IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RETAIL DIGITAL NETWORK, LLC, Plaintiff and Appellant, v. JACOB APPELSMITH, AS DIRECTOR OF THE ALCOHOLIC BEVERAGE CONTROL BOARD, Defendant and Appellee.	**13-56069** Opinion Filed January 7, 2016 Before: Sidney R. Thomas, Chief Judge, Consuelo M. Callahan, Circuit Judge, and Edward R. Korman, Senior District Judge

On Appeal from the United States District Court
for the Central District of California
Case No. CV11-09065 (BMCPJWX)
The Honorable Consuelo B. Marshall, Judge

DEFENDANT-APPELLEE APPELSMITH'S PETITION FOR PANEL REHEARING AND FOR REHEARING EN BANC

KAMALA D. HARRIS
Attorney General of California
EDWARD C. DUMONT
Solicitor General
CHRIS KNUDSEN
Senior Assistant Attorney General
JOSHUA A. KLEIN
Deputy Solicitor General
GARY BALEKJIAN
Supervising Deputy Attorney General
GABRIELLE H. BRUMBACH
Deputy Attorney General
State Bar No. 175431
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-6226
Fax: (213) 897-1071
Email: Gabrielle.Brumbach@doj.ca.gov
Attorneys for Defendant-Appellee

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

RULES

RULE 35 STATEMENT

Because California seeks to keep alcoholic beverage retailers economically independent from their upstream suppliers, California law generally prohibits payments and subsidies from alcoholic beverage manufacturers and wholesalers to retailers. These restrictions include a ban on payments in return for advertising—a restriction that this Court upheld against First Amendment challenge in *Actmedia, Inc. v. Stroh*, 830 F.2d 957 (9th Cir. 1986). The panel decision in this case holds that *Actmedia* is no longer controlling law because it has been superseded by the Supreme Court's intervening decision in *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011). The panel opinion conflicts with precedent of the Supreme Court, this Court and other Circuits, and raises two issues of nationwide importance.

First, *Actmedia*'s application of the longstanding intermediate-scrutiny test of *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), to the California statute at issue is not inconsistent with *Sorrell*. Indeed, *Sorrell*'s heightened scrutiny does not by its own terms apply to this case, because any impact which California's laws may have on speech is not based on

content, but is ancillary to and intended to prevent evasion of the economic regulations which are the primary goal and feature of the statute. In any event, applying heightened scrutiny would not require reconsideration of *Actmedia*, since heightened scrutiny involves application of the same *Central Hudson* test that *Actmedia* originally applied. *See* pp. 11-20, *infra*.

Second, the panel opinion limits the State's permissible justifications for any commercial speech regulation to strictly those rationales that were in the minds of legislators when the statute was originally passed. That rule conflicts with Supreme Court precedents, with this Court's precedents, and with other Circuits' precedents, each of which permit commercial speech regulations to be justified by factors which became apparent after passage of the law at issue. *See* pp. 7-11, *infra*.

BACKGROUND

1. After the end of Prohibition, California, like "the vast majority of states," passed a framework known as "tied-house' statutes" intended to "prevent vertical and horizontal integration of the alcoholic beverage industry and to promote temperance." Slip op. 4, 5, 6 (some internal quotation marks omitted). To ensure that alcohol retailers remain

economically independent of upstream suppliers, and to provide a fair playing field for individual retailers, California Business & Professions Code §§ 25500 *et seq.* prohibit a variety of economic arrangements that the Legislature viewed as likely to make retailers inappropriately (and perhaps corruptly) dependent on upstream suppliers. Thus, subject to certain exceptions, upstream suppliers generally may not "[f]urnish, give, or lend any money or other thing of value, directly or indirectly" to retail establishments. *Id.* §§ 25500(a)(2), 25502(a)(2). Manufacturers and wholesalers also may not deliver goods to retailers on consignment, *id.* § 25503(a); may not give secret rebates or make secret concessions to retailers or their employees, *id.* § 25503(c); and may not discriminate in the prices charged to different retailers in the same geographic area, *id.* § 25503(e).

To further ensure retailers' economic independence, and to prevent evasion of the other prohibitions, section 25503 provides that manufacturers and wholesalers may not:

> (f) Pay, credit, or compensate a retailer or retailers for advertising, display, or distribution service in connection with the advertising and sale of distilled spirits.
>
> (g) Furnish, give, lend, or rent, directly or indirectly, to any person any decorations, paintings, or signs, other than signs advertising their own products as permitted by Section 25611.1.

> (h) Pay money or give or furnish anything of value for the privilege of placing or painting a sign or advertisement, or window display, on or in any premises selling alcoholic beverages at retail.

Cal. Bus. & Prof. Code § 25503.

This Court upheld the constitutionality of § 25503(h) against First Amendment challenge in *Actmedia, Inc. v. Stroh*, 830 F.2d 957 (9th Cir. 1986). *Actmedia* held that the provision survived under the *Central Hudson* test, because it was "'as narrowly drawn as possible to effectuate'" the purpose of "'prevent[ing] illegal payments from being channeled by alcoholic-beverage manufacturers and wholesalers to retailers'" in ways that would "'conceal illegal payoffs and violations of the tied-house laws.'" Slip op. 8 (quoting *Actmedia*, 830 F.2d at 967).

2. Plaintiff-Appellant Retail Digital Network (RDN) is a company which installs video advertising displays in retail stores. Slip op. 9. Its business model includes taking advertising fees from companies who wish to advertise on the in-store display, and paying a portion of those fees to the retail store. *Id.* RDN sued, contending that insofar as § 25503(f)-(h) prohibited RDN's business model by treating RDN as a conduit for prohibited payments from

manufacturers to retailers, the statute violated its First Amendment rights. *Id.* at 9-10.[1] RDN claimed that *Actmedia*'s decision to uphold the statute had been superseded by, *inter alia*, *Sorrell v. IMS Health, Inc.*, 131 S.Ct. 2653 (2011), which applied "heightened judicial scrutiny" to a speaker-based or content-based commercial speech ban. Slip op. 9.

The district court granted the State's summary judgment motion. The court concluded that Section 25503 is content based, in that it disfavors advertisements by alcohol manufacturers. ER 6. But the court found *Sorrell* inapplicable, because *Sorrell*'s heightened scrutiny applies only to "complete speech bans founded on paternalistic motivations, [whereas] the parties agree Section 25503 is not a complete ban." *Id.* at 10. As a result, the court concluded, "*Sorrell* is not 'clearly irreconcilable' with the … reasoning in *Actmedia*." *Id.*

---

[1] RDN's complaint erroneously named the defendant as the Director of a nonexistent state agency. Then-defendant Appelsmith was in fact the Director of the Department of Alcoholic Beverage Control, not of the Alcoholic Beverage Control Board. Concurrent with this petition, Appellee is filing an Unopposed Motion To Amend the Caption, which corrects that error and which also substitutes the name of the Department's current director, Timothy Gorsuch.

3. The panel opinion at issue reverses that decision and remands for reconsideration, holding that *Sorrell* effectively modifies the *Central Hudson* test by requiring "'heightened judicial scrutiny'" of all speaker- or content-based commercial speech regulations. Slip op. 16. As a result, the panel opinion maintains, *Actmedia* is "'clearly irreconcilable'" with *Sorrell* and is no longer binding. *Id.* at 21.

On remand, the opinion instructs, "[h]eightened judicial scrutiny may be applied using the familiar framework of the four-factor *Central Hudson* test." Slip op. 16. The opinion states that the application of that test may be, in some respects, more stringent than previously thought. *See, e.g.*, *id.* at 17 ("With respect to the fourth *Central Hudson* factor, the government bears a heavier burden of showing that the challenged law 'is drawn to achieve [the government's substantial] interest.'" (alteration in original)). Particularly pertinent to this petition is a portion of the opinion instructing the district court to "test the consistency between (a) the specific interests asserted by the government during litigation in addressing *Central Hudson*'s second prong and (b) the legislative purposes that the court finds actually animated a challenged law, as made explicit in the statute's text or evidenced by its history or

design," and holding that "[p]ost hoc rationalizations for a restriction on commercial speech may not be used to sustain its constitutionality." *Id.*

ARGUMENT

I. THE OPINION PLACES UNWARRANTED RESTRICTIONS ON THE EVIDENCE AND ARGUMENTS AVAILABLE TO THE PARTIES ON REMAND

Appellee first requests rehearing so that the Court may reconsider particular language which, if left uncorrected, will prevent the building of a full record and will therefore hinder courts at all levels in their evaluation of the legal issues in this case.

In explaining the method to be applied on remand, the Court's opinion states that a "heightened scrutiny" inquiry

> first permits a district court to test the consistency between (a) the specific interests asserted by the government during litigation in addressing *Central Hudson's* second prong and (b) the legislative purposes that the court finds actually animated a challenged law, as made explicit in the statute's text or evidenced by its history or design. *See Friendly House v. Whiting,* 846 F. Supp. 2d 1053, 1060–61 (D. Ariz. 2012), *aff'd sub nom. Valle Del Sol Inc. v. Whiting,* 709 F.3d 808 (9th Cir. 2013). Post hoc rationalizations for a restriction on commercial speech may not be used to sustain its constitutionality.

Slip op. 17. If the regulation was originally based in part on a

theory that the court would now view as illegitimate (such as an intent to promote temperance by reducing advertising), the opinion explains, then judicial "skepticism" towards the regulation's fit for advancing the other original goals should be "deepened," because "a statute tailored to fit an impermissible goal of suppressing commercial speech for fear that it will persuade is less likely to be a close fit for another, permissible goal of the statute." *Id.* at 24.

