No. 18-2611

IN THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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

v.

DOROTHY TAYLOR, et al.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Missouri
(Case No. 2:13-cv-04034)

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AND THE SHOW-ME INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES, URGING AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Amici curiae the Washington Legal Foundation and the Show-Me Institute certify under Fed. R. App. P. 26.1 that they are not-for-profit corporations created under § 501(c)(3) of the Internal Revenue Code. They have no parent companies and issue no stock.

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IDENTITY & INTEREST OF *AMICI CURIAE*[1]

Founded in 1977, the Washington Legal Foundation (WLF) is a public-interest law firm and policy center with supporters in all 50 states, including Missouri. WLF promotes and defends free enterprise, individual rights, limited government, and the rule of law. To that end, WLF has appeared as an *amicus curiae* before this and other federal courts in important commercial-speech cases. *See, e.g.*, *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011); *Retail Dig. Network, LLC v. Prieto*, 861 F.3d 839 (9th Cir. 2017) (en banc).

The Show-Me Institute is a 501(c)(3) research and educational organization dedicated to improving the quality of life for all Missouri citizens by advancing sensible, well-researched solutions to state and local policy issues. The Institute's work is rooted in the American tradition of free markets and individual liberty. The Show-Me Institute has published commentaries and sponsored presentations emphasizing the importance of guarding against the erosion of the First Amendment, so this case is of significant interest.

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[1] All parties have consented to this brief's being filed. *Amici* state, under Fed. R. App. P. 29(a)(4)(E), that no party's counsel authored any part of this brief; no person or entity, other than *amici* or their counsel, helped pay for the preparation or submission of this brief.

Missouri's "tied-house" law restricts truthful, non-misleading commercial speech. Missouri's antiquated speech restrictions are grounded in the fear that the public will respond to honest advertising with lawful conduct disfavored by the State—that is, by purchasing and consuming alcoholic beverages. But "[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." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996). As *amici* show below, Missouri has not come close to supplying enough evidence to justify its speech restrictions under the First Amendment.

INTRODUCTION & SUMMARY OF ARGUMENT

This appeal arises from a First Amendment challenge to portions of Missouri's tied-house law. With the benefit of a bench trial, the district court correctly held that, even for commercial speakers, state-sponsored silencing of truthful speech violates the free-speech guarantees of the First Amendment. Otherwise, the State would be able to "burden the speech of others in order to tilt public debate in a preferred direction" or "keep [citizens] in the dark for what the

government perceives to be their own good." *Sorrell*, 564 U.S. at 578-79 (quoting *44 Liquormart*, 517 U.S. at 503).

But that is precisely what the State of Missouri seeks to do through § 311.070—a statute enacted by the Missouri legislature in the wake of the repeal of Prohibition. The law purportedly aims to prevent alcohol manufacturers and distributors from "tying" themselves to a retailer who will sell their products to the exclusion of competitors' products. But rather than address that anticompetitive conduct directly, Missouri's statute restricts truthful commercial speech.

In § 311.070.1, Missouri prohibits alcohol manufacturers and distributors from "directly or indirectly, loan[ing], giv[ing] away or furnish[ing] equipment, money, credit or property of any kind" to "retail dealers." Mo. Rev. Stat. § 311.070.1. This blanket ban prohibits manufacturers and distributors from giving any advertising-related support to retailers. In § 311.070.4(10), however, Missouri allows manufacturers and distributors to advertise on behalf of retailers, so long as the advertisement (1) excludes any mention of retail price, (2) lists "two or more unaffiliated retailers," (3) does so only once, and (4) displays the retailers' names inconspicuously. Mo. Rev. Stat.

§ 311.070.4(10). But this "exception" is just an unconstitutional condition on exercising First Amendment rights.

Repeating the now-familiar claim of government regulators everywhere, Appellants contend that Missouri's tied-house law regulates conduct, not speech, and so does not implicate the First Amendment. But this Court has already held otherwise. *See Mo. Broadcasters Ass'n v. Lacy*, 846 F.3d 295 (8th Cir. 2017). And Appellants conceded this very point on appeal at the pleadings stage. *Id.* at 300 ("At this stage, defendants accept [that] the provisions prohibit truthful and non-misleading speech.").

All the same, even laws "aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment." *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 592 (1983). Simply put, Missouri's tied-house law is "not shielded from constitutional scrutiny by the Twenty-First Amendment." *44 Liquormart*, 517 U.S. at 489.

As the district court rightly found, § 311.070 cannot satisfy even the intermediate scrutiny prescribed by *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557 (1980). Under

that test, Missouri must present solid evidence that the law's speech restrictions directly advance its policy aims "to a material degree." But the trial record here contains *no* such evidence.

