No. 13-56069

IN THE 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.

Appeal from the United States District Court
for the Central District of California
Case No. 2:11-cv-09065-CBM-PJW, Hon. Consuelo B. Marshall

MOTION OF CALIFORNIA BEER AND BEVERAGE DISTRIBUTORS AND WINE AND SPIRITS WHOLESALERS OF CALIFORNIA, INC. FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR REHEARING OR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Amicus Curiae California Beer and Beverage Distributors states that it has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Amicus Curiae Wine and Spirits Wholesalers of California, Inc. states that it has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Dated: March 31, 2016

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Pursuant to Ninth Circuit Rule 29-2(b) and Federal Rule of Appellate Procedure 29, California Beer and Beverage Distributors ("CBBD") and Wine and Spirits Wholesalers of California, Inc. ("WSWC") request leave to submit an *amicus curiae* brief in support of the petition for rehearing or rehearing en banc filed by Defendant-Appellee Jacob Appelsmith, as Director of the Alcoholic Beverage Control Board.

I. ATTEMPT TO OBTAIN PARTIES' CONSENT

Pursuant to Ninth Circuit Rule 29-3, CBBD and WSWC state that before filing this motion, they endeavored to obtain consent of all parties to the filing of this brief. Joshua Klein, Deputy Solicitor General at the California Attorney General's office, consented on behalf of defendant-appellee by email of March 24. Olivier Taillieu, representing plaintiff-appellant Retail Digital Network, LLC ("RDN"), stated by letter of March 30 that RDN does not consent.

CBBD and WSWC therefore request the Court to grant leave to file the proposed amicus brief.

II. MOVANTS' INTERESTS.

CBBD is a nonprofit trade association that has represented California beer distributors' interests since 1947.

California law recognizes the public policy interest of CBBD, as the major trade association representing beer distributors in California, in defending the

validity of California's alcoholic-beverage laws. State law entitles "[a]ny trade association having as members licensed beer manufacturers or licensed beer wholesalers representing more than half of the volume of beer sold in California" to "intervene as a party in any proceeding …[before] any court, which involves, in whole or part, the validity of any portion of the Alcoholic Beverage Control Act." Cal. Bus. & Prof. Code § 25008(b). As to licensed beer wholesalers, that association is CBBD.

CBBD advocates for its members – at both the state and federal level – on policy and regulatory matters concerning the manufacture, distribution, and sale of beer and malt beverages. These efforts include supporting the three-tier regulatory system to foster an orderly and competitive alcoholic-beverage market. This, in turn, ensures brewers, regardless of size or incumbency, have access to California's licensed retailers.

WSWC is a nonprofit trade association that has represented California's wine and distilled spirits wholesale distributors since 1955. WSWC similarly advocates on behalf of its members to support the three-tier system regulating the sale and distribution of wine and distilled spirits and to promote orderly and fair competition in California markets.

Amici are interested in this case because the panel's decision overrules Ninth Circuit precedent upholding the constitutionality of a statute integral to the

enforcement of California's "tied-house" laws regulating the alcoholic-beverage industry. California Business & Professions Code section 25503(f)-(h) forbids alcoholic-beverage manufacturers and wholesalers from giving anything of value to retailers for advertising. This Court held in *Actmedia, Inc. v. Stroh*, 830 F.2d 957 (9th Cir. 1986) that section 25503(h) does not violate the First Amendment. The panel holds that *Actmedia* is no longer binding in light of *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2014). The panel holds that *Sorrell* imposes "heightened scrutiny" for content- and speaker-based restrictions on commercial speech, and remands for further proceedings to determine whether sections 25503(f)-(h) violate the First Amendment under the panel's newly-minted test for validity of restrictions on commercial speech. The panel's decision throws section 25503(f)-(h)'s validity in doubt and the panel's heightened legal standard makes review more stringent, increasing the chance of invalidation.

Amici believe that the panel's decision is incorrect, and are concerned that it will open a major hole in regulation of California's alcoholic-beverage industry. The tied-house laws are intended to keep retailers economically independent of manufacturers and distributors, preventing integration of the alcoholic-beverage industry and thereby promoting temperance. *California Beer Wholesalers Ass'n, Inc. v. Alcoholic Beverage Control Appeals Board*, 487 P.2d 745, 747-49 (Cal. 1971). To maintain that separation, the tied-house laws (among other things)

prohibit manufacturers and wholesalers of alcoholic beverages from providing anything of value to retailers. *See* Petition for Rehearing or Rehearing En Banc at 3, 15; Cal. Bus. & Prof. Code §§ 25500(a)(2), 25502(a)(2). They thereby prevent manufacturers and wholesalers from paying retailers to obtain favorable treatment for their products, such as in-store displays, tap handles at bars, placement of products in refrigerated cases or at eye-level on shelves, and multiple customer facings of a manufacturer's products. They similarly prevent manufacturers and wholesalers from paying retailers to disfavor or exclude competing products. *See Actmedia*, 830 F.2d at 966-67. Such "pay to play" has long been a major problem in the alcoholic-beverage industry.

