion to dismiss for failure to state a claim. In addressing these motions the District Court applied the four-part test regarding the First Amendment's application to commercial speech adopted by the Supreme Court in *Central Hudson*.

Under *Central Hudson* certain regulation of commercial speech may be permissible, including restriction of some forms of aggressive sales practices that may exert undue influence over consumers. That is the purpose of the State's regulations, which do not address liquor ads in general, prices in general, or even the availability of discounts in general. Instead, the State's focus is on advertisements that promote and emphasize the discount as an inducement to purchase alcohol. This is consistent with the State's purposes to promote responsible consumption of alcohol, combat illegal underage drinking, and maintain an orderly marketplace. Promoting responsible consumption is substantially different than goals of other states, which have asserted an interest in reducing consumption of alcohol in general.

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Although this appeal comes to this court on the basis of rulings on motions to dismiss and for summary judgment, plaintiffs' argument treats this case as if it had been tried on the merits. For instance, in addressing the challenged regulations regarding ads of discount prices for alcoholic beverages, the plaintiffs concede that the State has a substantial interest at stake but then argue that the State's evidence was insufficient to meet its burden. See Appellants' Brief pp. 19, 21. But the evidence was submitted in response to the plaintiffs' motion for summary judgment. In considering such a motion, a court may not resolve factual disputes. It may only determine whether there is a factual dispute that demonstrates the inappropriateness of summary judgment. Plaintiffs' argument, therefore, does not address the State's evidence in a proper context and under a proper standard.

Moreover, plaintiffs do not address the sufficiency of their evidence to support their motion for summary judgment. As noted above, the District Court did not accept as undisputed facts much of what the plaintiffs submitted. J.A. p. 243. The plaintiffs' motion for summary judgment did not establish the absence of a genuine issue of fact as to whether the regulations and statute directly support the

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State's interests and whether there is a reasonable fit between the regulations and statute and the interests. In reviewing the record presented on a summary judgment motion, a court must view the evidence in the light most favorable to the nonmoving party and drawing all reasonable inferences in its favor. The District Court correctly applied this standard and denied plaintiffs' motion for summary judgment.

Having ruled on the matter of summary judgment, the District Court reconsidered the earlier ruling on the State's motion to dismiss for failure to state a claim. (The earlier order on the motion to dismiss had actually reserved ruling on whether the plaintiffs' complaint stated a claim for relief.) The District Court granted the motion and dismissed all of plaintiffs' claims.

Because plaintiffs pled a facial challenge to the State's statute and regulations, they undertook the burden of demonstrating that there is no set of circumstances under which the statute and regulations would be constitutionally valid. The District Court correctly applied the four part test of *Central Hudson*. Plaintiffs argue that the *Central Hudson* test has been superseded by later Supreme Court decisions. But these

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decisions do not explicitly overrule *Central Hudson*. Nor do these decisions explicitly adopt and explain a new standard to be applied. *Central Hudson* is still the appropriate standard to be applied in this case.

There is no dispute as to the first two elements of the *Central Hudson* test, since plaintiffs now concede that the State has a substantial interest in promoting responsible consumption of alcoholic beverages. As to the third and fourth elements, the plaintiffs did not allege that the State's statute and regulations would be unconstitutional under all circumstances. The statute and regulations are not the sort of total and absolute bans on advertising that the Supreme Court has struck down in *Central Hudson* and other cases. The Supreme Court has indicated that in the area of commercial speech, the First Amendment allows some restrictions that would not be constitutional in matters of non-commercial speech. Such restrictions of commercial speech must directly support a substantial state interest and must be reasonably and narrowly drawn in support of that interest.

In this case, the State's interest is narrower than has been identified in other cases. And that the regulations and statute plaintiffs

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challenge are narrower than those that have been struck down in other cases. In denying plaintiffs' motion for summary judgment, the District Court correctly concluded that the State's evidence demonstrated that the regulations and statute directly advanced the State's interests and were reasonably and narrowly tailored to the State's interests.

Given the nature of the State's interests and the fact that the regulations and statute are not absolute bans as plaintiffs claim, plaintiffs failed to allege any basis for their facial challenge. Plaintiffs failed to identify any reasons that the State's statute and regulations would be unconstitutional under all circumstances. Plaintiffs failed to state a claim of facial invalidity.

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Standard of Review

Plaintiffs' complaint was dismissed for failure to state a claim upon which relief can be granted. This is reviewed *de novo*. *Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990). In reviewing whether a complaint states a cause of action, the court assumes as true only well-pleaded factual allegations. 901 F.2d at 1488. The court rejects "conclusory allegations of law and unwarranted inferences." *Silver v. H.& R. Block*, 105 F.3d 394, 397 (8th Cir.1997). And the court accords substantial deference to the district court's interpretation of state law. 901 F.2d at 1488.

Plaintiffs' complaint is a facial challenge to a statute and two regulations. Advancing a facial challenge requires a plaintiff to establish that there is no valid application of the law or that it has no plainly legitimate sweep. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008); *1-800-411-Pain Referral Service, LLC v. Otto*, 744 F.3d 1045, 1060 (8th Cir. 2014).

This Court may also affirm the judgment on any basis appearing in the record, not just those identified by the district court. *H & Q*

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Properties, Inc. v. Doll, 793 F.3d 852, 857 n. 5 (8th Cir. 2015), *Gamradt v. Federal Laboratories, Inc.*, 380 F.3d 416, 419 (8th Cir. 2004).

The District Court also denied plaintiffs' motion for summary judgment. Although a denial of summary judgment is not always appealable, to the extent that the court of appeals has jurisdiction the denial is reviewed *de novo*, applying the same standard that governed the district court. *Collins v. Bellinghausen*, 153 F.3d 591595 (8th Cir. 1998). A summary judgment is appropriate where the movant establishes that there is no disputed issue of material fact and the moving party is entitled to judgment as a matter of law. *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-7 (1986); *Murr Plumbing Inc. v. Scherer Brother Financial Services*, 48 F.3d 1066, 1069 (8th Cir. 1995). The nonmoving party's evidence "is to be believed and all justifiable inferences are to be drawn in that party's favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Lower Brule Sioux Tribe v. State of South Dakota*, 104 F.3d 1017, 1021 (8th Cir. 1997)(facts and inferences from those facts are viewed in the light most favorable to the nonmoving party).