Yet without *some* record evidence that § 311.070 eliminates tied-house monopolies "to a material degree," the State cannot justify, under the First Amendment, banning the truthful advertising of a perfectly legal product. And because the State's overall regulatory scheme contains so many loopholes and exceptions, Missouri's tied-house law undermines, rather than furthers, the State's alleged policy aims.

Nor can Appellants show that § 311.070 is narrowly tailored and no more restrictive than necessary, another requirement under *Central Hudson*. This is especially true given the alternative ways—and they are legion—by which Missouri could achieve its goals without restricting speech. As Missouri's own officials conceded at trial, the State could achieve its desired ends by, for example, requiring alcohol manufacturers and distributors to disclose all payments to retailers, prohibiting manufacturers and distributors from requiring retailers to offer discounts, or regulating alcohol sales directly—all without

restricting speech. Yet, as the record here shows, restricting speech was Missouri's first, not last, resort.

ARGUMENT

I. THE CLEAR TRAJECTORY OF SUPREME COURT JURISPRUDENCE HAS BEEN TOWARD GREATER FIRST AMENDMENT PROTECTION FOR COMMERCIAL SPEECH.

The First Amendment landscape has changed much since the Supreme Court decided *Central Hudson* nearly four decades ago. But it has changed even more dramatically since Missouri enacted its tied-house statute in January 1934—a month after ratification of the Twenty-First Amendment. *See Northcutt v. McKibben*, 159 S.W.2d 699, 704 (Mo. Ct. App. 1942). At that time—the dawn of the New Deal era—commercial speakers enjoyed no free-speech protections under the Supreme Court's First Amendment jurisprudence.

While the Supreme Court historically accorded "lesser protection to commercial speech than to other constitutionally guaranteed expression," *Cent. Hudson*, 447 U.S. at 562-63, that misguided view has fallen out of favor. Indeed, the modern trend in Supreme Court jurisprudence has been to increase, not decrease, the level of protection accorded to both commercial speakers and commercial speech.

Even before *Central Hudson*—following decades of dormant First Amendment protection for businesses—the Supreme Court began subjecting government restriction on commercial speech to exacting scrutiny. In 1975, the Court rejected any notion that laws restricting advertising are categorically immune from First Amendment protection. In *Bigelow v. Virginia*, 421 U.S. 809 (1975), the Court considered a challenge to a Virginia law that made it a misdemeanor to advertise abortion services. In overturning the petitioner's conviction, the Court emphasized that the advertisement "did more than simply propose a commercial transaction"—it also contained factual information of keen interest to the public. 421 U.S. at 822. While *Bigelow* clarified that speech both proposing a commercial transaction and providing truthful information enjoys First Amendment protection, it left unanswered whether purely commercial speech also receives protection.

The Court soon answered that question in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), in which the Court struck down a Virginia law barring pharmacists from advertising prescription-drug prices. Though Virginia claimed the law helped maintain the professional image of pharmacists,

the Court held that a consumer's need for information on prescription-drug pricing outweighed any such interest. 425 U.S. at 763. The Court explicitly recognized that a "consumer's interest in the free flow of commercial information … may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Id.* As a result, access to commercial speech "is indispensable to the proper allocation of resources in a free enterprise system." *Id.* at 765.

Central Hudson itself went on to clarify that commercial speech, like other forms of speech, merits robust First Amendment protection. *Central Hudson* involved a challenge to an energy-conservation regulation that prohibited utility companies from promoting electricity use. In a now-familiar test, the Court examined the regulation to decide whether it directly advanced a substantial state interest and was narrowly tailored to further that interest. 447 U.S. at 568-71. Eight justices agreed that the challenged regulation failed that test. Writing for the majority, Justice Powell recognized that the First Amendment "protects commercial speech from unwarranted governmental regulation." *Id.* at 561. If anything, *Central Hudson* fortifies the notion that commercial speech "not only serves the economic interest of the

speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information." *Id.* 561-62.

In the decades following *Central Hudson*, the Court went on to invalidate an array of commercial-speech regulations. *See, e.g., Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002) (restriction on drug-compounding advertisements); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (regulation of tobacco advertising); *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173 (1999) (ban on casino and gambling advertisements); *44 Liquormart,* 517 U.S. at 484 (plurality opinion) (restriction on alcohol-price advertising); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995) (ban on disclosing alcohol content on beer labels); *Edenfield v. Fane*, 507 U.S. 418 (1993) (regulation of attorney solicitations); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993) (ban on commercial-flyer racks); *Bolger v. Young Drug Prods. Corp.*, 463 U.S. 60 (1983) (ban on advertising contraceptives); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) (plurality opinion) (restriction on billboards).[2]

[2] One notable outlier from this trend was *Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328, 342 (1986), but the Court has since expressly disavowed *Posadas*'s too deferential approach to government

In the span of these decisions, the Court undertook an increasingly vigorous review of commercial-speech restrictions while still casting *Central Hudson* as a test requiring "intermediate scrutiny." In fact, commentators posit that the *Central Hudson* test, as applied by the Court today, is "a standard so rigorous that it results in the virtually automatic invalidation of laws restraining truthful commercial speech." David C. Vladeck, *Lessons from a Story Untold:* Nike v. Kasky *Reconsidered*, 54 Case W. Res. L. Rev 1049, 1059 (2004) (arguing that the Court began to "recalibrate" the *Central Hudson* test soon after deciding *Central Hudson*).