These statements directly contradict binding Supreme Court precedents which the panel opinion does not discuss—precedents which *do* allow statutes regulating commercial speech to be sustained based on rationales that were not apparent during the statute's original passage. For instance, in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), which considered a federal statute prohibiting the mailing of advertisements for contraceptive products, the government sought to "advance[] interests that concededly were not asserted when the prohibition was enacted into law." *Id.* at 71. The Supreme Court held that such "reliance is permissible since the insufficiency of the original motivation does not diminish other interests that the restriction may now serve." *Id.*; *see also Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460 (1978) ("[T]he fact that the original

motivation behind the ban on solicitation today might be considered an insufficient justification for its perpetuation does not detract from the force of the other interests the ban continues to serve.").

The rule allowing reliance on post-enactment rationales has continuing force, as evidenced by recent lower-court cases. *See, e.g., Clear Channel Outdoor, Inc. v. City of New York*, 594 F.3d 94, 103 n.10 (2d Cir. 2010) ("[A] governmental entity 'need not rely on the justifications offered … when the [regulation] was enacted, since any insufficiency in the original motivation does not diminish other interests that the restriction may now serve.' Thus, to the extent that Plaintiffs assert that the City's proffered justifications for the Zoning Resolution were not raised at the time of its enactment, such complaints do not further their position in this litigation." (citation omitted)).[2] Indeed, *this* Court has said—in a published decision which the panel opinion likewise does not discuss or distinguish—that, in reviewing the permissibility of advertising restrictions under

---

[2] *See also Anderson v. Treadwell*, 294 F.3d 453, 461 n.5 (2d Cir. 2002) (similar); *Curtis v. Thompson*, 840 F.2d 1291, 1299 (7th Cir. 1988) (reasoning that "any 'insufficiency of the original motivations does not diminish other interests that the restriction may now serve'").

the First Amendment, "the asserted [government] interest need not be the original interest behind the legislation," and "the absence of support in the legislative history does not doom the government's purported interest." *Valley Broad. Co. v. United States*, 107 F.3d 1328, 1333 n.5 (9th Cir. 1997). Modification of the published opinion in this case is therefore appropriate to avoid unnecessary conflict with Supreme Court precedent, with precedent from other Circuits, and with this Court's own precedent.

Modification of this language through panel rehearing would permit the district court to receive evidence regarding "other interests that the [statute] may now serve" but which were not expected or expressed when the law was passed. *Clear Channel*, 594 F.3d at 103 n.10. That, in turn, would foster development of the sort of "complete record" that would be most helpful to the district court on remand, and to this Court in considering any appeal from that ruling, including in any future en banc proceeding. *See Minority Television Project, Inc. v. FCC*, 736 F.3d 1192, 1198 (9th Cir. 2013) (en banc) (concluding, where plaintiffs urged that Supreme Court case had "overruled decades of precedent sub silentio," that the en banc Court should not "go[] there … absent a complete record on the subject").

For that reason, the Court may wish at this stage simply to make clear that the current panel opinion is not intended to limit the development on remand of a full record concerning all proffered justifications for the statute, whether or not demonstrably considered at the time of enactment. Alternatively, the Court may wish to proceed immediately to rehear the case en banc.

II. EN BANC CONSIDERATION IS APPROPRIATE TO RESOLVE THE DECISION'S CONFLICT WITH SUPREME COURT AND NINTH CIRCUIT PRECEDENT

There is a further need for en banc review because the panel decision overrules this Court's *Actmedia* precedent without adequate cause. As the panel opinion acknowledges, *see* slip op. 6-9, this Court held in *Actmedia* that California's tied-house restriction against manufacturers' and wholesalers' subsidizing of retailer advertising was a permissible regulation of commercial speech under the *Central Hudson* test. Under ordinary principles of *stare decisis*, there thus was no need to remand this case for further proceedings; the district court's decision upholding the same statute should have been affirmed under this Court's *Actmedia* precedent.

Instead, the panel decision overrules *Actmedia*, and in the process makes two errors. It mandates application of a "heightened scrutiny"

standard where neither the precondition nor the rationale for such scrutiny under *Sorrell* applies; and it treats "heightened scrutiny" as stricter than the *Actmedia* test, without a clear sign that the Supreme Court intended in *Sorrell* to overrule the prior decisions that *Actmedia* applied. In these respects, the opinion drastically changes the standards governing review of commercial speech regulations.

As discussed above, en banc rehearing on these questions could be postponed until a further record is built in the district court after amendment of the panel opinion. But if the Court does not wish to await the building of that record, then en banc rehearing now is appropriate, in light of the significant, and erroneous, changes that the panel opinion creates in this Circuit's law concerning economic regulations that incidentally burden speech.

1. *Sorrell* considered a Vermont statute which barred certain entities from engaging in the sale, license, exchange, or use of particular content: "'records containing prescriber-identifiable information.'" *Sorrell*, 131 S. Ct. at 2660. The statute sought to correct what Vermont saw as a "'one-sided'" marketing phenomenon, in which drug manufacturers invested in "'expensive pharmaceutical

marketing campaigns to doctors'" causing "doctors to make decisions based on 'incomplete and biased information'" in "'conflict with the goals of the state.'" *Id.* at 2661. *Sorrell* instructed that "heightened judicial scrutiny," *id.* at 2663-64, is appropriate where the government employs content- and speaker-based restrictions to "'regulat[e] … speech *because of disagreement with the message it conveys*,'" *id.* at 2664 (emphasis added). Heightened scrutiny is needed in such cases because "'[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.'" *Id.* at 2671.

But California's tied-house regulations—including the regulations at issue here—are not motivated by disagreement with the content of alcohol advertising. Instead, the Legislature's motivation was the economic concern of preserving retailer independence. *See Kendall-Jackson Winery, Ltd. v. Superior Court*, 76 Cal. App. 4th 970, 981 (1999). "The Legislature recognized that small retailers were unable to cope with the pressures exerted by larger manufacturing interests. Thus, the statutes sought to remove the manufacturer's influence over the retailer, which could result in preference for the manufacturer's product. Under the statutory frame-

work, all levels of the alcoholic beverage industry must remain separate; producers are not to be involved with, or exercise influence over retailers." *Id.* (citing *California Beer Wholesalers Ass'n., Inc. v. Alcoholic Beverage Control Appeals Bd.*, 5 Cal. 3d 402, 407-408 & n.8 (1971)); *see also* slip op. 8 (section 25503(h) is part of "tied-house" prohibitions designed "'to prevent illegal payments from being channeled by alcoholic-beverage manufacturers and wholesalers to retailers'" (quoting *Actmedia*, 830 F.2d at 967)). Section 25503's prohibitions relating to payments for advertising thus implement the economic goals of the overall statute.

In keeping with this goal, California's law, unlike the statute in *Sorrell*, does not regulate according to content. Manufacturers and wholesalers not only are barred from paying for advertising that promotes their brand, or which promote alcoholic beverages in general. They cannot pay for advertising *at all*, even for products that have no relation to alcohol. Thus, under section 25503, a beer manufacturer may not curry favor with a retailer by subsidizing on-site ads for potato chips or soda. Nor may the manufacturer subsidize the retailer's promotion of the retailer itself (for instance, by paying for a convenience store's signage). The manufacturer also generally

cannot reimburse the retailer for non-advertising expenses. The statute prohibits upstream suppliers from *subsidizing* a retailer—and as an economic matter, subsidizing the retailer by paying for advertising is no different than subsidizing the retailer by other acts that the law also prohibits, such as providing free goods or special rebates, *see* § 25503(b), (c), or furnishing or lending any other "thing of value," *id.* §§ 25500(a)(2), 25502(a)(2).

In a related error, the panel incorrectly treated California's ban on *payment* in return for speech as equivalent, under *Sorrell*, to a ban on speech itself. The statute which received heightened scrutiny in *Sorrell* was not aimed at payment or subsidization; it effectively banned all dissemination or use of specified content by particular speakers and recipients. *See Sorrell*, 131 S. Ct. at 2660 (Vermont statute, which "prohibit[s] [covered entities] from allowing prescriber-identifying information to be used for marketing," "in effect bars pharmacies *from disclosing* the information for marketing purposes" (emphasis added)). The goal was to deprive pharmaceutical companies of information about what drugs particular doctors were prescribing in order to prevent the companies "from communicating with physicians in an effective and informative manner." *Id.* at 2663.

This, in turn, justified heightened scrutiny, because "'[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.'" *Id.* at 2671.

Sorrell's rationale for extra scrutiny does not apply to this case, because California's law does not have the goal or effect of "'keep[ing] people in the dark'" on the question of liquor. *Id.* Manufacturers and wholesalers advertise freely—including on television, radio, and the internet, in newspapers and magazines, on billboards and in person, and at sporting and entertainment events. They may even advertise at retail stores, so long as the arrangement does not confer on the retailer a "thing of value" that would undercut the statutory goal of retailer economic independence.

All that is barred is *payment and subsidy* to market-coparticipants whom the State requires to remain *economically* independent. Indeed, the statute bars such payments of any kind, whether or not they relate to speech or advertising. *See* § 25500(a)(2) (manufacturer may not "[f]urnish, give, or lend any money or other thing of value, directly or indirectly" to the owner or operator of on-sale premises); § 25502(a)(2) (similar, for off-sale premises).

In failing to observe the distinction between economic regulation of payments and regulation of speech itself, the panel opinion threatens to undermine areas of governmental regulation which had heretofore been believed unquestioned. Professional referrals, for instance, are a form of advice and information. It would be radical for *Sorrell* to have *sub silentio* changed the law to require heightened scrutiny of rules barring payment in exchange for such referrals. *Cf. People v. Guiamelon,* 205 Cal. App. 4th 383, 398, 415 (2012) (upholding state statute prohibiting medical providers from making payments in return for referrals); 42 U.S.C. § 1320a-7b(b) (federal prohibition on receiving or paying "any remuneration … directly or indirectly" in return for referring an individual for services payable under a federal health care program, or in exchange for "recommending" that the person purchase an item which will involve payment under such a program); Cal. Rules of Professional Conduct 1-320(B) & 2-200(B) (restricting payments for lawyer referrals).