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Argument

The *Central Hudson* Test Applies To Plaintiffs' Claims.

Plaintiffs' claims regarding the State regulations deal with commercial speech—ads regarding alcoholic beverages. While the First Amendment protects commercial speech, the nature of the protection is different than non-commercial speech. "Our decisions have recognized the 'commonsense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation and other varieties of speech. . . . The Constitution therefore accords a lesser protection to commercial speech." *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York,* 447 U.S. 557, 562-3 (1980).

As a result, "the State may regulate some types of commercial advertising more freely than other forms of protected speech. . . . it may restrict some forms of aggressive sales practices that have the potential to exert 'undue influence' over consumers." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 498 (1996). When a State regulates commercial messages to protect consumers from . . . aggressive sales practices . . .

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the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech." 517 U.S. at 501.

The Supreme Court devised a four part test to analyze restrictions on commercial speech. First, in order to be protected by the First Amendment at all, the commercial speech must concern a lawful activity and not be misleading. Second, the government must identify a substantial interest served by the regulation. Third, the regulation must directly advance the government's interest. Fourth, the regulation should be no more extensive than necessary to serve the government's interest. *Central Hudson*, 447 U.S. at 566. Later cases have characterized this test as "intermediate scrutiny." *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 623 (1995). This was the test applied by the District Court. J.A. pp. 250-259.

Plaintiffs argue that this is erroneous because the *Central Hudson* test has been superseded. The two decisions plaintiffs principally rely upon are *Sorrell v. IMS Health Inc.*, 131 S.Ct. 2653 (2011) and *Reed v. Town of Gilbert, Arizona*, 135 S.Ct. 2218 (2015). According to plaintiffs: (1) *Sorrell* adopts a standard of "heightened scrutiny" instead of the "intermediate scrutiny" of *Central Hudson* and (2) *Reed* adopts a test of

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strict scrutiny. However, neither decision explicitly overrules *Central Hudson* or enunciates a new standard to be applied to claims regarding commercial speech. The Supreme Court "does not normally overturn, or so dramatically limit, earlier authority *sub silentio*." *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000). Plaintiffs read far too much into *Sorrell* and *Reed*.

While *Sorrell* dealt with commercial speech, it was not the sort of commercial speech as in this case—advertising. *Sorrell* addressed a state statute restricting pharmaceutical companies from using information on the prescribing practices of doctors, obtained from pharmacists, for purposes of marketing the companies' products to doctors. 131 S.Ct. at 2261-2. But here, like in *Central Hudson*, we are concerned with commercial speech in the form of advertising. "The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation." *Central Hudson*, 447 U.S. at 563. Because the nature of the commercial speech in *Central Hudson* is the same type as in this case, *Central Hudson* controls.

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Also, *Sorrell* does not specifically define the term "heightened scrutiny." *1-800-411-Pain Referral Service, LLC v. Otto*, 744 F.3d 1045, 1055 (8th Cir. 2014). See also, *United States v. Caronia*, 703 F.3d 149, 164 (2nd Cir. 2012)(The *Sorrell* Court "did not decide the level of heightened scrutiny to be applied, that is, strict, intermediate, or some other form of heightened scrutiny.") Plaintiffs do not explain exactly what "heightened scrutiny" means, or even demonstrate that it is something different from "intermediate scrutiny." Although *Sorrell* mentions "heightened scrutiny," it actually applied *Central Hudson*. Similarly, this Court relied upon *Central Hudson* even after *Sorrell*. *1-800-411-Pain Referral Service, LLC v. Otto*, 744 F.3d at 1055("The upshot [of *Sorrell*] is that when a court determines commercial speech restrictions are content-or-speaker-based, it should then assess their constitutionality under *Central Hudson*.")

On the other hand, *Reed* does not directly concern commercial speech and does not even mention, much less overrule, *Central Hudson*. See *Geft Outdoor LLC v. Consolidated city of Indianapolis*, 2016 WL 2941329 (S.D. Ind., May 20, 2016). For that reason the majority of courts to have considered *Reed* in a commercial speech context have

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continued to apply *Central Hudson*. *Id*. at p. 10; *Massachusetts Association of Private Career Schools v. Healy*, 2016 WL 308776 (D. Mass., January 25, 2016) at 10-11(*Sorrell* and *Reed* do not overrule or diminish the Supreme Court's well-established principles regarding the First Amendment and commercial speech).

Central Hudson has direct application to the facts and issues in this case. Even if we assume that *Central Hudson* has been called into question by *Sorrell* and *Reed*, it has not been directly overruled. As a result, *Central Hudson* is still controlling and should be followed by lower courts until the Supreme Court exercises its prerogative of overruling its own decisions. *Agostini v. Felton*, 521 U.S. 203, 237 (1997).

In order to properly apply the *Central Hudson* test for purposes of the motion for summary judgment and the motion to dismiss, it is essential to have a proper understanding of what the State regulations do and, most importantly, what they do not do. Plaintiffs fail to draw this distinction. Sometimes, they cite language from another case that is broader than the facts here, thereby implying that there is no difference. "Wholesale suppression of truthful, nonmisleading

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information." Plaintiffs' Brief p. 19. "Advertising bans in every situation." Plaintiffs' Brief, p. 27. Plaintiffs also mischaracterize the District Court's order as dealing with "a ban on alcoholic beverage price and discount advertising." Plaintiffs' Brief, p. 33. But Missouri law does not ban all advertising of alcoholic beverages. *Brown-Foreman Distillers Corp. v. Stewart*, 520 S.W.2d 1, 10 (Mo. banc 1975). Nor is there a ban on the advertising of prices of alcohol. State regulations 11 C.S.R. 70-2.240(5)(G) and 11 C.S.R. 70-2.240(5)(I) provide, in part, that advertisements shall not contain offers of discount prices or prices below a retailer's cost. J.A. pp. 40 & 245. Thus, the regulations do not prohibit ads that contain the regular price for alcoholic beverages.

