

NO. 13-56069

**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,

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

No. CV11-09065 (BMCPJWX)

The Honorable Consuelo B. Marshall

United States District Court Judge

**JOINT MOTION OF THE NATIONAL BEER WHOLESALERS
ASSOCIATION AND THE WINE & SPIRITS WHOLESALERS OF
AMERICA, INC. FOR LEAVE TO SUBMIT AN *AMICI CURIAE* BRIEF
PURSUANT TO FRAP 29(b).**

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INTRODUCTION

The National Beer Wholesalers Association (“NBWA”) and the Wine & Spirits Wholesalers of America, Inc. (“WSWA”) submit this Joint Motion for Leave to submit an *Amici Curiae* Brief pursuant to FRAP 29(b). As of the date of this Motion, Defendant-Appellee Jacob Appelsmith, as Director of the Alcoholic Beverage Control Board, has consented to the NBWA and WSWA filing a joint *Amici Curiae* Brief in this case in accordance with FRAP 29(a). However, Plaintiff-Appellant Retail Digital Network, LLC has refused to consent to the NBWA and WSWA filing a joint *Amici Curiae* brief in this action. Accordingly, for the reasons set forth below, the NBWA and the WSWA respectfully requests that this Court grant their Joint Motion for Leave to file an *Amicus Curiae* Brief in support of Defendant-Appellee’s Petition for Panel Rehearing and for Rehearing En Banc.

I. Movant’s Interest.

Since 1938, the NBWA has served as the national membership organization of the beer distributing industry representing over 3,000 family-owned independent licensed beer distribution entities, including beer distributors in California. Its members reside in all fifty states and employ over 100,000 individuals.

WSWA is a national trade organization and the voice of the wholesale branch of the wine and spirits industry. Founded in 1943, WSWA represents over 350 companies in all 50 States and the District of Columbia that hold state licenses to act

as wine and/or spirits wholesalers and/or brokers. WSWA's members distribute more than 80% of all wine and spirits sold at wholesale in the United States.

This case implicates the interests of NBWA, WSWA and their members. The Panel Opinion calls into question long-standing federal and state laws that regulate the alcohol industry. These laws, including specifically "tied-house" laws, regulate economic relations between suppliers, distributors, and retailers and prevent industry members (suppliers and distributors) through the direct or indirect payment of cash or other value from unduly influencing or controlling retailers and thereby creating excess retail capacity, disorderly markets and overstimulated sales. This, in turn, would disrupt and destabilize transparent, accountable, and orderly alcohol markets which would lead to a rise in consumption and abuse, anticompetitive behavior in the alcohol industry to the detriment of *Amici* and their members, and public health, safety and welfare.

NBWA and WSWA support Defendant-Appellee and urge the Court to grant Defendant-Appellee's Petition for Panel Rehearing and for Rehearing En Banc.

II. Desirability and Relevance of NBWA and WSWA's Proposed *Amicus* Brief.

NBWA and WSWA offer this *amici curiae* brief in order to discuss the strong public policy and current relevance of three-tier and tied-house laws, the nature of the restrictions on economic activity and non-expressive conduct embodied in California Business & Professions Code §§ 25500, *et seq.*, the inapplicability of

Sorrell v. IMS Health, Inc., 131 S. Ct. 2653 (2014) to this case, the viability of *Actmedia*, and the need for an en banc hearing in light of the unintended but detrimental impact of the Panel Opinion on federal and state liquor regulatory structures and markets.

These issues are highly relevant to the determination of whether Defendant-Appellee's petition for rehearing should be granted. In rendering its Panel Opinion, the Panel concluded that Section 25503 constitutes a content – and speech-based restriction and expressed skepticism that the underlying purposes of California's tied-house laws were advanced by prohibiting suppliers and retailers from providing “anything of value” to a retailer in the context of paying for retailer advertising. *Retail Digital Network v. Appelsmith*, 810 F.3d 638, 652-53 (9th Cir. 2016).

Amici's members have participated in the heavily regulated alcohol market throughout the country since shortly after the repeal of prohibition. As such, NBWA and WSWA offer this *Amici Curiae* Brief to share their collective knowledge and insight about the long-standing success of these regulatory systems, developments in the alcohol industry that create a need greater than ever for tied-house laws, and the unintended but detrimental impact that the Panel Opinion would have on the current regulatory structures and systems in place throughout the United States.

If leave to file is granted, NBWA and WSWA hope to assist the Court by “supplementing the efforts of counsel and drawing the court's attention to law that

might otherwise escape consideration.” *Funbus Systems, Inc. v. State of California Public Utilities Commission*, 801 F.2d 1120, 1125 (9th Cir. 1986). In addition, NBWA and WSWA represent industry members that will be detrimentally impacted by the Panel Opinion. Accordingly, leave to file this *Amici Curiae* Brief is also appropriate because of *Amici’s* special interest in the litigation that is not already directly represented by the parties. *See id.* at 1125.

CONCLUSION

For the reasons stated herein, NBWA and WSWA’s Joint Motion for Leave to file the attached *Amici Curiae* Brief should be granted.

