CA No. 13-56069

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RETAIL DIGITAL NETWORK, LLC,
Plaintiff and Appellant,

v.

RAMONA PRIETO, as Acting Director of the
California Department of Alcoholic Beverage Control,
Defendant and Appellee.

On Appeal from the United States District Court
for the Central District of California
No. 2:11-cv-09065-CBM-PJW (Honorable Consuelo B. Marshall)

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT, URGING REVERSAL

Cory L. Andrews
Richard A. Samp
Mark S. Chenoweth
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Avenue, NW
Washington, DC 20036
(202) 588-0302

December 21, 2016

Counsel for *amicus curiae*
Washington Legal Foundation

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Washington Legal Foundation (WLF) states that it is a non-profit corporation organized under § 501(c)(3) of the Internal Revenue Code. WLF has no parent corporation, nor has it issued any stock owned by a publicly held company.

TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Page(s)

Statutes and Constitutional Provisions:

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT, URGING REVERSAL

INTERESTS OF *AMICUS CURIAE*

Washington Legal Foundation (WLF) is a public-interest law firm and policy center headquartered in Washington, DC, with supporters in all 50 States, including many in California.[1] WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law.

To that end, WLF has litigated frequently in support of the speech rights of market participants, appearing in numerous federal courts in cases raising commercial-speech issues. *See, e.g., Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011); *American Beverage Assoc. v. City and County of San Francisco*, No. 16-16073 (9th Cir., dec. pending); *United States v. Caronia*, 703 F.3d 149 (2d Cir. 2012). In particular, WLF has repeatedly urged courts to apply heightened scrutiny to content-based government regulation of commercial speech. *See, e.g., Grocery Mfrs. Ass'n v. Sorrell*, No. 15-1504, *dism'd as moot* (2d Cir., Aug. 5, 2016); *Educational Media Co. at Virginia Tech v. Insley*, 731 F.3d 291 (4th Cir.

---

[1] Pursuant to Fed.R.App.P. 29(c)(5), WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief. All parties have consented to the filing of this brief.

2013).

WLF is concerned that the decision below affords inappropriately broad deference to California's decision to restrict truthful, nonmisleading speech. California seeks to justify that restriction based on its fear that the public will respond to truthful speech in a manner the State deems inappropriate—by consuming excessive quantities of alcoholic beverages. But as the Supreme Court has repeatedly held, "[t]he First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." *44 Liquormart. Inc. v. Rhode Island*, 517 U.S. 484 (1996).

Such speech restrictions are subject to "heightened" First Amendment review, even when the speech in question is commercial in nature. But even if California's speech restrictions undergo the intermediate level of review articulated by the Supreme Court in *Central Hudson Gas & Elec. Corp. v. Pub. Service Comm'n*, 447 U.S. 557 (1980), WLF believes that the State has not come close to supplying evidence sufficient to justify its speech restrictions.

STATEMENT OF THE CASE

This case is a facial and as-applied First Amendment challenge to California Business and Professions Code § 25503(f), (g), and (h), which prohibit manufacturers and wholesalers of alcoholic beverages, or their agents, from paying

retailers to advertise their products.[2] Appellant Retail Digital Network, LLC (RDN) is in the business of installing advertising displays in retail outlets. Its usual business model entails agreeing to act as the agent for product manufacturers in seeking appropriate locations for placing their ads. When a retail outlet agrees that one of RDN's advertisements may be installed on its premises, RDN pays the retailer a portion of the advertising fee it charges to the manufacturer. Section § 25503 bars not only alcoholic-beverage manufacturers and wholesalers but also RDN, when acting as the agent of such manufacturers and wholesalers, from

---

[2] Section 25503 provides, in relevant part:

> 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 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.

paying advertising fees to retailers. Retailers are free to display any product advertising they wish, but they may not be paid by alcoholic-beverage manufacturers, etc. for doing so.

Section 25503 is part of a scheme of "tied-house" statutes passed by the California legislature in 1935 in the wake of Prohibition. The statutes seek to prevent manufacturers and wholesalers of alcoholic beverages from "tying" a retailer to themselves and thereby inducing the retailer to sell their products to the exclusion of competitors' products. These tied-house arrangements (which allegedly proliferated in the early twentieth century) were criticized in the 1930s for having "cause[d] a vast growth in the number of saloons and bars, for fostering commercial bribery, and for generating serious social and political evils, including political corruption, irresponsible ownership of retail outlets, and intemperance." *Actmedia, Inc. v. Stroh*, 830 F.2d 957, 960 n.2 (9th Cir. 1986) (citations omitted).

Although Congress adopted an alcohol control law in the 1930s, it differed from the California statutes in material respects. In particular, unlike § 25503, federal law does not include a blanket prohibition against manufacturers and wholesalers paying retailers to advertise their products. Rather, the federal "tied house" statute bars payments to a retailer (whether for advertising or some other service) *only* if the payments are made for the purpose of inducing the retailer to

purchase the products of the manufacturer/wholesaler "to the exclusion in whole or in part" of competitors' products. 27 U.S.C. § 205(b).