The District Court agreed with the State that plaintiffs' characterization of the regulations as total bans on advertisements were incorrect. J.A. p. 257. The "regulations do not ban ads for liquor, do not ban ads stating the price of liquor, do not ban all references to the availability of sales or discount prices (indeed, advertisements can say 'Specials,' 'Happy Hour,' and 'Ladies Night'), and within a retail establishment advertisements of sales and promotions may state the price of the alcohol." *Id.*; J.A. pp. 212-13. Plaintiffs did not submit

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anything to contradict this description of the State's regulations. Thus, the regulations plaintiffs challenge are more narrow and limited than their arguments imply.

I. The District Court Correctly Denied Plaintiffs' Motion for Summary Judgment.

A. It Was Assumed That Plaintiffs' Claims Dealt With Truthful, Nonmisleading Advertising.

The first part of the *Central Hudson* test is to determine whether the advertising concerns a lawful activity and is not misleading. *Central Hudson*, 447 U.S. at 566. Because plaintiffs asserted a facial challenge to the state regulations there was no specific advertisement to review. As a result, the State assumed for purposes of the motion for summary judgment (as it had for its earlier motion to dismiss) that the plaintiffs had satisfied the first *Central Hudson* factor. J.A. p. 202.

But in particular cases it may sometimes be difficult to draw the line between truthful and misleading advertisements. Plaintiffs themselves identified such a situation. Plaintiffs noted that advertising of price discounts "could be considered standard pricing in today's age of pervasive discounting." Plaintiffs' Brief pp. 35-6. In other words, if a

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business uses a "discount" price so much, it might in reality be its standard price. As noted above, the State's regulations do not make it illegal to advertise a business' regular prices. J.A. p. 212. But if a business takes its standard price and promotes it as a discount, then it is certainly misleading—similar to the perpetual going out of business sale. But because this case is a facial challenge, we must accept as an abstract matter that the advertising concerns legal activities and is not misleading.

The District Court accepted that the first factor of *Central Hudson* had been satisfied. J.A. p. 250.

B. The State Has A Substantial Interest

The second element of *Central Hudson* is whether the State has asserted a substantial interest to justify its regulations. The District Court noted that plaintiffs had not asserted in their motion for summary judgment that the State did not have a substantial interest in this case. J.A. p. 251. The District Court noted, however, that in their reply suggestions plaintiffs stated that they did not concede that maintaining an orderly marketplace was a substantial interest. *Id.*

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Here the Missouri General Assembly has identified the State's interests in enacting the Liquor Control Law—"to promote responsible consumption, combat illegal underage drinking, and maintaining an orderly marketplace composed of state-licensed alcohol producers, importers, distributors and retailers." § 311.015 RSMo Supp. 2013. Although plaintiffs now apparently concede the first two interests, Plaintiffs' Brief pp. 18-19, some discussion of the goal of responsible consumption is appropriate.

Missouri law does not ban all alcohol advertising. *Brown-Foreman Distillers Corp. v. Stewart*, 520 S.W.2d 1, 10 (Mo. banc 1975). There is no state policy, therefore, against the promotion of the sale of alcohol. There are also certain statutory provisions that allow wineries, distillers and microbreweries to secure a license to sell on or near their facilities. §§ 311.070.1, 311.190.4 & 311.195.3 RSMo. Sections 311.070.1, 311.070.11, and 311.070.12 RSMo identify the rationale for these provisions as the "promotion of tourism." Looking at the provisions of the State's liquor laws in general, the term "responsible consumption" does not refer to a reduction in levels of alcohol consumption marketwide, as in *44 Liquormart*. Rather, it refers to

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consumption in a manner that reduces the risks of dangerous alcohol abuse, such as binge drinking.

Even before § 311.015 RSMo explicitly identified the State's goal of maintaining an "orderly marketplace," Missouri's Liquor Control Law reflected "a legislative intent to preclude a licensee in one phase of the liquor traffic from controlling other separate and distinct phases of the liquor traffic, thereby controlling traffic in liquor in its entirety." *Brown-Foreman Distillers Corp.*, 520 S.W.2d at 7. A state's authority to structure its liquor industry is derived from the Twenty-first Amendment to the U.S. Constitution. *Granholm v. Heald*, 544 U.S. 460, 488 (2005). The Twenty-first Amendment gives "special protection to . . . state liquor control policies" and the policies are "supported by a strong presumption of validity and should not be set aside lightly." *North Dakota v. United States*, 495 U.S. 423, 432 (1990). The State's interest in organization of the liquor industry has been recognized by this Court. *Southern Wine & Spirits of America, Inc. v. Division of Alcohol & Tobacco Control*, 731 F.3d 799, 808-11 (8th Cir. 2013). The plaintiffs' argument that the State does not have a substantial interest in promoting an orderly marketplace is superficial at best.

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Plaintiffs argue that in *North Dakota* the Supreme Court only finds a state's interest in regulating the liquor industry to be "legitimate." Plaintiffs' Brief p. 42. They assert that this is different from a "substantial" state interest for purposes of applying *Central Hudson*. But *North Dakota* was not a First Amendment case and the Court there had no reason to apply *Central Hudson* or use its terminology. Plaintiffs' conclusion that a "legitimate" state interest is not "substantial" simply infers too much from cases that are not analogous.

Plaintiffs recognize that both *North Dakota* and *Southern Wine* rely on the states' "virtually complete control" under the Twenty-first Amendment over liquor distribution within their jurisdiction. But they argue, citing *44 Liquormart*, that this complete control does not exist where the First Amendment is at stake. While the Supreme Court held that the Twenty-first Amendment does not limit or qualify the protections of the First Amendment, it did not hold that a state's interests under the Twenty-first Amendment do not amount to a substantial state interest for purpose of First Amendment analysis. Instead, it held that the state could not establish that its ban on

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advertising alcohol prices was not more extensive than necessary because other regulations would be more likely to achieve the state's goal of promoting temperance. *44 Liquormart*, 517 U.S. at 507. Even though Rhode Island's view of "temperance" was different than Missouri's , promoting temperance, along with promoting an orderly market, is "within the core of the State's power under the Twenty-first Amendment." *North Dakota*, 495 U.S. at 432. As a result, "the special protection afforded to state liquor control policies by the Twenty-first Amendment" (*Id*. at 433) should surely constitute a substantial state interest for purposes of applying *Central Hudson*.