Unlike the Supreme Court, some lower federal courts have shown how easily they can manipulate the *Central Hudson* test to uphold excessive regulations rather than to invalidate them. As some of Appellants' authorities show—most notably *Retail Digital*, 861 F.3d at 850-51—the "substantial-interest" and "reasonable-tailoring" prongs of *Central Hudson*'s intermediate scrutiny test are particularly susceptible

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restrictions on commercial speech. *See 44 Liquormart*, 517 U.S. at 509 (plurality opinion) ("[O]n reflection, we are now persuaded that *Posadas* erroneously performed the First Amendment analysis.").

to self-serving constructions that are unduly solicitous of the government's regulatory judgments.

In response, the Court in recent years has suggested that commercial speech merits something closer to the level of protection that non-commercial speech enjoys. For example, when the commercial-speech regulation in question is content-based or speaker-based, the Court now holds that the intermediate scrutiny of *Central Hudson* must give way to "heightened" scrutiny. *See Sorrell*, 564 U.S. at 552. "Commercial speech is no exception," *Sorrell* explains, to the need for "heightened scrutiny whenever the government creates a regulation of speech because of disagreement with the message it conveys." *Id.* at 566 (internal quotation marks omitted).

Though it could hardly be clearer, *Sorrell* has not deterred state and local regulators from targeting truthful commercial speech to curb consumer demand for perfectly legal products those regulators disfavor. And some lower courts have continued to use *Central Hudson* to undermine the First Amendment by upholding commercial-speech retsrictions that advance insubstantial, explicitly paternalistic goals. *See, e.g., Retail Digital*, 861 F.3d at 839 (en banc) (upholding ban on

funding alcohol advertising); *Discount Tobacco City*, 674 F.3d 509, 534-537 (6th Cir. 2012) (upholding commercial speech restrictions on tobacco advertising).

Even so, "[t]he clear trajectory of the Supreme Court's jurisprudence is toward greater protection for commercial speech, not less." *Am. Meat Inst. v. USDA.*, 760 F.3d 18, 43 (D.C. Cir. 2014) (Brown, J., dissenting). After all, the First Amendment's text explicitly guarantees the "freedom of speech" and draws no distinction between commercial and non-commercial speech. *See* U.S. Const. amend. I.

And Justice Thomas "continue[s] to believe that when the government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as 'commercial.'" *Matal v. Tam*, 137 S. Ct. 1744, 1769 (2017) (Thomas, J., concurring in part and concurring in the judgment) (quoting *Lorillard Tobacco Co.*, 533 U.S. at 572 (Thomas, J., concurring in part and concurring in the judgment)).

Though the Court continues to apply the *Central Hudson* test, several justices have signaled their dissatisfaction with it. *See, e.g., Nike, Inc. v. Kasky*, 539 U.S. 654, 676 (2003) (Breyer, J., dissenting)

(arguing for applying "heightened scrutiny" to commercial speech restrictions when the speech involves a matter of public concern); *United States v. United Foods, Inc.*, 533 U.S. 405, 409-10 (2001) (noting "criticism" of *Central Hudson* test by several justices); *44 Liquormart*, 517 U.S. at 501, 510-14 (plurality opinion of Stevens, J., joined by Kennedy and Ginsburg, JJ.) ("The mere fact that messages propose commercial transactions does not in and of itself dictate the constitutional analysis that should apply to decisions to suppress them.").

The Court has also acknowledged the widely perceived need for "a more straightforward and stringent test for assessing the validity of governmental restrictions on commercial speech." *Greater New Orleans*, 527 U.S. at 184. Many constitutional scholars agree. *See, e.g.,* Jonathan H. Adler, *Compelled Commercial Speech and the Consumer "Right to Know,"* 58 Ariz. L. Rev. 421, 431 (2016) (arguing that "*Central Hudson* provides a floor, not a ceiling, for commercial speech protection"); Martin H. Redish, *Commercial Speech, First Amendment Intuitionism, and the Twilight Zone of Viewpoint Discrimination*, 41 Loy. L.A. L. Rev. 67, 108 (2007) (arguing that failure to extend *full* First Amendment

protection to commercial speech is "a form of impermissible viewpoint discrimination undermining of the very core of what the First Amendment is all about"); Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 Va. L. Rev. 627, 628 (1990) (arguing that "the commercial/noncommercial distinction makes no sense").