Dated: March 31, 2016

/s/ Michael D. Madigan

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CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2016, I electronically filed the foregoing motion with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit – with accompanying *Amici Curiae* brief - by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/Michael D. Madigan _____

Michael D. Madigan

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**BRIEF OF THE NATIONAL BEER WHOLESALERS
ASSOCIATION AND WINE & SPIRITS WHOLESALERS OF AMERICA,
INC. AS *AMICI CURIAE* IN SUPPORT
OF DEFENDANT-APPELLEE APPELSMITH'S PETITION FOR PANEL
REHEARING AND FOR REHEARING EN BANC**

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The National Beer Wholesalers Association (“NBWA”) is a Virginia non-profit corporation. It does not have any parent corporation and there is not any publicly held corporation that owns 10% or more of its stock.

Wine & Spirits Wholesalers of America, Inc. (“WSWA”) is a national trade corporation. It does not have any parent corporation and there is not any publicly held corporation that owns 10% or more of its stock.

RULE 29(C)(5) STATEMENT OF COMPLIANCE

This brief is submitted pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure with accompanying motion for leave to file. No party or party's counsel authored this brief in whole or in part or contributed money intended to fund its preparation or submittal. No person other than *Amici* or their members contributed money to fund its preparation or submittal.

TABLE OF CONTENTS

RULE 26.1 CORPORATE DISCLOSURE STATEMENT..... ii

RULE 29(C)(5) STATEMENT OF COMPLIANCE iii

TABLE OF AUTHORITIESv

INTERESTS OF *AMICI CURIAE*.....1

BACKGROUND2

ARGUMENT3

 1. Introduction.3

 2. Policies Underlying Three-Tier and Tied-House Laws.4

 3. Impact and Scope of Panel Opinion.11

 4. Inapplicability of *Sorrell* to this Case.....13

 5. *Central Hudson* and *Actmedia* Remain Controlling Authority and are Dispositive in this Case.16

CONCLUSION.....17

TABLE OF AUTHORITIES

CASES

1-800-411-Pain Referral Service, LLC v. Otto,
744 F.3d 1045, 1054-55 (8th Cir. 2014).....16

Actmedia, Inc. v. Stroh,
830, F.2d 957 (9th Cir. 1986)..... 2, 4, 16, 17

Cal Beer Wholesalers Assn v. Alco. Bev. Control App. Bd.,
5 Cal.3d 402, 96 Cal. Rptr. 297, 487 P.2d 745, 748 (1971).....8

Central Hudson Gas & Electric Corp. v. Public Service Commission of New York,
447 U.S. 557 (1980)16

Department of Alcoholic Beverage Control vs. Alcoholic Beverage Control Appeals Board,
100 Cal. App. 4th 1066, 123 Cal. Rptr 2d 278 (Cal. Ct. App. 2002).....8

Giboney v. Empire Storage & Ice Co.,
336 U.S. 490, 69 S.Ct. 684, 93 L.Ed. 834 (1949)14

Granholm v. Heald,
544 U.S. 460 (2005)5, 7

Manuel v. State of Louisiana,
982 So.2d 316 (La. Ct. App. 2008)7

Massachusetts Association of Private Career Schools v. Healey,
--- F. Supp. 3d ---, 2016 WL 308776 (D. Mass. January 25, 2016).....16

Minority Television Project, Inc. v. FCC,
763 F.3d 1992 (9th Cir. 2013) (en banc).....15

National Distributing, Co., Inc. v. U.S. Treasury Dept.,
626 F. 2d 997 (D.C. Cir. 1980).....7

North Dakota v. U.S.,
495 U.S. 423 (1990)5, 7

Rumsfeld v. Forum for Academic and Institutional Rights, Inc.,
547 U.S. 47, 126 S. Ct. 1297, 164 L.Ed.2d 156 (2006)14

