

CHEERS TO *CENTRAL HUDSON*: HOW  
TRADITIONAL INTERMEDIATE SCRUTINY  
HELPS KEEP INDEPENDENT CRAFT BEER  
VIABLE

*Daniel J. Croxall*

**ABSTRACT**—Independent craft breweries contributed approximately \$68 billion to the national economy last year. However, an arcane regulatory scheme governs the alcohol industry in general and the craft beer industry specifically, posing both obstacles and benefits to independent craft brewers. This Essay examines regulations that arguably infringe on free speech: namely, commercial speech regulations that prohibit alcohol manufacturers from purchasing advertising space from retailers. Such regulations were enacted to prohibit undue influence and anticompetitive behavior stemming from vertical and horizontal integration in the alcohol market. Although these regulations are necessary to prevent global corporate brewers from dominating the craft beer market at the expense of independent craft beer and consumer choice, evolving commercial speech doctrine threatens to invalidate them due to a trend towards increased protections for commercial speech. Without these regulations, and many others like them, nothing would restrain global corporate brands from engaging in illegal pay-to-play conduct to regain lost market share and force independent craft beer from the shelves and tap handles.

**AUTHOR**—Assistant Professor of Lawyering Skills, McGeorge School of Law; Director, Capital Lawyering Concentration. Thank you to Paige Davidson and Jessica Gandara for powerful research assistance and insights.

INTRODUCTION .....	2
I. THE REGULATION AT ISSUE: ALCOHOL MANUFACTURERS CANNOT PURCHASE ADVERTISING SPACE FROM RETAILERS .....	5
II. THE TRADITIONAL COMMERCIAL SPEECH ANALYSIS: <i>CENTRAL HUDSON</i> 'S INTERMEDIATE SCRUTINY APPLIED TO SECTION 25503(H) .....	7
III. <i>SORRELL</i> 'S TRAIL OF BREADCRUMBS .....	10
IV. A CHALLENGE TO SECTION 25503(H) POST <i>SORRELL</i> : THE NINTH CIRCUIT'S <i>RETAIL DIGITAL NETWORK</i> TRILOGY AND UNCERTAINTY IN ITS SISTER CIRCUITS .....	14
A. <i>The RDN District Court: Sorrell Is Nothing New</i> .....	14
B. <i>The Appeal: Sorrell Announced a New Standard</i> .....	15
C. <i>The En Banc Opinion: Sorrell Is Nothing New, or Is It?</i> .....	16
D. <i>Disagreement in the Other Circuit Courts and Potential Danger to Regulations Prohibiting the Purchase of Advertising</i> .....	17
V. WHY SECTION 25503(H) MATTERS TO INDEPENDENT CRAFT BEER .....	19
A. <i>The Power of POP Advertising</i> .....	20
B. <i>Pay-to-Play and the Illusion of Choice</i> .....	22
VI. REGULATIONS SUCH AS SECTION 25503(H) WOULD LIKELY FAIL UNDER HEIGHTENED SCRUTINY .....	26
CONCLUSION .....	28

## INTRODUCTION

Independent craft beer is on a roll.<sup>1</sup> Sales and market share are up; popularity continues to rise. To illustrate, the independent craft beer industry contributed \$67.8 billion to the U.S. economy in 2016 and provided more than 456,000 jobs.<sup>2</sup> A mere four years prior, in 2012, independent craft beer contributed \$33.9 billion and 360,000 jobs.<sup>3</sup> The growth has been incredible. Most experts agree that the craft beer segment will continue to grow, but perhaps not at the same pace.<sup>4</sup> There is a fly in the IPA, however, that could significantly curtail growth and diminish independent craft beer's presence in the market. Global corporate beer

---

<sup>1</sup> For purposes of this article, "independent craft beer" means any beer manufacturer that is not owned or controlled by a major corporation such as Ab InBev, MillerCoors, Molson Coors, Constellation Brands, Heineken, and the like.

<sup>2</sup> See *Economic Impact*, BREWERS ASS'N, <https://www.brewersassociation.org/statistics/economic-impact-data> [<https://perma.cc/BH38-CCBP>].

<sup>3</sup> See Press Release, Brewers Association, Craft Brewers' Economic Contribution Reaches \$34 Billion (Dec. 13, 2013), <https://www.brewersassociation.org/press-releases/craft-brewers-economic-contribution-reaches-34-billion/> [<https://perma.cc/NQW3-6YT8>].

<sup>4</sup> See Keith Gribbins, *2017 Mid-Year U.S. Craft Beer Analysis: 5% Growth Shows a Slowing, Maturing Market*, CRAFT BREWING BUS. (Aug. 1, 2017), <https://www.craftbrewingbusiness.com/featured/craft-beer-growth-shows-slowing-maturing-market> [<https://perma.cc/E395-Z2ZH>].

brands such as AB InBev, MillerCoors, Constellation Brands, and Heineken (commonly referred to as “Big Beer”)<sup>5</sup> have been losing market share since the craft beer revolution began in the mid- to late-2000s and would like nothing more than to recover those losses by any means necessary.

The laws and regulations surrounding California’s craft beer industry provide a stark example of how changes in First Amendment commercial speech doctrine can have real, potentially unintended, consequences. California’s craft beer industry benefits from existing commercial speech regulations that are designed to prevent vertical and horizontal integration in the alcoholic beverage market, as well as to ostensibly promote temperance in California drinkers. There are several such restrictions in California’s tied-house laws.<sup>6</sup> These enactments are important to maintain a competitive beer market and prohibit financial dealings that would render the retail arm of the market beholden to the manufacturing arm.

As just one specific example, California prohibits alcoholic beverage manufacturers from purchasing advertising space from a retailer.<sup>7</sup> Major breweries with interests adverse to independent craft breweries<sup>8</sup> have hotly contested this restriction and have directly challenged it using the

---

<sup>5</sup> To provide some context, in 2016 three global corporate brewers, AB InBev, MillerCoors, and Constellation Brands, controlled 75.6 percent of the U.S. beer market, and the five largest brewers manufactured 83 percent of the U.S. beer market. *See Major Suppliers Shipments and Share 2016 v. 2015*, BEER MARKETER’S INSIGHTS, [https://www.beerinsights.com/index.php?option=com\\_k2&view=item&id=19559:major-supplier-shipments-and-share-2016-vs-2015&tmpl=component](https://www.beerinsights.com/index.php?option=com_k2&view=item&id=19559:major-supplier-shipments-and-share-2016-vs-2015&tmpl=component) [<https://perma.cc/J4TA-EYU7>].

<sup>6</sup> *See* CAL. BUS. & PROF. CODE §§ 23001, 25500 (West 2016) (preventing, among other restrictions, makers of alcoholic beverages from owning an interest in a retail business which sells such beverages). Generally speaking, tied-house laws prohibit an alcoholic beverage manufacturer from exerting any influence or control over a retailer for the purpose of preventing vertical and horizontal integration in the alcoholic beverage industry, as well as to ostensibly promote temperance. *See id.*

<sup>7</sup> *See id.* § 25503(h).

<sup>8</sup> The Brewers Association is the leading industry trade group concerning independent craft beer. It defines a craft brewery as follows: (1) “Small: Annual production of 6 million barrels of beer or less (approximately 3 percent of U.S. annual sales). Beer production is attributed to a brewer according to the rules of alternating proprietorships”; (2) “Independent: Less than 25 percent of the craft brewery is owned or controlled (or equivalent economic interest) by a beverage alcohol industry member which is not itself a craft brewer”; (3) “Traditional: A brewer that has a majority of its total beverage alcohol volume in beers whose flavor derives from traditional or innovative brewing ingredients and their fermentation. Flavored Malt Beverages (FMBs) are not considered beers.” *See Craft Brewer Defined*, BREWERS ASS’N, <https://www.brewersassociation.org/statistics/craft-brewer-defined> [<https://perma.cc/E389-QZDQ>]. To put this into perspective, the vast majority of craft breweries produce less than 1,000 barrels of beer annually. *See* U.S. DEP’T OF THE TREASURY: ALCOHOL & TOBACCO TAX & TRADE BUREAU, NUMBER OF BREWERS BY PRODUCTION SIZE - CY 2016 (2017), [https://www.ttb.gov/statistics/production\\_size/2016\\_brew\\_prod\\_size\\_ttb\\_gov.pdf](https://www.ttb.gov/statistics/production_size/2016_brew_prod_size_ttb_gov.pdf) [<https://perma.cc/EJ2A-EN4D>].