By subjecting commercial speech regulations to stricter scrutiny, recent Supreme Court rulings have restored doctrinal clarity to First Amendment jurisprudence without compromising the government's substantial interest in protecting the commercial marketplace from fraud, deception, and serious threats to public safety. In contrast, Appellants' view of the Plaintiffs' free-speech rights—that "the tied-house law does not even implicate the First Amendment" (Appellants' Br. 13)—seeks to turn back the clock on meaningful commercial-speech protections.

II. MISSOURI'S TIED-HOUSE LAW REGULATES SPEECH, NOT CONDUCT.

Appellants insist that § 311.070 "targets financial arrangements, not speech." Appellants' Br. 47. So because the "tied-house law is an economic law that merely prohibits manufacturers and distributors from providing financial support to retailers," they contend, "the tied-

house law does not even implicate the First Amendment." *Id.* at 28, 13. That argument flouts too many Supreme Court precedents to list.

The Supreme Court confronted this very question in *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), which considered a First Amendment challenge to a federal law that outlawed providing "material support" to designated terrorists. As Missouri does here, the United States argued that the law, by targeting "the fact of plaintiffs' interaction" with terrorists, regulated "conduct, not speech" and so was undeserving of First Amendment protection. *Id.* at 26-27. All nine justices rejected that argument.[3]

Though it went on to uphold the challenged law even under strict-scrutiny review, *Humanitarian Law Project* clarifies that even if a law "may be described as a regulation of conduct," it still implicates the First Amendment when some of "the conduct triggering coverage under the statute consists of communicating a message." *Id.* at 28 (citing *Texas v. Johnson*, 491 U.S. 397, 403 (1989)).

[3] While Justice Breyer and two other justices dissented from the majority's holding on the merits, the dissenting justices all agreed with the majority that the challenged law was a restriction on speech, not conduct. 561 U.S. at 42 (Breyer, J., dissenting).

The Court addressed this same conduct/speech distinction in *Sorrell v. IMS Health Inc.* At issue was a Vermont law banning the sale, to drug manufacturers, of pharmacy records showing physicians' prescribing practices. 564 U.S. at 557. Vermont argued—and the First Circuit held—that the law did not even implicate the First Amendment "because sales, transfer, and use of prescriber-identifying information are conduct, not speech." *Id.* at 570. The Supreme Court disagreed.

The Court explained that "the creation and dissemination of information are speech within the meaning of the First Amendment." *Id.* And because "information is speech," even if shared through a commercial transaction, Vermont's law denied drug companies access to speech. *Id.* In the Court's view, the Vermont ban resembled "a law prohibiting trade magazines from purchasing or using ink." *Id.*

Likewise, in *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017), the plaintiffs challenged a New York law prohibiting retailers from imposing a "surcharge" on customers who choose to pay by credit card rather than in cash. In upholding the law against a First Amendment challenge, the Second Circuit found that the law touched conduct, not speech, since it regulated only pricing. 137 S. Ct. at 1150.

But the Supreme Court reversed. The law told "merchants nothing about the amount they are allowed to collect from a cash or credit card payer." *Id.* at 1151. Instead, the Court explained, the law regulated "how sellers may communicate their prices." *Id.* And by "regulating the communication of prices rather than prices themselves, [the statute] regulates speech." *Id.* This case is no different.

As these precedents confirm, § 311.070 regulates speech, not conduct. Section 311.070.1 provides that alcohol manufacturers and distributors may not "directly or indirectly, loan, give away or furnish equipment, money, credit or property of any kind" to "retail dealers." Mo. Rev. Stat. § 311.070.1. Among other things, that blanket ban prohibits manufacturers and distributors from giving any financial or in-kind advertising support to retailers.

In response, Appellants maintain that § 311.070.1 is merely an "economic regulation" that prohibits manufacturers from "shift[ing] resources to retailers through advertisements." Appellants' Br. 49. But by restricting the funding of speech, § 311.070.1 restricts speech. "All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech." *Citizens United v.*

Fed. Election Comm'n, 130 S. Ct. 876, 884 (2010). And the First Amendment protects speech, "even if it [i]s enabled by economic transactions." *Id.*

As Appellants otherwise concede, "[b]ecause the tied-house law prohibits licensed manufacturers and distributors from providing anything of value to retailers, the statute affects some speech that has value and is truthful." Appellants' Br. 29. In other words, Appellants admit that § 311.070.1 chills protected speech. *Id.* ("The tied-house law prohibits … truthful advertisements … ."). No matter how the State may try to spin it, "an advertising ban is an abridgement of speech protected by the First Amendment." *44 Liquormart*, 517 U.S. at 489; *see Passions Video, Inc. v. Nixon*, 458 F.3d 837 (8th Cir. 2006) (overturning, on First Amendment grounds, Missouri's ban on outside advertising for sexually oriented businesses).