Indeed, the distinction between regulation of payment and regulation of content is so strong that, in considering broadcaster regulations (which, like commercial speech, have traditionally been reviewed under intermediate scrutiny), this Court, in an en banc

opinion, recently upheld a prohibition on paid advertising which "burden[ed] public issue and political speech." *Minority Television*, 736 F.3d at 1198. Such speech generally receives more protection under the First Amendment than the commercial speech at issue here. If *Minority Television* found no reason to apply *Sorrell* to a paid-advertising prohibition affecting those topics, then *a fortiori* the regulation of payments made in return for liquor advertisements does not require such scrutiny.[3]

2. Even if heightened scrutiny did apply under *Sorrell*, that would not require a different result than when the same statute was upheld by this Court in *Actmedia* under the longstanding *Central Hudson* test. As a result, *Actmedia* is not clearly irreconcilable with

---

[3] The panel opinion quotes *Sorrell* as stating that "'the distinction between laws burdening and laws banning speech is but a matter of degree and … the Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans.'" Slip op. 22. But this statement from *Sorrell* cannot be read as meaning that every law which incidentally burdens speech through the regulation of payment mechanisms must survive something greater than intermediate scrutiny. This is evidenced by the fact that this Court did not apply such scrutiny in its en banc post-*Sorrell* decision in *Minority Television*. Rehearing is warranted, because the panel opinion's interpretation of this statement from *Sorrell* could render entire realms of payment regulation (including anti-kickback provisions and the referral-fee regulations discussed above) open to question.

Sorrell, and the overruling of *Actmedia* without en banc consideration was improper.

The panel opinion interprets *Sorrell* as essentially dividing commercial-speech regulations into two categories: regulations that are not content- or speaker-based, which continue to be evaluated under the preexisting intermediate scrutiny standard, and those that are content- or speaker-based and thus require scrutiny under a higher standard. *See* slip op. 16. But *Sorrell* itself is not clear as to whether "heightened scrutiny" is a higher standard than the traditional commercial-speech test.

Sorrell's first mention of the term "heightened judicial scrutiny" implies that that standard applies to *all* speech "protected by the Free Speech Clause of the First Amendment." *See* 131 S. Ct. at 2659 ("Speech in aid of pharmaceutical marketing, however, is a form of expression protected by the Free Speech Clause of the First Amendment. As a consequence, Vermont's statute must be subjected to heightened judicial scrutiny."). If that is the case, then the Supreme Court's invocation of "heightened scrutiny" was not meant to create a meaningfully distinct standard. Commercial speech (like all speech

that is not obscene, fighting words, or otherwise unprotected) enjoys First Amendment protection without respect to the motivations behind any particular regulation—that is why scrutiny higher than rational-basis review applies even in the absence of viewpoint discrimination. And if that is all that was meant by "heightened scrutiny," then *Sorrell* did not intend to establish a new, higher standard for some commercial speech—meaning that the traditional *Central Hudson* approach remains valid. *See, e.g., 1-800-411-Pain Referral Serv., LLC v. Otto*, 744 F.3d 1045, 1055 (8th Cir. 2014) ("The upshot [of *Sorrell*] is that when a court determines commercial speech restrictions are content- or speaker-based, it should then assess their constitutionality under *Central Hudson*."). *Actmedia* thus should have been recognized as controlling, unless and until an overruling by the en banc Court.

CONCLUSION

This Court should grant panel rehearing or rehearing en banc.

Dated: March 21, 2016

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
EDWARD C. DUMONT
Solicitor General
CHRIS KNUDSEN
Senior Assistant Attorney General
JOSHUA A. KLEIN
Deputy Solicitor General
GARY BALEKJIAN
Supervising Deputy Attorney General

s/ Gabrielle H. Brumbach
GABRIELLE H. BRUMBACH
Deputy Attorney General
Attorneys for Defendant-Appellee

LA2013608778
61919595.doc

CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULES 35-4 AND 40-1
FOR 11-55247

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for majority rehearing/petition for rehearing en banc: (check (x) applicable option)

[x] Proportionately spaced, has a typeface of 14 points or more and contains 3,919 words (petitions and answers must not exceed 4,200 words).

or

[ ] In compliance with Fed.R.App.P. 32(c) and does not exceed 15 pages.

March 21, 2016
Dated

s/ Gabrielle H. Brumbach
Gabrielle H. Brumbach
Deputy Attorney General

Opinion

Filed January 7, 2016

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RETAIL DIGITAL NETWORK, LLC, *Plaintiff-Appellant*, v. JACOB APPELSMITH, as Director of the Alcoholic Beverage Control Board, *Defendant-Appellee.*	No. 13-56069 D.C. No. 2:11-cv-09065-CBM-PJW OPINION

Appeal from the United States District Court
for the Central District of California
Consuelo B. Marshall, Senior District Judge, Presiding

Argued and Submitted
June 3, 2015—Pasadena, California

Filed January 7, 2016

Before: Sidney R. Thomas, Chief Judge, Consuelo M. Callahan, Circuit Judge and Edward R. Korman,* Senior District Judge.

Opinion by Judge Callahan

---

* The Honorable Edward R. Korman, Senior District Judge for the U.S. District Court for the Eastern District of New York, sitting by designation.

SUMMARY**

Civil Rights

The panel reversed the district court's summary judgment in favor of the Director of the California Department of Alcoholic Beverage Control, and remanded in an action in which plaintiff challenged, on First Amendment grounds, California Business and Professions Code Section 25503(f)–(h), which forbids manufacturers and wholesalers of alcoholic beverages from giving anything of value to retailers for advertising their alcoholic products.

The panel first held that plaintiff Retail Digital Network, a middleman involved in the advertising industry, had standing to challenge section 25503. The panel held that the Supreme Court's opinion in *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011), requires heightened judicial scrutiny of content-based restrictions on non-misleading commercial speech regarding lawful products, rather than the intermediate scrutiny previously applied to section 25503 by the Ninth Circuit in *Actmedia, Inc. v. Stroh*, 830 F.2d 957 (9th Cir. 1986). The panel held that *Actmedia* was clearly irreconcilable with the Supreme Court's intervening decision in *Sorrell*. The panel therefore reversed the district court's summary judgment, which had found *Actmedia* to be controlling, and remanded on an open record for the district court to apply heightened judicial scrutiny in the first instance.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

COUNSEL

Olivier A. Taillieu (argued) and Raffi V. Zerounian, The Taillieu Law Firm, Beverly Hills, California, for Plaintiff-Appellant.

Kamala D. Harris, Attorney General, Alicia M. B. Fowler, Senior Assistant Attorney General, Jerald L. Mosley, Supervising Deputy Attorney General, and Gabrielle H. Brumbach (argued), Deputy Attorney General, Los Angeles, California, for Defendant-Appellee.

OPINION

CALLAHAN, Circuit Judge:

California Business and Professions Code Section 25503(f)–(h) forbids manufacturers and wholesalers of alcoholic beverages from giving anything of value to retailers for advertising their alcoholic products. Thus, for example, a liquor store owner in California can hang a Captain Morgan Rum sign in his store's window, but the Captain can't pay him, directly or through an agent, for doing so. Twenty-nine years ago, in *Actmedia, Inc. v. Stroh*, 830 F.2d 957 (9th Cir. 1986), we found this law to be consistent with the First Amendment. Today we consider whether *Actmedia* remains binding in light of intervening Supreme Court decisions, which Plaintiff-Appellant Retail Digital Network, LLC (RDN) contends have strengthened the protection we must give commercial speech under the First Amendment.

We conclude that *Actmedia* is clearly irreconcilable with *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011). *Sorrell*

requires heightened judicial scrutiny of content-based restrictions on non-misleading commercial speech regarding lawful products, rather than the intermediate scrutiny applied to section 25503 in *Actmedia*. We therefore reverse the district court's summary judgment in favor of Defendant-Appellee Jacob Appelsmith, Director of the California Department of Alcoholic Beverage Control (the State), and remand on an open record for the district court to apply heightened judicial scrutiny in the first instance.

I.

A. California Business & Professions Code Section 25503

Section 25503 is part of a scheme of "tied-house" statutes passed by the California legislature in the wake of Prohibition.

The name "tied-house" derives from a perceived evil that the scheme was designed to defeat: the return of saloons and other retail alcoholic beverage outlets controlled by alcoholic beverage manufacturers and wholesalers that had been prevalent during the early 1900s. *See Actmedia*, 830 F.2d at 959–61; *Cal. Beer Wholesalers Ass'n v. Alcoholic Beverage Control Appeals Bd.*, 5 Cal. 3d 402, 407 (1971). Manufacturers and wholesalers "tied" retailers to them by providing them with low-interest loans, reduced rents, and free equipment, employing their staff, and other means. *See Actmedia*, 830 F.2d at 960; *see also Pickerill v. Schott*, 55 So. 2d 716, 719 (Fla. Sup. Ct. 1951). Lawmakers in Congress, California, and other states blamed "the industry structure that tied-house arrangements created . . . . for producing monopolies and exclusive dealing arrangements, for causing a vast growth in the number of saloons and bars, for fostering

commercial bribery, and for generating other 'serious social and political evils,' including political corruption, irresponsible ownership of retail outlets, and intemperance." *Actmedia*, 830 F.2d at 960 n.2 (quoting S. Rep. No. 1215, 74th Cong., 1st Sess. 2, 6–7 (1935)); *see also Nat'l Distrib. Co. v. U.S. Treasury Dep't*, 626 F.2d 997, 1009–10 (D.C. Cir. 1980).