commercial speech doctrine under the First Amendment.<sup>9</sup> The Federal Alcohol Administration Act has a similar restriction.<sup>10</sup>

That prohibition, and laws like it in other jurisdictions, are in jeopardy and are the subject of a potential circuit split. Traditionally, commercial speech is subject to intermediate scrutiny.<sup>11</sup> However, since at least 2011 and the Supreme Court’s ruling in *Sorrell v. IMS Health Inc.*,<sup>12</sup> commercial speech case law has been trending towards heightened protection beyond that provided in the traditional *Central Hudson* “intermediate scrutiny” test.<sup>13</sup> In *Sorrell*, the Supreme Court at the very least suggested that commercial speech deserves the same level of protection against regulation as noncommercial speech.<sup>14</sup> Opponents of craft beer’s increasing market share momentum were quick to recognize that *Sorrell* opened the door for a challenge to California’s prohibition described above. And challenge they did.<sup>15</sup> But the Ninth Circuit recently held en banc that *Sorrell* did not require a heightened level of scrutiny for commercial speech regulations other than the already “intermediate” level of scrutiny required by *Central Hudson*.<sup>16</sup> The Fourth Circuit (and others) might not agree.<sup>17</sup> For the moment, however, craft brewers in the Ninth Circuit can rest safe knowing

---

<sup>9</sup> See *Retail Digital Network, LLC v. Appelsmith*, 810 F.3d 638 (9th Cir. 2016) *overruled by* *Retail Digital Network, LLC v. Prieto*, 861 F.3d 839 (9th Cir. 2017) (en banc); *Actmedia, Inc. v. Stroh*, 830 F.2d 957 (9th Cir. 1986).

<sup>10</sup> See 27 U.S.C. § 205(b)(4) (2000) (making it unlawful for any manufacturer or wholesaler “[t]o induce through any of the following means, any retailer . . . by paying or crediting the retailer for any advertising, display, or distribution service . . .”). Indeed, federal tied-house regulations prohibit payments to retailers for advertising in several places. See 27 C.F.R. § 6.52 (2018) (prohibiting manufacturer and wholesaler payments for advertisements placed by a retailer); 27 C.F.R. § 6.54 (2018) (prohibiting purchase of advertising in retailer publications); 27 C.F.R. § 6.55 (2018) (prohibiting reimbursements to retailers for product or other displays); and 27 C.F.R. § 6.56 (2018) (prohibiting renting display space at a retailer). Federal permits require manufacturers and wholesalers to adhere to state and federal alcohol laws, including comprehensive trade practice regulations to ensure the independence of alcohol retailers.

<sup>11</sup> See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980).

<sup>12</sup> 564 U.S. 552 (2011).

<sup>13</sup> *Cent. Hudson*, 447 U.S. at 566; see Leslie Gielow Jacobs, *Regulating Marijuana Advertising and Marketing to Promote Public Health: Navigating the Constitutional Minefield*, 21 LEWIS & CLARK L. REV. (forthcoming 2018).

<sup>14</sup> See *Sorrell*, 564 U.S. at 563–64 (“On its face, Vermont’s law enacts content- and speaker-based restrictions on the sale, disclosure, and use of prescriber-identifying information. . . . The statute thus disfavors marketing, that is, speech with a particular content. More than that, the statute disfavors specific speakers, namely pharmaceutical manufacturers.”).

<sup>15</sup> See, e.g., *Retail Digital Network, LLC v. Appelsmith*, 945 F. Supp. 2d 1119, 1120–21 (C.D. Cal. 2013) (challenging California laws against vertical and horizontal integration in the beverage market).

<sup>16</sup> *Retail Digital Network, LLC v. Prieto*, 861 F.3d 839, 848 (9th Cir. 2017) (en banc).

<sup>17</sup> See *Educ. Media Co. at Va. Tech, Inc. v. Insley*, 731 F.3d 291, 297–98 (4th Cir. 2013) (recognizing that *Central Hudson*’s intermediate scrutiny is likely not the same as the heightened scrutiny the Supreme Court contemplated in *Sorrell*).

that Big Beer cannot squeeze them out of the market by simply purchasing advertising space from retailers. The same cannot be said for independent craft brewers in other circuits.

If commercial speech regulations are eventually held to something stricter than *Central Hudson*'s intermediate scrutiny as the general trend suggests, the constitutionality of many existing tied-house regulations that impact commercial speech is in jeopardy, if not entirely predetermined.

This Essay proceeds in six parts. Part I summarizes tied-house laws prohibiting alcohol manufacturers from purchasing advertising space from retailers, particularly Section 25503(h) in California. Part II explains how traditional intermediate scrutiny for commercial speech has been applied to Section 25503(h). Part III explains that judicial momentum has been trending towards increased protections for commercial speech since at least 2011 based on language in *Sorrell*. Part IV explores how the Ninth Circuit's recent decision in *Retail Digital Network v. Prieto*<sup>18</sup> bucks the trend and upholds *Central Hudson*'s intermediate scrutiny analysis. Part V argues that this decision helps independent craft beer remain viable. Finally, Part VI argues that abandoning *Central Hudson* for some further heightened scrutiny will significantly injure the independent craft beer industry.

#### I. THE REGULATION AT ISSUE: ALCOHOL MANUFACTURERS CANNOT PURCHASE ADVERTISING SPACE FROM RETAILERS

After Congress repealed Prohibition through the Twenty-First Amendment, every state adopted and implemented some version of what are known as "tied-house" laws.<sup>19</sup> In their purest form, tied-house laws are designed to prevent any ownership interests between the three tiers of alcohol manufacture, distribution, and sale.<sup>20</sup> Their purpose is to prevent the pre-Prohibition evils associated with saloons that were owned or heavily beholden, operated, and supplied by a single alcohol manufacturer with the sole purpose of selling the most owner-produced alcohol as possible—consumer choice and temperance be damned.<sup>21</sup> In short, a retail outlet (a "house") could easily become beholden to a manufacturer and push only that manufacturer's products through ownership, gifts, business support,

---

<sup>18</sup> 861 F.3d 839 (9th Cir. 2017) (en banc).

<sup>19</sup> See *Tied House: Pillar of Alcohol Regulation*, COMPLIANCE SERV. OF AM., [http://www.csa-compliance.com/articles/tied\\_house-\\_pillar\\_of\\_alcohol\\_regulation](http://www.csa-compliance.com/articles/tied_house-_pillar_of_alcohol_regulation) [<https://perma.cc/DN66-UD5B>].

<sup>20</sup> RAYMOND B. FOSDICK & ALBERT L. SCOTT, TOWARD LIQUOR CONTROL 72–73 (1933).

<sup>21</sup> *Id.*

low-interest loans, and outright payments.<sup>22</sup> And competition was fierce—beyond fierce. Alcohol manufacturers would stop at nothing to ensure that drinkers guzzled as much of their product as possible.<sup>23</sup> Indeed, the phrase “there is no free lunch” is often credited to pre-Prohibition U.S. saloons.<sup>24</sup> Tied-houses would offer thirsty lunch crowds a “free lunch” if they purchased beer or other alcoholic beverages during the lunch session.<sup>25</sup> Manufacturers’ thirst for alcohol sales was truly unquenchable.

After the U.S. Congress ratified the Twenty-First Amendment, California adopted its original Alcohol Beverage Control Act (the “Act”) in 1953, including its own version of tied-house restrictions.<sup>26</sup> The legislature adopted the Act for the following seemingly antiquated reasons: (1) “for the protection of the safety, welfare, health, peace, and morals of the people of the State”<sup>27</sup>; (2) “to eliminate the evils of unlicensed and unlawful manufacture, selling, and disposing of alcoholic beverages”<sup>28</sup>; and (3) “to promote temperance in the use and consumption of alcoholic beverages.”<sup>29</sup> More specifically, the Ninth Circuit recognized that California adopted these restrictions “(1) to prevent large-scale manufacturers and wholesalers of alcoholic beverages from dominating local markets for their products through vertical and horizontal integration; and (2) to promote and curb ‘excessive sales of alcoholic beverages’ by prohibiting the ‘overly aggressive marketing techniques’ that had been characteristic of large-scale alcoholic beverage concerns.”<sup>30</sup>

As part of the Act, California enacted Business and Professions Code Section 25503.<sup>31</sup> In particular, Section 25503(h) provides that no alcoholic beverage manufacturers or their agents shall “[p]ay money or give or furnish anything of value for the privilege of placing or painting a sign or advertisement, or window display, on or in any premises selling alcoholic beverages at retail.”<sup>32</sup> It is important to note what Section 25503(h) does not do—it does not prohibit manufacturers from advertising in retail

---

<sup>22</sup> *Id.* at 73.

