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

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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INTRODUCTION

Like other commercial speech cases, this case focuses on a partial advertising ban—specifically, of truthful media advertising of alcoholic beverage price discounts. *E.g., Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 187 (1999) (prohibition against truthful advertising of casino gambling *by broadcasters*); *Rubin v. Coors Brewing Co*., 514 U.S. 476, 488 (1995) (prohibition against truthful disclosure of certain alcohol content on *beer labels*, but not in media). The lack of a total ban is irrelevant. "[A] ban placing only partial limits on speech is nevertheless subject to the same standard of First Amendment review that would be applied to a complete ban." *Utah Licensed Beverage Ass'n v. Leavitt*, 256 F.3d 1061, 1075 n.5 (10th Cir. 2001). Nor does the availability of other channels of information save the ban. *Id.* ("[T]he existence of alternative channels of communication … does not eliminate the fact that the … regulations restrict speech." (quoting *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1232 (10th Cir. 1999)).

DE NOVO STANDARD OF REVIEW

Defendants improperly ask this Court to defer to factual findings of the District Court. Def. Br. 17-18. However, no factual disputes informed the Court's analysis under *Central Hudson*. Defendants argue that "the District Court did not accept as 'undisputed facts' much of what plaintiffs include in their statement of

the case." *Id.* at 12. The matters that the District Court characterized as hearsay or disputed, however, were simply information about the parties and the effect of the challenged rules, relevant to standing. Two different district judges found that Plaintiffs have standing (*see* JA-113-15 and 248-49), and Defendants have not challenged those rulings in this appeal, so any dispute as to those facts is irrelevant. None of the factual issues that the District Court noted played any role in its analysis and decision on the key issues. Similarly, no fact issues are involved in interpretation of the Kuo study, but merely legal issues as to what the study says and whether its conclusions support the State's position.

The issue on summary judgment below—primarily, application of the *Central Hudson* factors—was a pure legal issue which must be reviewed de novo. *See U.S. v. Howell*, 552 F.3d 709, 712 (8th Cir. 2009); *see also Pruett v. Harris County Bail Bond Bd.*, 499 F.3d 403, 409 (5th Cir. 2007) ("We review the lower court's application of this test [*i.e.*, *Central Hudson*] *de novo*.").

Similarly, the grant of a motion to dismiss for failure to state a claim is reviewed under the de novo standard. *B & B Hardware, Inc. v. Hargis Inds., Inc.*, 569 F.3d 383, 387 (8th Cir. 2009). That covers the District Court's sua sponte reconsideration and grant of Defendants' previously denied motion to dismiss.

Finally, even in First Amendment cases where facts are at issue, an appellate court must "make an independent examination of the whole record … to assure …

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that the judgment does not constitute a forbidden intrusion on the field of free expression." *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-85 (1964). This requires a "'fresh examination' of those facts that are crucial to the First Amendment inquiry." *Doe v. Pulaski County Special School Dist.*, 306 F.3d 616, 621 (8th Cir. 2002) (quoting *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 567 (1995)).

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I. THE CHALLENGED REGULATIONS DO NOT WITHSTAND INTERMEDIATE SCRUTINY UNDER *CENTRAL HUDSON*.

A. The Challenged Regulations Do Not Directly Advance The State's Purported Interest in Promoting Responsible Consumption.

Central Hudson sets a demanding standard for proof of direct and material advancement of the State's objective (*see* Pl. Br. 20-21)—not, as Defendants seem to claim, whether the state might "reasonably believe" that its regulations might advance its objective (Def. Br. 41). The State has not met, and cannot meet, the direct advancement standard.

1. Defendants Ignore the Remoteness of the Targeted Conduct from the Goal of Promoting Responsible Consumption.

The State does not deny that its ban on media advertising of price discounts at best only *indirectly*, not directly, advances its objective of preventing binge drinking. Direct advancement is the test under *Central Hudson*'s third prong; indirect advancement is not sufficient. *See* Pl. Br. 20-21.

2. The Inconsistencies Within the Challenged Regulations, Which Defendants Simply Ignore, Show That They Fail Intermediate Scrutiny.

The State's brief also totally neglects the numerous exemptions and inconsistencies in the Challenged Regulations, which are highly relevant under *Coors Brewing*, *Greater New Orleans*, and *Utah Licensed Beverage*. As explained in sections I.C.1, I.C.2 and I.C.4. of Plaintiffs' original brief, the Challenged Regulations:

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- Apply only to media advertising, not to on-premises advertising.
- Prohibit all alcohol wholesalers and retailers from offering rebates to consumers, but allow certain manufacturers to offer rebates.
- Permit distillers to offer rebates, but not brewers or wineries.

The Supreme Court has held that the Government cannot show direct advancement when restrictions on speech are "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). The State has no answer on this point, and its silence fails to meet its burden.

