

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
CASE NO. 13-56069

RETAIL DIGITAL NETWORK, LLC,
Plaintiff and Appellant,

vs.

JACOB APPELSMITH, AS DIRECTOR OF THE ALCOHOLIC BEVERAGE
CONTROL BOARD,
Defendant and Appellee,

Appeal from the United States District Court
For the Central District of California

Case No. CV11-09065(BMCPJWX)

The Honorable Consuelo B. Marshall, Judge

**MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF
BY THE CALIFORNIA CRAFT BREWERS ASSOCIATION
[FED. R. APP. P. 29(B)]**

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INTRODUCTION

Pursuant to Rule 29(b) of the Federal Rules of Appellate Procedure, the California Craft Brewers Association (“CCBA”) submits this motion for leave to file an *amicus curiae* brief in support of Appellee’s petition for panel rehearing and rehearing *en banc*.

Defendant-Appellee Jacob Appelsmith, as Director of the Alcoholic Beverage Control Board (“Appellee” or “the State”), has consented to the CCBA’s request to file an *amicus curiae* brief in this case in accordance with FED. R. APP. P. 29(a). Plaintiff-Appellant Retail Digital Network, LLC has advised CCBA that it will not consent to the filing of such a brief.

For the reasons set forth below, CCBA respectfully requests that this Court grant the present motion and permit it to file the accompanying *amicus curiae* brief.

I. Movant’s Interest.

The California Craft Brewers Association is a 501(c)(6) non-profit trade association whose members include more than 400 craft breweries in California. CCBA provides a range of services and resources to its members including education about issues and practices affecting the industry, and representation and advocacy before the Legislature and the courts.

Although the craft brewery industry has only existed for a few decades, it is a growing and vibrant part of the California economy. In 2015, CCBA's members contributed \$6.5 billion to the State's economy.

This case implicates the essential interests of the CCBA and its members. The Panel Opinion's analysis of California's tied-house laws raises issues that would affect the economic regulations that structure the beer and alcoholic beverage industry in California. The potential for allowing dominant corporations in that market to exert greater influence over the retailer sector, as well as the possibility for disruption of the market in which they operate, is of considerable concern to CCBA's members.

Therefore, CCBA supports the State's petition for panel rehearing and for rehearing *en banc*.

II. CCBA's Proposed Amicus Curiae Brief Addresses Relevant Issues That May Assist the Court.

CCBA offers its *amici curiae* brief in order to demonstrate how the tied-house laws at issue are critical to the industry in which they operate and the effects that the Panel's decision will have on those operations. As recent entrants to the alcoholic beverage industry, CCBA's members have operated under the existing three-tiered structure and have confronted stiff competition and resistance from large established companies. Their experience demonstrates that the goals and purposes that motivated these statutes are of current relevance to the industry, and

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document entitled **MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF BY THE CALIFORNIA CRAFT BREWERS ASSOCIATION [FED. R. APP. P. 29(B)]** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 31, 2016.

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

/s/ Pasha Durant

PASHA DURANT

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BANC**

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TABLE OF CONTENTS

I. INTRODUCTION2

II. CALIFORNIA’S CRAFT BREWERS HAVE PIONEERED A DYNAMIC AND EMERGING INDUSTRY.2

III. AS RECOGNIZED BY STATUTE AND CASE LAW, PRESERVING THE ECONOMIC INDEPENDENCE OF ALCOHOLIC BEVERAGE RETAILERS SERVES IMPORTANT PUBLIC POLICY GOALS.5

IV. CURRENT INDUSTRY EXPERIENCE DEMONSTRATES THE CONTINUING VITALITY OF THE TIED-HOUSE STATUTES..... 11

V. CONCLUSION 16

TABLE OF AUTHORITIES

Page(s)

Cases

Actmedia, Inc. v. Stroh,
830 F.2d 957 (9th Cir. 1986)10, 11, 14, 15

California Beer Wholesalers Ass’n v. Alcohol Beverage Control Board,
5 Cal.3d 402 (1971)8, 9

Dept. of Alcoholic Beverage Control v. Alcohol Beverage Control Appeals Board,
100 Cal.App.4th 1066 (2002)9, 10

Dept. of Alcoholic Beverage Control v. Schieffelin & Somerset Co.,
128 Cal.App.4th 1195 (2005)9

Statutes

CAL. BUS. & PROF. CODE § 230015

CAL. BUS. & PROF. CODE § 25500(a)(1)6

CAL. BUS. & PROF. CODE § 25502(a)(1)6

CAL. BUS. & PROF. CODE § 25503(f)7

CAL. CONST. art. XX, § 225

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the California Craft Brewers Association states that it has no parent or subsidiary corporations, and that it has not issued equity shares nor debt securities to the public.