RDN's complaint, filed against the Director of California's Alcoholic Beverage Control Board in her official capacity (hereinafter "California"), alleged that § 25503 infringes First Amendment speech rights by imposing content-based speech restrictions that California cannot adequately justify. The parties agreed in the district court that there were "no material issues of fact in dispute and the only issues in dispute are legal." Excerpts of Record (ER) at 2 n.1. Accordingly, they agreed that disposition of the case by means of summary judgment was proper. *Ibid*.

In May 2013, the district court granted summary judgment to California and dismissed the lawsuit. ER 1-10. The court first rejected California's contention that § 25503 is a content-neutral speech restriction:

> Defendant's argument that "Section 25503 [does not] regulate the speaker" is belied by the text of the statute which begins, in relevant part, with "[n]o 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 ... ." Cal. Bus. & Prof. Code § 25503. The Court finds that Section 25503 disfavors certain forms of commercial speech by alcoholic manufacturers (paid advertisements in retail stores) and is thus not a content-neutral time, place, or manner restriction.

ER 6.

The district court nonetheless rejected RDN's First Amendment claim, concluding that RDN's claim was foreclosed by this Court's 1986 *Actmedia* decision, which rejected a largely similar First Amendment challenge to § 25503. *Id.* at 6-10. RDN contended that Supreme Court commercial speech decisions issued in the years following 1986—particularly *Sorrell v. IMS Health, Inc.*—undermined *Actmedia*'s continued validity. The district court disagreed, finding that "*Sorrell* is not 'clearly irreconcilable' with the Ninth Circuit's reasoning in *Actmedia*" and thus that the latter decision remained binding authority. *Id.* at 10. It concluded that *Sorrell* was unclear regarding whether courts are required to apply "heightened scrutiny" to content-based speech restrictions that are not "complete speech bans." *Ibid*.

In January 2016, a panel of this Court unanimously reversed. *Retail Digital Network, LLC v. Appelsmith*, 810 F.3d 638 (9th Cir. 2016). The panel concluded that "*Sorrell* and *Actmedia* are clearly irreconcilable" because "*Sorrell* modified the *Central Hudson* analysis by requiring heightened judicial scrutiny of content-based restrictions on non-misleading advertising of legal goods or services." *Id*. at 650. Because, the panel concluded, § 25503 imposes content-based speech restrictions, it "must survive heightened judicial scrutiny to stand," and *Actmedia* (which upheld § 25503 after applying intermediate scrutiny) "is no longer

binding." *Id.* at 651. After outlining its views of what "heightened review" entails, the panel remanded the case to the district court for reconsideration of RDN's claims under the proper review standard. *Id.* at 651-53.

On November 16, 2016, the Court granted California's petition for rehearing *en banc*, thereby vacating the panel decision.

SUMMARY OF ARGUMENT

The Supreme Court unequivocally held in *Sorrell* that content-based restrictions on commercial speech must survive heightened judicial scrutiny to stand. Although the Court did not spell out a precise definition of the mandated "heightened scrutiny," it made clear that such review entails a First Amendment scrutiny more exacting than the *Central Hudson* "intermediate review" normally afforded commercial-speech restrictions that are neither content-based nor speaker-based.[3] Because the district court in this case granted summary judgment to California on the basis of *Actmedia*—a decision that scrutinized § 25503's content-

[3] *Central Hudson* adopted a four-prong test to be applied by courts in evaluating First Amendment challenges to commercial-speech restrictions. First, courts consider whether the commercial speech is either inherently misleading or related to an unlawful activity. If not, the government may regulate the speech only upon a showing that: (2) the government has a substantial interest that it seeks to achieve; (3) the regulation directly advances the asserted interest; and (4) the regulation serves that interest in a narrowly tailored manner. *Central Hudson*, 447 U.S. at 566.

and speaker-based speech restrictions under the insufficiently exacting *Central Hudson* test—the district court's decision must be reversed.

There is no merit to the assertions of California and its supporting *amici* that heightened judicial scrutiny is unwarranted. First, California asserts that § 25503 does not restrict speech at all, but rather simply regulates commercial conduct. It asserts that no speech is restricted because retailers remain free at all times to display whatever advertising they desire; they simply cannot be paid by wholesalers or manufacturers for doing so. Reh. Pet. 15. The Supreme Court rejected that precise argument in *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105 (1991). The Court invoked the First Amendment to strike down a New York law that permitted felons to write books about their crimes but prohibited them from receiving compensation for their efforts, finding that the ban on compensation imposed a significant content-based restriction on First Amendment rights. *Id.* at 108.