<sup>23</sup> See FOSDICK & SCOTT, *supra* note 20, at 42 (1933).

<sup>24</sup> See, e.g., Jan Whitaker, *Lunch and a Beer*, RESTAURANT-ING THROUGH HISTORY (Sept. 6, 2011) <https://www.restaurant-ingthroughhistory.com/2011/09/06/lunch-and-a-beer/> [https://perma.cc/Y3PM-CJGF] (explaining that saloons providing free lunches is a very old custom).

<sup>25</sup> *Id.*

<sup>26</sup> See CAL. BUS. & PROF. CODE § 23000 (West 1953).

<sup>27</sup> See *id.* § 23001.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Actmedia, Inc. v. Stroh, 830 F.2d 957, 959 (9th Cir. 1986) (citations omitted).

<sup>31</sup> CAL. BUS. & PROF. CODE § 25503 (West 1973).

<sup>32</sup> *Id.* § 25503(h).

outlets.<sup>33</sup> It simply prohibits manufacturers from providing any compensation in exchange for advertising.<sup>34</sup>

Section 25503(h) creates obvious First Amendment concerns in that it prohibits otherwise lawful speech to some degree. Many wonder why the state would enact such a broad restriction. The California Supreme Court provided a general answer in 1971:

In the era when most tied-house statutes were enacted, state legislatures confronted an inability on the part of small retailers to cope with pressures exerted by larger manufacturing or wholesale interests. Consequently, most of the statutes enacted during this period (1930–1940) manifested a legislative policy of controlling large wholesalers; the statutes were drafted in sufficiently broad terms, moreover, to insure the accomplishment of the primary objective of the establishment of a triple-tiered system. All 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.<sup>35</sup>

Thus, California and the various state legislatures sought to prohibit market domination that can minimize consumer choice and lead to intemperance. And one avenue to do so was to prohibit the influence that a manufacturer paying for retail advertisements would have over that retailer. “[S]ection 25503(h) is primarily designed to prevent or limit a specific evil: the achievement of dominance or undue influence by alcoholic beverage manufacturers and wholesalers over retail establishments.”<sup>36</sup> Section 25503(h), however, has not gone unchallenged, and its future existence (and the existence of similar state regulations) is all but clear.

## II. THE TRADITIONAL COMMERCIAL SPEECH ANALYSIS: *CENTRAL HUDSON*’S INTERMEDIATE SCRUTINY APPLIED TO SECTION 25503(H)

Since the mid-1970s, commercial speech has received some protections under the First Amendment.<sup>37</sup> While content-based

---

<sup>33</sup> Indeed, manufacturers are allowed to give retailers promotional materials for free with some limitations. See CAL. CODE REGS. tit. 4, § 106 (1973).

<sup>34</sup> *Id.* There are some exceptions. For example, sports stadiums and music venues. See CAL. BUS. & PROF. CODE § 25503.26 (West 2001).

<sup>35</sup> Cal. Beer Wholesalers Ass’n v. Alcoholic Beverage Control App. Bd., 487 P.2d 745, 748 (Cal. 1971) (citations omitted).

<sup>36</sup> Actmedia, Inc. v. Stroh, 830 F.2d 957, 966 (9th Cir. 1986) (citations omitted).

<sup>37</sup> See Jacobs, *supra* note 13.

noncommercial speech regulations must survive strict scrutiny, commercial speech regulations—an innately content-based category of speech—must only survive intermediate scrutiny.<sup>38</sup> This disparity stems from a long-held belief that commercial speech is generally of lower value than noncommercial speech, and commercial speech regulation is more appropriate based on the government’s power to regulate commerce.<sup>39</sup> As a result, commercial speech regulations are more likely to survive legal challenges than noncommercial speech regulations.

The Supreme Court has traditionally applied a four-part analytical framework to review commercial speech restrictions to achieve intermediate scrutiny.<sup>40</sup> Those four parts are as follows: (1) the speech “must concern lawful activity and not be misleading”; (2) the government interest must be substantial; (3) the regulation must “directly advance” the “asserted” government interest; and (4) the regulation must not be “more extensive than is necessary to serve” the asserted interest.<sup>41</sup> If these four queries are satisfied, the regulation will survive the challenge. If one is unmet, the regulation will fail.

*Actmedia, Inc. v. Stroh*, a 1986 Ninth Circuit case, provides a concrete example of *Central Hudson*’s intermediate scrutiny and involves a direct challenge to Section 25503(h).<sup>42</sup> In that case, the plaintiff Actmedia leased advertising space on shopping carts and placed beer manufacturers’ ads on those spaces.<sup>43</sup> Coors contracted with Actmedia to advertise Coors beer on shopping carts in certain California stores.<sup>44</sup> The California Alcoholic Beverage Control Board (ABC) decided that this agreement violated Section 25503(h) and initiated an administrative action against Coors; thus, Coors terminated its agreement with Actmedia.<sup>45</sup> In response, Actmedia filed a lawsuit seeking declaratory relief that (1) Coors’s conduct did not violate Section 25503(h) and (2) Section 25503(h) violated the First Amendment by impermissibly restricting commercial speech.<sup>46</sup> The District Court found for the California ABC, and Actmedia appealed to the Ninth Circuit.<sup>47</sup>

---

<sup>38</sup> *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642 (1994); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980).

<sup>39</sup> *Cent. Hudson*, 447 U.S. at 562–63.

<sup>40</sup> *Id.* at 566.

<sup>41</sup> *Id.*

<sup>42</sup> 830 F.2d 957, 958 (9th Cir. 1986).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 961.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 958.



Applying *Central Hudson*, the Ninth Circuit affirmed.<sup>48</sup> The court specifically found that Section 25503(h) materially and directly advances California's interests in preventing market dominance because it prevents manufacturers and wholesalers from circumventing the three-tiered system and thus concealing illegal payments for "advertising" when in reality such payments equate to "payoffs."<sup>49</sup> The court stated it as follows: "By flatly proscribing such payments, California minimized the possibility that alcoholic-beverage manufacturers and wholesalers will obtain undue influence over retail establishments, resulting in increased vertical and horizontal integration of California's liquor industry."<sup>50</sup> Regarding the fourth *Central Hudson* factor, which requires that the regulation must not be more extensive than necessary to serve the asserted interest, the court found that Section 25503(h) was as "narrowly drawn as possible to effectuate" California's interest in preventing illegal payoffs and, to some extent, temperance.<sup>51</sup> Accordingly, the court held that because Section 25503(h) "prohibits only *paid* advertising *in retail stores*, not unpaid advertising in those stores or paid advertising anywhere else," it survived *Central Hudson*'s intermediate scrutiny test.<sup>52</sup>

So while Section 25503(h) survived intermediate scrutiny, it is no easy test. And when juxtaposed with the rational basis test, *Central Hudson* already employs a "heightened" form of scrutiny. But since the Supreme Court decided *Central Hudson* in 1980, several opinions have cast doubt on its efficacy and trended towards increased protections for commercial speech.<sup>53</sup> Perhaps none of them have caused such consternation and speculation as the 2011 case of *Sorrell v. IMS Health, Inc.*, which placed *Actmedia*'s ruling in jeopardy.<sup>54</sup>

---

<sup>48</sup> *Id.* at 965–68. The first *Central Hudson* factor was not at issue because there was no dispute that the Coors advertisements concerned lawful activity. Also, the second factor was not at issue because California has a substantial interest in exercising its Twenty-First Amendment powers and in regulating the structure of the alcoholic beverage industry in California. *Id.* at 965–66.

<sup>49</sup> *Id.* at 967.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 968.

<sup>53</sup> *See, e.g.*, 44 *Liquormart v. Rhode Island*, 517 U.S. 484 (1996) (holding that a statutory ban on the advertising of liquor prices violates the First Amendment).

<sup>54</sup> 564 U.S. 552 (2011); Hunter B. Thomson, *Whither Central Hudson? Commercial Speech in the Wake of Sorrell v. IMS Health*, 47 *COLUM. J.L. & SOC. PROBS.* 171, 192–99 (examining cases with differing views of *Sorrell*'s change to, or lack thereof, the commercial speech doctrine).