IDENTITY OF AMICUS CURIAE

The California Craft Brewers Association (“CCBA”) is a 501(c)(6) non-profit trade association whose members include more than 400 craft breweries in California. CCBA provides a range of services and resources to its members including education about issues and practices affecting the industry, and representation and advocacy before the Legislature and the courts. In accordance with its internal procedures, CCBA has authorized the filing of this brief on its behalf.

RULE 29(c)(5) STATEMENT

CCBA, as *amicus curiae*, hereby states that this brief was not authored, in whole or in part, by counsel for either of the parties to this appeal. Neither of the parties nor their respective counsel nor any person other than CCBA contributed monies to fund the preparation or submission of this brief.

JOINDER

CCBA, as *amicus curiae*, supports the State’s petition for panel rehearing and for rehearing *en banc*. In this brief, we explain how the issues of this appeal

affect CCBA's individual brewery members and the California craft beer industry more generally.

ARGUMENT

I. INTRODUCTION

Amicus curiae CCBA submits this brief in support of the petition for rehearing, submitted by the Director of the Alcoholic Beverage Control Board. Rehearing is warranted because the panel decision, if it becomes law, will adversely affect the careful structure that regulates the economics of the alcoholic beverage industry in California.

In this brief, we first describe the emergence of the craft brewery industry and explain its interest in the tied-houses statutes. In Part II, we review the pertinent statutes and case law and, then, in Part III, we discuss the significance of those statutes to the contemporary craft brewing industry.

II. CALIFORNIA'S CRAFT BREWERS HAVE PIONEERED A DYNAMIC AND EMERGING INDUSTRY.

The life stories of California's craft brewers read like modern-day entrepreneurial legends:

- The founding of the modern craft brewing movement is often attributed to Fritz Maytag. In 1965, Maytag, a recent college graduate purchased the struggling 100-year-old Anchor Brewery in San Francisco. By recreating old recipes and developing new ones, this

brewery pioneered the contemporary revolution of craft breweries.¹

- Following a do-it-yourself model, Ken Grossman learned to weld so he could fabricate equipment for his own brewery. He personally sought out and purchased the best quality hops for his brewing. These efforts, and more, ultimately led to the now well-established Sierra Nevada Brewing Company.²
- Steve Wagner was in a rock band, when he met Greg Koch, also in the music business. When the two met again a few years later, over beers, they began a journey that led to the successful founding of Stone Brewing Company, in San Marcos. Through continued inspiration, tenacity and hard work, Stone Brewing now has multiple locations, a farm-to-table restaurant and has been dubbed the “All-Time Top Brewery on Planet Earth.”³
- Vinnie Cilurzo began home-brewing beer as a teenager, and opened his first craft brewery at the age of 24. After moving to Sonoma County, he and his wife Natalie took over the Russian River Brewing

¹ Anchor Brewing, http://www.anchorbrewing.com/brewery/our_history (last visited Mar. 30, 2016).

² Sierra Nevada, <http://www.sierranevada.com/brewery/about-us/our-story> (last visited Mar. 30, 2016).

³ Stone Brewing, <http://www.stonebrewing.com/about/our-story> (last visited Mar. 30, 2016).

Company, an innovative award-winning craft brewery with a Santa Rosa brewpub that is a renowned community gathering place.⁴

These are but a few examples of the hundreds of visionary brewers who comprise the CCBA membership. CCBA members are small and dynamic businesses that are brewing delicious beers and ales and supporting local economies throughout California, in small and big cities, from Oregon to the Mexico-United States border. These California entrepreneurs spawned the craft beer industry, a movement that has now spread throughout the country and beyond.