Second, California asserts that § 25503 does not qualify as a content-based restriction on speech because it bans *any* advertising-based payments from manufacturers or wholesalers to retailers, without regard to the subject matter of the proposed advertisement. Reh. Pet. 14. Thus, California argues, § 25503 "does not regulate according to content," because manufacturers and wholesalers "cannot

pay for advertising *at all*, even for products that have no relation to alcohol." *Ibid*. That argument ignores the Supreme Court's definition of content-based speech restrictions. A statute that is content-neutral on its face nonetheless is categorized as content-based when it was adopted by the government "because of disagreement with the message the speech conveys." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). And all agree that one of the principal reasons that California adopted § 25503's advertising-compensation ban was that it disliked liquor advertising—because it feared that increased advertising would lead to intemperance. *See, e.g., Actmedia,* 830 F.2d at 967 (stating that "in reducing the quantity of advertising that is seen in retail establishments selling alcoholic beverages, [§ 25033(h)] also directly furthers California's interest in promoting temperance").

Moreover, § 25503 is unquestionably a speaker-based restriction; it singles out advertising by manufacturers and wholesalers of alcoholic beverages for special restrictions. Such speaker-based restrictions are constitutionally suspect when, as here, "the legislature's speaker preference reflects a content preference." *Reed*, 135 S. Ct. at 2230.

Third, California contends that the "heightened scrutiny" mandated by *Sorrell* is actually synonymous with *Central Hudson* review, and thus that

Actmedia—which held that § 25503 survives *Central Hudson* scrutiny—mandates affirming the district court's decision. Reh. Pet. 19-20. That contention misreads *Sorrell*, which could not have been clearer that the heightened review mandated for content-based commercial speech restrictions is more exacting than *Central Hudson* review. While *Sorrell* did not precisely define what "heightened scrutiny" entails, § 25503 cannot withstand such scrutiny under any plausible standards.

Indeed, § 25503 even fails to satisfy the intermediate scrutiny prescribed by *Central Hudson*. For § 25503 to pass muster under *Central Hudson*, the State must present solid evidence that the statute's speech restrictions directly advance its intended objectives "to a material degree." The record before the Court contains *no* such evidence. In the absence of any evidence that § 25503 significantly promotes temperance or discourages "tied-house" monopolies, no justification exists for restricting the truthful advertising of a perfectly legal product.

Nor has the State demonstrated that § 25503 is narrowly tailored and thereby no more restrictive than necessary to achieve its stated goals—another requirement of *Central Hudson*. This is especially true given the myriad of alternative means by which the State could achieve its goals *without* restricting commercial speech. California could, for example, address directly the problem of hidden "illegal payoffs" without restricting perfectly lawful commercial speech. And the State

could promote temperance by requiring higher prices (either directly or through taxation) or by engaging in public educational campaigns—none of which involves restricting speech.

ARGUMENT

I. HEIGHTENED SCRUTINY APPLIES TO SECTION 25503'S SPEECH RESTRICTIONS, A STANDARD APPELLEE CANNOT POSSIBLY SATISFY

Supreme Court commercial-speech case law has arisen largely in the context of challenges to content-neutral speech restrictions that sought to prevent dissemination of potentially false or misleading commercial speech. Under those circumstances, the Court has had few opportunities to consider the proper First Amendment standards for reviewing content-based commercial speech restrictions. Faced with claims that a speech restriction violated the First Amendment because it discriminated against speech based on its content or the identity of the speaker, however, recent (post-*Actmedia*) Court decisions have consistently concluded that the proper review standard must be more stringent than the intermediate review standard articulated in *Central Hudson*. *See, e.g.*, *Sorrell*, 131 S. Ct. at 2664; *44 Liquormart*, 517 U.S. at 505 (plurality) (content-based prohibitions on truthful alcoholic beverage price advertising should be reviewed with "special care" given that "speech prohibitions of this type rarely survive constitutional review"); *id*. at

526 (Thomas, J., concurring in part and concurring in the judgment) ("[A]ll attempts to dissuade legal choices by citizens by keeping them ignorant are impermissible.").

As explained below, § 25503 cannot survive First Amendment scrutiny even when examined under the less-exacting *Central Hudson* test.[4] *A fortiori*, § 25503's content- and speaker-based speech restrictions also violate the First Amendment under any conceivable heightened-review standard. There is no merit to the assertions of California and its supporting *amici* that heightened judicial scrutiny is unwarranted.

A. Section 25503 Restricts Speech, Not Conduct

In asserting that heightened scrutiny should not be applied to § 25503, California questions whether the statute should be deemed to regulate speech at all. Criticizing the panel's application of heightened scrutiny, California asserts, "In failing to observe the distinction between economic regulation of payments and regulation of speech itself, the panel opinion threatens to undermine areas of government regulation which had heretofore been believed unquestioned." Reh.

---

[4] This Court sitting *en banc* is not, of course, bound by the contrary conclusion reached by the *Actmedia* panel. Nor does *stare decisis* provide any basis for adhering to that outdated panel decision, given that no one could plausibly contend that he relied to his detriment on the existence of advertising restrictions.

Pet. 17.