True, § 311.070.4(10) provides an exemption. But rather than ameliorate § 311.070.1's First Amendment infirmity, § 311.070.4(10) exacerbates it. Under § 311.070.4(10), producers and wholesalers may advertise for retailers, but only if the advertisement (1) excludes any mention of retail price, (2) lists "two or more unaffiliated retailers," (3)

does so only once, and (4) displays the retailers' names inconspicuously. *None* of these unconstitutional conditions target conduct.

Instead, they both restrict *and compel* speech. Yet the First Amendment protects a speaker's choices about "both what to say and what *not* to say." *Riley v. Nat'l Fed. Of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 796-97 (1988). And by compelling advertisers "to speak a particular message," § 311.070.4(10) "alters the content of [their] speech." *Id.* at 795. It makes no difference that the State's compulsion takes the form of an exception to a blanket ban. Even when Missouri has the power to deny a privilege altogether, "it may not condition the grant of such a privilege on a private party's surrender of a constitutional right." *L.L. Nelson Enterprises, Inc. v. County of St. Louis*, 673 F.3d 799, 805 (8th Cir. 2012).

And despite Appellants' professed concern about the evils of cheap alcohol, nothing in § 311.070 regulates the retail price of alcohol. On the contrary, Missouri's tied-house law is silent on that question. Instead, Missouri objects only to *advertising* the retail price for alcohol. *See* § 311.070.4(10) (permitting distillers and wholesaler to advertise for retailers so long as the ad does "not contain the retail price."). But "[i]n

regulating the communication of prices rather than prices themselves," § 311.070.4(10) "regulates speech." *Expressions Hair*, 137 S. Ct. at 1151.

III. MISSOURI'S TIED-HOUSE LAW FAILS *CENTRAL HUDSON*.

This Court's prior panel opinion in *1-800-411-PAIN Referral Service, LLC v. Otto*, 744 F.3d 1045, 1055 (8th Cir. 2014), understands *Sorrell* to hold that content- or speaker-based restrictions on commercial speech receive intermediate scrutiny under *Central Hudson*. On remand from this Court, the district court faithfully applied *Central Hudson*'s four-pronged test and found that Missouri's tied-house statute violates the First Amendment.

Central Hudson's first prong requires the Court to consider whether the commercial speech at issue concerns unlawful activity or is inherently misleading. As shown above, Missouri concedes that much of the relevant speech here is truthful and unconnected to criminal activity. *See* Appellants' Br. 29-30. As to *Central Hudson*'s second prong, the Plaintiffs do not concede that Missouri has a substantial interest in maintaining an orderly marketplace by imposing a three-tier system. *See* Plaintiffs' Br. 46-48.

Even so, § 311.070 violates the First Amendment unless Appellants can show that the statute (1) "directly advances" Missouri's substantial interest and (2) is no "more extensive than is necessary to serve that interest." *Central Hudson*, 447 U.S. at 566. As the district court found below, Appellants flunk both requirements.

A. Restricting Truthful Alcohol Advertising Neither Directly Advances Missouri's Stated Interest Nor Materially Alleviates the Relevant Harms.

Central Hudson's third prong requires Missouri to prove that § 311.070's restrictions on commercial speech "directly advance the governmental interest asserted," 447 U.S. at 566, and that they do so "to a material degree." *Edenfield*, 507 U.S. at 771. This prong is "critical" because, without it, "a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression." *Id.*

1. Though Appellants claim that the Plaintiffs bear a "heavy burden" in advancing their claim (Appellants' Br. 19), it is the *regulators* of commercial speech who bear the burden of justifying their speech restrictions. *See, e.g., Rubin*, 514 U.S. at 487 ("[T]he Government carries the burden of showing that the challenged regulation advances

the Government's interest."); *Bolger*, 463 U.S. at 71 n.20 ("The party seeking to uphold a restriction on commercial speech carries the burden of justifying it.").

This evidentiary burden is not light. Nor is it "satisfied by mere speculation or conjecture." *Edenfield*, 507 U.S. at 770. In *none* of its commercial speech cases has the Supreme Court ever been willing to defer to the State's own findings on the challenged law's efficacy in advancing the State's interest. Any such deference would ignore the State's heavy burden to prove that its speech restrictions alleviate real harms "to a material degree." *Id.* at 771.