Defendants' argument shows that this exception is irrational. Defendants argue that rebates are an "aggressive sales practice" that have "the potential to exert undue influence over consumers"—a "'bait' to lure the customer purchase more." Def. Br. 40-41 (internal citations and quotation marks omitted). But if Missouri believes that rebates are an "aggressive sales practice" that increase "binge drinking," why does it allow them for spirits, the most potent and dangerous alcoholic beverage? Defendants explained that lobbyists for distillers asked for the exemption. JA-265-66. If exemptions are so readily granted for "aggressive sales practices," the regulatory scheme is irrational and not a reasonable fit with the State's objective.

Under Supreme Court precedent, exception-laden regulatory schemes that

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prohibit truthful speech in certain media but not others cannot meet the *Central Hudson* reasonable fit test. *See Rubin v. Coors Brewing Co.*, 514 U.S. 476, 488 (1995) (holding that limited prohibition of alcoholic strength on beer labels did not advance state's asserted interest in preventing strength wars, since the information appeared on labels for other alcoholic beverages); *see also Utah Licensed Beverage Ass'n v. Leavitt*, 256 F.3d 1061, 1072-74 (10th Cir. 2001) (finding "irrational" and unconstitutional Utah's advertising restrictions on wine and liquor because there were no comparable restrictions on beer).

Finally, the State's brief suggests another inconsistency. The State now contends that media advertisements may use discounting code words, such as "Happy Hour," "Specials," or "Ladies Night." *See* Def. Br. 14, 50, 59. That is, it claims media ads can *hint* at discounts, just not disclose them outright. But this new loophole hurts the State's case. In *Greater New Orleans*, for example, despite the direct ban on broadcast advertising of casinos, the FCC let broadcasters "tempt viewers with claims of 'Vegas-style excitement' at a commercial 'casino,' if 'casino' is part of the establishment's proper name and the advertisement can be taken to refer to the casino's amenities, rather than directly promote its gaming aspects." 527 U.S. at 190-91. The Supreme Court noted that because it allowed indirect advertising of casinos, "the agency's practice is squarely at odds with the governmental interests asserted in this case" (*id*. at 191)—an inconsistency that

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further undercut any possibility that the ban could be found to directly advance the government objective.

The exception-laden regulatory scheme both undercuts any finding of direct advancement, and also suggests that Missouri's interest in avoiding binge drinking is weak. While the State ostensibly claims to combat binge drinking, the legislature has bowed to lobbying from distillers to allow discount coupons—which may be advertised in the media—of the most potent and dangerous form of alcohol. Similarly, the State's new-found desire to promote liquor sales to tourists (Def. Br. 31, 47) is at odds with its purported interest in preventing binge drinking. These inconsistencies between the State's stated purpose and its conduct are also relevant to the "quality" of the government interest asserted, and how strongly it should be weighed against the free speech interests. *Greater New Orleans*, 527 U.S. at 187.

3. Common Sense Alone Is Insufficient, and Defendants Don't Even Have That.

Defendants' brief makes it clear that they primarily rely, as did the District Court, upon supposed "common sense" to justify the Challenged Regulations. Defendants even argue that "simple common sense" alone is sufficient under *Central Hudson* to justify a restriction on commercial speech. Def. Br. 37. In making this allegation, Defendants misrepresent and misquote the Supreme Court's *Lorillard* decision. *Id.*

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Defendants claim that the Supreme Court has "permitted a state to meet its burden by studies, anecdotes, history, consensus, ***or*** 'simple common sense.'" *Id.* (emphasis added). Their assertion suggests that *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001), said this. But the Supreme Court in *Lorillard* actually said "***and***," not "or." As the District of Columbia Circuit explained, "the Supreme Court has 'permitted litigations to justify … restrictions … based … on history, consensus, ***and*** simple common sense' ***when the three are conjoined***." *Heller v. District of Columbia*, 801 F.3d 264, 279 (D.C. Cir. 2015) (quoting *Lorillard*, 533 U.S. at 555) (emphasis added). Common sense alone never cuts it. In fact, "[t]he Supreme Court recognized in *Florida Bar* … that the government's burden is not met when a 'State offer[s] *no* evidence or anecdotes in support of its restriction ….'" – *i.e.*, when it offers *only* common sense. *El Dia, Inc. v. Puerto Rico Dept. of Consumer Affairs*, 413 F.3d 110, 116 (1st Cir. 2005) (quoting *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995)). Moreover, accepting a state's purported "common sense" justification would violate the Supreme Court's admonition against use of "mere speculation or conjecture." *See* Pl. Br. 19-20. It would be contrary to the court's duty to "actively scrutinize the evidence and question the government's assertions. *Kiser v. Kamdar*, 2016 WL 4150918 at *4 (6th Cir. 2016).

Here, Defendants rely solely on (1) the Kuo study (Def. Br. 36-37), which is

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irrelevant and if anything rebuts Defendants' argument, as explained below, and (2) an assertion of simple common sense (*id.* at 38-40), which contradicts the empirical evidence of record, and is speculative and irrational (and thus not even common sense).