Sorrell v. IMS Health, Inc.,
131 S. Ct. 2653 (2014)..... passim

STATE STATUTES AND ADMINISTRATIVE CODES

§ 12-5-403(a)..... 3, 7, 8, 11

§ 25-736(a)..... 3, 7, 8, 11

§ 41-703 3, 7, 8, 11

§ 7.1-5-5-11..... 3, 7, 8, 11

14B NCAC § 15C.0709 3, 7, 8, 11

235 ILCS 5/6-5..... 3, 7, 8, 11

235 ILCS 5/6-6..... 3, 7, 8, 11

4 Del. Admin. Code 2 (III)(B) 3, 7, 8, 11

47 P.S. § 4-493(24)(i) 3, 7, 8, 11

A.C.A. § 3-3-213(a)(2)(B)..... 3, 7, 8, 11

A.R.S. § 4-243(A)(4) 3, 7, 8, 11

ALA Code § 28-3A-25(10)..... 3, 7, 8, 11

AR Admin. Code, Title 2, Subtitle E, § 2.28(4) 3, 7, 8, 11

C.G.S.A. § 30-94..... 3, 7, 8, 11

Cal. Bus. & Prof. Code § 25500(a)(2)8, 9

Cal. Bus. & Prof. Code §§ 25500-25512.....8

Cal. Bus. & Prof. Code § 25501(a).....9

Cal. Bus. & Prof. Code §25503 9, 14, 15, 16, 17

Cal. Bus. & Prof. Code § 25503(f)3

Cal. Bus. & Prof. Code § 25503(h).....11

Cal. Bus. & Prof. Code §25503.39

California Business & Professions Code §§ 25500, *et seq.*.....4

CO Code Regs. § 203-2:47-322..... 3, 7, 8, 11

CO Rev. Stat. § 12-47-308..... 3, 7, 8, 11

DC ST § 25-735(a)..... 3, 7, 8, 11

FL Stat. § 561.42(1) 3, 7, 8, 11

GA Comp. R. & Regs. § 560-2-2-.13 3, 7, 8, 11

HRS § 281-42(a)(3) 3, 7, 8, 11

IA Code § 123.45 3, 7, 8, 11

ID Code Ann. § 23-1033..... 3, 7, 8, 11

IN Code § 7.1-5-5-10 3, 7, 8, 11

KRS § 244.590(1)(c)..... 3, 7, 8, 11

KSA § 41-702 3, 7, 8, 11

LA Admin. Code § 55-317(A), (B), and (D) 3, 7, 8, 11

MCA § 16-3-241 3, 7, 8, 11

MCL § 436.1609 3, 7, 8, 11

MD Code Art. 2B § 12-102 3, 7, 8, 11

Minn. Stat. § 340A.308..... 3, 7, 8, 11

MO Rev. Stat. § 311.070 3, 7, 8, 11

MS Code Ann. § 67-3-45..... 3, 7, 8, 11

MSRA § 28-A-707(2)..... 3, 7, 8, 11

N.J.A.C. § 13:2-24.2(a)..... 3, 7, 8, 11

N.R.S. § 369.485 3, 7, 8, 11

N.Y. Alco. Bev. Cont. § 8-101(1)(C) 3, 7, 8, 11

N.Y. Comp. Codes R. & Regs. Tit. 86.1 3, 7, 8, 11

ND Cent. Code § 5-01-11 3, 7, 8, 11

NE Rev. Stat. § 53-168(1)..... 3, 7, 8, 11

NH Rev. Stat. § 179.11 3, 7, 8, 11

NM Stat. Ann. § 60-8A-1(B)(3) 3, 7, 8, 11

OH Admin. Code § 4301:1-1-43(H)(2) 3, 7, 8, 11

OK Stat. § 37-231(A)(3)..... 3, 7, 8, 11

OK Stat. § 37-535(2)..... 3, 7, 8, 11

OR Stat. § 471.398..... 3, 7, 8, 11

ORC § 4301.24 3, 7, 8, 11

RCW § 66.28.305..... 3, 7, 8, 11

SC Code Ann. § 61-4-940(B) 3, 7, 8, 11

SD Admin. R. 64:75:08:02 3, 7, 8, 11

TN Code Ann. § 57-6-110 3, 7, 8, 11
 TN Comp. R. & Regs. § 0100-03.11(1)..... 3, 7, 8, 11
 TX Alco. Bev. Code Ann. § 102.07..... 3, 7, 8, 11
 UT Code Ann. § 32B-4-704(3)(a) 3, 7, 8, 11
 VA Code Ann. § 4.1-216(c)..... 3, 7, 8, 11
 VT Admin. Code § 14-1-3(19) 3, 7, 8, 11
 WI Stat. § 125.33(1)..... 3, 7, 8, 11
 WV Code § 11-16-18(6) 3, 7, 8, 11
 WY Stat. § 12-5-402 3, 7, 8, 11

OTHER AUTHORITIES

Asher, Bernard, *Global Beer: The Road to Monopoly*, the American Antitrust
 Institute (2012), at 3.....9
<http://money.cnn.com/2015/10/13/investing/ab-inbev-sabmiller-beer-merger/>.....9
<http://www.ag.ny.gov/press-release/liquor-suppliers-settle-pay-play-probe>)10
<http://www.cdc.gov/features/alcohol-deaths/>4
<https://research.archives.gov/id/299967>6
In re Bacardi U.S.A., Inc., et al. <http://www.ag.ny.gov/press-release/liquor-suppliers-settle-pay-play-probe>10
In re Craft Beer Guild LLC d/b/a Craft Brewers Guild, Amended Notice of
 Suspension (MA Dep’t of the State Treasurer, Alcoholic Beverage Control
 Commission)(Feb. 12, 2016),
<http://www.mass.gov/abcc/decisions12/2016/feb16/everett-craft-beer-amended-supsn-02-12-2016.pdf>.....10
In re Diageo North America, Inc., et al., <http://www.ttb.gov/press/fy11/press-release-fy-11-4-faa-oic.pdf>10
In re Pernod Ricard USA, LLC, Acceptance of Abstract and Statement (Dep’t of
 the Treasury, TTB, May 2, 2011)
 (http://www.ttb.gov/fo/compromise/2011/oic_ernod-ricard.pdf)10
In re Sam’s Wine & Spirits, www.illinois.gov/ilcc/News/Pages/Liquor-Commission-accepts-largest-ever-fine,-suspension-of-retailer-license.aspx
<http://www.ttb.gov/press/fy09/press-release-ttb-settles-trade-practice-investigations.pdf>.....10

Joe de Ganahl, “Trade Practice and Price Control in the Alcoholic Beverage Industry,” 12 Law and Contemporary Problems 665 (1940).....6

National Commission on Law Observance and Enforcement, (The Wickersham Commission), Report on the Enforcement of the Prohibition Laws of the United States, H.R. Doc. No. 722, 71st Cong., (3rd Sess. 1931) at 6-7.....6

Raymond B. Fosdick and Albert Scott, Toward Liquor Control, (Center for Alcohol Policy, 2011), Harper & Brothers, at 29 (1933).....6, 12

CONSTITUTIONAL PROVISIONS

U.S. Constitutional Amendments 18 and 21.....5

FEDERAL STATUTES

27 U.S.C. § 205(b)(4).....2

INTERESTS OF AMICI CURIAE

Since 1938, the NBWA has served as the national membership organization of the beer distributing industry representing over 3,000 family-owned independent licensed beer distribution entities, including beer distributors in California. Its members reside in all fifty states and employ over 100,000 individuals.