III. *SORRELL'S* TRAIL OF BREADCRUMBS

In *Sorrell*, the Supreme Court struck down a Vermont statute that restricted the sale, disclosure, and use of pharmacy records for marketing purposes.<sup>55</sup> There were two major issues in *Sorrell*. One issue was whether the statute was a commercial “speech” regulation or whether it was commercial regulation of a commodity or conduct.<sup>56</sup> The Court ultimately held that the dissemination, use, or availability of information is “speech.”<sup>57</sup> For the second issue, the Court explored the First Amendment implications of this type of speech regulation.<sup>58</sup> Rather than staying within the parameters of the *Central Hudson* commercial speech doctrine, the Court discussed concerns that traditionally extend into the noncommercial speech arena, such as whether a regulation is content-based.<sup>59</sup> Surprisingly, and contrary to *Central Hudson*, the *Sorrell* Court stated that “heightened scrutiny” should be used for content-based commercial speech restrictions.<sup>60</sup> But all commercial speech regulations are inherently content-based, and the traditional *Central Hudson* commercial speech test is an intermediate scrutiny test.<sup>61</sup> Despite these groundbreaking statements, the Court did not bother to test drive or even define “heightened scrutiny” in this context because the law at issue in *Sorrell* could not pass *Central Hudson's* less challenging intermediate scrutiny test as it stood.<sup>62</sup>

The *Sorrell* opinion contains several hints that “heightened scrutiny” signals a departure from the traditional intermediate scrutiny test, and it could be an omen for the end of the commercial speech doctrine

---

<sup>55</sup> *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 557 (2011).

<sup>56</sup> *Id.* at 567–71.

<sup>57</sup> *Id.* at 570–71.

<sup>58</sup> *Id.* at 563–66, 571–72.

<sup>59</sup> *Id.* at 563–67.

<sup>60</sup> *Id.* at 565–66. The Court at the very least suggested that the term “heightened” as used in the opinion was either strict scrutiny or akin to it. *See id.* (citing cases applying strict scrutiny). The Court specifically noted that “[t]he Court has recognized that the ‘distinction between laws burdening and laws banning speech is but a matter of degree’ and that the ‘Government’s content-based burdens must satisfy the same rigorous scrutiny as its content-based bans.’” *Id.* (quoting *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 812 (2000)). Further, “[t]he First Amendment requires heightened scrutiny whenever the government creates ‘a regulation of speech because of disagreement with the message it conveys.’” *Id.* at 566 (citations omitted). Of course, content-based bans typically require a strict scrutiny analysis. *Id.*

<sup>61</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980).

<sup>62</sup> *Sorrell*, 564 U.S. at 571–72.

altogether.<sup>63</sup> If so, Section 25503(h) and similar laws in other jurisdictions would likely be deemed unconstitutional.<sup>64</sup>

*Sorrell* does not follow the previously established commercial speech framework under *Central Hudson*. The commercial speech test is entirely distinct from any other First Amendment analysis.<sup>65</sup> Terms like “content-based” and “speaker-based,” commonly employed during a strict scrutiny analysis of noncommercial speech restrictions, are not typically used in the commercial speech test.<sup>66</sup> Commercial speech even has its own branch of precedent, starting with *Central Hudson*, which veers away from core First Amendment case law.<sup>67</sup> Yet, the *Sorrell* Court approached what should have been a straightforward commercial speech case more like a noncommercial speech case.

Immediately after introducing the phrase “heightened scrutiny,” the *Sorrell* Court cited an unusual assortment of cases.<sup>68</sup> First, the Court cited *Cincinnati v. Discovery Network*,<sup>69</sup> a case that suggested, without precedent or much explanation, that a content-based commercial speech restriction might be treated differently than a content-neutral commercial speech restriction.<sup>70</sup> The *Sorrell* Court also cited *Turner Broadcasting System, Inc. v. FCC*<sup>71</sup> to support the “heightened scrutiny” concept, but the Court’s subsequent parenthetical described *Turner* as “explaining that *strict scrutiny* applies to regulations reflecting ‘aversion’ to what ‘disfavored speakers’ have to say.”<sup>72</sup> Neither *Discovery Network* nor *Turner* defined “heightened scrutiny”—*Discovery Network* applied *Central Hudson*

<sup>63</sup> See Thomson, *supra* note 54, at 199 (“If *Sorrell* is to be taken seriously and its ideas applied consistently in subsequent cases, however, then the distinction between commercial and noncommercial speech cannot stand.”).

<sup>64</sup> See *infra* Part VI.

<sup>65</sup> See *Cent. Hudson*, 447 U.S. at 566.

<sup>66</sup> *Id.* Cf. *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 813 (2000) (applying strict scrutiny and holding that “[o]ur precedents teach these principles. Where the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails, even where no less restrictive alternative exists.”).

<sup>67</sup> *Id.*; see, e.g., *Greater New Orleans Broad. Ass’n v. United States*, 527 U.S. 173, 183–86 (1999) (applying the *Central Hudson* test to a government prohibition against radio and television advertisements for casinos); *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 475–81 (1989) (applying the *Central Hudson* test to a law prohibiting commercial enterprises from operating public university facilities).

<sup>68</sup> *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565–66 (2011).

<sup>69</sup> 507 U.S. 410 (1993).

<sup>70</sup> *Id.* at 428 (considering whether to apply *Central Hudson* or the time, place, and manner test to a commercial speech restriction).

<sup>71</sup> 512 U.S. 622 (1994).

<sup>72</sup> *Sorrell*, 564 U.S. at 565 (emphasis added).

intermediate scrutiny<sup>73</sup> and *Turner* applied an intermediate scrutiny known as “*O’Brien*” scrutiny that applies to content-neutral restrictions that have an incidental burden on speech.<sup>74</sup> The only common theme between the two cases appears to be a mutual concern about whether restrictions are content- or speaker-based,<sup>75</sup> a concern which fits more squarely into a core, noncommercial speech analysis.

The Court continued its comprehensive First Amendment discussion—a discussion that normally would be unnecessary in a commercial speech case—by citing several other noncommercial speech cases, like *R.A.V. v. City of St. Paul*,<sup>76</sup> *Ward v. Rock Against Racism*,<sup>77</sup> and *Renton v. Playtime Theatres*.<sup>78</sup> The *Central Hudson* test—the bedrock of the commercial speech doctrine—is nowhere in the Court’s initial discussion.<sup>79</sup> In fact, *Sorrell*’s first mention of commercial speech reads like a side note: the Court states that a regulation designed solely to restrict speech would be unconstitutional, adding, “[c]ommercial speech is no exception.”<sup>80</sup> Thus, at least initially, the Court effectively merged commercial speech into a noncommercial speech analysis.

The *Sorrell* Court ultimately chose to apply *Central Hudson* because “the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied.”<sup>81</sup> The key is the “or.” The Court clearly referenced two different tests side-by-side, which cuts against the theory that *Central Hudson* and “heightened scrutiny” are the same. Additionally, *Central Hudson* is the sole, longstanding test for commercial speech—there was no need for the *Sorrell* Court to reach further. Therefore, hinting at a second test was probably not an accident, and it is equally unlikely that the Court’s words were superfluous.

The *Sorrell* Court also repeatedly emphasized the high value of commercial speech, almost as if to advocate for equal treatment between commercial and noncommercial speech—another seeming departure from established commercial speech doctrine. For example, the Court stated, “[a] ‘consumer’s concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue.’”<sup>82</sup> The Court also

---

<sup>73</sup> *Discovery Network*, 507 U.S. at 416.

<sup>74</sup> *Turner*, 512 U.S. at 641–42.

<sup>75</sup> *Turner*, 512 U.S. at 642; *Discovery Network*, 507 U.S. at 428–29.

<sup>76</sup> 505 U.S. 377 (1992).

<sup>77</sup> 491 U.S. 781 (1989).

<sup>78</sup> 475 U.S. 41 (1986).

<sup>79</sup> *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 564–66 (2011).

<sup>80</sup> *Id.* at 566.

<sup>81</sup> *Id.* at 571 (emphasis added).

<sup>82</sup> *Id.* at 566 (quoting *Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1977)).

pointed out that in the field of medicine and public health, “information can save lives.”<sup>83</sup> It continued, “[t]he commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. . . . [T]he general rule is that the speaker and the audience, not the government, assess the value of the information presented.”<sup>84</sup> In glaring contrast to the dissenting opinion and the status quo, the *Sorrell* Court never framed commercial speech as a lesser form of speech; rather, the Court continually pushed the idea that commercial speech can be just as valuable as noncommercial speech. At least by inference, this weakens the long-held belief that commercial speech should be less protected than noncommercial speech.