Section 25503(f)-(h) prevents manufacturers and wholesalers from circumventing the prohibition on providing things of value. If manufacturers and wholesalers could pay retailers for advertising, they could disguise illegal payments as legitimate payments for advertising. *See Actmedia,* 830 F.2d at 966-67. Invalidation of section 25503(f)-(h) would open a pipeline for large players to pay off retailers, dispensing advertising money in exchange for favored treatment or disguising illicit payments as "advertising" payments, and thereby obtaining preferential treatment and squeeze out competitors. Experience in the industry – including recent examples described in CBBD and WSWC's brief – teaches they would do just that.

CBBD and WSWC have a strong interest in preserving their members' ability to compete fairly on level playing field. If the district court invalidates section 25503(f)-(h) on remand, there is a serious risk of a flood of illegal payments disguised as pay for advertising.

As California's legislature recognized in enacting Business & Professions Code section 25008(b), the constitutionality of section 25503(f)-(h) – and therefore the First Amendment test under which that constitutionality will be measured – are thus of primary importance to CBBD, and to WSWC and their members.

III. DESIRABILITY AND RELEVANCE OF CBBD AND WSWC'S PROPOSED AMICUS BRIEF.

Amici's proposed brief does not merely repeat arguments made by the parties. The proposed brief makes the following points, citing extensive legal authority:

- Nothing in *Sorrell* overrules or modifies *Central Hudson*. *Sorrell* itself applies *Central Hudson* and makes clear the *Central Hudson* framework *is* heightened scrutiny.
- The panel's opinion conflicts with other courts' interpretations of *Sorrell*.
- Even as the third and fourth prongs of *Central Hudson* (the ones in dispute) are phrased in *Sorrell*, *Actmedia* addresses them.
- Even if ambiguous, *Sorrell* is not *clearly irreconcilable* with

Actmedia, as required to make *Actmedia* non-binding. The proposed brief cites other cases applying the clearly-irreconcilable test to demonstrate that other cases have held Ninth Circuit *not* to be overruled in analogous circumstances.

- The panel's premise for heightened scrutiny is that section 25503(f)-(h) is content- and speaker-based. But the secondary-effects doctrine dictates that section 25503(f)-(h) is treated as non-content-based, subject only to intermediate scrutiny.
- Because section 25503(f)-(h) is sufficiently justified by valid purposes, it does not matter whether another purpose is potentially invalid.
- Of potential interest to the en banc Court, the panel's decision overrules numerous Circuit precedents (not just *Actmedia*). *Central Hudson* is firmly-established in this Circuit and applied in numerous settings. The panel's reasoning makes non-binding every Circuit precedent upholding laws under *Central Hudson*, a major impact.
- The brief provides recent examples demonstrating that some distributors will pay retailers for preferential treatment and try to squeeze out competitors. By calling section 25503 into question, the panel's decision raises a serious risk of enabling the integration of the

alcoholic-beverage industry and disguised illegal payments that section 25503(f)-(h) were enacted to prevent.

Further, amicus briefing is desirable because this case presents two interrelated issues of first impression in this Court and widespread importance. First, post-*Sorrell*, what is the test for validity under the First Amendment of a law restricting commercial speech? As the proposed amicus brief explains, this Court has long evaluated such laws under the four-part test of *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 563-64 (1980). The panel holds that *Sorrell* modified the *Central Hudson* test and now requires "heightened scrutiny," and that *Actmedia* is no longer binding because it applied *Central Hudson* without heightened scrutiny. Amici submit that holding is incorrect and that *Actmedia* remains binding. The question is important. Under the panel's reasoning, not just *Actmedia* but numerous Ninth Circuit precedents upholding federal and state laws and local ordinances under *Central Hudson* (cited in the brief) are no longer good law. And because laws on everything from billboards to faxes to doctor referrals affect commercial speech, the decision makes a wide spectrum of laws more likely to be invalidated under the First Amendment.

Second, even if *Sorrell* changed the *Central Hudson* test, did *Actmedia* address the issues under the revised test, such that *Sorrell* is not clearly irreconcilable with *Actmedia*? The proposed brief explains that *Actmedia*

addressed the *Central Hudson* issues as phrased by *Sorrell*, such that it is *not* clearly irreconcilable with *Sorrell.*

In short, CBBD's and WSWC's proposed brief will, in a way useful to the Court, "supplement[] the efforts of counsel and draw[] the court's attention to law that might otherwise escape consideration." *Funbus Systems, Inc. v. State of California Pub. Util. Comm'n*, 801 F.2d 1120, 1125 (9th Cir. 1986).