WSWA is a national trade organization and the voice of the wholesale branch of the wine and spirits industry. Founded in 1943, WSWA represents over 350 companies in all 50 States and the District of Columbia that hold state licenses to act as wine and/or spirits wholesalers and/or brokers. WSWA's members distribute more than 80% of all wine and spirits sold at wholesale in the United States.

This case implicates the interests of NBWA, WSWA and their members. The Panel Opinion calls into question long-standing federal and state laws that regulate the alcohol industry. These laws, including specifically "tied-house" laws, regulate economic relations between suppliers, distributors, and retailers and prevent industry members (suppliers and distributors) through the direct or indirect payment of cash or other value from unduly influencing or controlling retailers and thereby creating excess retail capacity, disorderly markets and overstimulated sales. This, in turn, would disrupt and destabilize transparent, accountable, and orderly alcohol markets which would lead to a rise in consumption and abuse, anticompetitive behavior in

the alcohol industry to the detriment of *Amici* and their members, and public health, safety and welfare.

NBWA and WSWA support Defendant-Appellee and urge the Court to grant Defendant-Appellee's Petition for Panel Rehearing and for Rehearing En Banc.

BACKGROUND

This case arises out of a First Amendment challenge by Plaintiff-Appellant Retail Digital Network, LLC ("RDN") to certain key provisions of California's liquor statutes, which regulate the economic activity between members of the liquor industry. In a sweeping decision with far-reaching national implications, the Panel Opinion reversed the decision of the District Court, held that *Actmedia, Inc. v. Stroh*, 830, F.2d 957 (9th Cir. 1986) is no longer controlling law, and remanded the case for reconsideration with overbroad and unsupported restrictions on the evidence and arguments that the parties can present below. The Panel Opinion calls into serious question the legality of key provisions of the Federal Alcohol Administration Act as well as the tied-house provisions of a majority of state's liquor regulatory laws.¹

¹ Federal law generally prohibits suppliers and distributors from providing, directly or indirectly, "things of value" to retailers for the purpose of inducing the retailer to buy the industry member's products to the exclusion, in whole or in part, of other industry members. 27 U.S.C. § 205(b). More specifically, 27 U.S.C. § 205(b)(4) prohibits directly or indirectly *paying or crediting the retailer for any advertising, display, or distribution service*.

In addition, forty-six states, like California, have laws that contain broad prohibitions on an industry member providing items of value to retailers. *See* ALA Code § 28-

ARGUMENT

1. Introduction.

NBWA and WSWA submit this *Amicus* Brief in support of Defendant-Appellee Appelsmith's Petition for Panel Rehearing and for Rehearing En Banc. In

3A-25(10); A.R.S. § 4-243(A)(4); A.C.A. § 3-3-213(a)(2)(B) and AR Admin. Code, Title 2, Subtitle E, § 2.28(4); Cal. Bus. & Prof. Code § 25503(f); CO Rev. Stat. § 12-47-308 and CO Code Regs. § 203-2:47-322; C.G.S.A. § 30-94; DC ST § 25-735(a) and § 25-736(a); 4 Del. Admin. Code 2 (III)(B) FL Stat. § 561.42(1); GA Comp. R. & Regs. § 560-2-2-.13; HRS § 281-42(a)(3); ID Code Ann. § 23-1033; 235 ILCS 5/6-5 and 235 ILCS 5/6-6; IN Code § 7.1-5-5-10 and § 7.1-5-5-11; IA Code § 123.45; KSA § 41-702 and § 41-703; KRS § 244.590(1)(c); LA Admin. Code § 55-317(A), (B), and (D); MSRA § 28-A-707(2); MD Code Art. 2B § 12-102; MCL § 436.1609; Minn. Stat. § 340A.308; MS Code Ann. § 67-3-45; MO Rev. Stat. § 311.070; MCA § 16-3-241; NE Rev. Stat. § 53-168(1); N.R.S. § 369.485; NH Rev. Stat. § 179.11; N.J.A.C. § 13:2-24.2(a); NM Stat. Ann. § 60-8A-1(B)(3); N.Y. Alco. Bev. Cont. § 8-101(1)(C) and N.Y. Comp. Codes R. & Regs. Tit. 86.1; 14B NCAC § 15C.0709; ND Cent. Code § 5-01-11; ORC § 4301.24 and OH Admin. Code § 4301:1-1-43(H)(2); OK Stat. § 37-535(2) (strong beer) and OK Stat. § 37-231(A)(3) (light beer); OR Stat. § 471.398; 47 P.S. § 4-493(24)(i); SC Code Ann. § 61-4-940(B); SD Admin. R. 64:75:08:02; TN Code Ann. § 57-6-110 and TN Comp. R. & Regs. § 0100-03.11(1); TX Alco. Bev. Code Ann. § 102.07; UT Code Ann. § 32B-4-704(3)(a); VT Admin. Code § 14-1-3(19); VA Code Ann. § 4.1-216(c); RCW § 66.28.305; WV Code § 11-16-18(6); WI Stat. § 125.33(1); WY Stat. § 12-5-402 and § 12-5-403(a).