To prevent vertical and horizontal integration of the alcoholic beverage industry and to promote temperance, the California legislature prohibited manufacturers and wholesalers from owning retailers or making gifts, paying rebates, or otherwise buying the favor of retailers and their employees. *See, e.g.*, Cal. Bus. & Prof. Code §§ 25500, 25503(a)–(e). Section 25503(f)–(h), the provision challenged on First Amendment grounds here, was designed to "prevent manufacturers and wholesalers from circumventing these other tied-house restrictions by claiming that the illegal payments they made to retailers were for 'advertising.'" *Actmedia*, 830 F.2d at 967. In relevant part, section 25503(f)–(h) forbids manufacturers and wholesalers of alcoholic beverages, including their agents, from providing retail establishments with anything of value for the privilege of advertising their alcoholic products.[1]

---

[1] The statute provides:

> No manufacturer, winegrower, manufacturer's agent, California winegrower's agent, rectifier, distiller, bottler, importer, or wholesaler, or any officer, director, or agent of any such person, shall do any of the following: . . . .
>
> (f) Pay, credit, or compensate a retailer or retailers for advertising, display, or distribution service in

California was not alone in passing tied-house laws. Congress and "the 'vast majority of states' enacted [similar] alcohol beverage control laws" following the repeal of the Eighteenth Amendment. *Actmedia*, 830 F.2d at 959 n.1 (quoting *Cal. Beer Wholesalers Ass'n*, 5 Cal. 3d at 407). California's concern that advertising payments could be used to conceal illegal payoffs to retailers also "appears to have been widely held at the time of section 25503(h)'s enactment." *Id.* at 960. Congress, for example, passed a similar law barring manufacturers and distributors of alcoholic beverages from "paying or crediting the retailer for any advertising, display, or distribution service." 27 U.S.C. § 205(b)(4).

B. *Actmedia, Inc. v. Stroh*

Our court addressed section 25503(h)'s constitutionality under the First Amendment in *Actmedia, Inc. v. Stroh.*, 830 F.2d 957 (9th Cir. 1986). Actmedia, a corporation whose business consisted of leasing advertising space on supermarket shopping carts, challenged section 25503(h) as

---

> connection with the advertising and sale of distilled spirits.
>
> (g) Furnish, give, lend, or rent, directly or indirectly, to any person any decorations, paintings, or signs, other than signs advertising their own products as permitted by Section 25611.1.
>
> (h) Pay money or give or furnish anything of value for the privilege of placing or painting a sign or advertisement, or window display, on or in any premises selling alcoholic beverages at retail.

Cal. Bus. & Prof. Code § 25503.

an impermissible restriction on commercial speech. Following trial, the district entered judgment for the State and dismissed Actmedia's claims.

On appeal, we applied the test for laws that burden commercial speech set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980). Under that test, courts examine four questions: (1) whether the speech concerns lawful activity and is not misleading; (2) whether the asserted governmental interest justifying the regulation is substantial; (3) whether the regulation directly advances the governmental interest asserted; and (4) whether the regulation is not more extensive than is necessary to serve that interest. *Id.* at 566.

We found "little dispute concerning the first two factors of the *Central Hudson* analysis." *Actmedia*, 830 F.2d at 965. First, the ads "concern[ed] lawful activity and [were] not . . . misleading. Thus, they constitute[d] protected commercial speech under the [First Amendment]." *Id.* (quotation marks omitted). Second, the State "ha[d] a 'substantial' interest in exercising its twenty-first amendment powers and regulating the structure of the alcoholic beverage industry in California: the activities of manufacturers, wholesalers, and retailers in the state; the methods by which alcoholic beverages are marketed; and influences that affect the consumption levels of alcoholic beverages by California residents." *Id.* at 965–66.

Addressing the third *Central Hudson* factor, we concluded that "section 25503(h) furthers California's purposes both of limiting the ability of large alcoholic-beverage manufacturers and wholesalers to achieve vertical and horizontal integration by acquiring influences

over the state's retail outlets, and of promoting temperance." *Id.* at 966. We explained that the provision eliminated a loophole potentially left open by California's other tied-house laws, through which manufacturers and wholesalers might use advertisement payments to buy the favor of retailers and their employees. *Id.* at 967. "Because prohibiting alcoholic-beverage manufacturers and wholesalers from paying retailers to advertise in their stores will eliminate any danger that such payments will be used to conceal illegal payoffs and violations of the tied-house laws, we conclude[d] that section 25503(h) furthers the same interests that led California to enact the tied-house laws." *Id.* We also reasoned that "in reducing the quantity of advertising that is seen in retail establishments selling alcoholic beverages, the provision also directly furthers California's interest in promoting temperance." *Id.*

Addressing the fourth *Central Hudson* factor, we concluded that "section 25503(h)'s blanket prohibition of paid advertising in retail establishments appears to be as narrowly drawn as possible to effectuate [the provision's] first purpose," that being "to prevent illegal payments from being channelled by alcoholic-beverage manufacturers and wholesalers to retailers." *Id.* We also found that section 25503(h) is not more extensive than necessary to achieve the provision's "second purpose[,] . . . to promote temperance, both indirectly, by limiting vertical integration of the alcoholic-beverage industry and its side effects, and directly, by reducing the amount of point-of-purchase advertising." *Id.* We reasoned that "to the extent that the California legislature has determined that point-of-purchase advertising is a direct cause of excessive alcohol consumption, limiting that advertising is 'obviously the most direct and perhaps the only effective approach' available." *Id.* (quoting *Metromedia,*

Inc. v. City of San Diego, 453 U.S. 490, 508 (1981)). We thus held that section 25503(h) survived intermediate scrutiny.

C. RDN's Suit

Like the plaintiff in *Actmedia*, RDN is a middleman involved in the advertising industry. RDN installs liquid crystal displays, or LCDs, in retail stores for advertisements and then enters into contracts with other parties who want to advertise their products on the displays. In exchange for placing a display in a retail store, RDN pays the store a percentage of the advertising fees generated by the display. RDN states that it has attempted to enter into contracts with manufacturers to advertise their alcoholic beverages on RDN's displays in California. According to RDN, the manufacturers have refused due to concerns that the advertising would violate section 25503(f)–(h).

RDN filed this action on November 1, 2011, seeking declaratory relief that section 25503(f)–(h) is unconstitutional under the First Amendment, and an injunction against the State's enforcement of the law. The State moved for summary judgment and, at a hearing on that motion, RDN agreed "that the Ninth Circuit's decision in *Actmedia* . . . leaves 'no room for this litigation' except to the extent that a trio of subsequent Supreme Court decisions is clearly irreconcilable with its conclusions." *RDN v. Appelsmith*, 945 F. Supp. 2d 1119, 1123 (C.D. Cal. 2013). Specifically, RDN argued that *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (plurality opinion), and, most definitively, *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011), overrule *Actmedia*. According to RDN, these cases require heightened judicial

scrutiny of laws burdening non-misleading commercial speech regarding legal products, which section 25503 cannot survive.

The district court first found that RDN had standing to challenge section 25503 based on injury to its economic interest in the advertising of alcoholic beverages that section 25503 burdens . *RDN*, 945 F. Supp. 2d at 1122–23. On the merits, the district court found that section 25503 is a content- and speaker-based restriction on commercial speech, but held that the law is constitutional under *Actmedia*. *Id.* at 1125–26.

The district court acknowledged that, after *Actmedia*, the Supreme Court stated that heightened judicial scrutiny is warranted "whenever the government creates 'a regulation of speech because of disagreement with the message it conveys.'" *Id.* at 1125 (quoting *Sorrell,* 131 S. Ct. at 2664). But the district court found that *Sorrell* was consistent with *Actmedia*'s analytical framework for four reasons. First, *Sorrell* "cited to a previous Supreme Court decision applying *Central Hudson.*" *RDN*, 945 F. Supp. 2d at 1125. Second, *Sorrell* applied the *Central Hudson* test rather than heightened judicial scrutiny after noting that, "[a]s in previous cases, . . . the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied." *RDN*, 945 F. Supp. 2d at 1125 (quoting *Sorrell*, 131 S. Ct. at 2667). Third, the majority in *Sorrell* did not define heightened scrutiny. *RDN*, 945 F. Supp. 2d at 1125. And fourth, "the dissenting opinion by Justice Breyer (and joined by Justices Ginsburg and Kagan), notes that the majority opinion suggests but does not hold that a standard stricter than the traditional *Central Hudson* test might be applied to content-based restrictions." *Id.* (citing *Sorrell*, 131 S. Ct. at 2677 (Breyer, J., dissenting)). The district court

also reasoned that, "[e]ven assuming *arguendo* that *Sorrell* established a heightened level of scrutiny for complete speech bans founded on paternalistic motivations," *Actmedia* is not clearly irreconcilable because section 25503 does not completely ban any speech. *Id.* at 1125.

Accordingly, the district court did not examine section 25503 under *Sorrell*'s heightened judicial scrutiny or reexamine the law under intermediate scrutiny. Rather, it found that *Actmedia* remained controlling and thus granted summary judgement in favor of the State. *Id.* at 1125–26.

II.

A. Standing

Like the district court, we begin by determining whether RDN has standing. The State's silence about this issue on appeal does not excuse us from satisfying ourselves of our jurisdiction. *See, e.g.*, *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 963 (9th Cir. 2015) (en banc). To establish Article III standing, a plaintiff bears the burden of showing injury in fact, causation, and redressability. *See Bennett v. Spear*, 520 U.S. 154, 167 (1997). We agree with the district court that RDN's asserted loss of advertising revenue resulting from section 25503 meets this burden.

Our analysis does not end here. Several prudential principles that underscore the limitations embodied in Article III may bar standing even where, as here, the requirements of Article III have been met. "One of these prudential limits on standing is that a litigant must normally assert his own legal

interests rather than those of third parties."[2] *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985). This "general rule [that] a third party does not hav[e] standing to bring a claim asserting a violation of someone else's rights" adheres even where those rights are constitutional in stature. *Martin v. Cal. Dep't of Veterans Affairs*, 560 F.3d 1042, 1050 (9th Cir. 2009); *see also Wine & Spirits Retailers, Inc. v. Rhode Island*, 418 F.3d 36, 49 (1st Cir. 2005) ("A party ordinarily has no standing to assert the First Amendment rights of third parties.").