The other cases cited by plaintiffs are equally unavailing.

The decision in *Authentic Beverages Co. v. Texas Alcoholic Beverage Comm'n*, 835 F.Supp. 2d 227 (W.D. Tex. 2011) was not based upon a conclusion of law that the state did not have a substantial interest in regulating different levels of the liquor industry. Indeed, the court stated that prevention of vertical integration among levels of the liquor industry may well be a substantial state interest. *Id*. at 243. Its decision, however, was based upon the court's low opinion of the performance of the Commission's attorney. *Id*. at 244 & 247.

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Similarly, the 9th Circuit did not conclude there was no substantial state interest in preventing vertical integration of the liquor industry. *Retail Digital Network, LLC v. Appelsmith*, 810 F.3d 638, 652 (9th Cir. 2016). Instead, the court acknowledged that "the State's goal of suppressing a particular commercial structure, rather than a particular commercial message, remains valid." The court remanded to the district court in order to determine whether the particular statute regarding advertising payments to retailers directly and materially advances the state's interest. This is an application of the third and fourth factors of *Central Hudson*, not a conclusion that the state did not have a substantial interest under the second factor.

The District Court correctly concluded that the State had a substantial interest in promoting responsible consumption of alcohol, combatting illegal under-age drinking and maintaining an orderly marketplace in the liquor industry.

C. The State Statute and Regulations Directly Advance The State Interests

The District Court considered the plaintiffs' challenges to 11 C.S.R. 70-2.240(5)(G) and 11 C.S.R. 70-2.240(5)(I), separately from

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plaintiffs' challenge to Section 311.070.4(10) RSMo. J.A. p. 249-50. The two regulations, providing that advertisements for alcoholic beverages shall not contain statements offering coupons, prizes, rebates, sales prices below cost or discount as an inducement to purchase intoxicating liquor, are categorically different from the challenge to § 311.070.4(10) which is not a limitation on advertising discount prices. J.A. p. 249-50. Rather the statute provides a manner in which manufacturers and wholesalers of alcoholic beverages may list in an advertisement retail businesses selling its product, a party in a different tier of the State's liquor industry.

The State will similarly treat the regulations separately from the statute.

1. State Regulation 11 C.S.R. 70-2.240(5)(G) and State Regulation 11 C.S.R. 70-2.240(5)(I)

In opposition to plaintiffs' motion for summary judgment the State submitted a study from the American Journal of Preventive Medicine entitled *The Marketing of Alcohol to College Students—The Role of Low Prices and Special Promotions*. J.A. 215. The results of the study were that "the availability of large volumes of alcohol. . . low sales prices, and

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frequent promotions and advertisements. . .were associated with higher binge drinking rates on the college campuses." J.A. 215. The study concluded that the "regulation of marketing practices such as sales prices, promotions and advertisements may be important strategies to reduce binge drinking and its accompanying problems." J.A. 215.

The District Court concluded, on the basis of the study and commonsense, that there is a logical connection between the restrictions on discount price advertising and the State's interests, and that those restrictions will alleviate those harms to a material degree. J.A. p. 255. The District Court noted that the Supreme Court had permitted a state to meet its burden by studies, anecdotes, history, consensus, or "simple common sense." J.A. 254 (citing *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001). See also *Missouri ex rel. Nixon v. American Blast Fax, Inc.*, 323 F.3d 649, 654 (8th Cir. 2003). *Central Hudson* also relied upon a commonsense link between the state's interest in energy conservation and a ban on advertising electricity. 447 U.S. at 569 ("There is an immediate connection between advertising and demand for electricity. *Central Hudson* would not contest the advertising ban unless it believed that promotion would increase its sales.") The District Court similarly

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found that the plaintiffs would not have challenged these regulations unless they believed it would benefit them through increased sales. J.A. p. 255.

Other courts have also recognized the "commonsense" link between advertising and demand.

The Fourth Circuit concluded that it would be counterintuitive for retailers to spend money of advertisements that do not increase demand for their product. *Educational Media Co. v. Swecker*, 602 F.3d 583, 590 (4th Cir. 2010).[1]

In *Pitt News v. Pappert*, 379 F.3d 96 (3rd Cir. 2004) the Third Circuit did not reject, as plaintiffs seem to imply (Brief p. 26), the application of commonsense in considering a claim under *Central Hudson*. Instead, then Judge (now Justice) Alito, writing for the court, stated that "we do not dispute the proposition that alcoholic beverage advertising in general tends to encourage consumption, and if [the

[1] Plaintiffs note that the ban in *Swecker* was later held unconstitutional. *Educational Media Co. v. Insley*, 731 F.3d 291, 294 (4th Cir. 2013). But the later case was an as-applied challenge. The original case was a facial challenge, as is plaintiffs.'

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statute] had the effect of greatly reducing the quantity of alcoholic beverage ads viewed by underage and abusive drinkers on the Pitt campus, we would hold that the third prong of the *Central Hudson* test was met." 379 F.3d at 107. But the court noted that the restriction at issue applied only to media associated with educational institutions. Thus, Pitt students could see advertisements for alcohol in all other forms of media. It was this extreme under-inclusiveness of the statute that led the court to strike it down. But in doing so, the court still relied upon commonsense. The court described the state's argument that banning liquor ads in the student newspaper would slacken demand for alcohol as "counterintuitive." *Id*. It also rejected the argument that the ban would make it more difficult to locate establishments near campus where liquor could be purchased. "Common sense suggests that would-be drinkers will have no difficulty find those establishments." *Id.* Thus, the court actually applied, rather than rejected, commonsense.