Most of these states, like California, permit industry members to provide limited point-of-sales materials for placement in retail accounts. However, none of those limited exceptions would allow for a supplier or a wholesaler to directly or indirectly pay a retailer for the privilege of advertising that supplier or wholesaler's product within the retailer's premises. As a result, as set forth below, adopting Appellant RDN's position would undermine state statutes that prohibit industry members from providing anything of value to a retailer.

the interest of avoiding the repetition of arguments made persuasively by Defendant-Appellee, NBWA and WSWA will focus their *Amicus* Brief on the national implications of the current Panel Opinion, the strong public policy benefits and critical importance of three-tier and tied-house laws, the historically-rooted rationales for the restrictions on economic activity and non-expressive conduct embodied in California Business & Professions Code §§ 25500, *et seq.*, the inapplicability of *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2014) to this case, the viability of *Actmedia*, and the need for panel or en banc rehearing in light of the unintended but nationwide impact of the Panel Opinion on federal and state liquor regulatory structures and markets. NBWA and WSWA support the other bases for rehearing asserted in Defendant-Appellee's Petition.

2. Policies Underlying Three-Tier and Tied-House Laws.

Intoxicating liquor is a unique product in American law. The detrimental impacts on individuals, families, and society as a whole that result from intemperate or underage consumption of intoxicating liquors are dramatically different from those related to the use of other products, whether measured by scale, severity, nature, or remediability.² As a consequence, government has attempted to mitigate

² Excessive alcohol consumption remains a very serious health and social problem in the U.S. According to the federal government's Center for Disease Control, alcohol causes or contributes to over 88,000 deaths a year in this country and the estimated economic cost of excessive drinking in the U.S. is over \$223.5 Billion annually. <http://www.cdc.gov/features/alcohol-deaths/>

these impacts through regulation. Indeed, intoxicating liquor has always been, and remains, one of the most heavily regulated products in the country. No other product has been the subject of one, let alone two, Constitutional Amendments: the first with the Eighteenth Amendment, which established National Prohibition and the second was the Twenty-First Amendment, which returned primary responsibility for alcohol regulation to the states. *See U.S. Const. Amend 18 & 21.*

The keystones of alcohol regulation in this country are three-tier and tied-house laws. Pursuant to the states' plenary authority to regulate the sale and distribution of alcohol under the Twenty-first Amendment, each state regulates the sale and distribution of alcohol within its borders through some form of a "three-tier system" of licensed and structurally separate producers, distributors, and retailers. *Granholm v. Heald*, 544 U.S. 460, 466 (2005); *North Dakota v. U.S.*, 495 U.S. 423, 432 (1990). The purpose of the three-tier system is, in part, to avoid the harmful effects of vertical integration in the industry by restricting producers, distributors, and retailers to their respective service functions.

"Tied-house" laws serve to enforce separation between the tiers and, in particular, to insulate retailers from undue influence and control by producers and distributors. The nation's experience prior to Prohibition has proven that vertical integration and "tied-houses" lead to excessive retail capacity, and overstimulated

sales, which ultimately lead to intemperate consumption and alcohol abuse.³ Prior to Prohibition, “tied houses” were identified as a root cause of alcohol abuse and related problems because retailers were pressured to sell product by any means, including selling to minors, selling after hours, and overselling to intoxicated customers. Raymond B. Fosdick and Albert Scott, Toward Liquor Control, (Center for Alcohol Policy, 2011), Harper & Brothers, at 29 (1933).

President Franklin D. Roosevelt recognized this governmental interest in preventing a return to the tied house saloon days and noted in his official Proclamation on the Repeal of Prohibition on December 5, 1933, “*I ask especially that no State shall by law or otherwise authorize the return of the saloon in its old form or in some modern guise.*”⁴ Following Repeal, as states and Congress debated

³ These conditions of unregulated distribution and over-stimulated sale arose

in part [owing] to the failure to recognize the effects of industrial organization on the manufacture and sale of intoxicating liquor. With the rise of the large distilling and brewing corporations seeking new markets through high-pressure sales organizations, the independent tavernkeep, theretofore subject to the restraints imposed by local legislation and local public opinion, ceased to exist.

Joe de Ganahl, “Trade Practice and Price Control in the Alcoholic Beverage Industry,” 12 Law and Contemporary Problems 665 (1940), *citing* National Commission on Law Observance and Enforcement, (The Wickersham Commission), Report on the Enforcement of the Prohibition Laws of the United States, H.R. Doc. No. 722, 71st Cong., (3rd Sess. 1931) at 6-7.

⁴ <https://research.archives.gov/id/299967>.

how the nascent alcohol industry should be regulated, they all agreed that restrictions on payments between tiers was necessary and undertook regulation in this space to prevent the return of the tied-house saloon. *See* fn. 1 *supra*; *National Distributing Co., Inc. v. U.S. Treasury Dept.*, 626 F. 2d 997, 1008 (D.C. Cir. 1980)(“The Members of Congress debating the [FAAA] bill repeatedly stated that the tied house provision was designed to prevent control by alcoholic beverage producers and wholesalers over retail outlets, especially saloons.”).