That criticism is not well taken. The Supreme Court has routinely held that the First Amendment is presumptively violated when the government imposes non-uniform financial obligations/restrictions that have the effect of chilling speech. *See, e.g., Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592 (1983) ("We have long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment."). There can be no serious question that a law prohibiting alcoholic-beverage manufacturers and wholesalers from paying retailers to advertise their products will severely limit the number of alcoholic-beverage advertisements displayed by retailers.

Simon & Schuster also explicitly rejected the economic-regulation-not-speech-regulation argument espoused by California. That case involved a challenge to New York's "Son of Sam law," which significantly restricted the right of publishers to pay convicted felons to write books about their crimes. New York argued that its law did not implicate First Amendment rights because it did not interfere with the publication of such true-crime stories, nor was that even the intent of the law, which was designed to ensure that income earned by convicted

felons remained available to compensate victims of their crimes. The Supreme Court nonetheless held that the law unconstitutionally abridged First Amendment rights of would-be publishers and authors, because "[i]t single[d] out income derived from expressive activity for a burden the State places on no other income," and thus "plainly impose[d] a financial disincentive only on speech of a particular content." 502 U.S. at 508.

Similarly, while § 25503 does not explicitly bar any advertising, it plainly imposes a financial disincentive on the advertising of alcoholic beverages by retailers. That financial disincentive implicates RDN's First Amendment rights. As the Supreme Court explained in *Sorrell*, "[T]he 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. ... Lawmakers may no more silence unwanted speech by burdening its utterance than by censoring its content." *Sorrell*, 564 U.S. at 565-66.

B. The Speech Restrictions at Issue Are Both Content-Based and Speaker-Based

California also challenges the district court's finding that § 25503's speech restrictions are content-based. It asserts that the statute "does not regulate according to content" because "[m]anufacturers and wholesalers not only are

barred from paying for advertising that promotes their brand, or which promote[s] alcoholic beverages in general. They cannot pay for advertising *at all*, even for products that have no relation to alcohol." Reh. Pet. 14 (emphasis in original).

That argument ignores Supreme Court holdings regarding what constitutes a content-based speech restriction. The Court deems a speech regulation to be "content-based," even if it is facially content-neutral, if it either: (1) "cannot be justified without reference to the content of the regulated speech"; or (2) was "adopted by the government because of disagreement with the message the speech conveys." *Reed*, 135 S. Ct. at 2227 (citations omitted). *Accord, Sorrell*, 564 U.S. at 566. That definition indisputably requires that § 25503 be classified as "content-based" because California adopted the statute in part because of its aversion to excessive advertising of alcoholic beverages. California concluded that limiting such advertising would promote temperance. *See Actmedia*, 830 F.2d at 967; *California Beer Wholesalers Ass'n, Inc. v. Alcoholic Beverage Control Appeals Bd.*, 5 Cal.3d 402, 407 (1971).

Section 25503's content-based nature is also made evident by its focus on particular speakers: its restriction on advertising payments applies to payments made by alcoholic-beverage manufacturers and wholesalers to retailers and to no one else. When, as determined by *Actmedia*, those entities are barred from paying

supermarkets to display advertising on shopping carts, it is hardly surprising that—when one goes into a California supermarket today—one sees shopping-cart advertisements for virtually every brand-name product sold in the store *except* for alcoholic beverages.

Reed explained that "speech restrictions based on the identity of the speaker" are highly suspect because they "are all too often simply a means to control content." *Reed*, 135 S. Ct. at 2230. "[L]aws favoring some speakers often demand strict scrutiny when the legislature's speaker preference reflects a content preference." *Ibid*. There can be little question that § 25503's speaker-based provisions reflect the State's disfavor of alcoholic-beverage advertising.[5]

As *Sorrell* makes clear, much existing commercial-speech regulation is *not* content-based. For example, *Sorrell* explained that regulation designed to restrict false or misleading speech is not deemed content-based because such regulation is based on a "neutral justification" unrelated to the subject matter of the speech. *Sorrell*, 564 U.S. at 579. For similar reasons, commercial-speech restrictions designed to protect privacy, to prevent fraud (*e.g.*, anti-kickback statutes), or to

---

[5] It is irrelevant, for purposes of First Amendment analysis, that alcoholic-beverage advertising in other forums does not face similar restrictions. As the Supreme Court has explained, "One is not to have the liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556 (1975).

content-neutrally regulate the time, place, or manner of speech are similarly not classified as content-based. Accordingly, affirming the district court's finding that § 25503 is content-based will not bring on the parade of horribles imagined by California, Reh. Pet. 15-16; much commercial-speech regulation will continue to be evaluated under the less-stringent *Central Hudson* test.

C. Content-Based and Speaker-Based Restrictions on Commercial Speech Are Subject to Heightened Scrutiny

Because § 25503 imposes content-based and speaker-based restrictions on speech, it is subject to "heightened scrutiny." *Sorrell*, 564 U.S. at 566. "Commercial speech is no exception" to the rule applying heightened scrutiny to content-based speech restrictions, *ibid*; indeed, as the Supreme Court explained, "A consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue." *Ibid.* It added:

> In the ordinary case it is all but dispositive to conclude that a law is content-based and, in practice, viewpoint-discriminatory. See *R.A.V.* [*v. St. Paul*, 505 U.S. 377, 382 (1992)] ("Content-based regulations are presumptively invalid").