CONCLUSION

The Court should grant leave to file CBBD and WSWC's proposed amicus brief supporting the petition for rehearing or rehearing en banc.

Dated: March 31, 2016

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CERTIFICATE OF SERVICE

I, Robert A. Brundage, 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 CM/ECF system on March 31, 2016.

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

/s/ Robert A. Brundage
Robert A. Brundage

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AMICUS CURIAE BRIEF OF CALIFORNIA BEER AND BEVERAGE DISTRIBUTORS AND WINE AND SPIRITS WHOLESALERS OF CALIFORNIA, INC. IN SUPPORT OF PETITION FOR REHEARING OR REHEARING EN BANC

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I. INTEREST OF AMICI

California Beer and Beverage Distributors ("CBBD") is a nonprofit trade association representing California's beer distributors (wholesalers). CBBD is dedicated to: (1) sustaining and strengthening the three-tier regulatory system governing the manufacture, sale and distribution of alcoholic beverages; (2) supporting an independent and competitive system of distribution; and (3) maintaining an orderly market for the sale of alcoholic beverages in California.

Wine and Spirits Wholesalers of California, Inc. ("WSWC") is a nonprofit trade association representing California's wine and distilled spirits wholesale distributors. WSWC is dedicated to: (1) supporting an orderly three-tier regulatory system regulating the sale and distribution of wine and distilled spirits; and (2) supporting and encouraging fair and competitive distribution by wine and distilled spirits distributors.

Amici are interested in this case because the panel's decision throws into question California Business & Professions Code section 25503(f)-(h). Federal and state laws prohibit alcoholic-beverage manufacturers and distributors from paying bars, stores and other retailers for preferential treatment and to exclude competing brands. Section 25503 prevents them from disguising these illegal payments as advertising subsidies. Overturning section 25503(f)-(h) would create an opening for large manufacturers and distributors to pay retailers and squeeze out

competitors, to the detriment of consumers and amici's members.

II. RULE 29(c)(5) STATEMENT

No party or party's counsel authored this brief in whole or part or contributed money intended to fund preparing or submitting it. No person other than amici, their members and counsel contributed money intended to fund preparing or submitting it.

III. INTRODUCTION

The Court should grant Defendant-Appellee Appelsmith's petition for rehearing or rehearing en banc ("Petition" or "Pet.") in *Retail Digital Network, LLC v. Appelsmith*, 810 F.3d 638 (9th Cir. 2016) ("*RDN*").

As the Petition details, *Actmedia, Inc. v. Stroh*, 830 F.2d 957 (9th Cir. 1986), holds that the statute at issue satisfies the First Amendment under this Circuit's long-established test for validity of restrictions on commercial speech, established in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980). The panel holds that *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011), now requires "heightened scrutiny" of content- and speaker-based restrictions on commercial speech, modifying *Central Hudson*. The panel overrules *Actmedia* as clearly irreconcilable with *Sorrell*.

Amici agree with the Petition. They add these points:

- Nothing in *Sorrell* overrules or modifies *Central Hudson. Sorrell*

itself applies *Central Hudson* and makes clear the *Central Hudson* framework *is* heightened scrutiny.

- The panel's opinion conflicts with other courts' interpretations of *Sorrell*.
- Even if ambiguous, *Sorrell* is not *clearly irreconcilable* with *Actmedia*. Other cases have held the Circuit precedent remains binding in analogous circumstances.
- The premise for heightened scrutiny is that section 25503(f)-(h) is content- and speaker-based. But the secondary-effects doctrine dictates that section 25503(f)-(h) is treated as non-content-based, subject only to intermediate scrutiny.
- Because section 25503(f)-(h) is sufficiently justified by a valid purpose, it does not matter whether another purpose is invalid.
- The decision overrules numerous Circuit precedents (not just *Actmedia*). *Central Hudson* is firmly-established in this Circuit and applied in numerous settings. The panel's reasoning makes non-binding every Circuit precedent upholding laws under *Central Hudson*.
- By calling section 25503 into question, the decision raises a serious risk of enabling the vertical integration and disguised illegal payments

that section 25503(f)-(h) was enacted to prevent.

IV. THE PANEL SHOULD GRANT REHEARING.

A. The Panel Decision.

The Supreme Court in *Central Hudson* announced a four-part test for determining the constitutionality of a law restricting commercial speech. 447 U.S. at 564-66.