The *Sorrell* dissent reinforces the theory that the majority was breaking new ground. The dissent was concerned that the majority proposed “a standard yet stricter than *Central Hudson*” without any precedent for this new test.<sup>85</sup> Unlike the majority, the dissent expressly concluded that commercial speech must have less protection because it often crosses paths with commerce, the regulation of which is within the power of the legislature, and it thus should not be inhibited by heightened levels of scrutiny.<sup>86</sup> The dissent also suggested that the *Sorrell* majority misused words from First Amendment jurisprudence—like “content-based,” “content-neutral,” and “speaker-based”—that do not belong in a commercial speech analysis.<sup>87</sup> According to the dissent, the majority reached its conclusion “without taking full account of the regulatory context, the nature of the speech effects, the values these First Amendment categories seek to promote, and prior precedent.”<sup>88</sup> The dissent’s concerns support the idea that *Sorrell* hinted at a stricter standard for commercial speech, which might—to the chagrin of the dissent—implicate the regulation of commerce and “open[] a Pandora’s Box of First Amendment challenges.”<sup>89</sup>

---

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 579 (quoting *Edenfield v. Fane*, 507 U.S. 761, 767 (1993)).

<sup>85</sup> *Id.* at 588 (Breyer, J., dissenting).

<sup>86</sup> *Id.* at 583–85, 589–91.

<sup>87</sup> *Id.* at 588, 602.

<sup>88</sup> *Id.* at 602.

<sup>89</sup> *Id.*

IV. A CHALLENGE TO SECTION 25503(H) POST *SORRELL*: THE NINTH CIRCUIT'S *RETAIL DIGITAL NETWORK* TRILOGY AND UNCERTAINTY IN ITS SISTER CIRCUITS

Given that *Actmedia* was the law of the Ninth Circuit since 1986 and upheld Section 25503(h), *Sorrell* provided another chance to challenge restrictions against alcohol manufacturers paying for advertising space. One case, *Retail Digital Network, LLC v. Appelsmith*,<sup>90</sup> shows how *Sorrell* created confusion about whether it modified the commercial speech landscape enough to finally overturn Section 25503(h) and allow alcohol manufacturers to purchase advertising space from retailers.<sup>91</sup>

A. *The RDN District Court: Sorrell Is Nothing New*

Retail Digital Network, LLC (RDN) installed liquid crystal display advertisements and contracted with entities and individuals seeking to use that medium to advertise in retail outlets.<sup>92</sup> But RDN had trouble securing contracts with alcohol manufacturers because those manufacturers were concerned about violating California Business & Professions Code sections 25503(f), (g), and (h)<sup>93</sup>—the same statute sections upheld 29 years earlier in *Actmedia*.<sup>94</sup> To remedy this, RDN brought suit against the California Alcoholic Beverage Control Board (ABC).<sup>95</sup> RDN argued that *Actmedia* was no longer binding because *Sorrell*'s intervening “heightened scrutiny” test rendered sections 25503(f), (g), and (h) unconstitutional.<sup>96</sup>

The district court upheld *Actmedia*, and saved the statute yet again because it decided that *Sorrell* was consistent with the *Central Hudson* analysis used in *Actmedia*.<sup>97</sup> The court came to this conclusion by emphasizing *Sorrell*'s adherence to *Central Hudson*: (1) *Sorrell* cited cases that apply *Central Hudson*; (2) the *Sorrell* Court itself applied *Central Hudson*; (3) the Court did not define heightened scrutiny; and (4) the *Sorrell* dissent considered heightened scrutiny to be a suggestion rather

---

<sup>90</sup> 945 F. Supp. 2d 1119 (C.D. Cal. 2013).

<sup>91</sup> Given the potentially huge ramifications, the craft beer industry watched this case closely and several trade groups filed amicus briefs. *See, e.g.*, Motion for Leave to File Amici Curiae Brief by the California Craft Brewers Association and Brewers Association, *Retail Digital Network, LLC v. Prieto*, 861 F.3d 839 (9th Cir.) (en banc) (No. 13-56069), 2016 WL 7210480, at \*1–2 (supporting the district court decision upholding Section 25503(h)).

<sup>92</sup> *Appelsmith*, 945 F. Supp. 2d at 1121.

<sup>93</sup> *Id.*

<sup>94</sup> 830 F.2d 957 (9th Cir. 1986); *see supra* Part II.

<sup>95</sup> *Appelsmith*, 945 F. Supp. 2d at 1120.

<sup>96</sup> *Id.* at 1124.

<sup>97</sup> *Id.* at 1125.

than a holding.<sup>98</sup> Finally, the court decided that even if *Sorrell* did establish a new test, heightened scrutiny would not apply because Section 25503 was not a complete speech ban.<sup>99</sup> For all these reasons, the district court found that *Sorrell* was not “clearly irreconcilable” with the Ninth Circuit’s reasoning in *Actmedia*.<sup>100</sup>

*B. The Appeal: Sorrell Announced a New Standard*

On appeal, a three-judge panel of the Ninth Circuit reversed the district court’s opinion.<sup>101</sup> The appellate court held that *Sorrell*’s heightened scrutiny was clearly irreconcilable with *Central Hudson* and remanded the case to analyze Section 25503 with “heightened” scrutiny.<sup>102</sup> The court also hinted that it would be difficult for Section 25503 to survive under *Sorrell*’s potentially new standard.<sup>103</sup>

In interpreting heightened scrutiny, however, the appellate court circled back to *Central Hudson*.<sup>104</sup> The court explained that “[h]eightedened judicial scrutiny may be applied using the familiar framework of the four-factor *Central Hudson* test,” albeit with stricter third and fourth prongs.<sup>105</sup> According to the court, the third prong of *Central Hudson* became more demanding as applied in pre-*Sorrell* cases.<sup>106</sup> And the fourth prong became a two-part process that first considers the actual legislative purpose of the law<sup>107</sup> (as opposed to asserted interests or post hoc rationalizations), and

---

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 1125–26.

<sup>101</sup> *Retail Digital Network, LLC v. Appelsmith*, 810 F.3d 638, 642 (9th Cir. 2016), *overruled by* *Retail Digital Network, LLC v. Prieto*, 861 F.3d 839 (9th Cir. 2017).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 653.

<sup>104</sup> *Id.* at 648.

<sup>105</sup> *Id.* at 648–49.

<sup>106</sup> *Id.* at 648. The court stated that *Sorrell*’s heightened scrutiny changed the third prong of *Central Hudson*; now “the government bears the burden of showing ‘that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.’” *Id.* at 648 (quoting *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995)). This is different than the original *Central Hudson* verbiage, which required the government to show that the restriction “directly advances the government’s asserted interest,” but *RDN*’s reformulation of the third prong is not from *Sorrell*. *Cent. Hudson Gas & Electric Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980). The *RDN* court pulls the direct quote from *Rubin*, and the quote was nowhere in the *Sorrell* opinion. *Rubin*, 514 U.S. at 487.

<sup>107</sup> *Appelsmith*, 810 F.3d at 648 (citing *Friendly House v. Whiting*, 846 F. Supp. 2d 1053, 1060–61 (D. Ariz. 2012)). The court derived its new first step of the fourth prong from a district court case in Arizona, not from *Sorrell*. *Id.* The *Friendly House* court, like the *RDN* court, believed that by saying “drawn to achieve” an interest, the *Sorrell* Court was creating a fourth prong that literally looks at the history of the law to see if it was “drawn” to achieve the interest asserted by the government. *Friendly House*, 846 F. Supp. 2d at 1061 (“The fact that [the laws at issue] were created as part of a package of

then considers whether the law is reasonably drawn to fit that purpose using methods that predate *Sorrell*.<sup>108</sup>

Despite asserting that *Sorrell* justifies its version of heightened scrutiny, the three-judge panel's elaborate interpretation cannot be fairly traced back to *Sorrell*, especially considering that the *Sorrell* Court said almost nothing about heightened scrutiny. Perhaps because of these irregularities, the Ninth Circuit stepped in to hear the case en banc.

### C. *The En Banc Opinion: Sorrell Is Nothing New, or Is It?*

After its en banc review, the Ninth Circuit disagreed with the three-judge panel.<sup>109</sup> The Ninth Circuit decided that *Sorrell* did not say anything new at all: *Sorrell* did not add a “content-based” threshold question, “heightened scrutiny” is not a novel concept, and therefore *Central Hudson* stands unchanged.<sup>110</sup> Using this reasoning, the Ninth Circuit affirmed the district court's reliance on *Actmedia*'s holding that Section 25503 survived *Central Hudson*.<sup>111</sup> The en banc court, however, did put a chip in *Actmedia*'s holding: it rejected California's interest in temperance as a justification for the law,<sup>112</sup> perhaps signaling yet another challenge strategy.