In the commercial-speech context, the Supreme Court has held that the "individual parties to the transaction that is proposed in the commercial advertisement"—the advertiser and the consuming public—have protected First Amendment interests in the speech proposing the transaction. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762–63 (1976). The Court has distinguished between the proposal of a commercial transaction, "which is what defines commercial speech," and the provision of services for profit, which is not commercial speech. *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480–81 (1989).

While an advertisement about an alcoholic beverage clearly constitutes commercial speech, *see 44 Liquormart*, 517 U.S. at 495 (opinion of Stevens, J.), *id.* at 528 (O'Connor, J., concurring), RDN is not a manufacturer or

[2] We need not address whether the label "prudential standing" is a misnomer as applied to the third-party standing analysis, as we find that RDN's claim may proceed regardless of the doctrine's rubric. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 n.3 (2014).

retailer seeking to hawk its wares, or a consumer looking to buy. Rather, RDN is interested in profiting from facilitating the publication of alcoholic beverage advertisements. In the circumstances presented, however, where RDN could face criminal penalties for placing advertisements of particular content on its retail displays paid for by alcoholic beverage manufacturers, we find that RDN may bring a First Amendment challenge to the law proscribing its conduct. *See* Cal. Bus. & Prof. Code § 25503 (prohibiting an "agent" of a manufacturer, wholesaler, or other listed entity from providing anything of value to retailers for the privilege of advertising); *id.* § 25504 (listing penalties); *cf. Dep't of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.*, 128 Cal. App. 4th 1195, 1208 (Ct. App. 2005), *as modified* (May 13, 2005) (holding that section 25503(h) prohibits "indirect payments by suppliers to retailers" through promoters).

Our conclusion finds support in the principle that "when [a] threatened enforcement effort implicates First Amendment rights, the [standing] inquiry tilts dramatically toward a finding of standing." *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1155 (9th Cir. 2000). Indeed, the Supreme Court has found that a plaintiff threatened with criminal prosecution for violating a law imposing a content-based burden on commercial speech may challenge that law under the First Amendment, even though the speech of third parties is more directly at stake. *Bigelow v. Virginia*, 421 U.S. 809, 815–18 (1975) (holding that a newspaper publisher who had been convicted of violating a state statute outlawing advertising regarding abortion services had standing to challenge the law on First Amendment grounds).

The Court also has held that a publisher whose business conduct was directly regulated by a law imposing a content-based burden on commercial speech could challenge that law under the First Amendment. In *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Board*, 502 U.S. 105, 109 (1991), the Court held that a publisher, Simon & Schuster, had standing to challenge a law that imposed a financial disincentive on one of its authors to write a book about a career criminal named Henry Hill. Under a contract with Simon & Schuster, Hill was entitled to compensation, but New York's "Son of Sam" law required that these funds be held in escrow for five years for use in satisfying any civil judgments obtained by the victims of Hill's crimes. Pursuant to this law, the New York State Crime Victims Board ordered Simon & Schuster to turn over all money payable to Hill. *Id.* at 115. The Court found that Simon & Schuster had standing to challenge the Son of Sam law under the First Amendment. The Court reasoned that "[w]hether the First Amendment 'speaker' is considered to be Henry Hill, whose income the statute places in escrow because of the story he has told, or Simon & Schuster, which can publish books about crime with the assistance of only those criminals willing to forgo remuneration for at least five years, the statute plainly imposes a financial disincentive only on speech of a particular content." *Id.*; *see also Pitt News v. Pappert*, 379 F.3d 96, 105–06 (3d Cir. 2004) (Alito, J.) (holding that a newspaper had standing to challenge a law that prohibited the newspaper from receiving payments for running alcoholic beverage ads).

Similarly, section 25503 imposes a financial burden on a speaker based on the content of the speaker's expression. The law may be enforced against RDN as an agent facilitating that expression. Consequently, whether the commercial

"speaker" is considered to be RDN as a publisher or third-party alcoholic beverage manufacturers, distributors, and retailers whose speech RDN would display, RDN may challenge section 25503 on First Amendment grounds.

B. First Amendment Protection of Commercial Speech After *Sorrell*

Turning to the merits, we first summarize how the protection given to commercial speech has evolved since 1986, when we last addressed section 25503's constitutionality under the First Amendment.

As noted, the Supreme Court defines commercial speech as that "which does 'no more than propose a commercial transaction.'" *Va. State Bd. of Pharmacy*, 425 U.S. at 762 (quoting *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973)). Such speech has long been given less protection under the First Amendment than other types of speech. *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001); *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 818 (9th Cir. 2013). Specifically, restrictions on commercial speech have been subject to intermediate scrutiny under the four-part test set forth in *Central Hudson*, 447 U.S. at 566. The burden is on the government to show that the elements of the test are satisfied. *44 Liquormart*, 517 U.S. at 504–05 (opinion of Stevens, J.). Consistent with *Central Hudson*, we have previously applied intermediate scrutiny to content-based and content-neutral regulations of commercial speech alike. *See, e.g.*, *Coyote Publ'g, Inc. v. Miller*, 598 F.3d 592, 599 n.10 (9th Cir. 2010) ("[W]hether or not the . . . regulation is content-based, the *Central Hudson* test still applies because of the reduced protection given to commercial speech.").

In *Sorrell*, however, the Supreme Court held that content- or speaker-based restrictions on non-misleading commercial speech regarding lawful goods or services must survive "heightened judicial scrutiny." 131 S. Ct. at 2664. The Court invalidated a Vermont law that restricted the sale, disclosure, and use of pharmacy records for marketing purposes. *Id.* at 2659. On its face, the law was content- and speaker-based. In fact, it had been enacted with the avowed purpose of "diminish[ing] the effectiveness of marketing by manufacturers of brand-name drugs." *Id.* at 2663. While the Court found that heightened judicial scrutiny of the law was required, the Court did not actually apply heightened scrutiny, as it found that the law could not withstand intermediate scrutiny under *Central Hudson*. *Id.* at 2667–68.

Consistent with *Sorrell*'s plain language, we rule that *Sorrell* modified the *Central Hudson* test for laws burdening commercial speech. Under *Sorrell*, courts must first determine whether a challenged law burdening non-misleading commercial speech about legal goods or services is content- or speaker-based. If so, heightened judicial scrutiny is required. *See Sorrell*, 131 S. Ct. at 2664.

Heightened judicial scrutiny may be applied using the familiar framework of the four-factor *Central Hudson* test.[3]

---

[3] The district court need not apply strict scrutiny, which requires the government to demonstrate that a challenged law "is justified by a compelling government interest and is narrowly drawn to serve that interest." *Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2738 (2011). For the law to be crafted with sufficient precision to survive strict scrutiny, there must be no less restrictive means available to achieve the compelling governmental interest. *See, e.g.*, *Boos v. Barry*, 485 U.S. 312, 328–29 (1988). The Supreme Court knows the words, "strict scrutiny," and the *Sorrell* majority seems at pains to avoid them. *See Sorrell*, 131

With respect to the third *Central Hudson* factor, the government bears the burden of showing "that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Coors Brewing Co.*, 514 U.S. at 487. With respect to the fourth *Central Hudson* factor, the government bears a heavier burden of showing that the challenged law "is drawn to achieve [the government's substantial] interest." *Sorrell*, 131 S. Ct. at 2667–68. This inquiry first permits a district court to test the consistency between (a) the specific interests asserted by the government during litigation in addressing *Central Hudson*'s second prong and (b) the legislative purposes that the court finds actually animated a challenged law, as made explicit in the statute's text or evidenced by its history or design. *See Friendly House v. Whiting*, 846 F. Supp. 2d 1053, 1060–61 (D. Ariz. 2012), *aff'd sub nom. Valle Del Sol Inc. v. Whiting*, 709 F.3d 808 (9th Cir. 2013). Post hoc rationalizations for a restriction on commercial speech may not be used to sustain its constitutionality.

Second, after identifying the governmental interests that animate the challenged restriction, intermediate scrutiny—and, a fortiori, heightened scrutiny—demands a "fit between the legislature's ends and the means chosen to accomplish those ends." *Sorrell*, 131 S. Ct. at 2668 (quoting *Fox*, 492 U.S. at 480). This requirement is demanding under heightened scrutiny, but it is "something short of a least-restrictive-means standard" that the government must meet under strict judicial scrutiny. *See Fox*, 492 U.S. at 477. What is required is "a fit that is not necessarily perfect, but

---

S. Ct. at 2667 ("[T]he outcome is the same whether a special commercial speech inquiry or a *stricter form of judicial scrutiny* is applied.") (emphasis added).

reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served; that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective." *Id.* at 480.

"As in other contexts, these standards ensure . . . that the [government's] interests are proportional to the resulting burdens placed on speech," *Sorrell*, 131 S. Ct. at 2668, thus preventing "the government from too readily sacrific[ing] speech for efficiency." *McCullen v. Coakley*, 134 S. Ct. 2518, 2534 (2014) (alternation in original). These standards also check raw paternalism, ensuring "that the law does not seek to suppress a disfavored message" or "keep people in the dark for what the government perceives to be their own good." *Sorrell*, 131 S. Ct. at 2668, 2671. Indeed, at least when the audience of commercial speech consists of adult consumers in possession of their faculties, the fact "[t]hat the State finds expression too persuasive does not permit it to quiet the speech or to burden its messengers." *Id.* at 2671.

Our conclusion that *Sorrell* modified the *Central Hudson* test is consistent with the decisions of other circuit courts applying *Sorrell*. Our sister circuits have agreed that *Sorrell* requires stricter judicial scrutiny of content-based restrictions on non-misleading commercial speech, though they may not have settled on the contours of this more demanding level of scrutiny.