The panel holds "*Sorrell* modified the *Central Hudson* analysis by requiring heightened judicial scrutiny of content-based restrictions on non-misleading advertising of legal goods or services." *RDN*, 810 F.3d at 650. It concludes "*Sorrell* and *Actmedia* are clearly irreconcilable" because "*Actmedia's* 'overall analytical framework' of intermediate scrutiny cannot be reconciled with *Sorrell's* framework of heightened judicial scrutiny," so "*Actmedia* is no longer binding." *Id.* at 650-51. The panel remands for the district court to hold a trial on section 25503's validity under "heightened scrutiny." *Id.* at 651.

As detailed below, this decision errs on several fronts and conflicts with other cases. Unless corrected, it will significantly change Ninth Circuit First Amendment law and overrule numerous Circuit precedents.

B. The Panel's Application of *Sorrell* Is Incorrect

1. *Sorrell* Is Not Clearly Irreconcilable With *Actmedia*.

A panel is bound by Circuit precedent – here *Actmedia* – unless a later Supreme Court or en banc case has "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) (en banc). "[A]s long as we can apply our prior circuit precedent without 'running afoul' of the intervening authority, we must do so." *Lair v. Bullock*, 697 F.3d 1200, 1207 (9th Cir. 2012).

a. ***Sorrell* Is Not Clearly Irreconcilable With The *Central Hudson* Framework.**

Sorrell is fully consistent with *Central Hudson* (and, therefore, *Actmedia*). *Sorrell* (i) does not overrule *Central Hudson;* (ii) calls traditional *Central Hudson* "heightened scrutiny" and does not define "heightened scrutiny" as anything other than *Central Hudson*; (iii) itself applies *Central Hudson* and (iv) says it need not decide whether a standard higher than *Central Hudson* applies.

First, *Sorrell* unequivocally describes a case applying the traditional *Central Hudson* test as "applying heightened scrutiny":

> It follows that *heightened judicial scrutiny* is warranted. *See Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 418, 113 S. Ct. 1505, 123 L.Ed.2d 99 (1993) (*applying heightened scrutiny* to "a categorical prohibition on the use of newsracks to disseminate commercial messages")

131 S. Ct. at 2664 (emphasis added). The scrutiny applied in *Discovery Network* was *Central Hudson. See Discovery Network*, 507 U.S. at 416 n.11 ("[W]e conclude that Cincinnati's ban on commercial newsracks cannot withstand scrutiny under *Central Hudson* and *Fox.*"), 428 ("[T]he city has not established the 'fit' between its goals and its chosen means that is required by our opinion in *Fox.*").

"*Fox*" is *Board of Trustees of State University v. Fox*, 492 U.S. 469 (1989). *Fox* applied *Central Hudson.* 492 U.S. at 475-81.

Second, *Sorrell* referred to its own analysis under *Central Hudson* as heightened scrutiny. *Sorrell* explained that "Vermont's statute must be subjected to *heightened judicial scrutiny. The law cannot satisfy that standard.*" 131 S. Ct. at 2659 (emphasis added). The standard that Vermont's law "cannot satisfy" was *Central Hudson.* Vermont's law was invalidated in Part II.B of the *Sorrell* opinion, which applied *Central Hudson. Id.* at 2667-72.

Third, *Sorrell* had no need to, and did not, decide whether heightened scrutiny beyond *Central Hudson* applied to restrictions on commercial speech. *Sorrell* explained that ordinarily it would be dispositive that Vermont's law was content-based and viewpoint-discriminatory, but that Vermont argued "that a different analysis applies" because the statute "at most burdens only commercial speech." *Id.* at 2667. *Sorrell* responded that "the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied." *Id.* It then applied *Central Hudson* and concluded the test was not met. *Id.* at 2667-72.

b. Any Change In *Central Hudson's* Third And Fourth Prongs Does Not Make *Sorrell* Clearly Irreconcilable With *Actmedia.*

Perhaps the panel concluded that *Sorrell* was clearly irreconcilable with

Actmedia because, citing *Sorrell*, the panel phrases the third and fourth *Central Hudson* prongs differently from *Actmedia*. 810 F.3d at 648 (describing third and fourth prongs). But a change in the governing test does not itself make Circuit precedent non-binding. *Day v. Apoliona*, 496 F.3d 1027, 1034-38 (9th Cir. 2007); *Newdow v. Lefevre*, 598 F.3d 638, 644-45 (9th Cir. 2010).

Sorrell gives no reason to think that *Actmedia* is incorrect. *Actmedia* in fact answers the *Central Hudson* inquiry posed in *Sorrell*.