Neither the record nor Defendants' brief contains any anecdotes or stories on how allowing the media advertising of discounted alcohol promoted irresponsible consumption and binge drinking. The vast majority of the states allow media advertising of discounted alcohol. If such advertising resulted in increased binge drinking, the State surely could have found credible studies, evidence, or at least stories and anecdotes to support its case. It had none, however; the State submitted *absolutely no evidence that media advertising of discounts promotes irresponsible drinking*. Nor did Defendants present any historical evidence to justify the restriction. Even the historical discussions of the long-ago Prohibition era suggest no link between the advertising of discounted alcohol and irresponsible consumption.

In addition, "common sense" refers to something that nearly everyone accepts, without debate. This cannot be said with respect to the contention that advertising of discounted alcohol increasing binge drinking. In fact, Defendants' argument logically means that they believe that Justice Alito lacks common sense. He saw the common-sense position exactly opposite of Defendants. Then-Judge

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Alito wrote in *Pitt News v. Pappert*, 379 F.3d 96, 107 (3d Cir. 2004), that "[t]he suggestion that the elimination of alcoholic beverage ads from *The Pitt News* and other publications connected with the University [of Pittsburgh] will slacken the demand for alcohol by Pitt students is counterintuitive…." If Justice Alito is correct that it is *not* common sense that eliminating alcohol advertising in a university publication will slacken students' demand for alcohol, the much greater conjecture that eliminating media ads for discounted alcohol will reduce irresponsible consumption cannot be common sense either.

The State's attempt to distinguish then-Judge Alito's decision in *Pitt News* on the ground that it involved a college newspaper is not credible. Def. Br. 39. In both *Pitt News* and this case, the challenged rules prohibited dissemination of truthful alcohol sales information in certain places but not others. This underbreadth meant that the *Pitt News* ban failed the direct advancement test, and the same is true here. The Challenged Regulations only prohibit *media advertisements* of discount prices—just as in the *Pitt News* case, the prohibited *college newspaper ads* constituted just one portion of the messages that would reach consumers. Justice Alito found that Pitt students will still see alcohol ads on the radio and TV and in other publications regardless of the prohibition at issue in *Pitt News*. 379 F.3d at 107. Likewise, Missouri residents will learn about alcohol discounts even if that information is kept out of media ads. In addition to ads from

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neighboring states, Missouri residents will be exposed to general media ads for alcohol, and, very significantly, to *on premises* discount promotions. The significance of the non-banned information is even stronger here than in *Pitt News,* because the *on premises* discount price messages that Missouri law permits are more closely related to any binge drinking dangers than the general media ads that are prohibited. Just as Judge Alito found the ban in *Pitt News* failed the reasonable fit/direct advancement test of *Central Hudson*, so does the ban here.

Finally, the common sense argument is undercut by the many inconsistencies in how the State allows, and doesn't allow, publicity about discounts (*see* Pl. Br. 31-34 and section I.A.2 above). In *Rubin v. Coors Brewing*, the Supreme Court rejected the government's "common sense and history" argument that keeping alcohol content off of beer labels would decrease sales of high-alcohol products, because that "common sense" logic cannot apply where there were many exemptions and inconsistencies in the regulations. 514 U.S. at 487-89. Even though the government there had some anecdotes—unlike the State here—that evidence "cannot overcome the irrationality of the regulatory scheme." *Id*. at 490. The government was required there to offer "convincing evidence that the labeling ban has inhibited strength wars." *Id*. It could not do that, just as the State here cannot provide convincing evidence that the discount advertising ban has curtailed binge drinking.

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In another strike against the State's "common sense" argument, in *Greater New Orleans*, the Supreme Court rejected the simplistic claim that greater promotion through media advertising leads to greater abuse. *See* 527 U.S. at 189. Even if some advertising might affect overall demand for gambling, it is nonetheless clear that "much of that advertising would merely channel gamblers to one casino rather than another" – meaning that the ad ban cannot meet the direct advancement test. *Id.*

Because Defendants have failed to justify the Challenged Regulations based on common sense, let alone common sense, anecdotes *and* history, they have not met their burden, and thus the Challenged Regulations are unconstitutional.

4. Kuo, the State's Only Empirical Evidence, Does Not Support the Challenged Regulations.

Defendants claim that the Kuo study establishes that advertisement of discounted alcohol leads to higher binge drinking rates (Def. Br. 36-37), but this is incorrect. The Kuo study is about *on-premises promotions at college bars*. It says *nothing* about the unproven premise that media ads (*i.e., OFF-premises* messages) directed to adults create a binge drinking problem.