The selling point of craft breweries is simple: Better-quality, better-tasting beer, created with centuries-old brewing methods.

But, from an economic perspective, these path-breaking brewers would not have been able to survive as fledging startups without the structure provided by the tied-house statutes. Although they struggled to obtain a commercial foothold, craft brewers have had success, and the movement is expanding. Today, the combined sales of all craft brewers in the State is still small, but has expanded to roughly 15 percent of the statewide market. That success is directly attributable to the triple-tiered structure and the tied-house statutes (including the limitations placed on the dominant brewing companies). Within that structure, these entrepreneurial brewers were able to enter the market, to compete and to grow—based on the

⁴ Russian River Brewing, <http://russianriverbrewing.com/about-us/> (last visited March 30, 2016).

quality of the beers they crafted. As a result, they have a unique and contemporary perspective on the significance of those enactments.

III. AS RECOGNIZED BY STATUTE AND CASE LAW, PRESERVING THE ECONOMIC INDEPENDENCE OF ALCOHOLIC BEVERAGE RETAILERS SERVES IMPORTANT PUBLIC POLICY GOALS.

A. Maintaining Retailer Independence is a Core Purpose of The Tied-House Statutes.

As this panel correctly recognized, California, like the federal government and the majority of states, adopted “tied-house” statutes “[to] prevent vertical and horizontal integration of the alcoholic beverage industry and to promote temperance.” Slip op. at 5 (citation omitted). In California, the licensing and regulation of the alcoholic beverage industry is enshrined in the state constitution. CAL. CONST. art. XX, § 22. Further, the California Legislature left no doubt about the State’s paramount interest in regulating alcoholic beverages for the sake of public welfare. “It is hereby declared that the subject matter of [the Alcoholic Beverage Control Act] involves in the highest degree the economic, social, and moral well-being and the safety of the State and of all its people.” CAL. BUS. & PROF. CODE § 23001.

The core economic purpose of the “tied-house” enactments—ensuring that businesses in each tier of the industry are separate and independent from businesses in the other two tiers—is manifestly evident from the statutory language. To prevent upstream manufacturers or distributors from controlling or

improperly influencing both on-sale and off-sale licensed retailers, the statute *prohibits* manufacturers, bottlers, wholesalers and their agents:

- From owning on-sale or off-sale licenses. CAL. BUS. & PROF. CODE §§ 25500(a)(1), 25502(a)(1).
- From giving or lending money or objects of value to retailers. *Id.* §§ 25500(a)(2), 25502(a)(2).
- From owning, furnishing, renting or selling the furniture, fixtures, refrigerators or other equipment to on-sale retailers. *Id.* §§ 25500(a)(3), 25501(a).
- From giving alcoholic beverages as free goods to the retailer as part of a sale transaction. *Id.* § 25503(b).
- From retaining title to any alcoholic beverages furnished to a retailer. *Id.* § 25503(a).
- From giving secret rebates or concessions to retail licensees or their employees. *Id.* § 25503(c).

The three enactments at issue in this appeal likewise prohibit payments to retailers for advertising and marketing purposes. That is, the statutes prohibit manufacturers and distributors, among others, from:

- Paying or compensating retailers for advertising, display or distribution service in connection with the advertising and sale of

distilled spirits. CAL. BUS. & PROF. CODE § 25503(f).

- Furnishing, giving or renting decorations or signs to any person. *Id.* § 25503(g).
- Paying money or giving anything of value for the privilege of placing a sign or advertisement on the retailers' premises. *Id.* § 25503(h).

As recently as 2014, the Legislature reaffirmed its concern about payments from beer manufacturers to retailers by enacting a statute that prohibits beer manufacturers or wholesalers from furnishing or funding retail coupons. *Id.* § 25600.3. As well as referencing the three-tiered system of the tied-house statutes, the legislative history of that enactment expressed concern about the lack of “transparency” resulting from beer manufacturers’ coupons.⁵ Also, the author of the bill explained the need to “level the playing field” between the large corporate brewers and the craft breweries: “[u]nlike the major conglomerates, most craft breweries, which are much smaller operations, cannot afford to offer their own beer coupons.”⁶

Review of these statutes unequivocally demonstrates the intent to structure the industry for economic purposes of separate and discrete tiers. To ensure that

⁵ Cal. Senate Committee on Governmental Organization, Staff Analysis of Bill No. AB 1928, 2013-2014 Regular Session, June 9, 2014, http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201320140AB1928 (last visited Mar. 30, 2016).