The United States Supreme Court has expressly recognized that the three-tier system is “unquestionably legitimate.” *North Dakota v. U.S.*, 495 U.S. 423, 432 (1990), *see Granholm v. Heald*, 544 U.S. 460, 466 (2005). The vital states’ interests served by the three-tier system were cogently explained in *Manuel v. State of Louisiana*, 982 So.2d 316, 330 (La. Ct. App. 2008).

Under the three-tier system, the industry is divided into three tiers, each with its own service focus. No one tier controls another. Further, individual firms do not grow so powerful in practice that they can out-muscle regulators. In addition, because of the very nature of their operations, firms in the wholesaling tier and the retailer tier have a local presence, which makes them more amenable to regulation and naturally keeps them accountable. Further, by separating the tiers, competition, a diversity of products, and availability of products are enhanced as the economic incentives are removed that encourage wholesalers and retailers to favor the products of a particular supplier (to which wholesaler or retailer might be tied) to the exclusion of products from other suppliers.

In furtherance of these interests, the federal government and forty-six states have enacted tied-house provisions similar to the law being challenged in this case.

See fn. 1 *supra*. Following the repeal of Prohibition, California enacted a comprehensive statutory scheme restricting “tied-house” arrangements in the distribution of alcoholic beverages. *See Cal Beer Wholesalers Assn v. Alco. Bev. Control App. Bd.*, 5 Cal.3d 402, 408, 96 Cal. Rptr. 297, 301, 487 P.2d 745, 748 (1971); Cal. Bus. & Prof. Code §§ 25500-25512. Under this scheme “[a]ll levels of the alcoholic beverage industry were to remain segregated; firms operating at one level of distribution were to remain free from involvement in, or influence over, any other level.” *Department of Alcoholic Beverage Control vs. Alcoholic Beverage Control Appeals Board*, 100 Cal. App. 4th 1066, 1075, 123 Cal. Rptr 2d 278, 284 (Cal. Ct. App. 2002) (“An ongoing relationship between a winegrower and a retailer . . . could easily lead to the kind of influence of a supplier over a retailer the statutes were intended to prevent, for example, by causing the retailer to favor or ‘push’ the products of the wholesaler who chooses to pay for the advertising in the retailer’s catalogue.”).

In order to safeguard the independence of each tier, suppliers and distributors may not “[f]urnish, give, or lend any money or other things of value, directly or indirectly” to retail establishments. Cal. Bus. & Prof. Code § 25500(a)(2). Section 25500’s reference to “indirectly” would obviously preclude channeling “value” through a non-licensed entity such as RDN. It would also preclude guaranteeing loans, fulfilling a retailer’s financial obligations or buying or leasing premises to

retailers. *Id.* This does not prohibit an industry member from providing goods and services to retailers that are incident to the function of their tier, however. *See e.g.*, Cal. Bus. & Prof. Code § 25501(a) (permitting limited point-of-sale materials); *Id.* § 25503 (sets forth specific, limited exemptions such as permitting delivery, shelf placement, rotation of product, and otherwise servicing the production); *Id.* § 25503.3 (permitting participation in retail trade shows, advertising in a retail trade association publication, etc.).

In light of accelerating consolidation in the industry and the growing dominance of a few industry members, the concern over vertical integration and the need for three-tier and tied-house laws is as great or greater today as it was in the past. For instance, two companies, Anheuser-Busch InBev (“ABI”) and SABMiller (“SAB”) now control approximately 80% of the U.S. beer market.⁵ In November 2015, ABI, the largest brewer in the world, announced that it had entered into an agreement to purchase SAB, the second largest brewer in the world for \$106 Billion.⁶ That proposed merger is currently being reviewed by the Department of Justice (“DOJ”).

⁵ Asher, Bernard, *Global Beer: The Road to Monopoly*, the American Antitrust Institute (2012), at 3.

http://www.antitrustinstitute.org/sites/default/files/Global%20Beer%20Road%20to%20Monopoly_0.pdf.

⁶ <http://money.cnn.com/2015/10/13/investing/ab-inbev-sabmiller-beer-merger/>

As consolidation and vertical integration have progressed, efforts to unduly influence or control retailers by impermissible financial arrangements have increased in violation of tied-house laws. Accordingly, Federal and state enforcement of tied-house laws has also increased in order to insulate retailers from undue pressure. This is evidenced by several, recent high profile enforcement actions in Massachusetts, Illinois, Arizona, and Nevada. For instance, in *In re Diageo North America, Inc., et al.*, the Department of Treasury, Alcohol and Tobacco Tax and Trade Bureau (“TTB”) imposed fines totaling nearly \$2 Million on six suppliers who TTB alleged paid nearly \$2 Million in inducements *through a third party* to Harrah’s in return for preferential product display and shelf space.⁷ These enforcement actions highlight the current relevance and compelling need for these laws.