The Eighth Circuit, for example, held that *Sorrell* "devised a new two-part test for assessing restrictions on commercial speech." *1-800-411-Pain Referral Serv., LLC v. Otto*, 744 F.3d 1045, 1054 (8th Cir. 2014). "The first question to ask is whether the challenged speech restriction

is content- or speaker-based, or both. . . . If a commercial speech restriction is content- or speaker-based, then it is subject to 'heightened scrutiny.'" *Id.* at 1055. The second step is to apply the appropriate level of scrutiny. According to the Eight Circuit, because *Sorrell* "did not define what 'heightened scrutiny' means, ... [t]he upshot is that when a court determines commercial speech restrictions are content- or speaker-based, it should then assess their constitutionality under *Central Hudson*." *Id.* at 1055.

The Second Circuit also has interpreted *Sorrell* to require heightened scrutiny of content- or speaker-based restrictions on commercial speech, which may be applied using the framework of the *Central Hudson* test. *United States v. Caronia*, 703 F.3d 149, 164 (2d Cir. 2012). The Seventh Circuit similarly observed that *Sorrell* requires "the government [to] establish that the challenged statute 'directly advances a substantial governmental interest and that the measure is drawn to achieve that interest.'" *Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 604 (7th Cir. 2012) (quoting *Sorrell*, 131 S. Ct. at 2667–68)).

The Third Circuit has suggested that *Sorrell* may require strict scrutiny of content-based burdens on commercial speech. *King v. Governor of the State of N.J.*, 767 F.3d 216, 236 (3d Cir. 2014), *cert. denied sub nom. King v. Christie*, 135 S. Ct. 2048 (2015). Citing *Sorrell*, the court noted that "[o]rdinarily, content-based regulations are highly disfavored and subjected to strict scrutiny." *Id.* However, the court did not apply strict scrutiny to the challenged content- and speaker-based restriction on "professional speech" because it found that the law did not "discriminat[e] on the basis of content [or speaker] in an impermissible manner." *Id.* at 237.

Moreover, our holding is consistent with our non-binding decisions referenced by the parties. These decisions indicated that *Sorrell* requires a more demanding form of scrutiny of content- or speaker-based regulations on commercial speech than we have previously applied. *See Minority Television Project, Inc. v. FCC*, 676 F.3d 869, 881 n.8 (9th Cir. 2012), *vacated*, 704 F.3d 1009–10 (9th Cir. 2012) (order); *Jerry Beeman & Pharmacy Servs., Inc. v. Anthem Prescription Mgmt., LLC,* 652 F.3d 1085, 1101 n.17 (9th Cir. 2011), *vacated*, 741 F.3d 29 (9th Cir. 2014) (order).[4]

C. *Actmedia* is No Longer Binding.

We next consider whether *Actmedia* remains binding after subsequent Supreme Court commercial speech decisions, including *Coors Brewing*, *44 Liquormart*, and *Sorrell*.

As a three-judge panel, we are bound by *Actmedia* unless it is "clearly irreconcilable" with intervening higher authority. *Miller v. Gammie,* 335 F.3d 889, 893 (9th Cir. 2003) (en banc). "This is a high standard." *Lair v. Bullock,* 697 F.3d 1200, 1207 (9th Cir. 2012). "It is not enough for there to be some tension between the intervening higher authority and prior circuit precedent." *Id.* at 1207. "Rather, the relevant court of last resort must have undercut the theory or reasoning

---

[4] Both of these decisions were vacated, and the subsequent decisions entered in the cases did not interpret *Sorrell*. In another case, we noted that "[t]he parties . . . raise[d] the challenging issue of whether *Sorrell*, 131 S. Ct. at 2664, 2667–68, made the fourth *Central Hudson* prong for content-based restrictions on commercial speech even more demanding for the state." *Valle Del Sol Inc.*, 709 F.3d at 821. But we "defer[red] extended discussion of *Sorrell*," after finding that the challenged "provisions [were] deficient under even the pre-*Sorrell,* arguably more government-friendly, precedent." *Id.*

underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable." *Miller*, 335 F.3d at 900; *see also In re Flores*, 692 F.3d 1021, 1030–31 (9th Cir. 2012).

We do not find that *Coors Brewing*, 514 U.S. 476 (1995) (striking down a law prohibiting beer labels from displaying alcohol content), or *44 Liquormart*, 517 U.S. 484 (1996) (striking down a ban on all advertising of alcoholic beverage prices except for price tags), meets this high standard. *Coors Brewing* and *44 Liquormart* do not clearly undermine *Actmedia*'s reasoning—they also applied intermediate scrutiny under the *Central Hudson* test. Similarly, we held in *Lair v. Bullock* that our circuit precedent could not be eschewed where a subsequent Supreme Court decision had "only clarified and reinforced" the principles on which our prior decision relied. 697 F.3d at 1207. While *Coors Brewing* and *44 Liquormart* suggest that complete bans on particular commercial speech require a higher level of scrutiny, section 25503 is not a complete ban on advertisements of alcoholic beverages in retail stores.

We find, however, that *Sorrell* and *Actmedia* are clearly irreconcilable. As explained above, *Sorrell* modified the *Central Hudson* analysis by requiring heightened judicial scrutiny of content-based restrictions on non-misleading advertising of legal goods or services. The parties do not dispute that section 25503 is a content- and speaker-based restriction on commercial speech. As such, section 25503 is now subject to heightened judicial scrutiny, not the intermediate scrutiny applied in *Actmedia*. Thus, *Actmedia*'s "overall analytical framework" of intermediate scrutiny cannot be reconciled with *Sorrell*'s framework of heightened judicial scrutiny. *See Lair*, 697 F.3d at 1206.

We cannot distinguish *Sorrell* as a case involving a complete ban on commercial speech. *Sorrell* foreclosed this argument. The majority stated "that the distinction between laws burdening and laws banning speech is but a matter of degree and that the Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans." *Sorrell*, 131 S. Ct. at 2664.

Our conclusion that *Sorrell* undercut the theory and reasoning underlying *Actmedia* in a way that makes the cases clearly irreconcilable is strengthened by *Actmedia*'s treatment of paternalistic policy. *Actmedia* held that California could, consistent with the First Amendment, promote temperance "directly . . . by reducing the amount of point-of-purchase advertising" of alcoholic beverages. *Actmedia*, 830 F.2d at 967.[5] However, the Supreme Court has since made clear that the First Amendment does not allow the government to silence truthful speech simply for fear that adults who hear it would be too persuaded. Even in the context of commercial speech, "the fear that people would make bad decisions if given truthful information cannot justify content-based burdens on speech." *Sorrell*, 131 S. Ct. at 2670–71; *see also 44 Liquormart*, 517 U.S. at 503 (opinion of Stevens, J.) ("The First Amendment directs us to be especially skeptical of

[5] *Actmedia* does not appear to have definitively held that an additional goal of section 25503(h) is the suppression of point-of-purchase advertising. *See Actmedia*, 830 F.2d at 967 ("Moreover, *to the extent* that the California legislature has determined that point-of-purchase advertising is a direct cause of excessive alcohol consumption, limiting that advertising is obviously the most direct and perhaps the only effective approach available." (emphasis added)). Other courts that have examined section 25503 and similar tied-house statutes in detail have not found this goal to animate the laws. *See, e.g.*, *Nat'l Distrib. Co.*, 626 F.2d at 1009–10; *Cal. Beer Wholesalers Ass'n*, 5 Cal. 3d at 407.

regulations that seek to keep people in the dark for what the government perceives to be their own good.").

We conclude that *Actmedia* is no longer binding in light of the Supreme Court's opinion in *Sorrell*. Following *Sorrell*, section 25503(f)–(h) must survive heightened judicial scrutiny to stand.

D. We Remand for the District Court to Apply Heightened Judicial Scrutiny.

While we conclude that *Actmedia* is clearly irreconcilable with *Sorrell*, we remand for the district court to apply heightened judicial scrutiny in the first instance. A remand is appropriate in this case for several reasons. First, RDN did not move for summary judgment in the district court and agreed at oral argument that a remand for the district court to develop the factual record and apply heightened judicial scrutiny would be appropriate. The State also expressed a desire to develop the factual record should we find that *Actmedia* is no longer controlling. Second, the record before us is thin, as this appeal is from a motion for summary judgment rather than, as in *Actmedia*, from judgment after a trial. Third, the State should not be faulted for resting on *Actmedia*, which has been the law since 1986, rather than investing more resources in rallying to section 25503(f)–(h)'s defense. Confronted with similar circumstances, the Supreme Court approved of the Second Circuit's decision to remand for the district court to apply the third and fourth *Central Hudson* factors in the first instance. *Fox*, 492 U.S. at 475–76. Similarly, we recently declined to fault a plaintiff for relying on an overruled decision that had "been the law of the circuit since 1985," and thus remanded "on an open record to allow [the plaintiff] an opportunity to make" the required showing.

Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv., 789 F.3d 1075, 1092 (9th Cir. 2015). Here too we remand on an open record to give the State a chance to meet its burden and for the district court to apply heightened judicial scrutiny in the first instance.

On remand, there are several considerations that should be addressed in applying heightened judicial scrutiny. As an initial matter, we observe that the State's goal of suppressing a particular commercial structure, rather than a particular commercial message, remains valid. *See Granholm v. Heald*, 544 U.S. 460, 466 (2005) (maintaining a "three-tier distribution system" is a legitimate governmental interest); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 715 (1984) (noting that "exercising control over . . . how to structure the liquor distribution system" is a legitimate exercise of a State's Twenty-first Amendment powers). The broad goal of "temperance" also remains "a valid and important interest of the State under the Twenty-first Amendment." *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874, 902 (9th Cir. 2008). However, "state laws that violate other provisions of the Constitution [including the First Amendment] are not saved by the Twenty-first Amendment." *Granholm*, 544 U.S. at 486. Moreover, to the extent that the legislature intended to promote temperance by reducing the amount of point-of-purchase advertising, as *Actmedia* assumed, the court's skepticism regarding whether section 25503(f)–(h)'s burden on expression directly advances and is fit to achieve a permissible goal should be deepened. This is because a statute tailored to fit an impermissible goal of suppressing commercial speech for fear that it will persuade is less likely to be a close fit for another, permissible goal of the statute.