First, "the State must show at least that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest." *Sorrell*, 131 S. Ct. at 2667-68. *Actmedia* directly holds this test met: (1) "California has a '*substantial' interest*" in regulating, *inter alia*, the alcoholic-beverage industry's structure; manufacturers', wholesalers' and retailers' activities and marketing methods; and influences affecting alcohol consumption; (2) section 25503(h) "*directly advances* California's interests in preventing vertical and horizontal integration of the alcoholic beverage industry and promoting temperance," *inter alia*, by "eliminat[ing] the possibility that [advertising] payments could be used by large-scale operators to purchase favored treatment … or even exclusion of their products' competing brands" and "prevent[ing] manufacturers and wholesalers from circumventing these other tied-house restrictions by claiming that the illegal payments they made to retailers were for

'advertising'"; (3) "section 25503(h)'s blanket prohibition of paid advertising in retail establishments appears to be *as narrowly drawn as possible* to effectuate California's first purpose," preventing illegal payments. 830 F.2d at 966-67 (emphasis added).

Second, "[t]here must be a 'fit between the legislature's ends and the means chosen to accomplish those ends.'" 131 S. Ct. at 2668 (quoting *Fox*). This refers to a scope "in proportion to the interest served" and "a means narrowly tailored to achieve the desired objective." *Fox*, 492 U.S. at 480. *Actmedia* holds section 25503(h) "as *narrowly drawn* as possible." 830 F.2d at 967 (emphasis added). *Actmedia* also makes clear, if implicitly, that the paid-advertising ban is proportional to the interest served. *See Day*, 496 F.3d at 1035, 1037 (Circuit precedent remained binding where it "implicitly" addressed factor later identified by Supreme Court). As *Actmedia* explained, California's interest in regulating market structure is unquestionably substantial; the evidence showed Coors' payments for advertising actually yielded preferential treatment for Coors, increased Coors' sales and reduced competitors' sales; and section 25503(h) is no broader than needed because it "prohibits only *paid* advertising in *retail* stores, not unpaid advertising in those stores or paid advertising anywhere else." 830 F.2d at 961-62, 965-66.

Third, the "law does not seek to suppress a disfavored message." 131 S. Ct.

at 2668. The *Central Hudson* test was met by California's first purpose of preventing integration and preventing circumvention of tied-house laws, 830 F.2d at 966-68, a purpose unrelated to the message. It does not matter whether section 25503 *also* originally sought to reduce advertising or whether that purpose remains valid. Part IV.B.3.

c. The Panel's Interpretation of *Sorrell* Conflicts With Numerous Decisions.

Other courts agree *Sorrell* does not define heightened scrutiny or modify traditional *Central Hudson*.

The Eighth Circuit holds *Central Hudson* continues to govern:

> *Sorrell* … did not define what "heightened scrutiny" means. Instead, after concluding that the restrictions in the case were both content- and speaker-based, the Court proceeded to analyze them under the *Central Hudson* factors, noting the outcome would have been "the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied." The upshot is that when a court determines commercial speech restrictions are content- or speaker-based, it should then assess their constitutionality under *Central Hudson.*

1-800-411 Pain Referral Service, LLC v. Otto, 744 F.3d 1045, 10555 (8th Cir. 2014). The panel's adoption of heightened scrutiny directly conflicts with *Otto.*

The Second Circuit agrees. *Sorrell* "did not decide the level of heightened scrutiny to be applied, that is, strict, intermediate, or some other form of heightened scrutiny." *United States v. Caronia,* 703 F.3d 149, 162–69 (2d Cir. 2012). *Caronia* applied *Central Hudson*.

State appellate courts interpret *Sorrell* as maintaining the traditional *Central Hudson* analysis:

> [*Sorrell*] still applied the traditional *Central Hudson* analysis for restrictions on commercial speech (i.e., intermediate, not heightened, scrutiny), to the facts in *Sorrell*, and did not articulate how the "heightened scrutiny" test should be applied going forward. … Moreover, the Court has not clearly elucidated what that "heightened scrutiny" might entail. In the wake of the Supreme Court's post-*Sorrell* silence and inaction, many federal and state courts are continuing to apply the standard set forth in *Central Hudson.*

New Jersey Dep't of Labor and Workforce Dev. v. Crest Ultrasonics, 82 A.3d 258, 268 (N.J. Super. 2014).

Federal district courts, too, read *Sorrell* as *not* changing *Central Hudson*:

> [*Sorrell*] did not overturn the long line of Supreme Court precedent based upon *Central Hudson*. In fact, the *Sorrell* Court stated it was applying *Central Hudson*. [Citations]….[I]t is unlikely that the Supreme Court would directly overturn a prior holding and drastically alter the level of scrutiny … without a thorough and comprehensive discussion ….

Demarest v. City of Leavenworth, 876 F.Supp.2d 1186, 1194-95 (E.D. Wash. 2012); *King v. Gen. Info. Servs., Inc.*, 903 F.Supp.2d 303, 308 (E.D. Pa. 2012) ("[T]he typical commercial speech inquiry under intermediate scrutiny remains valid law.").