⁷ *In re Diageo North America, Inc., et al.*, <http://www.ttb.gov/press/fy11/press-release-fy-11-4-faa-oic.pdf>; *In re Sam’s Wine & Spirits*, www.illinois.gov/ilcc/News/Pages/Liquor-Commission-accepts-largest-ever-fine,-suspension-of-retailer-license.aspx and <http://www.ttb.gov/press/fy09/press-release-ttb-settles-trade-practice-investigations.pdf> (Illinois – over \$1 Million Dollars in fines); *In re Pernod Ricard USA, LLC*, Acceptance of Abstract and Statement (Dep’t of the Treasury, TTB, May 2, 2011) http://www.ttb.gov/fo/compromise/2011/oic_ernod-ricard.pdf (New York - \$300,000 fine); *In re Bacardi U.S.A., Inc., et al.* <http://www.ag.ny.gov/press-release/liquor-suppliers-settle-pay-play-probe> (New York - \$1.6 Million fine); *In re Craft Beer Guild LLC d/b/a Craft Brewers Guild*, Amended Notice of Suspension (MA Dep’t of the State Treasurer, Alcoholic Beverage Control Commission)(Feb. 12, 2016), <http://www.mass.gov/abcc/decisions12/2016/feb16/everett-craft-beer-amended-supsn-02-12-2016.pdf> (Massachusetts - \$2.6 Million fine).

This case also illustrates this problematic trend. Plaintiff-Appellant RDN, an entity that does not have a liquor license, solicits advertising fees from industry members, places video advertising displays in retail stores, and pays a portion of the industry member's fees to the retail store. Section 25503(h), as well as federal law and other state laws, bars this arrangement because it prohibits an industry member from "directly or indirectly" providing a thing of value to a retailer. If an industry member can subvert this prohibition by merely characterizing the payment as "advertising or marketing," and therefore an impermissible burden on commercial speech, the tied-house provisions becomes nearly impossible to enforce.

As demonstrated above, the purpose and intent of these "for value" laws is *inter alia* to prevent the exercise of undue influence or control through the payment of cash or other value and thereby creating excessive retail capacity and overstimulated sales. These harms, in turn, would disrupt and destabilize an orderly and accountable alcohol market which would lead to a rise in consumption patterns and abuse.

3. Impact and Scope of Panel Opinion.

If the Panel Opinion is permitted to stand, it calls into serious question all federal and state tied-house laws that prohibit the provision of "value" in the context of advertising or promotion.⁸ This poses the possibility that under the auspices of

⁸ See fn. 1 *supra*.

“advertising” or “marketing,” and utilizing a third party as a conduit, an industry member could *defacto* create a tied-house by purchasing expensive full page newspaper ads, radio ads, or television ads featuring a retailer or retail chain, paying a retailer “slotting fees” to place point-of-sale advertising materials along eye-level shelf space or end caps in off-sale accounts, or paying cash to a bar to install a brand-identified tap handle. All of these practices are the equivalent of “pay-to-play” arrangements or slotting fees, which have always been prohibited in this heavily regulated, socially sensitive industry.

Such a large, unmanageable loophole in tied-house laws would lead to a damaging imbalance in the alcohol market, a substantial increase in retail outlets as retail licensees became “tied” to one supplier,⁹ an erosion of accountability and

⁹ The leading treatise that created much of the rationale for American alcohol policy noted the correlation between tied-houses, the number of retail outlets, consumption, and abuse:

The ‘tied house’ system also involved a multiplicity of interests, because each manufacturer had to have a sales agency in a given location. In this respect, the system was not unlike that now used in the sale of gasoline, and with the same result: a large excess of sales outlets. Whether or not this is of concern to the public in the case of gasoline, in relation to the liquor problems it is a matter of crucial importance because of its effect in stimulating competition in the retail sale of alcoholic beverages. “Tied houses” should, therefore, be prohibited, and every opportunity for the evasion of this system should, if possible, be foreseen and blocked.

Raymond B. Fosdick and Albert Scott, Toward Liquor Control, (Center for Alcohol Policy, 2011), Harper & Brothers, at 29 (1933).

responsibility in distribution channels, and a lack of consumer choice and variety. The creative minds and nearly unlimited resources of powerful industry members would exploit this loophole to those undesirable effects.

4. Inapplicability of *Sorrell* to this Case.

The forgoing discussion makes clear that this case is readily distinguishable from *Sorrell*. *Sorrell* involved a Vermont statute that imposed a “specific, content-based burden on protected expression.” 131 S. Ct. 2653, 2664 (2014). In holding that the statute was subject to “heightened scrutiny,” the *Sorrell* Court noted that the statute barred disclosure of prescriber-identifying information “when recipient speakers will use the information for marketing” and specifically “prohibit[ed] pharmaceutical manufacturers from using the information for marketing.” *Id.* at 2663. As such, the Supreme Court concluded that the Vermont statute was a content – and speaker-based restriction. “Heightened scrutiny” was predicated on the Supreme Court finding that “the content – and speaker-based restriction [was designed] to regulat[e] . . . speech because of disagreement with the message it conveys.” *Id.* at 2664.

The *Sorrell* Court recognized, however, that economic regulations which imposed only incidental burdens on speech are not subject to “heightened scrutiny.”

As the Court explained:

It is true that restrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive

conduct. It is also true that the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech. That is why a ban on race-based hiring may require employers to remove ““White Applicants Only”” signs, *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 62, 126 S. Ct. 1297, 164 L.Ed.2d 156 (2006); why “an ordinance against outdoor fires” might forbid “burning a flag” *R.A. V.*, *supra*, at 385, 112 S.Ct. 2538; and why antitrust laws can prohibit “agreements in restraint of trade,” *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502, 69 S.Ct. 684, 93 L.Ed. 834 (1949).