⁶ *Id.*

larger corporate concerns could not directly or surreptitiously influence retailers, these statutes prohibit all types of payments, loans and subsidies. The three subparts of Section 25503 fit readily within that statutory scheme and serve the same purposes.

B. California Case Authorities Confirm That Alcoholic Beverage Retailers Should Not Be Influenced by Upstream Payments from Manufacturers and Distributors.

California courts have consistently recognized the economic purposes underlying tied-house regulations—to prohibit the vertical and horizontal integrations of different levels of the alcoholic beverage industry. Numerous cases have upheld the statutes enacted to carry out those goals.

In *California Beer Wholesalers Ass’n v. Alcohol Beverage Control Board*, 5 Cal.3d 402, 407 (1971), the California Supreme Court explained that “tied-house” arrangements were adopted “to prevent two particular dangers: the ability and potentiality of large firms to dominate local markets through vertical and horizontal integration and the excessive sales of alcoholic beverages produced by the overly aggressive marketing techniques of larger alcoholic beverage concerns.” (Citations omitted). Thus, under these statutes, “wholesale interests were to be segregated from retail interests. In short, business endeavors engaged in the production, handling, and final sale of alcoholic beverages were to be kept ‘distinct and apart.’” *Id.*

Further, the Court observed that “[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.” *Id.* at 408. In that case, the California Supreme Court denied a wholesale beer and wine license to a division of a corporation that also sold beer and wine on a retail basis, thus upholding the segregation between the different levels of the distribution system.

In another case, a distributor of Grand Marnier supplied funds to sponsor “fun runs” for which Chevy’s Restaurants, a retailer of alcoholic beverages, was the title sponsor. *Dept. of Alcoholic Beverage Control v. Schieffelin & Somerset Co.*, 128 Cal.App.4th 1195 (2005). As part of the marketing campaign, posters and other materials depicting the Grand Marnier logo were displayed in Chevy’s restaurants to promote the events. The Court of Appeal concluded that the distributor had violated the economic limitations of the tied-house statutes. Specifically, the evidence established that the wholesaler’s payment of sponsorship funds “indirectly” provided the retailer (Chevy’s) with something of value and that the sponsorship payment also provided the wholesaler with the privilege of displaying Grand Marnier advertising on the retailer’s premises. *Id.* at 1208-1216.

The Court of Appeal invalidated a winegrower-funded advertisement arrangement in *Dept. of Alcoholic Beverage Control v. Alcohol Beverage Control Appeals Board*, 100 Cal.App.4th 1066 (2002). In that case, a licensed winegrower paid money to place an advertisement in a licensed retailer’s sales catalog. The

Court of Appeal concluded that such a payment violated the statutory prohibition by furnishing “a thing of value” to a licensed retailer. *Id.* at 1074. Further, the court agreed with the Department of Alcoholic Beverage Control that the wholesaler’s effort to narrowly interpret the statute would create the risk of “subterfuges” regarding their payments to retailers. *Id.* (“[to] limit the reach of the statute’s use of ‘furnish’ to unilateral contracts as urged by [ZD] would invite suppliers to engage in subterfuges regarding the fair value exchanges cited by [ZD] as a non-proscribed activity between suppliers and retailers and [would] defeat the Legislature’s intent to limit vertical and horizontal integration of the alcoholic beverage industry”) (citation omitted) (square brackets by the court).