As noted, with respect to the third *Central Hudson* factor, the "Government carries the burden of showing that the challenged regulation advances the Government's interest in a direct and material way." *Coors Brewing Co.*, 514 U.S. at 487. "That burden is not satisfied by mere speculation or conjecture." *Id.* Rather, to survive scrutiny "a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id.* On remand, the district court should consider whether the State has shown that there is a real danger that paid advertising of alcoholic beverages would lead to vertical or horizontal integration under circumstances existing in the alcoholic beverage market today. While we "hesitate to disagree with the accumulated, common-sense judgments of [the] lawmakers" who enacted section 25503(f)–(h), *see Metromedia*, 453 U.S. at 509, we cannot say on the record before us that the State's Prohibition-era concern about advertising payments leading to vertical and horizontal integration, and thus leading to other social ills, remains an actual problem in need of solving. Additionally, the district court should consider whether the State's concern about paid advertising leading to horizontal and vertical integration is real in the circumstances of this case. Here, advertising payments to retailers are made by a third party, not directly by a manufacturer or wholesaler of alcoholic beverages. There may be additional reasons to doubt the State's concern about advertising payments actually leading to vertical or horizontal integration in these circumstances.

The district court must also consider whether the State has shown that section 25503(f)–(h) materially advances the State's goals of preventing vertical and horizontal integration and promoting temperance. We note that the increasing number of statutory exceptions to section 25503(f)–(h) call

into doubt whether the statute materially advances these aims. Cal. Bus. & Prof. Code §§ 25503.1–25503.57; *see Coors Brewing Co.*, 514 U.S. at 489 (finding "little chance" that a law "can directly and materially advance its aim, while other provisions of the same Act directly undermine and counteract its effects"). Additionally, the record before us does not demonstrate that a prohibition on paid point-of-sale advertising materially advances the goal of temperance.[6] Indeed, a study discussed in *Actmedia* suggests that the effect of paid advertising is only to persuade customers to purchase a particular brand, not to purchase and consume more alcohol. *See Actmedia*, 830 F.2d at 961–62.

With respect to the fourth *Central Hudson* factor, heightened judicial scrutiny demands a "fit between the legislature's ends and the means chosen to accomplish those ends." *Sorrell*, 131 S. Ct. at 2668. We cannot say on the record now before us that section 25503(f)–(h) is narrowly tailored to serve the State's interest in preventing advertising payments from undermining its triple-tiered distribution and licensing scheme. For example, the State's interest might be achieved by policing advertising agreements made between retailers, manufacturers, wholesalers, and intermediaries like RDN, rather than by banning paid advertisements of alcoholic beverages in retail stores. The State's additional goal of

[6] On this score, the State's expert states that "[i]t is almost impossible to pull a single regulation out of the system and determine exactly what it does and how it contributes to an overall goal such as temperance." Although we leave it for resolution on remand, we observe that this acknowledgment would suggest that the State will have a difficult time carrying its burden of showing that section 25503(f)–(h) directly and materially advances the State's asserted interests in preventing vertical and horizontal integration of the alcoholic beverage industry and promoting temperance. *See Edenfield v. Fane*, 507 U.S. 761, 767 (1993).

increasing temperance might be achieved by regulating the prices of alcoholic beverages, limiting when and where they are sold, or adopting educational programs, rather than by burdening commercial speech of particular content by particular speakers. On remand, the district court should consider whether the State has demonstrated the requisite fit between section 25503(f)–(h) and the State's goals.

While we decline to decide these issues on the thin record before us, the State must meet its burden on remand.

III.

Twenty-nine years ago, in *Actmedia, Inc. v. Stroh*, 830 F.2d 957 (9th Cir. 1986), we held that California Business and Professions Code section 25503(h) was consistent with the First Amendment. Today we hold that *Actmedia* is no longer binding in light of *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011). As a content-based restriction on non-misleading commercial speech regarding a lawful good or service, section 25503(f)–(h) now must survive heightened judicial scrutiny. We remand on an open record for the district court to apply heightened judicial scrutiny in the first instance.

REVERSED and REMANDED.

9th Circuit Case Number(s) 13-56069

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

****

CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) March 21, 2016.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) s/ Marsha A. Petty

****

CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date)

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature (use "s/" format)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 13-56069

RETAIL DIGITAL NETWORK,
Plaintiff-Appellant,

v.

JACOB APPEL SMITH, as Director of the Alcoholic Beverage Control Board,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

PLAINTIFF-APPELLANT RETAIL DIGITAL NETWORK'S OPPOSITION TO DEFENDANT-APPELLEE APPELSMITH'S PETITION FOR PANEL REHEARING AND FOR REHEARINNG EN BANC

OLIVIER A. TAILLIEU
The Taillieu Law Firm
One Park Plaza
3250 Wilshire Blvd., Suite 1200
Los Angeles, CA 90010
(310) 651-2440

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTRODUCTION

Appellee seeks rehearing based on two grounds. First, Appellee claims that the Opinion places unwarranted restrictions on the evidence and arguments available to the State on remand. Second, Appellee claims that en ban review is warranted to resolve a conflict with the Supreme Court and Ninth Circuit precedent. Appellee errs on both fronts. For the reasons stated herein, rehearing is inappropriate in this case. The matter should be remanded to the District Court for the development of a full record and consideration thereof by that court.

THERE ARE NO UNWARRANTED RESTRICTIONS

The State bases its entire first argument on one sentence in the Opinion. To wit, the State states that the Opinion commands the district court that "post hoc rationalizations for a restriction on commercial speech may not be used to sustain its constitutionality." That sentence is found at page 17 of the Slip Opinion.

Based on that sentence alone, Appellee argues that this Court has limited the District Court in a very specific way. It argues that "[t]he rule allowing reliance on post-enactment rationales has continuing forces, as evidenced by recent lower-court cases." Brief at 9. And that the "asserted [government] interest need not be the original interest behind the legislation." Brief at 10. The Opinion, however, does no such thing.

The sentence immediately preceding the purported "offending" sentence makes it clear that the district court should consider all interests advanced during the litigation—pre- and post-hoc. It states that "[t]his inquiry first permits a

district court to test the consistency between (a) the specific interest asserted by the government during litigation in addressing Central Hudson's second prong ***AND*** (b) the legislative purpose that the court finds actually animated a challenged law, as made explicit in the statute's text or evidenced by its history or design." Thus, central to the Opinion's analysis is "the specific interest asserted by the government during litigation", which clearly post-dates any enactment of the statute. As such, the entire basis for Appellee's first argument crumbles even upon a cursory look. Slip Opinion, p. 17.

Furthermore, in the section of the Opinion that specifically addresses remand, the Opinion states a clear mandate to consider ***all rationalizations advanced by the State***. In that section, the Opinion states that:

> On remand, the district court should consider whether the State has shown that there is a real danger that paid advertising of alcoholic beverages would lead to vertical or horizontal integration under circumstances existing in the alcoholic beverage market ***today***. While we "hesitate to disagree with the accumulated, common-sense judgments of [the] lawmakers" who enacted section 25503(f)-(h), *see Metromedia*, 453 U.S. at 509, we cannot say on the record before us that the State's Prohibition-era concern about advertising payments leading to vertical and horizontal integration, and thus leading to other social ills, ***remains an actual problem in need of solving***. Additionally, the district court should consider whether the State's concern about paid advertising leading to horizontal and vertical integration ***is real in the circumstances of this case***. Here, advertising payments to retailers are made by a third party, not directly by a manufacturer or wholesaler of alcoholic beverages. There may be additional reasons to doubt the State's concern about advertising payments actually leading to vertical or horizontal integration ***in these circumstances***.

Retail Digital Network, LLC v. Appelsmith, 810 F.3d 638, 652 (9th Cir. 2016) (emphasis added).

There are simply no unwarranted restrictions for the district court to abide by. The State has the burden of expressing its interests, which it has done in this case. These interests are (1) avoidance of vertical integration and (2) temperance. These interests were expressed at the time the statute was passed, at the time the *Actmedia* decision was rendered, and during this litigation. *Actmedia, Inc. v. Stroh*, 830 F.2d 957 (9th Cir. 1986). These are the only interests the State has ever advanced for this restriction on speech. On remand, the State will be allowed to explain itself to the court and justify how these interests are served—if at all—by this law. This time, however, the State will have to meet its burden under existing Supreme Court jurisprudence—a jurisprudence which embodies *Sorrell* and thus requires a higher threshold than that expressed in *Actmedia*.

EN BANC CONSIDERATION IS NOT WARRANTED

As a preliminary matter, the State admits that rehearing should not occur until a full record develops in the court below. As such, this Petition is premature. Appellant therefore respectfully requests that the Petition for Rehearing En Banc be summarily denied.

Should the Court decide this Petition on the merits, Appellee does not present any argument that addresses any of the bases for rehearing. Rather, Appellee tries to re-argue the case it just lost.

Rule 35 of the Federal Rules of Appellate procedure state the following:

> **(a) When Hearing or Rehearing En Banc May Be Ordered.** A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:
>
> **(1)** en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or
>
> **(2)** the proceeding involves a question of exceptional importance.

Fed. R. App. P. 35; *Henry v. Ryan*, 766 F.3d 1059, 1061 (9th Cir. 2014)

THERE IS UNIFORMITY IN THIS COURT'S DECISIONS

En Banc review might be appropriate when there are two or more decisions that conflict with each other. No such conflict exists here. The decision in *Actmedia* and the Opinion in this case do not conflict. In fact, the Opinion explicitly addresses *Actmedia* and explains that, in light of intervening Supreme Court jurisprudence, it is no longer the law. This is perfectly appropriate.