The Supreme Court also has accepted the commonsense link between advertising and demand for alcoholic beverages. In *Rubin v. Coors Brewing Co*. 514 U.S. 476 (1995) plaintiffs challenged a federal statute that banned beer labels from displaying the alcohol content of

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the beer. 514 U.S. at 483. One of the purposes for this ban was to prevent "strength wars" in which brewers compete for customers on the basis of alcohol content. *Id*. The Supreme Court struck down the statute, and in the process held that it was more extensive than necessary because there were lesser intrusive alternatives. One of these alternatives was "prohibiting marketing efforts emphasizing high alcohol strength." *Id*. 490-1. The Supreme Court recognized, at least indirectly, the commonsense link between advertisements that emphasize certain characteristics of a product and the demand therefore.

The State's regulations, similarly to *Rubin*, restrict advertisements that emphasize the discount prices, or other forms of inducements (prizes, coupons etc.). Ironically, even plaintiffs recognized the link between discounts and demand in the court below. In discussing rebates, plaintiffs said "this explains why manufacturers offer rebates instead of coupons. Consumers think they are getting a discount, and thus purchase or buy in larger quantities, but they really aren't, because they don't redeem the rebate." J.A. p. 298 (emphasis added). Plaintiffs relied upon a study entitled "*Rebate or bait?*" that was

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submitted as an exhibit below but not included in the appendix. The title alone demonstrates the importance of advertising that emphasizes something (discount, rebate, etc.) as "bait" to lure the customer to purchase more. The State's regulations address the sort of "aggressive sales practices that have the potential to exert 'undue influence' over consumers." *44 Liquormart,* 517 U.S. at 498.

The record on the summary judgment motion demonstrates that the State could reasonably believe that the two regulations would directly advance its interest in promoting responsible consumption. In their motion for summary judgment the plaintiffs did not address whether there was an absence of a genuine issue of fact regarding this or any other prong of the *Central Hudson* test. They did not offer any contradictory evidence. Their arguments regarding the Kuo study in the court below, as in this court, merely go to the weight to be given thereto. But in the context of a summary judgment motion a court should not weigh the evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The court must simply determine whether there is a genuine issue of fact that would preclude summary judgment. In doing so, the court must view the evidence in the light most favorable to the non-

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moving party and draw all reasonable inferences in its favor. 477 U.S. at 255. *Lower Brule Sioux Tribe*, 104 F.3d at 1021(facts and inferences from those facts are viewed in the light most favorable to the nonmoving party).

Here the non-moving party is the State and the record must be viewed in the light most in its favor, drawing all reasonable inferences in its favor. Under this standard the District Court did not err in holding that the State had met its burden, for purposes of summary judgment, of showing that the State regulations 11 C.S.R. 70-2.240(5)(G) and 11 C.S.R. 70-2.240(5)(I) directly advanced its substantial interests.

2. Section 311.070.4(10) RSMo Supp 2013

The District Court treated the plaintiffs' challenge to § 311.070.4(10) RSMo separately from the regulations because, unlike the regulations, the overall statute of which subsection 4(10) is a part is not concerned with advertising at all. The general purpose of § 311.070 is to restrict the financial relationships between the various licensees under the various tiers of the liquor industry. *Brown-Foreman Distillers Corp.*, 520 S.W.2d at 7("legislative intent to preclude a

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licensee in one phase of the liquor traffic from controlling other separate and distinct phases of the liquor traffic, thereby controlling traffic in liquor in its entirety.")

Subsection 4(10) is not really a restriction on advertising. Rather it is a limited allowance of advertising by manufacturers and wholesalers that names two or more retailers if (1) the advertisement does not contain the retail price of the product, (2) the listing of the retail businesses is the only reference to the businesses in the advertisement, (3) the listing of the businesses is relatively inconspicuous, and (4) the advertisement does not refer to only one retail business or to a business that is controlled directly or indirectly by the same retail business. The statute does not apply to advertising by a retailer. It applies to manufacturers and wholesalers and allows them to list retail business in their advertising without being in violation of § 311.070.1 RSMo which prohibits manufacturers and wholesalers from having financial interests in retail sales and from, directly or indirectly, loaning, giving away or furnishing equipment, money, credit, or property of any kind to retailers.

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Plaintiffs argue that subsection 4(10) is invalid because it precludes truthful information about prices. Plaintiffs' Brief p. 40. But this statute deals with advertisements by the alcohol producer or wholesaler, not the retailer. It is the retailer, not the producer or wholesaler, that sets the retail prices. (At least that's the way it should be under the three tier system.) Subsection 4(10) is designed to prevent a situation in which a producer or wholesaler offers to include a reference to a retailer in the ad if the retailer will offer a discount price on the producer's or wholesaler's product. The statutory exception is designed to limit this type of influence over another tier of the liquor industry. It is not designed to limit truthful information because the retailer may advertise the prices it charges. J.A. p. 257.

Plaintiffs also argue that subsection 4(10) is invalid because the retailer "being promoted must keep its own profile low." Plaintiffs' Brief p. 40. This raises a couple of questions.

First, because this is an advertisement by the producer or wholesaler, its purpose cannot really be to promote the retailer. That would be indirectly giving property to another separate tier of the

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industry. The purpose of a producer's or wholesaler's ads should be to promote its products.

Second, because this is an advertisement by the producer or wholesaler, how can the retailer "keep its own profile low?" The retailer shouldn't have any say in advertising by the producers of wholesalers. On the other hand, in its own ads a retailer does not have to "keep its own profile low."

Finally, plaintiffs argue that subsection 4(10) is invalid because "incredibly, a competitor of the retailer being promoted must also be mentioned in the ad." Plaintiffs' Brief p. 40. As discussed above, it is not really appropriate for a producer or wholesaler to have the intent to "promote" a retailer. The purpose of producer's or wholesaler's ads should be to promote the sale of its products. Mentioning retailers in the ad may aid in that purpose, but consistently with the separation of the liquor industry into tiers, the purpose of the ad should not be the actual promotion of the retailers. The plaintiffs say that they "simply seek to promote their distinctive products and services as superior to their competitors." Plaintiffs' Brief p. 29. But the "competitors"

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plaintiffs mention here are competitors of producers.[2] Listing two or more retailers in an ad, as stated in subsection 4(10), does not require listing competitors of the producers. Retailers are not the competitors of the producers.