Defendants' own quotation of Kuo further highlights the weakness in Defendants' position. According to Defendants, "[t]he results of the [Kuo] study were that 'the availability of large volumes of alcohol … low sales prices, and frequent promotions and advertisements … were associated with higher binge

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drinking rates on the college campuses." Def. Br. 36-37 (quoting JA-215). That is, all these conditions *together* were associated with higher binge drinking. Missouri, however, does not prohibit "the availability of large volumes of alcohol" (such as kegs or 24-packs of beer), and it has not banned "low sales prices" or "frequent promotions." Missouri only regulates prices and discounts through media advertisements. Kuo, however, did not study the effect of media advertisements. It studied, as the State's quotation illustrates, the *combined* effect of (1) availability of large volumes of alcohol, (2) low sales prices and (3) frequent on-premises promotions, all (4) at college bars and retailers. Thus, it does not support Defendants' position as to any effects of general media advertisements, particularly in the absence of the other conditions studied.

The District Court was wrong in concluding that the Kuo study on on-premises promotions shows "a logical connection" between media ads and binge drinking, and Defendants gave the District Court no credible evidence that would support such a finding. Defendants bear the burden with respect to the third prong of *Central Hudson*, and they have not satisfied that burden.

Indeed, Kuo is a "correlational study" that gives no reliable indication as to causation. JA-221. Studies that merely reveal that two conditions appear together do not show causation. (A classic example is the fact that childhood milk consumption is 100% correlated with later marijuana use.) The Kuo paper

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explicitly cautions about this limit. JA-221; *see also* David H. Kaye and David A. Freedman, "Reference Guide on Statistics ("When two variables are correlated, one is not necessarily the cause of another"), in Federal Judicial Center, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 298 (3d ed. 2011). Notably, Kuo also found "a positive association … between checking identification in on-premises establishments and college binge-drinking rates." JA-220. Obviously, checking IDs does not cause binge drinking. But the Kuo study's conclusions as to the effects of on-premises discount promotions on binge drinking are no more scientifically reliable than that absurd conclusion about checking IDs.

In *Greater New Orleans*, the Supreme Court stressed that it was the government's duty to "connect casino gambling and compulsive gambling with broadcast advertising for casinos." 527 U.S. at 189. By analogy, it is the State's obligation here to connect binge drinking with media advertising of price discounts, and the State has not done so.[1]

For all these reasons, the Kuo study cannot satisfy the State's burden of showing that the Challenged Regulations reasonably and materially advance its objective.

[1] Empirical evidence is always necessary to show a causal relationship. *See* Daniel L. Rubinfeld, "Reference Guide on Multiple Regression," Federal Judicial Center, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 310 (3d ed. 2011). Without this requirement of clear evidentiary support, states could impose speech-suppressive regulations even when they were unnecessary and ineffective.

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B. The State Failed to Show That The Challenged Regulations Are Reasonably and Narrowly Tailored to Its Asserted Interests.

The Supreme Court has "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." *Thompson v. Western States Medical Center*, 535 U.S. 357, 371 (2002). Defendants, however, brush off the alternatives proposed by Plaintiffs with little analysis, even though they bear the burden to establish the speech restrictions are no more expansive than necessary. *See Edenfield v. Fane*, 507 U.S. 761, 770 (1993) ("It is well established that the party seeking to uphold a restriction on commercial speech carries the burden of justifying it." (internal quotation omitted)). Any of the alternatives suggested in Plaintiffs' brief would "restrict[] less speech" than the Challenged Regulations.

The simplest alternative is to ban promotions on alcohol. If alcohol discounts promote binge drinking, banning the discounts would solve the problem. The Kuo study noted that "[t]he regulation of marketing practices such as sales prices [and] promotions … may be important strategies to reduce binge drinking and its accompanying problems." JA-215. Or a ban could be made of price discounts on *weekends*, based on the finding of the Kuo study that "[t]he presence of weekend beer specials was highly correlated with college binge-drinking rates…." JA-218. Yet, the State does not even respond to these reasonable,

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effective, non-speech-suppressive alternatives, even though they are supported by the study it embraced.

Defendants criticize alternatives such as "[i]ncreased taxes and prices controls" because such "would apply to all alcohol sales—not those giving rise to the potential for alcohol abuse." Def. Br. 48. But *all* alcohol sales give rise to the potential for alcohol abuse.[2] These are feasible and available non-speech-suppressive means of combatting binge drinking—*i.e.,* yet more narrowly tailored alternatives.

Central Hudson requires all of these alternative means to be favored over the indirect speech-suppressive route of prohibiting truthful advertising of a legal practice. *See 44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 507-08 (1996); *see also Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490-91 (1995) ("respondent suggests several alternatives, such as directly limiting the alcohol content of beers

[2] "[T]here are some people who should **not** drink any alcohol, including those who are:

- Younger than age 21.
- Pregnant or may be pregnant.
- Driving, planning to drive, or participating in other activities requiring skill, coordination, and alertness.
- Taking certain prescription or over-the-counter medications that can interact with alcohol.
- Suffering from certain medical conditions.
- Recovering from alcoholism or are unable to control the amount they drink."

Centers for Disease Control and Prevention, "Fact Sheets - Alcohol Use and Your Health," *available at* http://www.cdc.gov/alcohol/fact-sheets/alcohol-use.htm.