Id. at 2664-65.¹⁰

Here, Section 25503 broadly prohibits an industry member from providing *any* value to a retailer that is not incident to its function as either a supplier or distributor, regardless of whether that value takes the form of providing cash, free services, free goods, or paying for the obligations of retailers. The purpose of the prohibition is to regulate the economic relationships between the tiers in order to prevent vertical integration, limit the influence of industry members over retailers, safeguard the independence of each tier, and maintain an orderly, stable, and

¹⁰ It is noteworthy that the authority cited by the *Sorrell* Court in support of this proposition involved interests arising under other constitutional provisions (the 14th Amendment and the Commerce Clause). Presumably, the justification for *Sorrell*'s expanded First Amendment protection for commercial speech was the protection of a “free enterprise economy,” an interest broadly arising under the Commerce Clause. This case also implicates other important constitutional interests, namely the states' core interests in regulating alcohol arising under the Twenty-first Amendment and the federal government's interest in safeguarding competition under the Commerce Clause. As outlined above, the burden imposed by Section 25503 on commercial speech is incidental at best. The beneficial impact of this regulation on effective liquor law and a “free enterprise economy” unfettered by monopolistic practices, however, is substantial.

transparent alcohol market. The purpose is *not* to regulate the content or means of advertising. See *Minority Television Project, Inc. v. FCC*, 763 F.3d 1992 (9th Cir. 2013) (en banc).¹¹

The Panel Opinion misinterpreted Section 25503 as a restriction on protected expression, rather than a restriction on economic activity. Section 25503 imposes no restriction on the content of RDN's advertising or its ability to advertise in retail locations. As such, RDN's interests under the First Amendment are not implicated or, if they are, California's economic regulation imposes a mere incidental burden on those interests that does not abrogate California's substantial interests in the effective regulation of alcohol or the federal and state governments' interests in a competitive economy unfettered by monopolistic practices. Whatever the threshold might be for a "content – or speaker-based" restriction on commercial speech, it is not met here. As such, *Sorrell* has no application.

¹¹ The *Sorrell* Court indicated that the challenged Vermont statute might have likely survived First Amendment scrutiny if the State had demonstrated that the law had a neutral justification rather than a motivation to regulate content.

Here, however, Vermont has not shown that its law has a neutral justification . . . [or that] the provision challenged here will prevent false or misleading speech . . . [citation omitted] The State's interest in burdening speech of retailers instead turns on nothing more than a difference of opinion.

Sorrell, 131 S. Ct. at 2672. That is clearly not the case here where Section 25503 broadly prohibits an industry member from providing *any* value that is not incident to its function.

5. Central Hudson and Actmedia Remain Controlling Authority and are Dispositive in this Case.

Assuming arguendo that Section 25503 is a content – or speaker-based restriction and that *Sorrell* applies, *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980) and *Actmedia* remain controlling authority and are dispositive in this case. As elucidated in *1-800-411-Pain Referral Service, LLC v. Otto*, 744 F.3d 1045, 1054-55 (8th Cir. 2014), the *Sorrell* Court articulated a new two-part test for assessing restrictions on commercial speech: (1) determine whether the restriction is content – or speaker-based; and (2) if so, subject the restriction to “heightened scrutiny.” The *Sorrell* Court, however, did not define heightened scrutiny and proceeded to analyze the challenged Vermont statute under the four-part *Central Hudson* test. *See Sorrell*, 131 S. Ct. at 2668. Accordingly, the *Pain Referral* Court logically concluded that *Central Hudson* remains good law and that the constitutionality of content – or speaker-based restrictions is to be assessed under the four-part *Central Hudson* standard. *1-800-411-Pain Referral Service, LLC*, 744 F.3d at 1055 (“The upshot [of *Sorrell*] is that when a court determines commercial speech restrictions are content – or speech-based, it should then assess their constitutionality under *Central Hudson*.”); *see Massachusetts Association of Private Career Schools v. Healey*, --- F. Supp. 3d ---, 2016 WL 308776 at * 8-9 (D. Mass. January 25, 2016) (identifying the limited nature of the *Sorrell* holding and confirming *Central Hudson*’s dictate that the level of First

Amendment scrutiny for commercial-speech regulations depends on the specific nature both of the expression and of the government interests served by its regulation) (citations omitted). Because this Court previously assessed and upheld Section 25503 under that standard in the *Actmedia* case, *Amici* respectfully suggest that *Actmedia* is controlling here and is not “clearly irreconcilable” with *Sorrell*. At the very least, the *Actmedia* decision should not be set aside unless reviewed and overruled by the Court en banc.

CONCLUSION

This Court should grant Panel rehearing or rehearing en banc.

Respectfully submitted,

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STATEMENT OF RELATED CASES

So far as is known to *Amici Curiae* National Beer Wholesalers Association and Wine & Spirits Wholesalers of America, Inc., there are no related cases pending in the Ninth Circuit Court of Appeals.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Pursuant to Fed. R. App. P. 32(a)(7)(B), this brief contains 4,193 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 proportionally spaced typeface using Microsoft Office Word 2013, in 14 points, Times New Roman, including footnotes.

March 31, 2016
Date

/s/Michael D. Madigan
Michael D. Madigan

CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2016, I electronically filed the foregoing *Amici Curiae* brief with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit – as an exhibit to the accompanying motion for leave to file - by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/Michael D. Madigan _____

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