That burden amounts to nothing if the State can satisfy it by pointing to mere administrative or legislative fact-findings devoid of any empirical evidence. That is why a State's commercial-speech restrictions cannot survive First Amendment scrutiny if they give "only ineffective or remote support for the government's purpose," *Central Hudson*, 447 U.S. at 564, or if they otherwise have "little chance" of advancing the State's goal. *Rubin*, 514 U.S. at 489.

2. Here, § 311.070 is part of a larger statutory scheme enacted "to promote responsible consumption, combat illegal underage drinking,

and achieve other important state policy goals such as maintaining an orderly marketplace." Mo. Rev. Stat. § 311.015. Called on to explain precisely how § 311.070's burdens on truthful commercial speech accomplish those aims, Appellants recount historical harms from the pre-Prohibition era, when "'tied-house' liquor establishments ravaged many communities." Appellants' Br. 21. Missouri's tied-house law, they contend, "minimize[s] the risk of harms that can flow from [alcohol] manufacturers and distributors exercising undue influence over retailers." *Id.* at 24.

Yet Missouri cannot meet its burden by pointing to sui generis social and economic conditions from a century ago. In other constitutional settings, the Supreme Court has cautioned that a law's "current burdens" must be "justified by current needs" and "sufficiently related to the problem that it targets." *Nw. Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009); *Shelby Cnty., Ala. v. Holder*, 570 U.S. 529, 551 (2013) ("The coverage formula met that [constitutional] test in 1965, but no longer does so.").

In contrast, § 311.070 is an anachronism in Missouri law. Much like the era of tied-house laws from which it sprang, § 311.070 aims at a

problem that no longer exists. Sweeping economic, technological, and social changes over the past century have dramatically transformed the alcoholic-beverage industry, rendering obsolete any problems with vertical integration. That is precisely why Missouri now allows so many exceptions to the three-tiered system (see section A.3 below). And today's big-box retailers, with their coveted floor displays and sprawling shelf space, simply are not vulnerable to the kind of undue influence that threatened retailer independence early in the Twentieth Century. *None* of Appellants' evidence at trial proves otherwise.

3. Nor can Appellants explain how the utter inconsistency of Missouri's tied-house statutory scheme—riddled with exceptions—furthers the State's interest in maintaining a three-tiered system. Missouri law, for example, allows Missouri-based wineries to produce, wholesale, and retail wine. *See* Mo. Rev. Stat. §§ 311.190.1, 311.070.11, 311.060.2. And even out-of-state wineries may sell and ship wine directly to Missouri residents. *See* Mo. Rev. Stat. § 311.185.

Likewise, Missouri law exempts microbreweries from having to distribute through a licensed wholesaler. *See* Mo. Rev. Stat. §311.195.5. And microbreweries may even sell beer and malt liquor at retail, in

proximity to the microbrewery. *See* Mo. Rev. Stat. § 311.195.3. Distilleries, too, are free to sell alcohol at retail, in proximity to the distillery—six days a week, from 6:00 a.m. to 1:30 a.m. *See* Mo. Rev. Stat. § 311.070.1.

Nor is that all. Despite § 311.070.1's blanket ban on providing retailers with money or property of any kind, Missouri law permits distillers and wholesalers to provide many financial and other incentives to retailers. These include, for example, product displays: "wine racks, bins, barrels, casks, shelving, or similar items" to display alcohol beverages to consumers. *See* Mo. Rev. Stat. § 311.070.3(3). Missouri even insists that all such displays "shall bear in a conspicuous manner" the "name of the distiller, wholesaler, winemaker, or brewer." *See* Mo. Rev. Stat. § 311.070.4(1)(b). And they may include even the name and address of the retailer. *Id.*

So much for combating the evils wrought by comingling the three tiers! Section 311.070's loopholes betray any "reasonable fit between the legislature's ends and the means chosen to accomplish them." *Lorillard Tobacco Co.,* 533 U.S. at 556. Asked to explain why these jarring inconsistencies do not undermine Missouri's stated interest, Appellants

answer that these exceptions apply to fewer "than a couple hundred retailers" dispersed throughout the State. But even if true, that is not a constitutionally relevant consideration.

The State insists that its tied-house law targets the "principal harm" of "absentee producers inducing retail behavior they would be less likely to encourage in their own communities." Appellants' Br. 39. But that presumably does not include the countless out-of-state wineries that are perfectly free to ship wine directly to Missouri consumers. Tr. 254. Surely those out-of-state producers are not "retail[ing] only in their own communities." Appellants' Br. 39. So despite its claimed interest in combatting the evils of absenteeism, Missouri law encourages wine consumption in places where the retailer has *no* ties to the community.