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***. We agree that the availability of these options, all of which could advance the Government's asserted interest in a manner less intrusive to respondent's First Amendment rights, indicates that § 205(e)(2) is more extensive than necessary.").

Because there are numerous narrower non-speech suppressive alternatives, the Challenged Regulations are more extensive than necessary, and fail prong 4 of *Central Hudson*.

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II. THE CHALLENGED STATUTE ALSO FAILS THE *CENTRAL HUDSON* INTERMEDIATE SCRUTINY TEST.

A. The State's Economic Regulation Objective Is Not a "Substantial" Government Interest that Can Justify Suppression of Truthful Speech.

Most commercial speech cases are decided on the failure of the state to meet prongs 3 and 4 of the *Central Hudson* test, not on the presence or absence of a substantial government interest. But *Central Hudson*'s prong 2 is meaningful, too. It requires something special and substantial about the government interest. The interests that the State offers with respect to the Challenged Statute, however, are ordinary at best—specifically, inconsistent, incoherent, loophole-filled and lobbyist-driven economic regulations directing how an industry must be organized. In commercial speech, where the stakes are citizens' rights to information, and the free flow of information vital to our market economy, these interests do not cut it as "substantial."

The State's cited authorities all relate to instances where, *outside of commercial speech and First Amendment contexts*, economic regulation of the structure of the alcoholic beverage industry was found to be a legitimate area for state activity. Def. Br. 32-34. The issue here, however, which none of the State's cases address, is whether that interest is "substantial" for purposes of commercial speech First Amendment analysis.

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Courts have found government interests "substantial" for *Central Hudson* prong 2 purposes where they focus on protection of citizens. *E.g.*, *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 485 (1995) (protecting the health, safety, and welfare of citizens); *W. States Med. Ctr. v. Shalala*, 238 F.3d 1090, 1093 (9th Cir. 2001), *aff'd* 535 U.S. 357 (2002) ("protecting the public health and safety"); *1-800-411 Pain Referral Service, LLC v. Tollefson*, 915 F. Supp. 2d 1032, 1052 (D. Minn. 2012) (protecting accident victims while they are under duress); *Desnick v. Dep't of Prof'l Regulation*, 665 N.E.2d 1346, 1356 (Ill. 1996) ("preventing overreaching by physicians, and protecting citizens' right to privacy").

In this case, however, the State offers no citizen-protective interest. It offers merely its desire to regulate and organize the industry as its alleged "substantial" interest. It characterizes its "interest" as "to restrict the financial relationships between the various licensees under the various tiers of the liquor industry," or "to preclude a licenser 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." Def. Br. 42-43. Those are a descriptions of *means*, not purposes, objectives, or government interests, much less *substantial* ones. If that "interest" is accepted here, prongs 3 and 4 will be judged solely on whether the Challenged Statute is a reasonable and narrow fit to this specific economic regulatory

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scheme—a circular argument that excludes any true "substantial" interest in protecting citizens.

A state's desire to regulate an industry in a certain way is not a "substantial" interest under *Central Hudson* prong 2. *See Dana's R.R. Supply v. Attorney General, Fla.*, 807 F.3d 1235, 1250 (11th Cir. 2015) (questioning substantiality of interest involved in economic regulation law); *Int'l Dairy Foods Ass'n v. Amestoy,* 92 F.3d 67, 73 (2d Cir. 1996) (even "genuine" interest of state in a particular objective cannot be substantial for *Central Hudson* purposes if it is not based on "real" (*i.e.*, proven) harms). And Defendants have not even submitted any evidence that the Prohibition-era concern about tier separation "remains an actual problem in need of solving," even apart from whether the "problem" (if it exists) is "substantial." *Retail Digital Network, LLC v. Applesmith*, 810 F.3d 638, 652 (9th Cir. 2016). The substantiality of the State's preferred interest is a legal issue for the Court; it is not, as Defendants claim (Def. Br. 17), a factual issue on which the Court must accept their claim on summary judgment.

In sum, the State's choice to organize the alcoholic beverage industry in a particular way is not a substantial government interest that can justify the speech-suppressive provisions of the Challenged Statute. The Challenged Statute fails at this basic level of the *Central Hudson* test. And even if the interest is accepted as passable, its weakness must be considered in connection with the other *Central*

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Hudson prongs. *See Greater New Orleans*, 527 U.S. at 187 (where the government's asserted policy is "decidedly equivocal," courts must carefully weigh the "quality" of that government interest against the value of the "information sought to be suppressed").

B. The Statute's Belabored, Complex, Inconsistent, and Speech-Intrusive Prohibitions Do Not Directly Advance the State's Interest.

Defendants make no credible argument as to how allowance of uncensored cooperative ads will cause a liquor wholesaler or manufacturer to "control[ ] traffic in liquor in its entirety." Def. Br. 32. They have not met their burden of proving that their censorship of cooperative advertising "directly" and "materially" advances the independence of retailers from complete control by other tiers.