Id. at 571.

California argues that *Sorrell*'s heightened-scrutiny requirement should not apply to § 25503 because the statute does not impose a blanket ban on advertising, and heightened scrutiny should only apply to blanket bans. Reh. Pet. 16. But

nothing in the *Sorrell* decision supports such a limitation on the heightened-scrutiny requirement; to the contrary, the Court stated explicitly, "Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans." *Sorrell*, 564 U.S. at 566. Indeed, the speech restrictions at issue in *Sorrell* did not involve a blanket ban on speech.

California cites this Court's decision in *Minority Television* in support of its contention that it is sometimes appropriate to apply intermediate scrutiny to content-based speech restrictions. Reh. Pet. 18 (citing *Minority Television Project, Inc. v. FCC*, 736 F.3d 1192 (9th Cir. 2013) (*en banc*)). But *Minority Television* arose in the context of television broadcast regulations, and as the Court noted, the Supreme Court has long recognized the special First Amendment status of such regulation in light of the ostensible scarcity of broadcast spectrum. *Minority Television*, 736 F.3d at 1197-98 (citing *FCC v. League of Women Voters*, 468 U.S. 364, 380 (1984)). The Supreme Court has never carved out a similar exception for restrictions on alcoholic-beverage advertising. To the contrary, the Court has held explicitly that the Twenty-first Amendment (which repealed Prohibition and granted States authority to regulate liquor sales) does *not* empower States to regulate truthful alcoholic-beverage advertising. *44 Liquormart*, 517 U.S. at 516 ("[T]he Twenty-first Amendment does not qualify the constitutional prohibition

against laws abridging the freedom of speech embodied in the First Amendment.").

D. The Heightened Scrutiny Mandated by *Sorrell* for Content-Based and Speaker-Based Restrictions Is Stricter than *Central Hudson*'s Intermediate Scrutiny

California argues that even if the Court determines that § 25503 is content-based, *Actmedia* applied the proper standard of review because the "heightened scrutiny" required by *Sorrell* for content-based commercial-speech restrictions is actually synonymous with the intermediate standard of review mandated by *Central Hudson* and applied by *Actmedia*. Reh. Pet. 19-20.

That argument blatantly misreads *Sorrell*. The Supreme Court declined to specify precisely what "heightened scrutiny" entails; but its statement that content-based commercial-speech restrictions are "presumptively invalid," 564 U.S. at 571, belie any suggestion that it equated "heightened scrutiny" with the more-relaxed *Central Hudson* intermediate scrutiny. The Court ultimately determined that the Vermont speech restrictions at issue in *Sorrell* were constitutionally impermissible even when analyzed under *Central Hudson* (and thus that the Court had no need to undertake a separate "heightened scrutiny" analysis of those restrictions), *ibid*, but that determination does not plausibly mean that the Court equated the two standards of review. To the contrary, by stating that "the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny

is applied," *ibid*, the Court indicated that it viewed "heightened scrutiny" as a "stricter form of judicial scrutiny" than the *Central Hudson* standard normally applied to commercial-speech restrictions.

WLF urges the Court to use this occasion to provide at least some guidance regarding what constitutes the "heightened scrutiny" mandated by *Sorrell*. One plausible approach would be to apply the same "strict scrutiny" to content-based commercial-speech restrictions that courts already apply to content-based restrictions on noncommercial speech. At the very least, the Court should not only require California to make the three factual showings mandated by *Central Hudson* ((1) the interest asserted by the government is substantial: (2) the challenged speech restriction directly advances the asserted interest; and (3) the restriction serves that interest in a narrowly tailored manner) but also require that California satisfy its evidentiary burden under a "clear and convincing evidence" standard of proof. For example, the "narrow tailoring" prong should, at an absolute minimum, require completion of an empirical study demonstrating with a high degree of certainty that the government could not achieve its asserted interests without imposing speech restrictions.

The evidence submitted by California during summary judgment proceedings came nowhere close to meeting such heightened evidentiary standards.

In light of California's concession in the district court that there are no disputed issues of material fact, ER 2 n.1, the Court may appropriately direct the district court to enter judgment for RDN. Alternatively, the Court should reverse and remand with instructions that the district court consider the constitutionality of § 25503 under the "heightened scrutiny" standard mandated by *Sorrell*.

II. EVEN UNDER INTERMEDIATE SCRUTINY AS PRESCRIBED BY *CENTRAL HUDSON*, SECTION 25503'S RESTRICTION ON COMMERCIAL SPEECH IS UNCONSTITUTIONAL

Although *Sorrell* plainly mandates that § 25503 be subjected to "heightened scrutiny" because it contains discriminatory content- and speaker-based restrictions on speech, § 25503 also violates the First Amendment even if evaluated under the level of scrutiny prescribed by *Central Hudson*. Bound by this circuit's prior panel decision in *Actmedia*, the district court chose not to independently analyze § 25503 under *Central Hudson*'s traditional test for government restrictions on commercial speech. But this *en banc* Court is not bound by *Actmedia*, and this case offers the Court an excellent opportunity to reevaluate and overturn that 30-year-old decision.