These decisions are correct. At a minimum, that so many judges read *Sorrell* as maintaining the standard set forth in *Central Hudson* shows that it can be reconciled with traditional *Central Hudson.* The *clearly*-irreconcilable test is not

met.

In a similar situation, *United States v. Orm Hieng* held the Circuit precedent remained binding. 679 F.3d 1131 (9th Cir. 2012). There, Circuit precedent decided a Sixth-Amendment question based on evidence law. A later Supreme Court case "might be read as essentially divorcing Sixth Amendment analysis from the law of evidence." *Id.* at 1140. However, that case "continue[d] to use the vocabulary" of evidence law. *Id.* The panel concluded that it "provide[d] no clear guide with respect to the interplay, if any, between the Confrontation Clause and the law of evidence" and "[w]ithout a further pronouncement from the Court, we conclude that [circuit precedent] remains binding …." *Id.* at 1140-41.

Similarly, *Sorrell* at most provides "no clear guide" on what heightened scrutiny is or whether it differs from traditional *Central Hudson*. It provides no clear indication that the Supreme Court intended to change the *Central Hudson* test. Under *Orm Hieng*, such ambiguous Supreme Court guidance does not overrule Circuit precedent.

2. **Section 25503(f)-(h) Are Not Content-Based Distinctions.**

Sorrell is also off point. The panel's premise for applying heightened scrutiny is that section 25503(f)-(h) are content- and speaker-based. 810 F.3d at 642, 645. But as the Petition persuasively explains, section 25503 is *not* content-based. Section 25503(f)-(h) prevents manufacturers and retailers from currying

favor with retailers and channeling illegal payments to retailers under the guise of payment for advertising, not because of disagreement with the advertising. Pet. 13-15; Part V.C below.

Another line of cases, beyond those in the Petition, confirms section 25503 is not content-based. The government may regulate the "noxious side effects" of speech, such as the pollution from a newspaper factory or the obstructed view from billboards. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 444-46 (2002) (Kennedy, J., concurring in judgment). *Alameda Books* did not have a majority opinion, and Justice Kennedy's concurrence controls. *Ctr. For Fair Pub. Policy v. Maricopa Cty., Arizona*, 336 F.3d 1153, 1161 (9th Cir. 2003) (recognizing Kennedy concurrence controls).

Under this "secondary effects" doctrine, a content-based law is nevertheless treated as content- and speaker-neutral if its purpose is to control secondary effects of speech, *e.g.* crime. *See, e.g.*, *Alameda Books*, 535 U.S. at 444-49 (upholding zoning ordinance limiting concentration of adult entertainment businesses). The doctrine applies if the "primary motivation behind the regulation is to prevent secondary effects." *Gammoh v. City of La Habra*, 395 F.3d 1114, 1123-24 (9th Cir.) *as amended*, 402 F.3d 875 (9th Cir. 2005); *Vivid Entm't, LLC v. Fielding*, 774 F.3d 566, 578 (9th Cir. 2014).

The Supreme Court has defined secondary effects based on whether the

government regulates speech because of its effect on the listener. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), held a law regulating only adult entertainment (a distinction based on content and speaker) nevertheless regulated secondary effects, because the content of the films shown inside the theaters was irrelevant. "[T]he ordinance by its terms is designed to prevent crime, protect the city's retail trade, maintain property values, and generally 'protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life.'" 475 U.S. at 47-48. In contrast, "[when] the chain of causation … *necessarily* run[s] through the persuasive effect of the expressive component of the conduct, [the law] regulates on the basis of the *primary* effect of the speech—*i.e.*, its persuasive (or repellant) force." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 394 n.7 (1992) (emphasis added; quotation omitted).

While the Supreme Court and this Court have upheld laws under the secondary effects doctrine only in the adult-entertainment setting, *see Vivid Entm't*, 774 F.3d at 578 (law "must regulate 'speech that is sexual or pornographic in nature'"), the doctrine's purpose is not so limited. Its rationale applies whenever the "primary motivation behind the regulation is to prevent secondary effects." *Gammoh*, 395 F.3d at 1123-24; *see Alameda Books*, 535 U.S. at 450-51 (Kennedy, J.) ("necessary rationale" is that such regulations "may reduce the costs of secondary effects without substantially reducing speech."). The Supreme Court

has considered on the merits whether laws on other subjects fall within the "secondary effects" doctrine, without suggesting that it is limited to the adult-entertainment industry. *Cf. R.A.V.*, 505 U.S. at 394-95 (holding "secondary effects" doctrine inapplicable to ordinance against hate speech because ordinance targeted persuasive effect); *Boos v. Barry*, 485 U.S. 312, 320-21 (1988) (similar as to law limiting signs protesting foreign governments).