Moreover, it is not compelled speech as claimed by plaintiffs. Subsection 4(10) does not compel any advertisement by liquor producers or wholesalers to mention any retailer at all. It merely provides a manner in which some retailers may be mentioned in ads by producers or wholesalers if they wish.

The District Court agreed that § 311.070.4(10) was not compelled speech. J.F. p. 261. As a limited allowance of ads by producers and wholesalers that mentioned retailer, the District Court concluded that it directly served the State's interest of maintaining an orderly marketplace by limiting monetary transactions between the separate tiers of the industry. J.F. pp. 261-2. The State met the third prong of *Central Hudson* with respect to plaintiffs challenge to § 311.070.4(10).

[2] Of course, plaintiff Uncle D's is apparently not a producer at all and so is not affected by § 311.070.4(10) RSMo. J.A. 13.

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D. Section 311.070.4(10) RSMo And Regulations 11 C.S.R 70-2.240(5)(G) And 11 C.S.R. 70-2.240(5)(I) Are Reasonably and Narrowly Tailored to the State's Interests.

Plaintiffs claim that there are lesser alternatives that could advance the State's interests. Interestingly, one of their suggestions is to totally prohibit the sale of alcohol. Plaintiffs' Brief p. 36. Counsel is not sure that the prohibition of alcohol was one of the alternatives suggested by the Supreme Court in *44 Liquormart*, as plaintiffs imply. But, in any event, it is difficult to see how prohibition of alcohol could serve the interests of the State which has Anheuser-Busch, as well as the growing number of microbreweries and wineries mentioned by plaintiffs at page 47 of their brief. The liquor industry is, as plaintiffs themselves recognize, an important sector of the State's economy. As noted above, the rationale of some provisions of the Liquor Control Law is the promotion of tourism. §§ 311.070.1, 311.070.11 & 311.070.12 RSMo. As a result, dismantling the liquor industry through prohibition might serve the State's interests in about the same way that amputating your foot will cure an ingrown toenail.

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But the State's goal is not the elimination of alcohol consumption or even reducing the overall consumption in the entire marketplace. This distinguishes the State of Missouri from Rhode Island in *44 Liquormart*. Evidently, Rhode Island's goal in banning advertising of alcohol prices was to "significantly reduce marketwide consumption." 517 U.S. at 1509. Rather, the State of Missouri's goal is to promote responsible consumption. This interest is rational given that the dangers of alcohol abuse—binge drinking, underage drinking and driving under the influence—are all pretty self-evident. Plaintiffs acknowledge that the State's goal is narrower than Rhode Island's. Plaintiff's Brief p. 19. Plaintiffs' argument, therefore, is not an alternative method of achieving the State's interests. It is an attempt to redefine the State's interests.

The same can be said for other alternatives suggested by plaintiffs—heavily taxing alcohol and direct control over prices. Plaintiffs' Brief p. 36. Increased taxes and price controls would apply to all alcohol sales—not those giving rise to the potential for alcohol abuse. This distinction may not have made a difference in *44 Liquormart* where Rhode Island's interest related to "marketwide consumption."

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But when the State's interest is narrower than that, as it is here, it certainly cannot be said that these same alternatives are automatically considered as alternative methods to achieve that narrower interest.

The State could reasonably believe that both an increase in taxes and price controls could have an adverse impact upon the liquor industry as a whole. Such steps could limit the entry of new businesses into the industry and limit competition within the industry. These consequences could adversely affect the State's economy. In *44 Liquormart* the alternatives mentioned by the Supreme Court actually came from Rhode Island's own expert. 517 U.S. at 507. But here, plaintiffs offered no evidence that any of these steps could, consistently with the State's economic interests, promote the State's statutorily stated interest of promoting responsible consumption of alcohol.

Not only is the State's interest narrower than in other cases, the regulations being challenged are substantially narrower. The District Court rejected the plaintiffs' attempts to characterize the State's regulations as an absolute or a total ban. J.A. p. 255 & 257. In fact, in spite of their efforts to overstate the nature of the State's regulations the plaintiffs have acknowledged that the State's regulations "ban a

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particular type of price advertising—specifically, advertising of price discounts." Plaintiffs' Brief p. 35. While the plaintiffs recognized that the regulations apply only to a particular type of price advertising, their description of this as a "ban" is still inaccurate. The regulations do not ban "all references to the availability of sales or discount prices (indeed, advertisements can say "Specials," "Happy Hour," and "Ladies Night"), and within a retail establishment advertisements of sales and promotions may state the price of the alcohol." J.A. p. 257. The regulations address advertisements that emphasize the extent of price discounts and other promotions. This is similar to *Rubin*, 514 U.S. 476, 490-1 in which the Supreme Court struck down a restriction on label content of beer, in part because of the availability of alternatives such as "prohibiting marketing efforts emphasizing high alcohol strength." The State's regulations likewise focus on marketing efforts that emphasize the extent of price discounts.

Although *Central Hudson* described the fourth factor as whether the state restriction was more expansive than necessary to serve its interests (447 U.S. at 566), later cases have clarified that it does not require application of a least restrictive means standard. *Bd. of Trustees*

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of State University of New York v. Fox, 492 U.S. 469, 477 (1989). As the Court explained, application of *Central Hudson* was substantially similar to time, place and manner restrictions on protected speech which does not require a least restrict means. *Id.* Moreover, commercial speech is subject to regulation that might be impermissible in a noncommercial context. "This ample scope of regulatory authority . . . would be illusory if it were subject to a least restrict means." *Id.* There does not need to be a perfect fit between a state's interest and its law. *Id.* at 480. All that is required is a reasonable fit that is proportionate to the interest served. *Id.* When the nature of the State's interest and the nature of the regulations are considered, the District Court was correct in concluding that the State had demonstrated such a fit. J.A. 258-9.