Yet the Ninth Circuit's opinion ignored *Sorrell*'s trail of breadcrumbs leading to stricter scrutiny for commercial speech regulations. For example, the court relied on *Sorrell*'s citation to *Discovery Network*, but it overlooked the litany of noncommercial speech case references within *Sorrell*.<sup>113</sup> Also, the court believed that *Sorrell* stood for the proposition that

---

statutes . . . related to unlawful immigration also weighs against a finding that the provisions are ‘drawn to’ address a traffic problem.”).

<sup>108</sup> *Appelsmith*, 810 F.3d at 648–49. The new second step of the fourth prong does not come from *Sorrell* either; this “narrowly tailored” requirement is a well-worn formulation of the fourth prong that has been refined over time in cases like *Fox. Id.* at 648–69 (quoting Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989)). The fourth prong required a reasonable and proportional fit to the government's interest long before *Sorrell*. See *Fox*, 492 U.S. at 480. Like the “new” third prong, this part of the fourth prong is not new, and the *Sorrell* Court never connected it to heightened scrutiny.

<sup>109</sup> *Retail Digital Network, LLC v. Prieto*, 861 F.3d 839, 841–42 (9th Cir. 2017).

<sup>110</sup> *Id.* at 846.

<sup>111</sup> *Id.* at 842.

<sup>112</sup> *Id.* at 841–42. The court cast a pall on any argument that temperance is a sufficient justification to ban paid advertisements: “Even assuming that promoting temperance is a substantial interest, *Actmedia* erroneously concluded that Section 25503(h) directly and materially advances that interest by ‘reducing the quantity of advertising that is seen in retail establishments selling alcoholic beverages.’” *Id.* at 851 (quoting *Actmedia, Inc. v. Stroh*, 830 F.2d 957, 967 (9th Cir. 1986)). Moreover, “[i]f California sincerely wanted to materially reduce the quantity of alcohol advertisements viewed by consumers, surely it could have devised a more direct method for doing so.” *Id.* Accordingly, using temperance as a justification for infringements on commercial speech appears to be fruitless going forward. Temperance, after all, is one of the primary reasons the ABC Act exists. See CAL. BUS. & PROF. CODE § 23001 (West 1953).

<sup>113</sup> *Prieto*, 861 F.3d at 848.



commercial speech deserves lesser protection,<sup>114</sup> but that contradicts *Sorrell*'s recognition of the high value of commercial speech. And although the court admitted that *Sorrell*'s “the outcome is the same” language suggested that the Court entertained the idea of a stricter test, the Ninth Circuit still brushed off the possibility of separate tests.<sup>115</sup>

Ultimately, the Ninth Circuit took the default escape hatch: it justified using *Central Hudson* because *Sorrell* used *Central Hudson*.<sup>116</sup> But *Sorrell*'s effect on commercial speech doctrine is an open question. As Chief Judge Thomas, *RDN*'s lone dissenter, wrote: “Of course, the ultimate determination as to whether *Sorrell* altered the *Central Hudson* test is entirely up to the Supreme Court. However, I think the most reasonable reading of *Sorrell* is that it did.”<sup>117</sup>

While the Ninth Circuit seemingly resolved the issue for its own jurisdiction, none of its sister circuits have ruled on the matter. Until the Supreme Court speaks to whether *Sorrell* modified the *Central Hudson* standard, commercial speech regulations like Section 25503 are in grave danger. As a result, independent brewers are at risk in those jurisdictions. As set forth below, *Central Hudson* must remain the relevant standard if independent craft beer is to continue thriving.

#### D. Disagreement in the Other Circuit Courts and Potential Danger to Regulations Prohibiting the Purchase of Advertising

The Ninth Circuit is currently the only circuit court that has ruled on whether *Sorrell* created a new test for commercial speech regulations. And even the Ninth Circuit reversed its view within a two-year period.<sup>118</sup> Other circuit courts have been less than clear with respect to whether *Sorrell* announced a new test or whether it simply recognized that *Central Hudson* already requires a “heightened” scrutiny.<sup>119</sup> None of the circuits seem to fully agree, and whether restrictions like Section 25503(h) will survive legal challenges depends heavily on each circuit's reading of *Sorrell*. If the circuit agrees that *Sorrell* did not change *Central Hudson*, such restrictions

---

<sup>114</sup> *Id.* at 849.

<sup>115</sup> *Id.* at 848.

<sup>116</sup> *Id.* at 849. (“In any event, because *Sorrell* applied *Central Hudson*, there is no need for us to ‘craft an exception to the *Central Hudson* standard.’”) (quoting *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 482 n.2 (1995)).

<sup>117</sup> *Id.* at 852 (Thomas, C.J., dissenting).

<sup>118</sup> *Id.* at 841–42 (majority opinion).

<sup>119</sup> Compare *United States v. Caronia*, 703 F.3d 149, 163 (2d Cir. 2012) (interpreting *Sorrell* as adding an inquiry of whether the regulation was “content- and speaker-based”) with *Educ. Media Co. at Va. Tech., Inc. v. Insley*, 731 F.3d 291, 297–98 (4th Cir. 2013) (differentiating heightened scrutiny under *Sorrell* from intermediate scrutiny under *Central Hudson*).

will likely stand. But the converse is also true. If a circuit interprets *Sorrell* to require a new, heightened scrutiny above *Central Hudson*'s test, prohibitions on alcohol manufacturers from purchasing advertising space will likely be deemed unconstitutional.

More specifically, circuit courts have sensed the significance of *Sorrell*, but those courts, sans the Ninth Circuit, have struggled to understand “heightened scrutiny” and its effect on commercial speech law. The result is a spectrum of inconsistent interpretations.<sup>120</sup>

To illustrate, in *United States v. Caronia*,<sup>121</sup> the Second Circuit interpreted *Sorrell* as adding a threshold question to the *Central Hudson* analysis: Is a commercial speech regulation content-based?<sup>122</sup> Regarding heightened scrutiny, the *Caronia* court stated “[t]he Court [in *Sorrell*] did not decide the level of heightened scrutiny to be applied, that is, strict, intermediate, or some other form of heightened scrutiny. Rather . . . the Court concluded that the Vermont statute was unconstitutional even under the lesser intermediate standard set forth in *Central Hudson*.”<sup>123</sup> Thus, the Second Circuit recognized that “heightened scrutiny” as used in *Sorrell* might mean something new, but it did not explicitly recognize a new standard.

The Eighth Circuit suggested a similar understanding in *1-800-411-Pain Referral Service, LLC v. Otto*.<sup>124</sup> In that case, the Eighth Circuit noted that the Supreme Court did not define “heightened scrutiny,” but instead of leaving the term undefined, the Eighth Circuit decided that “[t]he upshot is that when a court determines commercial speech restrictions are content- or speaker-based, it should then assess their constitutionality under *Central Hudson*.”<sup>125</sup> Essentially, the Eighth Circuit appears to believe that “heightened scrutiny” and *Central Hudson* are the same.

Conversely, the Fourth Circuit readily accepted that heightened scrutiny and *Central Hudson*'s intermediate scrutiny are different—it even suggested that heightened scrutiny might be strict scrutiny.<sup>126</sup> Referencing *Sorrell*, the Fourth Circuit stated that “the Court did not actually apply ‘heightened scrutiny,’ striking the ban under *Central Hudson* alone.”<sup>127</sup> The court continued that, like the *Sorrell* Court, “we need not determine

---

<sup>120</sup> See Thomson, *supra* note 54, at 192–98.

<sup>121</sup> 703 F.3d 149 (2d Cir. 2012).

<sup>122</sup> *Id.* at 163.

<sup>123</sup> *Id.* at 164 (citations omitted).

<sup>124</sup> 744 F.3d 1045, 1055 (8th Cir. 2014).

<sup>125</sup> *Id.*

<sup>126</sup> *Educ. Media Co. at Va. Tech., Inc. v. Insley*, 731 F.3d 291, 298 (4th Cir. 2013).

