IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 13-56069

RETAIL DIGITAL NETWORK,
Plaintiff-Appellant,

v.

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

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

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

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INTRODUCTION

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

THERE ARE NO UNWARRANTED RESTRICTIONS

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

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

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

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

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

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

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

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

EN BANC CONSIDERATION IS NOT WARRANTED

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

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

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

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

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

THERE IS UNIFORMITY IN THIS COURT'S DECISIONS

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

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

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

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

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

Id.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

May 3, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

May 3, 2016

Respectfully submitted,

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9th Circuit Case Number(s) 13-56069

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