Typically, once a three-judge panel resolves an issue in a published opinion, the matter is considered resolved, unless overruled by the court itself sitting en banc, or by the Supreme Court. *Hart v. Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001). Such a panel may not any more disregard the earlier panel's opinion than it may disregard a ruling of the Supreme Court. *Santamaria v. Horsley*, 110 F.3d 1352, 1355 (9th Cir.1997) ("It is settled law that one three-judge panel of this court cannot ordinarily reconsider or overrule the decision of a prior panel."), *rev'd*, 133 F.3d 1242 (9th Cir.) (en banc), *amended by* 138 F.3d 1280 (9th Cir.); *Montesano v.*

Seafirst Commercial Corp., 818 F.2d 423, 425–26 (5th Cir.1987) (A "purpose of institutional orderliness [is served] by our insistence that, in the absence of intervening Supreme Court precedent, one panel cannot overturn another panel, regardless of how wrong the earlier panel decision may seem to be.").

Therefore, a Panel "may not respectfully (or disrespectfully) disagree with his learned colleagues on his own court of appeals who have ruled on a controlling legal issue." *Hart*, 266 F.3d at 1170. Thus, binding authority cannot be considered and cast aside; it is not merely evidence of what the law is—rather, case law on point *is* the law.

> If a court must decide an issue governed by a prior opinion that constitutes binding authority, the later court is bound to reach the same result, even if it considers the rule unwise or incorrect. Binding authority must be followed unless and until overruled by a body competent to do so.

Id.

Here, however, the United States Supreme Court has spoken on this very issue since this Court addressed it in *Actmedia*. To wit, the Court has stated that when a regulation "does not simply have an effect on speech, but is directed at certain content and is aimed at particular speakers", then heightened scrutiny must be applied. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011).

Sorrell was not just another application of existing law (*Central Hudson*). The Supreme Court rarely engages in such banal endeavors. In Sorrell, the Court sought to distinguish the type of cases that are subject to traditional *Central Hudson* analysis from those that are not. *Central Hudson* applies to all restraints

on commercial speech—whether or not speaker based or content based. *Sorrell* on the other hand applies only to commercial speech cases where the government restricts particular content or particular speakers.

That is precisely what the offending statute does here: It prevents liquor manufacturers (aimed at particular speakers) from paying retailers for the benefit of advertising (aimed at particular content). Therefore, the statute deserved heightened scrutiny as expressed in *Sorrell*.

Actmedia has therefore been abdicated because it did not apply any form of heightened scrutiny; rather it applied the *Central Hudson* test which was deemed insufficiently scrutinous when dealing with content based and speaker based restrictions.[1] *See Sorrell*, 564 U.S. at 567. The Opinion makes that point at length and RDN could not craft a better argument for that position.

"Circuit precedent may be overturned without an en banc rehearing if the Supreme Court has 'undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable.'" *In re Bender*, 586 F.3d 1159, 1164 (9th Cir. 2009) (quoting *Miller v. Gammie*, 335 F.3d 889, 899-900 (9th Cir.2003)).

In *Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002), this Court took very flexible approach to this principle and recognized that circuit

[1] In its brief for rehearing, and for the first time in this case, the State argues that the ban is not content based because the law prevents manufacturers from giving anything of value to retailers, whether or not it relates to speech or advertising. Brief at 16. This completely ignores the actual language of the statute, which specifically prohibits "pay[ment], credit, or compensate[ion of] a retailer or retailers for advertising, display, or distribution service in connection with the advertising and sale of distilled spirits." 25503(f).

precedent, authoritative at the time that it issued, can be effectively overruled by subsequent Supreme Court decisions that "are closely on point," even though those decisions do not expressly overrule the prior circuit precedent. *Id.* at 1123 (internal quotation marks omitted).

Similarly, in *United States v. Lancellotti*, 761 F.2d 1363 (9th Cir.1985), this Court confirmed that "we may overrule prior circuit authority without taking the case en banc when an 'intervening Supreme Court decision undermines an existing precedent of the Ninth Circuit, and both cases are closely on point.' " *Galbraith*, 307 F.3d at 1123 (quoting *Lancellotti*, 761 F.2d at 1366); *see also United States v. Nachtigal*, 507 U.S. 1, 2–6, 113 S.Ct. 1072, 122 L.Ed.2d 374 (1993) (per curiam) (holding that the Ninth Circuit erred by not finding the case controlled by intervening Supreme Court authority even though circuit authority was not expressly overruled); *LeVick v. Skaggs Cos.*, 701 F.2d 777, 778 (9th Cir.1983) ("[W]hen existing Ninth Circuit precedent has been undermined by subsequent Supreme Court decisions, this court may reexamine that precedent without the convening of an *en banc* panel."); *Piedmont Label Co. v. Sun Garden Packing Co.*, 598 F.2d 491, 495 (9th Cir.1979) (holding that an intervening Supreme Court decision "undercut the ... theory" of the Ninth Circuit decision).

> We must recognize that we are an intermediate appellate court. A goal of our circuit's decisions, including panel and en banc decisions, must be to preserve the consistency of circuit law. The goal is codified in procedures governing en banc review. *See* 28 U.S.C. § 46; Fed. R.App. P. 35.
>
> That objective, however, must not be pursued at the expense of creating an inconsistency between our circuit decisions and the reasoning of state or federal authority embodied in a decision of a court of last resort.

> We hold that the issues decided by the higher court need not be identical in order to be controlling. Rather, the relevant court of last resort must have undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable.

Miller v. Gammie, 335 F.3d 889, 900 (9th Cir. 2003)

"The present case is an example where intervening Supreme Court authority is clearly irreconcilable with our prior circuit authority." *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003). As such, the Opinion does not reflect a conflict in this Circuit, but rather an evolution of the law based on intervening Supreme Court jurisprudence. As such, there is no basis for rehearing en banc.

The rest of Appellee's brief simply regurgitates the same argument made on appeal—to wit, the State argues that *Sorrell* does not alter the analysis engaged in commercial speech cases and therefore, *Actmedia* controls. The Opinion addresses this argument better than this writer ever could and thus no further argument will be offered in this brief.

THE AMICI BRIEFS' ARGUMENTS MAKE ASSUMPTIONS BASED ON AN EMPTY RECORD

All amici briefs simply rehash the arguments made by the State—the crux of which is that very bad things will happen to America if liquor manufacturers are allowed to pay third parties for the benefit of advertising at the point of sale. Their arguments are, however, just arguments. One of the central points of the Opinion is that the case should be remanded so that the Court below can make that

determination. Then, and only then, can the state make its showing that the regulation does in fact prevent the harm sought to be prevented and that it does so in the most narrow way possible.

Additionally, the amici spend considerable time arguing that Sorrell does not apply because the regulation at play here purportedly regulates economic activities, and places only an incidental burden on speech. The NBWA goes as far as saying that "Section 25503 imposes no restrictions on the content of RDN's advertising or its ability to advertise in retail locations." Brief at 15. That is simply absurd. Section 25503 absolutely does prevent RDN from advertising liquor.

Amici Curiae National Beer Wholesalers Association and the Wine and Spirit Wholesaler of America, Inc. ("NBWA/WSWA") also argues that *Sorrell's* "heightened scrutiny" simply means "more than rational basis," and as such both intermediate scrutiny and strict scrutiny qualify as such. NBWA/WSWA Brief at 16. As such, per the Amicus brief, Sorrell is just an application of the *Central Hudson* test to a new set of facts and therefore creates no new analysis. Accordingly, then, the analysis under *Central Hudson* applies to this case and *Actmedia* still stands—or so goes the argument. This is clearly incorrect.

Sorrell is more than just an application of *Central Hudson* to a new set of facts, however. Had it been just so, the Supreme Court would not have gone at length about the need to recognize a new category of ills—namely, speaker-based and content-based regulations. And here is where the distinction lies: All regulations to commercial speech are subject to *Central Hudson's* four-part test—including regulation to commercial speech that disfavors no specific speaker or viewpoint. Examples of these are laws limiting billboards, *Metro Lights, L.L.C. v. City of Los Angeles*, 551 F.3d 898 (9th Cir. 2009), laws limiting door to door

solicitation, *Project 80's, Inc. v. City of Pocatello*, 942 F.2d 635, 639 (9th Cir. 1991), etc.

But, under Sorrell, should a regulation impede speech based on viewpoint or identity of speaker, the heightened scrutiny dictated by Sorrell applies. The Opinion recognized that distinction and ruled accordingly.

Finally, Amicus California Craft Brewers Association ("CCBA") also argues the merits of the case, without the benefit of a full record. Strangely, CCBA's brief states that small producers and manufacturers are helped by the three-tiered structure, when all the evidence in the marketplace is to the contrary. The near monopoly power of the major players in the beer industry prevents small craft beer producers from having access to both distribution and shelf space. Opening up this market by allowing them direct access through point of sale advertising would increase their visibility—not decrease it. In any event, these are relevant arguments to be had on remand.

CONCLUSION

For the foregoing reasons, the Petition for Rehearing and Rehearing en Banc should be denied.

May 3, 2016

Respectfully submitted,

/s/ Olivier A. Taillieu

OLIVIER A. TAILLIEU
THE TAILLIEU LAW FIRM LLP
One Park Plaza
3250 Wilshire Blvd., Suite 1200
Los Angeles, CA 90010
(310) 651-2440

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached **PLAINTIFF-APPELLANT RETAIL DIGITAL NETWORK'S OPPOSITION TO DEFENDANT-APPELLEE APPELSMITH'S PETITION FOR PANEL REHEARING AND FOR REHEARINNG EN BANC**, proportionately spaced, uses a 14 point Times New Roman font and contains 3,052 words (petitions and answers must not exceed 4,200 words).

May 3, 2016

Respectfully submitted,

/s/ Olivier A. Taillieu

OLIVIER A. TAILLIEU
THE TAILLIEU LAW FIRM LLP
One Park Plaza
3250 Wilshire Blvd., Suite 1200
Los Angeles, CA 90010
(310) 651-2440

9th Circuit Case Number(s) 13-56069

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

****

CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) May 3, 2016 .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) s/ Mekaela Brook Stephens

****

CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature (use "s/" format)