The reasoning and result of the *Actmedia* court is fully consistent with these decisions. In that case, the court concluded that Section 25503(h), one of the statutes at issue here, advanced the interests embodied in the tied-house statutes by prohibiting brewer-funded advertisements on supermarket carts. *Actmedia, Inc. v. Stroh*, 830 F.2d 957, 967 (9th Cir. 1986). The court explained that this and other provisions of the tied-house statutes were intended to curtail “overly aggressive marketing techniques” by large alcoholic beverage companies. *Id.* at 966. The court understood that the advertising restrictions were part of the scheme to prohibit all payments from larger concerns to retailers, to prevent larger companies from exercising undue influence and to prevent the use of advertising funds to

conceal illegal payoffs:

By prohibiting alcoholic beverage manufacturers and wholesalers from paying retailers for advertising within their establishments, section 25503(h) was designed to eliminate the possibility that such payments could be used by large-scale operators to purchase favored treatment for their products by individual retailers, or even exclusion of their products' competing brands. Since California's other tied-house laws explicitly prohibited alcoholic beverage manufacturers and wholesalers from making gifts, paying rebates, or otherwise "buying" the favor of retailers and their employees, *see, e.g.*, Cal. Bus. & Prof. Code § 25503(a)-(e), section 25503(h) was designed to prevent manufacturers and wholesalers from circumventing these other tied-house restrictions by claiming that the illegal payments they made to retailers were for "advertising."

Id. at 966-67 (citations omitted). In sum, these decisions demonstrate the paramount economic purposes of the tied-house statutes, including those that prohibit manufacturers and wholesalers from funding retailers' advertising efforts.

IV. CURRENT INDUSTRY EXPERIENCE DEMONSTRATES THE CONTINUING VITALITY OF THE TIED-HOUSE STATUTES.

Although alcoholic beverages have been manufactured and exchanged for thousands of years, the competitive struggle of California's newly-created craft brewers is a modern-day chapter of that history. These scrappy businesses, most of which were established in the last couple of decades, face a number of challenges in the present marketplace. Their experience highlights the continuing vitality of tied-house statutes.

In 2014, California's craft brewers collectively produced about 3.5 million

barrels of beer and ale, generating revenues of \$6.5 billion.⁷ That constitutes about 15 percent of the statewide market. Despite their limited resources and economic power, the independent craft brewers must confront several economic and competitive challenges, including:

- **Dominance of global beer manufacturers.** At the manufacturing level, two global corporate brewers, Anheuser-Busch InBev (“ABI”) and SAB MillerCoors, collectively controlled 70 percent of the United States beer market in 2014. The five largest brewers constituted 84 percent of the market.⁸
- **Distributor consolidation.** At the distributor level generally, mergers and acquisitions in recent years have greatly consolidated the industry. As a result, there are only two beer distributors in most local markets,⁹ a situation that limits the ability of independent craft brewers to distribute their products to retailers.

⁷ California Craft Brewers Association, <http://www.californiacraftbeer.com/beer-stats/>

⁸ Beer Marketer’s Insights, http://www.beerinsights.com/index.php?option=com_content&view=article&id=11&Itemid=14

⁹ *Ensuring Competition Remains on Tap: The AB InBev/SABMiller merger and the State of Competition in the Beer Industry: Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the H. Comm on the Judiciary*, 114th Cong. (2015) (written testimony of Bob Pease, Chief Executive Officer, Brewers Association), <https://www.brewersassociation.org/wp-content/uploads/2015/12/Pease-Testimony.pdf>

- **Distributor incentives**. ABI has established financial incentives so that both independent and ABI-owned distributors are encouraged to restrict the distribution of non-aligned craft beers. Under this program, ABI will reimburse marketing funds expended by its distributors, with the highest level of reimbursement reserved to those distributors who limit their sales of non-ABI beers to 2% or less.¹⁰ Thus, ABI uses its market dominance to remove independent craft beers from distributors' trucks and, as a result, from retailers' shelves.
- **Competing for shelf space**. Because retail stores have limited refrigerator and shelf space, craft brewers must compete with larger and more dominant brands for the display of their products.
- **Retail chain stores**. Large retail chains, such as Safeway, WalMart and Costco, make centralized purchasing decisions, a dynamic that limits the ability of independent craft brewers to sell to those customers.
- **Point-of-sale advertising**. The dominant beer manufacturers have increased expenditures for point-of-sale marketing in retail

¹⁰ *Ensuring Competition Remains on Tap: The AB InBev/SABMiller merger and the State of Competition in the Beer Industry: Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the H. Comm on the Judiciary, 114th Cong. (2015) (written testimony of Bob Pease, Chief Executive Officer, Brewers Association), <https://www.brewersassociation.org/wp-content/uploads/2015/12/Pease-Testimony.pdf>*

establishments, which comports with research showing that many consumers choose between competing brands when in the store.¹¹

One report by the Federal Trade Commission found that 28.6% of marketing expenditures were used to help wholesalers and retailers promote brand sales.¹²

These present-day circumstances reinforce the continuing need for retailer independence, which, of course, is a motivating purpose of the tied-house statutes. Craft brewers have difficulty in getting retailers to display their products to consumers. At the retail level, groceries have limited shelf space; most bars and restaurants typically carry only a few types of beer and ale.