Though Defendants refer to their alcohol industry regulation as a "three-tier system," they ignore its many inconsistencies and exceptions. It is, for example, a one-tier system for Missouri wineries, microbreweries, and distilleries, as well as for liquor manufacturers who own entertainment facilities. *See* Pl. Br. 47-48. These many inconsistences and exceptions are fatal to any finding that Challenged Statute directly advances state objectives. Advertising restrictions cannot advance a tier separation that is already ridden with distortions, exceptions, and loopholes (which, at least in the case of Missouri wineries, affect more than half their sales).

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This is a crucial point, laid out in section II.C.2. of Plaintiff's original brief, to which Defendants make no response.

Defendants' chief defense of the Challenged Statute seems to be an attempt to characterize the cooperative ads at issue as actions by the wholesalers or manufacturers who pay for them, not the retailers whose establishments are advertised. Def. Br. 43. But payment is meaningless for First Amendment purposes. Regardless of who originated, owns, or paid for the ad, consumers are being deprived of truthful information, on the command of the state. The commercial speech doctrine protects consumers' right to receive truthful information. Whether an ad comes from a wholesaler or a retailer, the state cannot suppress truthful information unless that suppression directly advances a substantial state interest—and the suppression of price information does not directly advance any substantial state interest here.

Finally, Defendants' argument that manufacturers and wholesalers must surrender their First Amendment right to advertise, and accept State censorship of their ads, in order to do business in Missouri, runs afoul of the unconstitutional conditions doctrine. *See*, *e.g.*, *Dep't of Texas, Veterans of Foreign Wars of U.S. v. Texas Lottery Comm'n*, 760 F.3d 427, 437-38 (5th Cir. 2014) (citing *Perry v. Sindermann*, 408 U.S. 593, 597 (1972), and other cases). The Supreme Court explained in *44 Liquormart*:

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> That the State has chosen to license its 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.

44 Liquormart, 517 U.S. at 513; *see also R.S.W.W., Inc. v. City of Keego Harbor*, 397 F.3d 427, 434 (6th Cir. 2005) ("a state actor cannot constitutionally condition the receipt of a benefit, such as a liquor license …, on an agreement to refrain from exercising one's constitutional rights" (internal citations and quotation marks omitted)).

The restrictions of the Challenged Statute (prohibiting prices or mention of a single retailer in cooperative advertising) do not reasonably advance any legitimate state interest. Accordingly, the Challenged Statute (not only the exception in § 311.070.4(10) but also § 311.070.1 to the extent it prohibits cooperative advertising) is unconstitutional.

C. The Statute Is Not Reasonably and Narrowly Tailored to Advance the State's Interest.

The State could meet its previously stated objective of limiting influence of manufacturers or distributors over retailers more directly and effectively. It could prohibit cooperative advertising, or limit it to cooperative ad allowances consistent with those in other industries. Similarly, if, as the State now claims, its purpose is to prevent a manufacturer or wholesaler from requiring a retailer to offer a discount price (Def. Br. 44), that practice could be directly prohibited. And the State could

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turn to the many other alternative methods of addressing price advertising concerns, which Plaintiffs laid out in section II.D. of their original brief. But Defendants do not even answer any of these reasonable narrower alternatives, even though they bear the burden of justifying the Challenged Statute as being narrowly tailored.

The indirect speech-suppressive route of limiting dissemination of truthful information is the wrong way to act, violative of the requirement of *Central Hudson*'s fourth prong that state action be reasonably narrowly tailored to advance the state's interest.

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III. *SORRELL'S* HEIGHTENED SCRUTINY APPLIES HERE.

Heightened scrutiny under *Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011), applies to the content-based regulations of truthful commercial speech in the Challenged Advertising Laws. Defendants' argument to the contrary (Def. Br. 18-19, 24-26) misreads both the Supreme Court's decision and this Court's precedent. In *1-800-411-Pain Referral Service, LLC v. Otto*, 744 F.3d 1045, 1055 (8th Cir. 2014), this Court explicitly held that "[i]f a commercial speech restriction is content- or speaker-based, then it is subject to 'heightened scrutiny.'" (citing *Sorrell*, 131 S. Ct. at 2664); *see also Retail Digital Network, LLC v. Appelsmith*, 810 F.3d 638, 649-50 (9th Cir. 2016) (citing cases from this Court, and the Second and Third Circuits in support of the proposition that *Sorrell* heightened the *Central Hudson* standard).

If the Court finds that the Challenged Advertising Laws fail intermediate scrutiny, the heightened scrutiny standard need not be reached. But if the *Sorrell* standard must be addressed, while neither the Supreme Court or this Court have detailed its contours, it is certainly "stricter than *Central Hudson*." *Sorrell*, 564 U.S. at 588 (Breyer, J., dissenting); *see also Retail Digital*, 810 F.3d at 650-51 ("*Sorrell* requires a more demanding form of scrutiny of content- or speaker-based regulations on commercial speech than we have previously applied."). It certainly would not permit the directly speech-suppressive laws at issue here, which prevent

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dissemination of truthful pricing information, to the joint detriment of consumers, retailers, and the marketplace.