Missouri's "unwillingness to adopt" a "more coherent policy" shows that its tied-house law does not advance its claimed interest. *Greater New Orleans*, 527 U.S. at 174, 195. And as this Court has already found, § 311.070.4 "actually *weakens* the impact of the overall statutory scheme" by allowing "retailers, wholesalers, and producers" to become "financially entangled." *Lacy*, 846 F.3d at 302. If the true aim of

Missouri's tied-house law is to maintain a three-tiered system, then—like the statute at issue in *Rubin*—the inconsistencies in the State's statutory scheme "make[ ] no rational sense." *Rubin*, 514 U.S. at 488.

4. Though it devotes many words to recounting early Twentieth Century history and to explaining the New Deal's response to the repeal of Prohibition, Appellants' brief scarcely cites the closed evidentiary record in this case. This is no oversight. Appellants have good reason to avoid the record evidence accumulated at trial—*none* of it supports their case on appeal.

Take, for example, Missouri's claimed interest in preventing alcohol manufacturers and distributors from exercising "undue influence" over retailers. Appellants identify no record evidence that materially links the problem of undue influence with collaborative retail advertising to consumers. Nor can Appellants point to any evidence, for example, showing that restricting the *source* of retail-advertising funding is essential to maintaining independent alcohol retailers.

Even the State's own witness—Michael Schler, the deputy state supervisor with Missouri's Division of Alcohol and Tobacco Control—testified at trial that he knew of no "problem of taint or public safety"

with alcohol products sold outside Missouri's three-tier system. Tr.262. And Keith Hendrickson, Missouri's Chief of Enforcement for Alcohol and Tobacco Control, testified that there is nothing unique about advertising dollars that poses a special threat to the three-tiered system. Tr.151. At most, Missouri has shown only that the challenged statute has "little chance" of advancing the State's goal. *Rubin*, 514 U.S. at 489. But that is not enough.

Appellants urge an application of the third prong of *Central Hudson* that is so weak that it renders that prong virtually meaningless. Given Missouri's scant evidence, this Court must refuse Appellants' invitation "to engage in the sort of 'speculation or conjecture' that is an unacceptable means of demonstrating that a restriction on commercial speech directly advances the State's interest." *44 Liquormart*, 517 U.S. at 507.

At bottom, § 311.070's restrictions on truthful commercial speech violate the First Amendment because Missouri has failed to show that they "directly advance the state interest involved," *Central Hudson*, 447 U.S. at 564, and "alleviate [the harms alleged] to a material degree."

Edenfield, 507 U.S. at 771. The district court's judgment should be affirmed.

B. Section 311.070 Is Not Narrowly Tailored and Restricts More Speech than Necessary.

Even if Missouri could prove that § 311.070 directly advances its claimed interests, *Central Hudson* still requires a showing that the statute is no "more extensive than is necessary to serve that interest." 447 U.S. at 566. Under this prong, the existence of "numerous and obvious less-burdensome alternatives to the restriction on commercial speech" shows that the "fit" between means and ends is unreasonable. *Discovery Network*, 507 U.S. at 417 n.13.

1. The record here precludes any suggestion that § 311.070 is narrowly tailored to achieve Missouri's interests. The leading case is *Thompson v. Western States Medical Center*, which involved a federal attempt to prohibit pharmacies from advertising compounded drugs. The federal law at issue exempted compounded drugs from the Food and Drug Administration's rigorous drug-approval process, so long as pharmacies selling those drugs complied with several restrictions, "including that they refrain from advertising or promoting particular compounded drugs." 535 U.S. at 360. The advertising ban was

necessary, the government insisted, to prevent "large-scale [drug] manufacturing" from occurring "under the guise of pharmacy compounding." *Id.* at 371.

But the Court held that the government may not restrict pharmacists' speech instead of their conduct: "If the First Amendment means anything, it means that regulating speech must be a last—not first—resort. Yet here it seems to have been the first strategy the Government thought to try." *Id.* at 373. In other words, "if the Government could achieve its interests in a manner that does not restrict speech … [it] must do so." *Id.* at 371.

Statutes restricting speech ostensibly to regulate alcohol sales have fared no better. As the Supreme Court has repeatedly recognized, States can easily advance their interests in regulating alcohol sales without restricting speech. In *Rubin*, for example, the Court overturned a law prohibiting beer manufacturers from displaying alcohol content on their beer labels, despite available alternatives like "directly limiting the alcohol content of beers" or "prohibiting marketing efforts emphasizing high alcohol strength." 514 U.S. at 490-91.

Likewise, in *44 Liquormart*, the Court struck down a ban on advertising alcohol prices given the many "alternative forms of regulation that would not involve any restriction on speech" but that would be "more likely to achieve the State's goal of promoting temperance." 517 U.S. at 507. Among other things, these included "higher [alcohol] prices [that could] be maintained either by direct regulation or by increased taxation." *Id.* Based on this prong alone, the district court's judgment should be affirmed.