In most markets, there are only two distributors for their products—one distributor is typically owned by or affiliated with the ABI conglomerate, the other with the SAB MillerCoors. Thus, independent craft brewers must try to persuade distributors beholden to these tenacious competitors to carry their beers. Further, and as noted above, ABI has announced a program that provides financial

¹¹ Alcohol Point-of-Purchase Advertising and Promotions: Prevalence, Content, and Targeting, <http://www.popai.com/uploads/downloads/Research-Alcohol-POP-Ads-Promo-2004.pdf> (last visited Mar. 30, 2016). See *Actmedia, Inc.*, 830 F.2d at 961 (citing 1977 consumer study showing that 64.8% of supermarket customers decided which brand of product to purchase once they were in the supermarket).

¹² FTC Releases Fourth Major Study on Alcohol Advertising and Industry Efforts to Reduce Marketing to Underage Audiences, <https://www.ftc.gov/news-events/press-releases/2014/03/ftc-releases-fourth-major-study-alcohol-advertising-industry> (last visited Mar. 30, 2016).

incentives to distributors who strictly limit the volume of independent craft beers they distribute.

The panel decision, if it becomes law, will have far more significant economic and commercial effects, than its effects on commercial speech. To be sure, it cannot credibly be claimed that the alcoholic beverage industry is in any way constrained in its ability to disseminate its messages to the commercial marketplace. Departing from the *Actmedia* precedent is not necessary to promote commercial speech. The impact of less deferential scrutiny of these statutes, however, will alter the commercial relationships of the three-tiered structure. If manufacturers and wholesalers are permitted to compensate retailers for advertising, the competitive market will be tipped in favor of those larger and more dominant players. They have the resources to spend far more for more point-of-sale placements and advertisements in a greater number of retail establishments throughout the State. This, of course, is exactly what the Legislature sought to prevent when the statutes were enacted 80 years ago, a goal that was reaffirmed through more recent enactments. This situation also increases the risk, as recognized by the Legislature and the courts, that advertising payments can be used for improper purposes. Those legislative judgments deserve deference. Under the level of scrutiny proposed by the panel decision, the State's enforcement efforts to prevent such practices become far more difficult, if not impossible. In contrast to the present bright-line rules that prevent *any* payments from manufacturers and

wholesalers to the retail licensees, State officials would face great difficulty in ferreting out facts from uncooperative market participants to demonstrate that “advertising” payments were mere pretexts actually used to promote favoritism or exclusionary practices.

V. CONCLUSION

The tied-house laws provide a critical bulwark to prevent dominant players in the alcoholic beverage industry from exercising improper influence over retailers of alcoholic beverages. As explained, the structure created by these statutes has promoted innovation and competition, exemplified by the dynamic success of California’s craft brewers. It is essential that the statutory restrictions be kept in place to preserve retailer independence.

The CCBA therefore supports the State’s petition for rehearing.

Dated: March 31, 2016

NOSSAMAN LLP

By: /s/ Carl L. Blumenstein
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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Fed. R. App. P. 29(c) and 32(a)(7).

The brief is proportionately spaced using Times New Roman 14-point type. The brief contains 3,014 words (as counted by the computer program used to generate this brief), not including the table of contents and authorities, the caption page, signature blocks, or this certification.

/s/ Carl L. Blumenstein
CARL L. BLUMENSTEIN

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document entitled **AMICUS CURIAE BRIEF BY THE CALIFORNIA CRAFT BREWERS ASSOCIATION SUPPORTING APPELLEE'S PETITION FOR PANEL REHEARING AND REHEARING EN BANC** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 31, 2016.

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

/s/ Pasha Durant

PASHA DURANT