The District Court's conclusion that the regulations fit the State's interest, also applies to plaintiffs' challenge to § 311.070.4(10) RSMo. As explained above, the State's interest here is not directly concerned with restriction of advertising. Section 311.070 in general deals with the dealings between separately licensed tiers of the alcohol industry. In particular, producers and wholesalers are not allowed to give to

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retailers, directly or indirectly, equipment, money, credit or property of any kind. § 311.070.1 RSMo. Subsection 4 creates several exceptions to this general provision.[3] Plaintiffs argue that these exceptions undermine the legitimacy of the State's interest and demonstrate the lack of a fit with the statute. Plaintiffs' Brief p. 48. "But there is no archetypal three-tier system. . . States have discretion to establish their own versions of the three-tier system." *Southern Wine & Spirits of America, Inc.*, 731 F.3d at 810. The State has exercised its judgment in enacting, pursuant to the Twenty-first Amendment, its regulation of the liquor industry.

But the only exception plaintiffs challenge is subsection 4(10) which allows, subject to certain qualifications, advertisements by producers or wholesalers to mention retailers. These qualifications are

[3] Plaintiffs also argue that § 311.355 RSMo allows distillers to "support" retailers by delivering cash rebate coupons. They claim this is no different than cooperative advertising. But the statute does not permit a distiller to single out a particular retailer for issuing rebate coupons. However, plaintiffs argue a producer's or wholesaler's ads should be allowed to single out a single retailer.

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not for the purpose of limiting speech *per se*, but limiting the possibility that producers and wholesalers would attempt to exert undue influence over retailers. The District Court concluded that subsection 4(10) "lessens the effect of transferring money among the tiers. . . while it allows some advertising to be paid for by wholesalers or producers that mentions the names of retailers." J.A. p. 262. "As a result it is not more burdensome that necessary to serve the state's interest." J.A. p. 262.

Ironically, plaintiffs' claim does not really serve its interests. Although plaintiffs argue that the State's interest in regulating the liquor industry is not "substantial," they do not challenge the constitutionality of any other provision of § 311.070 RSMo. Their argument against the exception in subsection 4(10) is that the State didn't give broad enough permission for the ads. But assuming that subsection 4(10) were found unconstitutional, there would be no exception. The general provisions of § 311.070.1 RSMo would prohibit any advertising by producers or wholesalers that mention retailers.

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II. The District Court Correctly Granted Defendants' Motion To Dismiss For Failure To State A Claim.

A. The District Court's Order Did Not Constitute Granting Summary Judgment In Favor Of The State.

After denying plaintiffs' motion for summary judgment the District Court *sua sponte* reconsidered the earlier denial of the State's motion to dismiss for failure to state a claim and granted dismissal. J.A. pp. 259, 262 & 304. Plaintiffs, however, argue that the District Court granted summary judgment in the State's favor. Plaintiffs' Brief. Pp. 64-5. Plaintiffs' explanation as to why they do not take the District Court at its word that it is dismissing the complaint is cursory and somewhat vague.

The only specific reason for viewing this as a judgment is plaintiffs' assertion that the District Court considered matters outside the pleadings, such as the Kuo study. Plaintiffs' Brief p. 64. But the Kuo study was submitted by the State in response to plaintiffs' motion for summary judgment. The study clearly had to be considered in connection with the denial of plaintiffs' summary judgment motion. But there is no indication that the study formed a basis for the District

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Court's granting the State's motion to dismiss for failure to state a claim.

The standards for consideration of motions for summary judgment are well established. On summary judgment a court is not to weigh the evidence and determine the truth of an issue but only to determine whether there is a genuine issue for trial. *Anderson,* 477 U.S. at 249. In determining whether there is a genuine issue of fact, the record on the summary judgment must be viewed in the light most favorable to the non-movant. The evidence of the non-movant must be believed and all reasonable inferences are to be drawn in his favor. 477 U.S. at 255. *Lower Brule Sioux Tribe*, 104 F.3d at 1021(facts and inferences from those facts are viewed in the light most favorable to the nonmoving party).

But this does not mean that a court is to weigh the evidence and finally determine the truth. *Tolan v. Cotton*, 134 S.Ct. 1861, 1866 (2014). While there is no requirement that a court make findings when ruling on a summary judgment motion, findings can be helpful to a reviewing court. 477 U.S. at 250 n. 6; *Langford v. Norris*, 614 F.3d 445, 459 (8th Cir. 2010). Findings for purpose of a summary judgment motion

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are not the same as findings in which a court weighs the evidence, determines credibility and determines the truth.

In line with these standards, the District Court's conclusion that the State had met its burden under *Central Hudson* referred to the State's burden in responding to the plaintiffs' motion for summary judgment. The District Court had correctly identified the standards governing its consideration of plaintiffs' summary judgment motion. J.A. p. 246. Plaintiffs offer no reason why this Court should not presume that the District Court followed them.

The District Court then denied the motion for summary judgment because plaintiffs failed to meet their burden that there was an absence of a genuine issue of fact and that they were entitled to judgment as a matter of law. *Lower Brule Sioux Tribe*, 104 F.3d at 1021.

Having denied the plaintiffs' motion for summary judgment the District Court reconsidered the earlier ruling on the State's motion to dismiss for failure to state a claim. A court has inherent authority to reconsider and modify earlier interlocutory ruling. *Murr Plumbing, Inc.*, 48 F.3d at 1070. A court may *sua sponte* dismiss for failure to state a claim. *Smithrud v. City of St. Paul*, 746 F.3d 391, 395 (8th Cir. 2014).

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Plaintiffs have not challenged the District Court's authority to reconsider the earlier motion.

The District Court did not err in reconsidering the State's motion to dismiss and such reconsideration did not constitute granting a summary judgment in favor of the State.

B. The Plaintiffs' Complaint Failed to Allege A Claim That The State Statue And Regulations Were Facially In Violation Of The First Amendment.

The plaintiffs alleged that § 311.070.4(10) RSMo and state regulations 11 C.S.R. 70-2.240(5)(G) & 11 C.S.R. 70-2.240(5)(I) are facially unconstitutional under the First Amendment. J.A. pp. 32, 34 and 35. The nature of their claim is confirmed by the nature of the relief they requested. Plaintiffs sought a declaration that the statute and regulations were unconstitutional in their entirety and that the defendants be enjoined from enforcing them. J.A. p. 37. They did not seek an injunction limiting the application of the statute or regulations to some precise circumstances. The District Court recognized that plaintiffs claimed that the statute and regulations were "facially unconstitutional prohibitions on commercial speech." J.A. p. 245.