Here, the "primary motivation behind [section 25503(f)-(h)] is to prevent secondary effects." *See Gammoh*, 395 F.3d at 1123-24. Section 25503 seeks to prevent secondary effects of paid advertising unrelated to the ads' content. It seeks to prevent *payment* for advertisements from being used to disguise illegal payments, purchase preferential treatment from retailers, or compromise retailers' independence. *Actmedia,* 830 F.2d at 966-67; Pet. 13-15; Part V.C below. Content is irrelevant. Manufacturers cannot pay for advertising at all, regardless of whose product is advertised. Pet. 14-15. The "chain of causation" does not "run through the persuasive effect" of the speech. *R.A.V.*, 505 U.S. at 394 n.7.

Because Section 25503 addresses such secondary effects, it is not treated as content-based. Thus it is not subject to heightened scrutiny, regardless of *Sorrell*. California need only show that section 25503 is "designed to serve a substantial governmental interest and do[es] not unreasonably limit alternative avenues of communication." *See Renton*, 475 U.S. at 50; *Vivid Entm't*, 774 F.3d at 578.

Satisfying the first prong, *Actmedia* holds California's interest is "substantial" and section 25503(h) "directly advances California's interests in preventing vertical and horizontal integration." 830 F.2d at 967. Section 25503 also leaves open alternatives that do not present those secondary effects. As *Actmedia* emphasized, the section "prohibits only paid advertising in retail stores, not unpaid advertising in those stores or paid advertising anywhere else." 830 F.2d at 968.

3. Because Section 25503 Has A Sufficient Valid Purpose, It Does Not Matter Whether It Is Also Justified To Reduce Advertising.

The panel notes *Actmedia* approved California's "paternalistic" interest in promoting temperance "by reducing the amount of point-of-purchase advertising" of alcoholic beverages. 810 F.3d at 651. The panel suggests, without holding, this motivation may now be invalid. *Id.* Any debate whether this motivation remains valid, however, is moot given the sufficiency of the justification discussed in Parts IV.B.1-2 above and Petition 13-16.

As the Petition points out, "insufficiency of the original motivation does not diminish other interests that the restriction may now serve." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 71 (1983). *See* Pet. 8-9 (citing cases). It follows that a statute supported by a sufficient justification does not become invalid if a second justification is held insufficient. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460 (1978), rejected a First Amendment challenge on just this basis. It upheld

a ban on lawyer solicitation because it served current legitimate objectives, even though the original "professional etiquette" motivation for enacting it "today might be considered an insufficient justification." Because section 25503(f)-(h) is supported by valid purposes to prevent manufacturers from disguising illegal payments, influencing retailers, or compromising their independence, *see Actmedia*, 830 F.2d at 966-67, Part IV.B.1-2 above, and Pet. 13-16, the section is valid regardless of validity of the ostensibly "paternalistic" justification.

V. THE DECISION WARRANTS EN BANC REVIEW.

A. The Decision Effectively Overrules Numerous Ninth Circuit Precedents And Undermines Numerous Areas of Law.

The panel's holding overturns not just *Actmedia*, but many Circuit precedents. Its First Amendment holding changes a long-established, widely-applied test that governs validity of many laws.

Central Hudson applies widely to restrictions on both topics and methods of commercial speech. Under *Central Hudson* the Supreme Court or this Court have upheld limits on advertising of lotteries, *United States v. Edge Broad. Co.*, 509 U.S. 418 (1993), lawyers, *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995), bankruptcy-petition preparers, *In re Doser*, 412 F.3d 1056, 1063-1064 (9th Cir. 2005), Nevada brothels, *Coyote Pub., Inc. v. Miller*, 598 F.3d 592, 598-611 (9th Cir. 2010), drug paraphernalia, *Washington Mercantile Ass'n v. Williams*, 733 F.2d 687, 690-92 (9th Cir. 1984), and physicians, *Am. Academy of Pain Mgmt. v.*

Joseph, 353 F.3d 1099, 1104-11 (9th Cir. 2004) as well as limits on environmental claims, *Ass'n of Nat. Advertisers, Inc. v. Lungren*, 44 F.3d 726, 728-37 (9th Cir. 1994). Under *Central Hudson* this Court has upheld legal restrictions on billboards, *Vanguard Outdoor, LLC v. City of Los Angeles*, 648 F.3d 737, 740-48 (9th Cir. 2011), *Get Outdoors II, LLC v. City of San Diego*, 506 F.3d 886, 893-94 (9th Cir. 2007); *World Wide Rush, LLC v. City of Los Angeles*, 606 F.3d 676, 684-89 (9th Cir. 2010); portable signs, *Beverly Boulevard LLC v. City of West Hollywood*, 238 F. App'x 210, 212-13 (9th Cir. 2007), telemarketing, *Bland v. Fessler*, 88 F.3d 729, 738-39 (9th Cir. 1996), and faxes. *Destination Ventures, Ltd. v. FCC*, 46 F.3d 54, 55-57 (9th Cir. 1995).