Sorrell is also instructive because it stresses the Supreme Court's skepticism of paternalistic attempts to keep truthful information from the public—like the Challenged Advertising Laws. It explains that "[t]he 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." *Sorrell*, 564 U.S. at 577 (quoting *44 Liquormart*, 517 U.S. at 503). States may not "seek to remove a popular but disfavored product from the marketplace by prohibiting truthful, non-misleading advertisements…." *Id.* at 577-78.

In striking down an alcohol advertising restriction, the Fourth Circuit explained that the Virginia Alcoholic Beverage Control Board ("ABC") did "exactly what *Sorrell* prohibits: it attempts to keep would-be drinkers in the dark based on what the ABC perceives to be their own good." *Educational Media Co. at Va. Tech, Inc. v. Insley*, 731 F.3d 291, 302 (4th Cir. 2013). So also here, Missouri's Challenged Advertising Laws attempt to keep alcoholic beverage consumers in the dark, at least through the media, as to discount pricing, based on what the State of Missouri perceives to be their own good.

The paternalistic Challenged Advertising Laws violate the First Amendment and must fall under *Sorrell* and heightened scrutiny.

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IV. THE CHALLENGED STATUTE COMPELS SPEECH AND FORCES ASSOCIATIONS IN VIOLATION OF THE FIRST AMENDMENT.

The Challenged Statute is unconstitutional not only in its prohibitions (no price information or mention of a single retailer), covered by Argument II, but also in its compelled speech (compelled mention of another retailer). Defendants all but admit that the Challenged Statute compels speech and forces associations in violation of the First Amendment. Their brief fails to rebut, or even acknowledge, the Supreme Court cases cited by Plaintiffs. *See* Pl. Br. 60-61 (citing and discussing *Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2288 (2012), and *United States v. United Foods, Inc*., 533 U.S. 405 (2001)). Moreover, Defendants entirely ignore the "association" argument.

Defendants defend the Challenged Statute essentially by construing it as a State act of beneficence—the State's gift ("permission") to the industry and public of a very limited right for a manufacturer or wholesaler to advertise on behalf of a retailer. Def. Br. 46, 60. But the right to speak truthfully is not dependent on the beneficent grace of the sovereign, and, as noted above (Section II.B) and in Plaintiffs' opening brief (Pl. Br. 62-63), the State may not condition benefits on a forfeiture of First Amendment freedoms. Similarly, the State's suggestion that speech is not compelled because the speaker can simply choose not to speak has been specifically disapproved by the Supreme Court. *See* Pl. Br. 62-63.

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V. THE DISTRICT COURT'S DISMISSAL OF PLAINTIFFS' CASE WAS SUBSTANTIVELY INCORRECT AND PROCEDURALLY IMPROPER.

Under any circumstances, the District Court should not have dismissed Plaintiffs' case. If Plaintiffs were not entitled to summary judgment, they would be entitled to present their full case (including the as-applied unequal enforcement claim) at trial. The 2013 motion to dismiss, based on the non-meritorious theory that only blanket bans of all advertising were unconstitutional (*see* JA-58, -66, and -68), should not have been reconsidered, and granted on other grounds, without any notice or opportunity for Plaintiffs to be heard.

A. The Ruling Was Procedurally Unfair and Improper.

Our system is based on fairness, the adversarial process, and respect for prior decisions. The District Court's reconsideration and dismissal breaks all these rules. It was not fair, as it granted a motion to dismiss on grounds that were never raised. It circumvented the adversarial process, since Plaintiffs were given no opportunity to address the new ground for dismissal. It directly contradicted the District Court's prior carefully considered ruling, which was law of the case. The law of the case doctrine provides that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California,* 460 U.S. 605, 618 (1983). It "prevents the relitigation of settled issues in a case, thus protecting the settled expectations of

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parties, ensuring uniformity of decisions, and promoting judicial efficiency." *Little Earth of the United Tribes, Inc. v. U.S. Dep't of Housing & Urban Dev.,* 807 F.2d 1433, 1441 (8th Cir. 1986). Law of the case should not be overruled lightly; if a previously settled ruling is to be reconsidered, all parties should at least have full notice and opportunity to respond, which did not occur here.

Moreover, on motions to dismiss, district courts are required to construe all reasonable inferences in favor of the non-movant—Plaintiffs here. *See Stone Motor Co. v. General Motors Corp*., 293 F.3d 456, 464 (8th Cir. 2002). Yet the District Court bent over backwards against Plaintiffs, and interpreted the Kuo study as supporting something it never found (a causal link between the advertisements of discounted alcohol and binge drinking). It then applied this purported link (obtained from a review of on-premises promotions at college bars) to the much-different situation of off-premises media advertisements directed to adults. Such slanted interpretations of Kuo, going well beyond its findings, are both legally erroneous and contrary to the text and spirit of Rule 12, which requires all favorable inferences to be made in favor of the non-moving party. (At trial, for example, other evidence could refute the conclusions the District Court drew from Kuo.)