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Facial challenges are generally "disfavored." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008). Such challenges (1) are often based on speculation, (2) can cause a court to act in advance of the necessity of deciding a constitutional question and to formulate a rule broader than required by precise facts, and (3) may interfere with the democratic process by preventing laws reflecting the will of the people from being implemented in a constitutional manner. *Id*. at 450-1.

Perhaps as a reflection of this disfavor, a facial challenge is very difficult for the party challenging the statute. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *1-800-411-Pain Referral Service, LLC*, 744 F.3d at 1060(quoting *United States v. Salerno* 481 U.S. 739, 745 (1987)). The Supreme Court has also held that "a facial challenge must fail where the statute has a plainly legitimate sweep." *Washington State Grange*, 552 U.S. at 449(interior quote omitted). Plaintiffs fail to meet this standard.

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The first step in assessing a facial challenge to a statute or regulation is to understand what the statute or regulation actually says. The District Court recognized that the regulations and statute challenged by the plaintiffs were not as broad and restrictive as plaintiffs attempted to characterize them.

When the complaint is considered give the statute and regulations their proper meaning, the complaint fails to state a claim. The regulations were not total bans on alcohol advertisements in general or price in particular. Indeed, the regulations contemplate that advertising will take place. And, as plaintiffs now acknowledge, the regulations relate to a particular type of price advertising—advertising of price discounts. Plaintiffs' Brief p. 35. The District Court concluded that the "regulations do not ban ads for liquor, do not ban ads stating the price of liquor, do not ban all references to the availability of sales or discount prices (indeed, advertisements can say "Specials," "Happy Hour," and "Ladies Night"), and within a retail establishment advertisements of sales and promotions may state the price of the alcohol." J.A. p. 257.

As to § 311.070.4(10) RSMo, it is not a proscription on advertising of alcohol but a limited allowance of advertising that would otherwise

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be prohibited by a substantive regulation regarding financial dealing among the tiers of the liquor industry. By the plain words of the statute it gives permission for producers and wholesalers to mention retailers (the third tier of the State regulated industry) in advertisements of their products. But it does not compel speech because it does not require a producer or wholesaler to mention retailers in its ad. J.A. p. 261.

The State regulations and statute here are in sharp contrast to the regulations that were struck down by the Supreme Court in other cases. *Central Hudson* dealt with a ban on advertising promoting the use of electricity. 447 U.S. at 558. *44 Liquormart* dealt with a ban on advertising the price of alcohol. 517 U.S. at 490. But in concluding that these bans were unconstitutional, the Supreme Court recognized that "the State may regulate some types of commercial advertising more freely than other forms of protected speech. . . it may restrict some forms of aggressive sales practices that have the potential to exert 'undue influence' over consumers." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 498 (1996). When a State regulates commercial messages to protect consumers from . . . aggressive sales practices . . . the purpose of its regulation is consistent with the reasons for according

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constitutional protection to commercial speech." 517 U.S. at 501. Therefore, there is permissible area for the exercise of regulatory authority of commercial speech.

The State regulations and statute here are aimed at the sort of "aggressive sales practices" that the Court indicated could be regulated. Indeed, the Court later held that it would be permissible "to prohibit marketing efforts emphasizing high alcohol strength" as a means of advancing the federal government's goal of preventing "strength wars." *Rubin*, 514 U.S. at 490-1. Here, the State regulations and statute are not even a prohibition of all marketing efforts. However, they do set some limitations on certain marketing efforts. They do not affect marketing within an establishment. And as to marketing outside in various media, the regulations and statute do not prohibit mentioning the availability of sales or discount prices. Similar to *Rubin*, the State's focus is on restricting marketing efforts that emphasize the price discount (or other inducements like coupons or prizes) as a means of purchasing alcohol in larger quantities.

The State's regulations and statute are consistent with the State's purpose of promoting responsible consumption of alcohol. § 311.015

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RSMo. And as plaintiffs themselves recognize this interest is narrower that Rhode Island's interest (reduction of consumption marketwide) in *44 Liquormart*. Plaintiffs' Brief p. 19. Therefore, the substance of the regulations and statute are "in proportion to the interest served." *Bd. of Trustees of the State University of New York*, 492 U.S. at 480(interior quote omitted).

The Supreme Court noted that "none of our cases invalidating the regulation of commercial speech involved a provision that went only marginally beyond what would adequately have served the governmental interest." 492 U.S. at 479. All the regulations struck down were "substantially excessive." *Id.* Certainly the regulations and statute here are not substantially excessive. Indeed, they follow the Supreme Court's standards. They are reasonably and narrowly tailored to advance a substantial government interest.

Plaintiffs' facial challenge to the regulations and statute fails because they do not allege any basis that would demonstrate that "no set of circumstances exists under which the Act would be valid." *Salerno* 481 U.S. at 745; *1-800-411-Pain Referral Service, LLC*, 744 F.3d at 1060. The regulations and statue have "a plainly legitimate sweep,"

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Washington State Grange, 552 U.S. at 449, and plaintiffs' complaint fails to allege any basis for concluding otherwise. To paraphrase this Court in rejecting a facial challenge, the regulations and statute are not "so unduly burdensome and unjustified that in no conceivable instance would such provisions ever be constitutional" 744 F.3d at 1060.

The District Court correctly dismissed plaintiffs complaint alleging a facial challenge to § 311.070.4(10) RSMo, state regulation 11 C.S.R. 70-2.240(5)(G) and state regulation 11 C.S.R. 70-2.240(5)(I) for failure to state a claim.

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Conclusion

The District Court's dismissal of plaintiffs' complaint should be affirmed.

Respectfully submitted,

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Certificate of Compliance

I certify that on July 20, 2016 I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system. Upon acceptance of this brief, the original plus 10 copies of this brief will be mailed, postage prepaid, to the Clerk of the Court.

I certify that this brief was prepared using Microsoft Word 2010, in 14-point, proportionally spaced typeface. I certify that the brief contains 10,089 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I certify that upon acceptance of this brief, two true and correct copies of this brief will be mailed, postage prepaid, to:

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