As a threshold matter, the first prong of *Central Hudson* requires the Court to consider whether the commercial speech at issue concerns unlawful activity or is inherently misleading. The State concedes that the speech at issue here is neither

misleading nor related to unlawful activity. Appellee's Answer Br. at 16. As to the second prong of *Central Hudson,* Appellant concedes that the State's interest in promoting temperance is "substantial." Appellant's Opening Br. at 23. Accordingly, § 25503 violates the First Amendment unless the State can establish that the statute (1) "directly advances" the State's substantial interest and is (2) "not more extensive than is necessary to serve that interest." *Central Hudson*, 447 U.S. at 566. As demonstrated below, the State fails to satisfy either requirement.

A. Restricting Truthful Alcohol Advertising Neither Directly Advances California's Asserted Interests Nor Materially Alleviates Any Purported Harm

Under the third prong of *Central Hudson,* the State bears the burden of proving that § 25503's restrictions on commercial speech "directly advance the governmental interest asserted," 447 U.S. at 566, and that they do so "to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 771 (1993). This prong is "critical" because, without it, "'a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression.'" *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995) (quoting *Edenfield*, 507 U.S. at 771). A State's regulation of commercial speech cannot be sustained if it provides "only ineffective or remote support for the government's purpose," *Central Hudson*, 447 U.S. at 564, or if the restriction

otherwise has "little chance" of advancing the State's purported goal. *Coors Brewing*, 514 U.S. at 489.

The Supreme Court has emphasized that it is the *regulators* of commercial speech who bear the burden of justifying their regulations. *See Coors Brewing*, 514 U.S. at 487 ("[T]he Government carries the burden of showing that the challenged regulation advances the Government's interest."); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71 n.20 (1983) ("The party seeking to uphold a restriction on commercial speech carries the burden of justifying it.").

That evidentiary burden is not light. Indeed, the State's burden of showing that a challenged regulation of commercial speech advances "in a direct and material way" a substantial government interest is "not satisfied by mere speculation or conjecture." *Edenfield*, 507 U.S. at 767, 770. Tellingly, in *none* of the cases in which the Supreme Court has considered First Amendment challenges to commercial-speech restrictions has the Court been willing to defer to the government's findings and policy assertions regarding the effectiveness of such restrictions. That would be inconsistent with the heavy burden of demonstrating that speech restrictions alleviate real harms "to a material degree," which would amount to nothing if the government could satisfy that burden by merely pointing to administrative or legislative fact-finding devoid of any empirical evidence.

Here, § 25503 is part of a larger regulatory scheme enacted "to eliminate the evils of unlicensed and unlawful manufacture, selling, and disposing of alcoholic beverages, and to promote temperance in the use and consumption of alcoholic beverages." Cal. Bus & Prof. Code § 23001. Called upon to explain precisely how § 25503's restrictions on truthful speech accomplish those aims, the State recounts historical problems from the pre-Prohibition era, when "manufacturers controlled the industry and owned retail saloons—called 'tied-houses'—where almost all alcohol was consumed." Appellee's Answer Br. at 18.

A century ago, the State explains, "[a]ggressive promotions encourage[d] high volume consumption and money was used to dissuade politicians from crack-downs." *Ibid.* The State actually contends that the "fact that such [pre-Prohibition] problems no longer exist evidences that there is a link between Section 15503's provisions and California's stated interest to promote temperance." *Id.* at 22. Such "mere speculation," however, is insufficient to satisfy the State's burden under *Central Hudson*. *See Edenfield*, 507 U.S. at 770.

Contrary to the State's contention, the mere absence of pre-Prohibition era problems since the enactment of § 25503 is not in itself *evidence* of anything, much less proof that § 25503's speech restrictions alleviated those problems in a material way. Rather, it is far more plausible that the early Twentieth Century

economic and social circumstances that led to the concerns California enacted § 25503 to address simply no longer exist. Today's robust antitrust laws, vigilantly enforced by a host of federal and state regulatory regimes, effectively police against anticompetitive "integration" among firms—without abridging First Amendment rights. Likewise, ubiquitous public-education campaigns, such as those by nonprofit groups like Alcoholics Anonymous and Mothers Against Drunk Driving, have educated generations of Californians on the dangers of excessive alcohol consumption. And today's big-box retailers, with their coveted floor displays and sprawling shelf space, do not appear vulnerable to becoming the "alter ego" of heavy-handed alcohol manufacturers or wholesalers. Simply put, the alcoholic-beverage industry—shaped by larger sweeping economic and social forces—has changed dramatically over the last century.[6]

More fundamentally, the State urges an application of the third prong of the *Central Hudson* test that is so weak as to render that prong virtually meaningless.