Every Ninth Circuit or district-court decision upholding a law against a First Amendment challenge under *Central Hudson* appears to be overruled by the panel's opinion. The panel holds *Actmedia* "no longer binding" simply because *Actmedia* applied the *Central Hudson* framework and the panel holds that framework "clearly irreconcilable" with *Sorrell*. This reasoning applies to every other Ninth Circuit precedent that upholds a law under *Central Hudson*. Since the panel's decision is itself binding precedent, future panels and district courts must apparently hold those precedents no longer binding.

Similarly, a multitude of laws touch commercial speech, as illustrated by the citations above and at Petition 17. The panel's heightening of scrutiny under

Central Hudson thus threatens to undermine laws far beyond alcoholic-beverage regulation.

B. The Panel's Interpretation of *Sorrell* Conflicts With Other Decisions.

As detailed in Part IV.B.1.c above, the panel's decision conflicts with decisions of the Eighth Circuit and other federal and state courts.

C. The Decision Will Exacerbate Illegal "Pay To Play," A Serious Problem

The decision undercuts federal and state tied-house laws throughout the Ninth Circuit.

The federal government and most every state have tied-house laws. *See Actmedia*, 830 F.2d at 959 n.1. Like section 25503(f)-(h), federal tied-house provisions prohibit manufacturers from paying retailers to display advertising. 27 U.S.C. § 205(b)(4) (illegal for producer or wholesaler to induce retailers to purchase alcoholic beverages to exclusion of other brands by, *inter alia*, "paying or crediting the retailer for any advertising …. ").

The harms these laws seek to prevent are real. Just this month, the Boston Globe reported that Boston and New York distributors illegally paid retailers large sums – some disguised as legitimate payments – to get business and squeeze out competitors:

- A Massachusetts distributor is paying a $2.6 million fine "after investigators found it had paid Boston bars $120,000 in kickbacks

over several years to carry … various craft beers it distributes."

- Sales representatives for a New York distributor of Anheuser-Busch and craft beers testified "they routinely gave some … retail customers gifts worth as much as $15,000. In return, they said, the shops and bars would stock beers sold by [distributor] and freeze out competitors."

- To disguise illegal payments, the distributor's salesmen would let bartenders charge phony transactions to their credit cards.

- The distributor's assistant manager testified that "All ... wholesalers that we compete with engaged in the same activity."

"A Rare Glimpse Into A Beer Distributor's 'Pay-To-Play' Tactics," *Boston Globe* (March 4, 2016), https://www.bostonglobe.com/business/2016/03/03/just-like-mass-nyc-beer-distributor-used-pay-play-tactics/dcZL74qIyyFoKNlbHsO1LL/story.html (visited 3/27/2016).

The same thing happened in Chicago. "Pay-to-play infects Chicago beer market, *Crain's* investigation finds," *Crain's Chicago Business* (Nov. 20, 2010) ("Sources say the big brewers and their wholesalers keep out the independents by offering cash … and other incentives to tavern owners and retailers in exchange for taps or shelf space for mainstream brands. Some bar owners have set up separate marketing companies to take in the cash …."), http://www.chicagobusiness.com/article/20101120/ISSUE01/311209986/pay-to-play-infects-chicago-beer-market-crains-investigation-finds (visited 3/27/2016).

The *Actmedia* record also confirms that advertising payments of the kind barred by section 25503 squeeze competitors. Coors' use of Actmedia's program

"resulted in a 6% increase in the sales volume of its beer at participating supermarkets, at the expense of reduced purchases of other brands, " "partly attributable to preferential treatment that Coors received." 830 F.2d at 961-62.

By requiring (another) trial to determine section 25503(f)-(h)'s validity under higher scrutiny, the panel's decision throws into question whether section 25503 will remain enforceable. If it is invalidated, manufacturers and wholesalers can disguise payments, whose true purpose is to obtain preferential treatment and freeze out competitors, as payment for "advertising." As the recent history in Boston and elsewhere demonstrates, they will exploit that opportunity with zeal.

Dated: March 31, 2016

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CERTIFICATE OF WORD COUNT

Pursuant to Federal Rules of Appellate Procedure 32(a)(7) and 29(c)(7) and Ninth Circuit Rule 29-2(c)(2), the undersigned counsel certifies that this brief contains 4,199 words as counted by the Microsoft Word 2010 software on which it was written, excluding matters excluded from the word count items excluded by Rule 32(a)(7)(B)(iii).

Dated: March 31, 2016

s/ Robert A. Brundage
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CERTIFICATE OF SERVICE

I, Robert A. Brundage, 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 CM/ECF system on March 31, 2016.

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