2. The record here is replete with many reasonable non-speech-suppressive alternatives that could help Missouri safeguard its interests. Even before trial, a panel of this Court agreed that "there are reasonable alternatives to the challenged restrictions Missouri could have enacted that are less intrusive to plaintiffs' First Amendment rights." *Lacy*, 846 F.3d at 303 (citing *44 Liquormart*, 517 U.S. at 507). These include limiting alcohol purchases directly (by taxing or regulating alcohol prices and sales) and public-education campaigns on the dangers of overconsumption. *Id.*

At trial, the Plaintiffs marshaled overwhelming evidence of alternative means available to Missouri to further its claimed

objectives. Keith Hendrickson, Missouri's Chief of Enforcement for Alcohol and Tobacco Control, testified at length on some of these alternatives. He conceded that Missouri, rather than restrict commercial speech, could accomplish its policy aims by:

- "enforc[ing] existing laws which prevent undue influence on the manufacturer over a retailer," Tr.152;
- "prohibit[ing alcohol] manufacturers and distributors from requiring retailers to offer discounts," Tr.153;
- "requiring [alcohol] manufacturers and distributors [to] disclose their advertising payments," *id.*;
- "heavily tax[ing] or regulat[ing] alcohol sales," Tr.119;
- "prohibit[ing] alcohol beverage sales and consumption," *id.*

The record also reveals that while Missouri could allocate funds for educational campaigns to mitigate the risks of underage drinking, it has chosen not to do so. Kacey Buschjost, Missouri's Highway Safety Division's Youth Coordinator, testified on the effectiveness of such educational campaigns as "Safe and Sober," in which 461 Missouri high schools participated in 2017. Tr.285. According to Ms. Buschjost, though the National Highway Traffic Safety Administration (NHTSA) funds Missouri's Safe and Sober campaign, Missouri itself allocates no funds for the program. *Id.* And NHTSA also funds training for Missouri state

and local law enforcement on how best to combat underage drinking, but Missouri allocates no state funds for that purpose either. *Id.*

Not only have Appellants been unable to refute any of these viable alternatives with their own, contrary record evidence, but they have failed altogether to satisfy their burden to show that *no* less-restrictive alternative exists. That is because virtually the *only* evidence adduced at trial on this point supports the Plaintiffs, not Appellants. Appellants argue that Missouri "could not obtain its objective[s] using more tailored means" (Appellants' Br. 47), but they cite no record evidence to support that claim. Of course, Appellants' argument, standing alone, is not evidence—it is just talk. On this record, a clearer showing that Missouri's tied-house law is "more extensive than necessary" is hard to fathom.

3. By barring a manufacturer's or a distributor's support to a retailer only if it is for the specific purpose of exerting undue influence on the retailer, the federal tied-house law is less restrictive than Missouri's. *See* 27 U.S.C. § 205. But as Appellants' own witness, Michael Schler, explained at trial, Missouri's § 311.070.1 "is a blanket prohibition, basically against anything provided to the retailer." Tr.268.

Missouri could amend its law to mirror the less-restrictive federal law, but it has chosen not to do so. And because the federal tied-house statute imposes fewer speech restrictions than Missouri's, Appellants cannot possibly show that § 311.070.1 is narrowly tailored. On that basis alone, this Court should affirm.

Besides, state and federal antitrust laws—vigilantly enforced in Missouri—already effectively police against anticompetitive practices among firms. And they do so without abridging First Amendment rights. If Missouri is concerned that cooperative advertising among the three tiers might conceal illegal payoffs to retailers, it could require audits of all advertising-related transactions among manufacturers, distributors, and retailers. This would help ensure that advertising support does not result in undue influence or otherwise interfere with the State's regulatory aims.

But as in *Western States*, "there is no hint that the Government even considered these or any other alternatives." 535 U.S. at 373. Like Vermont in *Sorrell*, Missouri "seeks to achieve its policy objectives through the indirect means of restraining certain speech," rather than directly regulating the vertical integration of manufacturers,

distributors, and retailers. *Sorrell*, 564 U.S. at 577. This it cannot do. Because § 311.070 restricts more speech than necessary, the district court's well-reasoned judgment should be affirmed.

CONCLUSION

The Court should affirm the judgment below.

Respectfully submitted,

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I certify that

1. This brief complies with the type-volume limits of Fed. R. App. P. 29(a)(5) because it contains 6,374 words under Fed. R. App. P. 32(a)(7)(B), excluding those parts of the brief exempted by Fed. R. App. P. 32(f).

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Dated: December 13, 2018

/s/ Cory L. Andrews
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I certify under Fed. R. App. P. 25(c)(2) that on this 13th day of December, 2018, I filed a copy of the above with the Clerk of the Eighth Circuit through the Court's CM/ECF system, which will send notice of the filing to all registered CM/ECF users.

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