---

[6] The State cannot possibly satisfy its burden in this case by relying on sui generis social and economic conditions from a century ago. In other constitutional settings, the Supreme Court has cautioned that a statute's "current burdens" must be "justified by current needs" and "sufficiently related to the problem that it targets." *N.W. Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009); *cf. Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2627 (2013) ("The coverage formula met that [constitutional] test in 1965, but no longer does so."). But much like the obsolete regime of tied-house laws which produced it, § 25503 is an anachronism in California law, aimed at a problem that no longer exists.

The State has introduced *no* evidence in these proceedings that § 25503's advertising restrictions do anything to further the cause of temperance. In fact, the State's only evidence in this case—a report prepared by the State's expert declarant Pamela S. Erickson—concedes that any link between § 25503 and the State's purported goals is virtually impossible to establish:

> It is difficult to address the [Central] Hudson Test because it seems designed for a single regulation. Alcohol regulation is a system whereby regulations serve to work together and reinforce one another. *It 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.

Erickson Rep. at 41 (emphasis added). When a State's own expert opines that it is "almost impossible" to demonstrate that § 25503 furthers the State's purported interest, that State has failed altogether to satisfy its burden under *Central Hudson*.

Even in the face of *some* supporting evidence, the Supreme Court has resisted the temptation to readily accept a theoretical link between a restriction on advertising and reduced demand as sufficiently material to satisfy the government's burden to restrict commercial speech. In *44 Liquormart*, for example, the Court struck down Rhode Island's restriction on alcohol advertising in the absence of any evidence that that restriction had a significant effect on demand for alcoholic beverages. 517 U.S. at 505-06. Even accepting the State's

theory that restricting advertising would decrease aggregate demand for alcohol and thereby further the State's purported interest in temperance, the Court concluded that the State had failed to meet its burden because it had not presented evidence that the decrease in demand would be significant. *Id.* at 506-07. Likewise, here, the State has failed to establish *any* degree to which § 25503's advertising restrictions actually impact alcohol consumption, let alone whether any effect would be material or significant.

The State has also failed to explain how the utterly inconsistent nature of its speech restrictions, which are riddled with exceptions, furthers § 25503's temperance goal. Indeed, the myriad exceptions built into § 25503 for certain sales locations undermine any suggestion that the statute's advertising restrictions further the State's purported interests in either temperance or retailer independence. These exceptions include (among others) stadiums, zoos, theme parks, aquariums, symphonies, hotels—all of which are perfectly free to charge manufacturers for alcohol advertisements.

The Supreme Court has made clear that where other provisions of the same regulatory scheme directly undermine or counteract a speech restriction's desired effect, that speech restriction does not further the government's claimed interest. For example, while Cincinnati had "admittedly legitimate interests" in maintaining

the "aesthetics" of its sidewalks, its selective ban on *commercial* newsracks did not advance that interest because other newspapers were "equally unattractive." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 424-25 (1993). Likewise, the federal government's "unwillingness to adopt" a "more coherent policy" on gambling advertising demonstrated that its highly inconsistent restriction on certain advertisements would not advance its claimed interest of "alleviating the societal ills" of gambling. *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 186-95 (1999). As the Court explained, the challenged statute was "so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it." *Id.* at 190.

The State's purported interest in preventing the "takeover" of alcohol retailers by manufacturers and wholesalers fares no better. The State offers no evidence, for example, that policing the source of advertising *funding* is the *sine qua non* of maintaining independent alcohol retailers, or that § 25503's advertising restrictions are somehow an indispensable component of the statute's overall regulatory scheme. Nor has the State pointed to any study or fact-finding that substantially links the undesirable outcome that § 25503 supposedly prevents (vertical integration of the alcohol-beverage industry) with the particular speech being restricted (paying retailers to display advertising). Given so scant an

evidentiary record, the State asks this Court "to engage in the sort of 'speculation or conjecture' that is an unacceptable means of demonstrating that a restriction on commercial speech directly advances the State's asserted interest." *44 Liquormart*, 517 U.S. at 507.

In sum, § 25503's restrictions on truthful commercial speech violate the First Amendment because they neither "directly advance the state interest involved," *Central Hudson*, 447 U.S. at 564, nor "alleviate [the harms alleged] to a material degree." *Edenfield*, 507 U.S. at 771. Accordingly, the district court's judgment should be reversed.

B. Section 25503 Is Not Narrowly Tailored and Restricts More Speech than Necessary

Even if California could prove that § 25503 directly advances its purported aims, *Central Hudson* still requires the State to demonstrate that § 25503 is not "more extensive than is necessary to serve that [governmental] interest." *Central Hudson*, 447 U.S. at 566. Under this prong, the existence of "numerous and obvious less-burdensome alternatives to the restriction on commercial speech" is the best indicator that the "fit" between means and ends is unreasonable. *Discovery Network*, 507 U.S. at 417 n.13. As the Supreme Court has stressed, "if the Government could achieve its interests in a manner that does not restrict speech

… [it] must do so." *Thompson v. Western States Medical Center*, 535 U.S. 357, 371 (2002). Application of this rule does not require that less restrictive alternatives are in fact available or would work—it is sufficient if non-speech related means "might be possible." *Id.* at 372.