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Because of these procedural irregularities, the court's preemptory reconsideration and reversal of the motion to dismiss, on different grounds, was procedurally improper and the decision should be reversed on these grounds alone.

B. The Dismissal Was Substantively Incorrect.

Defendants attempt to justify the dismissal on the theory that the District Court applied *Central Hudson* using the Kuo study to deny the motion for summary judgment, and then somehow reapplied *Central Hudson* without using the Kuo study to grant the motion to dismiss. Def. Br. 54-56. This is not believable. The District Court's entire analysis on the motion to dismiss amounted to only a single sentence, essentially treating the summary judgment and motion to dismiss issues as the "same issues." JA-262.

It is textbook civil procedure that the denial of a plaintiff's motion for summary judgment does not mean that the plaintiff loses the case. A summary judgment motion is a special opportunity for an early disposition, but when a plaintiff does not succeed on summary judgment (a procedure which does not consider or allow resolution of disputed evidence), the case simply moves to trial. Here, however, the District Court inexplicably treated Plaintiffs' loss on summary judgment as equivalent to a loss at a trial which was never held.

Defendants seem to suggest that only the most blatant complete advertising bans can ever support a facial challenge, and courts must defer to the state in cases

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of limited bans. Def. Br. 59-61. No law supports this claim. *See* p. 1 *supra*. Defendants assert that because this is a facial challenge, "the challenger must establish that no set of circumstances exists under which the Act would be valid." Def. Br. 58 (quoting *1-800-411 Pain Referral Serv., LLC v. Otto*, 744 F.3d 1045, 1060 (8th Cir. 2014), which in turn quotes *United States v. Salerno*, 481 U.S. 739 (1987)).[3] Initially, Defendants have the burdens all wrong. *See Utah Licensed Beverage Ass'n v. Leavitt*, 256 F.3d 1061, 1072-73 (10th Cir. 2001) (*Central Hudson* burdens always fall on the State, regardless of procedural posture). And the mini-summary judgment argument that Defendants make at pages 59-61 of their brief—arguing that their Challenged Advertising Laws are limited, benign, beneficial, and justified—cannot justify a Rule 12 failure-to-state-a-claim dismissal. A Rule 12 dismissal must be based on Plaintiffs' pleadings, not Defendant's arguments, and Plaintiffs' pleadings stated a claim of unconstitutional restrictions on commercial speech. *See Kiser v. Kamdar*, 2016 WL 4150918 at *3

[3] The challenger's obligation in a commercial speech challenge is to show that the State cannot meet its *Central Hudson* obligations (now modified by *Sorrell*). For example, *Central Hudson*, *Sorrell*, *44 Liquormart*, and *Lorillard* all involved facial attacks and resulted in the Supreme Court declaring the laws or regulations at issue unconstitutional. In none of these cases did the Court apply a standard more friendly to the government than that set forth in *Central Hudson* and *Sorrell*. *Cf.*, *Doe v. City of Albuquerque*, 667 F.3d 1111, 1124-27 (10th Cir. 2012) ("[t]he idea that the Supreme Court applies the 'no set of circumstances' test to every facial challenge is simply a fiction, readily dispelled by a plethora of Supreme Court authority") (citing numerous Supreme Court decisions and explaining how *Salerno* has been misconstrued).

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(6th Cir. 2016) (complaint that alleges that state prohibits truthful advertising of lawful activity held to state claim under *Central Hudson*).

Finally, it certainly cannot be, as Defendants seem to suggest, that every time the proponent of a facial constitutional challenge fails on summary judgment, that failure proves that it deserves to lose on the merits. This would turn the summary judgment procedure on its head. *Cf.*, *Byrum v. Landreth*, 566 F.3d 442, 446 (5th Cir. 2009) (plaintiff's success or failure on summary judgment held irrelevant to preliminary injunction analysis).

Plaintiffs believe the record is more than sufficient for this Court to find the Challenged Advertising Laws unconstitutional. But if the Court is not satisfied that the limited summary judgment record shows that the laws are unconstitutional, the case should be remanded so that Plaintiffs can put on their complete and best case. None of the motion to dismiss or summary judgment briefs touch on additional evidence of the unconstitutionality of the Challenged Advertising Laws that may be presented at trial, including deposition testimony of employees of the Missouri Division of Alcohol and Tobacco Control, evidence that cooperative advertising does not lead to domination of the retailer by the sponsoring party, and studies that refute or explain the Kuo study Nor do those motions address the as-applied equal protection discriminatory enforcement claim, which can only be presented and decided at trial.

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CONCLUSION

This Court should 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. Alternatively, the Court should reverse the District Court's judgment and remand for trial.

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 6975 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
Mark Sableman
August 18, 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 18th day of August 2016.

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