<sup>127</sup> *Id.*

whether strict scrutiny is applicable here . . . we too hold that the challenged regulation fails under intermediate scrutiny set forth [in] *Central Hudson*.<sup>128</sup> Thus, there is no clear, definitive ruling outside of the Ninth Circuit regarding the viability of *Central Hudson* and the relationship between heightened and strict scrutiny.

#### V. WHY SECTION 25503(H) MATTERS TO INDEPENDENT CRAFT BEER

So what do these constitutional standards have to do with craft beer? The negative impact that heightened scrutiny for commercial speech regulations would have on independent craft beer cannot be overstated. Over the last ten years, Big Beer has consistently lost market share to independent craft beer.<sup>129</sup> Independent craft beer's growth has been exponential. To illustrate, in 2011, independent craft beer represented 5.7% volume of the total U.S. beer market.<sup>130</sup> In 2016, independent craft beer's volume share rose to 12.7%.<sup>131</sup> Big Beer is not happy about this and is doing everything it can to quell the losses.<sup>132</sup> If courts subject regulations like Section 25503(h) to a scrutiny higher than *Central Hudson*, they would likely fail.<sup>133</sup> If manufacturers are allowed to purchase advertising space from retailers, Big Beer would receive a powerful weapon to regain its lost market share and essentially force independent brewers off the shelves of many retailers.<sup>134</sup>

There are several reasons why Section 25503(h) and the *Central Hudson* test benefit independent craft beer and must remain in effect to preserve its market share. But the most prominent are that (1) point-of-

---

<sup>128</sup> *Id.*

<sup>129</sup> See Chris Crowell, *Craft Beer Market Share Hits 12 Percent of Total Beer*, CRAFT BREWING BUS. (Mar. 28, 2016), <https://www.craftbrewingbusiness.com/news/craft-beer-market-share-hits-12-percent-of-total-beer/> [<https://perma.cc/S7QS-6AZP>] (“For the past decade, craft brewers have charged into the market, seeing double digit growth for eight of those years,” said Bart Watson, chief economist, Brewers Association.”)

<sup>130</sup> See Press Release, Brewers Ass’n, *Craft Continues to Brew Growth*, (Mar. 11, 2013), <https://www.brewersassociation.org/press-releases/brewers-association-craft-continues-to-brew-growth/> [<https://perma.cc/V5B5-ESX3>].

<sup>131</sup> See Bart Watson & Julia Herz, *National Beer Sales & Production Data*, BREWERS ASS’N, <https://www.brewersassociation.org/statistics/national-beer-sales-production-data> [<https://perma.cc/97A3-6U4G>].

<sup>132</sup> See, e.g., Kate Taylor, *The Battle Between Big Beer and Craft Brewers Is Getting Ugly*, BUS. INSIDER (Feb. 11, 2016, 3:34 PM), <http://www.businessinsider.com/big-beer-vs-craft-beer-battle-gets-ugly-2016-2> [<https://perma.cc/7FVH-VKJG>] (discussing how large breweries have taken measures such as mocking craft breweries in advertisements and acquiring small breweries).

<sup>133</sup> See *Retail Digital Network, LLC v. Appelsmith*, 810 F.3d 638, 651–53 (9th Cir. 2016) *overruled by* *Retail Digital Network, LLC v. Prieto*, 861 F.3d 839 (9th Cir. 2017) (en banc) (pointing out several difficulties Section 25503(h) faces under a heightened scrutiny).

<sup>134</sup> See *infra* Part V.A.

purchase (POP) advertising is extremely powerful and can be manipulated to favor Big Beer; (2) Big Beer’s prior pay-to-play market conduct, though illegal,<sup>135</sup> suggests that Big Beer would gladly use “advertising” payments to squeeze independent beer from the shelves and tap handles or use those payments to purchase favorable treatment rather than advertising; and (3) allowing manufacturers to purchase advertising creates an untenable environment for regulators, thus inviting corruption of the market.

#### A. *The Power of POP Advertising*

Big Beer would love nothing more than to take back its lost market share. One way to do so is to outspend independent craft brewers with an aim towards prominent retail placement.<sup>136</sup> Without Section 25503(h)’s protections and assuming that Big Beer actually paid for advertising space (not influence), Big Beer would absolutely dominate retail sales, minimize consumer choice, and negate the stated purposes behind state alcoholic beverage control statutes.<sup>137</sup> The power of POP advertising is that strong.

Several studies confirm that POP advertising has an enormous impact on consumers. In 2016, the Path to Purchase Institute (PTPI)<sup>138</sup> conducted the 2016 Point of Purchase Trends Survey, in which it surveyed several hundred consumer packaged goods (CPG) companies’ marketing executives and their relevant data, including Johnson & Johnson Consumer, General Mills, Hunter-Douglas, and many other household names. In pertinent part, the data demonstrate that POP advertising increased sales by 19% for permanent displays and 23.8% for temporary displays of any given

---

<sup>135</sup> See CAL. BUS. & PROF. CODE § 25503(c) (West 1973) (prohibiting secret rebates and concessions to retailers from suppliers); *id.* § 25600 (West 2018) (prohibiting free gifts, premiums, refunds, and advertising specialties (among other things) to retailers from suppliers); CAL. CODE REGS. tit. 4, § 106 (1973).

<sup>136</sup> The vast majority of independent craft brewers brew less than 1,000 barrels per year, whereas Big Beer typically brews millions of barrels per year. Thus, this is truly a David versus Goliath scenario when it comes to advertising budgets. The Alcohol & Tobacco Tax & Trade Bureau’s figures from 2016 show that of 5,096 operating breweries in the US, 3,283 produced between 1 and 1,000 barrels of beer. *Number of Brewers by Production Size*, DEP’T OF THE TREASURY: ALCOHOL & TOBACCO TAX & TRADE BUREAU (revised Oct. 25, 2017), [https://www.ttb.gov/statistics/production\\_size/2016\\_brew\\_prod\\_size\\_ttb\\_gov.pdf](https://www.ttb.gov/statistics/production_size/2016_brew_prod_size_ttb_gov.pdf) [<https://perma.cc/4ECV-NLX3>]. To put this into further perspective, the Brewers Association reports that in 2015, roughly “90% of the breweries in the country, more than 3,000 breweries put together, have less than half the capacity of a single MillerCoors facility in Golden, CO.” Bart Watson, *Craft Brewer Capacity*, BREWERS ASS’N, (Apr. 23, 2015) <https://www.brewersassociation.org/insights/craft-brewer-capacity/> [<https://perma.cc/JJ4P-CKQ7>].

<sup>137</sup> See *infra* Part V.B.

<sup>138</sup> PTPI is a retail industry trade group that conducts studies and education about retail marketing. See *About Us*, PATH TO PURCHASE INST., <https://p2pi.org/about> [<https://perma.cc/T7LV-GLML>].

products.<sup>139</sup> This is no small number, especially given that independent craft beer only made up 12.7% of the overall U.S. beer market in 2016.<sup>140</sup> POP advertising's effectiveness is not a new concept to Big Beer; indeed, this study found that AB InBev is the third most admired merchandise and branding in America, behind only Proctor & Gamble and Coca-Cola.<sup>141</sup> Consider that Coca-Cola is allowed to pay for advertising in retail outlets, and no law prevents a soda seller from selling only Coca-Cola products. Consumers regularly find themselves in a Coca-Cola only retail outlet, but that is precisely the core purpose of the California ABC Act—to prevent vertical and horizontal integration in the alcohol market.<sup>142</sup>

Other studies confirm these percentages. According to a 2016 study by the Shop! Association, 76% of all purchase decisions are made in-store and 68% of all in-store purchases are impulse driven.<sup>143</sup> Manufacturers know how to manipulate these percentages through product placement, shelf space, and plain-old marketing ingenuity. For example, Guinness increased its U.K. sales in 2006 by 27% simply placing large replica Guinness-filled pint glasses on the sides of shelf displays in retail outlets and making them visible from every point in the beer aisle.<sup>144</sup> Through simple but effective POP advertising, Guinness retained its loyal customers and encouraged new ones to impulsively purchase the product.<sup>145</sup>

Courts in the alcohol context have recognized that POP advertising can greatly improve sales. Specifically, in *Actmedia*, the Ninth Circuit cited to a 1977 study of “consumer purchasing tendencies” at retail outlets that specifically focused on POP advertising and conclusions about consumer influence concerning alcohol brands.<sup>146</sup> That study, by the Power of

---

<sup>139</sup> See Bill Schober, *The 2016 P-O-P Trends Survey*, PATH TO PURCHASE INST., [http://p2pi.org/sites/default/files/2016\\_POPTrends\\_WP\\_Final.pdf](http://p2pi.org/sites/default/files/2016_POPTrends_WP_Final.pdf) [<https://perma.cc/SGF2-5XKC>]; see also John Quelch & Kristina Cannon-Bonventre, *Better Marketing at the Point of Purchase*, HARV. BUS. REV. (Nov. 1983), <http://hbr.org/1983/11/better-marketing-at-the-point-of-purchase> [<https://perma.cc/8TZ7-LXAQ>].