Here, any contention that § 25503 is narrowly tailored to achieve the State's purported interest in *temperance* is easily defeated. In similar alcohol-control settings, the Supreme Court has made clear that the government can easily accomplish its interests in temperance in a way that does not restrict speech. In *Coors Brewing*, for example, the Court overturned a law prohibiting beer manufacturers from displaying alcohol content on their beer labels because of the availability of alternatives "such as directly limiting the alcohol content of beers," or "prohibiting marketing efforts emphasizing high alcohol strength." 514 U.S. at 490-91. Likewise, in *44 Liquormart*, the Court struck down a prohibition on advertising the price of alcoholic beverages in light of "alternative forms of regulation that would not involve any restriction on speech" but would be "more likely to achieve the State's goal of promoting temperance." 517 U.S. at 507. Among other things, these included "higher [alcohol] prices [that could] be maintained either by direct regulation or by increased taxation." *Ibid.*

And California could always take upon itself the responsibility (and

expense) of supplying information about the dangers of alcohol abuse directly to alcohol consumers. Because this alternative alone could more effectively accomplish California's interest in temperance without interfering in First Amendment speech rights, § 25503 is not narrowly tailored.

Nor has the State given this Court any grounds for concluding that § 25503's overall regulatory regime would be any less effective in preventing the undesirable "integration" of California's alcoholic-beverage industry without its ban on paying for truthful advertising. If California is truly concerned that advertising payments may be used to conceal "illegal payoffs" to retailers, it could require audits of all advertising transactions between manufacturers and retailers to ensure that such arrangements do not hide such payoffs or otherwise interfere with the State's regulatory objectives. Alternatively, California could adopt the less restrictive federal tied-house law, which bars such payments to a retailer *only* if the payments are made with the specific purpose of inducing the retailer to exclude the manufacturer's competitors. But as in *Western States*, "there is no hint that the Government even considered these or any other alternatives." 535 U.S. at 373.

Even where, as here, speech restrictions are part of an overall regulatory regime for a heavily regulated industry, the Supreme Court has made clear that government efforts to regulate manufacturers' *conduct* by restricting their *speech*

almost always violates First Amendment rights. In *Western States*, pharmacies brought a First Amendment challenge to a federal statute that sought to prevent pharmacists from advertising their capability to "compound" drugs (*i.e.*, mixing or altering drugs to provide a drug product not otherwise commercially available). 535 U.S. at 360. Although federal law had long exempted compounding from the general prohibition against marketing a "new drug" without FDA approval, Congress grew wary of pharmacies that sought to compound drugs on too large a scale. *Id.* at 362-63. In response, Congress adopted a statute withdrawing that exemption from any pharmacy that *advertised* its compounding capabilities. *Id.* at 364-65.

Because Congress's claimed interest in adopting the statute in *Western States* was not to prohibit advertising per se but rather to view certain advertising as an indication that pharmacists were engaged in the distribution or sale of an unapproved drug, the argument advanced by the government in *Western States* is identical to that made here by California: we are not regulating "speech" at all; rather, we are regulating undesirable conduct and merely using certain advertising as evidence of that conduct. *Id.* at 369-70. But the Supreme Court squarely rejected that argument because Congress had failed to consider any alternative way to regulate compounding that would *not* infringe on commercial speech rights. As

the Court explained, "regulating speech must be a last—not a first—resort." *Id*. at 373. That rule applies directly in this case.

As did Vermont in *Sorrell*, California "seeks to achieve its policy objectives through the indirect means of restraining certain speech" rather than the more direct means of restricting the vertical integration of manufacturers, wholesalers, and retailers. *Sorrell*, 564 U.S. at 577. This it cannot do. Because § 25503 unquestionably restricts more speech than necessary, the judgment below should be reversed.

CONCLUSION

The Court should reverse the district court's grant of summary judgment for Appellee. The Court should either enter judgment for Appellant or, alternatively, remand the case with instructions that the district court consider Appellant's First Amendment claims under the "heightened scrutiny" standards outlined herein.

Respectfully submitted,

/s/ Cory L. Andrews
Cory L. Andrews
Richard A. Samp
Mark S. Chenoweth
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Dated: December 21, 2016

CERTIFICATE OF COMPLIANCE

I am an attorney for *amicus curiae* Washington Legal Foundation. Pursuant to Fed.R.App.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I hereby certify:

1. This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because: this brief contains 6,989 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

2.This brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because: this brief has been prepared in a proportionately spaced typeface using WordPerfect X5 Times New Roman.

/s/ Richard A. Samp
Richard A. Samp
Attorney for Washington Legal Foundation

Dated: December 21, 2016

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of December, 2016 I electronically filed the foregoing brief of *amicus curiae* Washington Legal Foundation with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. 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.

/s/ Richard A. Samp
Richard A. Samp