<sup>140</sup> See *National Beer Sales & Production Data*, *supra* note 131.

<sup>141</sup> Schober, *supra* note 139.

<sup>142</sup> See CAL. BUS. & PROF. CODE § 23001 (West 1953); *Actmedia, Inc. v. Stroh*, 830 F.2d 957, 959 (9th Cir. 1986) (citation omitted).

<sup>143</sup> SHOP! ASS'N, *A DISPLAY IS A TERRIBLE THING TO WASTE: EXAMINING P.O.P. COMPLIANCE RATES & BEST PRACTICES 3* (2016), [http://www.shopassociation.org/wp-content/uploads/2016/07/POP-Compliance\\_2016\\_whitepaper\\_SM\\_FINAL.pdf](http://www.shopassociation.org/wp-content/uploads/2016/07/POP-Compliance_2016_whitepaper_SM_FINAL.pdf) [<https://perma.cc/6QC9-ADWG>].

<sup>144</sup> Nigel Hollis, *Making the Most of the Moment of Truth*, MILLWARD BROWN POV (July 2006), [http://www.millwardbrown.com/docs/default-source/insight-documents/points-of-view/MillwardBrown\\_POV\\_MomentOfTruth.pdf](http://www.millwardbrown.com/docs/default-source/insight-documents/points-of-view/MillwardBrown_POV_MomentOfTruth.pdf) [<https://perma.cc/SF86-SNXR>].

<sup>145</sup> *Id.*

<sup>146</sup> *Actmedia*, 830 F.2d at 961.

Purchase Institute, and the E.I. DuPont Company, concluded that POP advertising is indeed effective.

The study concluded that supermarket customers make 64.8% of their decisions concerning which *brand* of product to purchase once they are already in the supermarket.<sup>147</sup> For alcoholic beverages, this percentage is 67%: 61% for beer, 74.7% for wine, and 81.2% for spirits.<sup>148</sup> The study also concluded that display advertising increases the number of customers purchasing the advertised brand six times for beer, thirteen times for wine, and thirty-nine times for hard liquor.<sup>149</sup>

Accordingly, while a substantial increase in Big Beer POP advertising is unlikely to sway the dedicated craft beer consumer to the same extent as an average beer drinker, it would certainly have some detrimental impact on independent craft beer's continued expansion and it would perhaps recoup some of Big Beer's losses. Most independent craft brewers cannot afford to pay for such advertising, let alone the amounts Big Beer can afford to spend. The result would almost certainly reduce consumer choice, move the beer market towards integration, and make it more difficult for independent brewers to sell their products.

#### *B. Pay-to-Play and the Illusion of Choice*

In response to its lost market share to independent craft beer, Big Beer has engaged in an interesting two-front war to regain its losses. On one front, Big Beer has attempted to minimize the appeal of independent craft beer with a series of tactics and strategies aimed at discrediting the independent craft beer movement.<sup>150</sup> On a second front, Big Beer has employed an "if you can't beat 'em, join 'em" approach, purchasing numerous former craft breweries and adding them to the Big Beer portfolio.<sup>151</sup> Both strategies would be emboldened if Big Beer were allowed to purchase advertising from retailers.

---

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> See, e.g., Paul R. La Monica, *Bud Mocks Craft Beer. But It Owns Microbrews!*, CNN MONEY (Feb. 2, 2015, 2:15 PM), <http://money.cnn.com/2015/02/02/media/budweiser-macro-beer-super-bowl/index.html> [https://perma.cc/29YG-BPJ8 ] (noting that AB InBev ran advertisements that mocked craft beer).

<sup>151</sup> See, e.g., Fritz Hahn, *The World's Biggest Brewing Company Is Thirsty for Your Beer-Drinking Data*, SEATTLE TIMES (Jan. 3, 2018), <https://www.seattletimes.com/business/the-worlds-biggest-brewing-company-is-thirsty-for-your-beer-drinking-data> [https://perma.cc/V95G-SF5L] (noting that AB InBev has bought many small breweries in recent years).

Pay-to-play conduct is illegal.<sup>152</sup> Specifically, under California Business and Professions Code Section 25503(c), manufacturers cannot “[g]ive secret rebates or make any secret concessions to any licensee or the employees or agents of any licensee, and no licensee shall request or knowingly accept from another licensee secret rebates or secret concessions.”<sup>153</sup> Similarly, Section 25600(a)(1) states that “[n]o licensee shall, directly or indirectly, give any premium, gift, or free goods in connection with the sale or distribution of any alcoholic beverage.”<sup>154</sup> And the California ABC extended the definition to include any “thing of value.”<sup>155</sup> Most, if not all, states contain similar restrictions.<sup>156</sup>

Even though pay-to-play is illegal, Big Beer and its distributors are not afraid to engage in such conduct. For example, the California ABC settled a yearlong investigation of AB InBev and a distributor in 2015.<sup>157</sup> The ABC found that AB InBev covered the cost of or partially financed refrigeration units, television sets, and draught systems for several retailers in Southern California.<sup>158</sup> AB InBev settled the matter for \$400,000—one of the largest fines that the ABC has ever imposed. This sounds like a great result.<sup>159</sup> To put it into perspective, that \$400,000 fine (enough to put most independent breweries out of business) amounted to roughly 3% of the profits AB InBev made in one single day at the time—\$12,602,739.<sup>160</sup> At that price point, engaging in pay-to-play simply appears to be a cost of doing business. In short, even though providing things of value (like draught systems, televisions, or payments) is illegal,<sup>161</sup> the cost is negligible

---

<sup>152</sup> See Bethany Hatf, *Alcohol and Tobacco Tax and Trade Bureau Announces Joint Operation Targeting Alleged “Pay-to-Play” Activities in Florida*, MCDERMOTT, WILL & EMERY: ALCOHOL LAW ADVISOR (July 25, 2017), <https://www.alcohollawadvisor.com/tag/pay-to-play> [<https://perma.cc/E58R-T7V8>] (“‘Pay-to-play’ is an industry term generally used to mean the provision of payments or other ‘things of value’ by an upper-tier industry member (*i.e.*, supplier or wholesaler) to a retailer to secure placement for the industry member’s products in the retailer’s premises.”).

<sup>153</sup> CAL. BUS. & PROF. CODE § 25503(c) (West 2018).

<sup>154</sup> CAL. BUS. & PROF. CODE § 25600(a)(1) (West 2018).

<sup>155</sup> See CAL. CODE REGS. tit. 4, § 106(a) (1973).

<sup>156</sup> These statutes generally prohibit alcoholic beverage suppliers from providing retailers with various services and items at no cost, as well as prohibiting vertical and horizontal integration of supply and retail. See, e.g., HAW. REV. STAT. § 281-42 (West 1990); KAN. STAT. ANN. § 41-703 (West 1991); N.C. GEN. STAT. § 18B-1116 (West 2017); 47 PA. STAT. AND CONS. STAT. ANN. § 4-443 (West 2016).

<sup>157</sup> Press Release, Cal. Dep’t of Alcoholic Beverage Control, *ABC Fines Two Large Beer & Wine Wholesalers and Numerous Retailers for Unfair Business Practices* (2017), <https://www.abc.ca.gov/press/PR2017-13.pdf> [<https://perma.cc/65S4-WGUT>].

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> See *Oops, They Did It Again: AB Fined for Pay-to-Play*, THORN BREWING, <http://thorn.beer/oops-ab-fined-pay-play/> [<https://perma.cc/5YUK-9ADJ>]

<sup>161</sup> CAL. CODE REGS. tit. 4, § 106 (1973).

to Big Beer. The obvious result is that retailers who receive such free gifts are then obligated to push the gift giver's product to the detriment of other manufacturers and the consuming public at large.

This is not a regional phenomenon. Boston has long been the subject of pay-to-play and anticompetitive scandals in the alcohol industry.<sup>162</sup> Specifically, in May 2017, the Massachusetts Alcoholic Beverages Control Commission charged that AB InBev gave nearly \$1 million worth of illegal incentives, including refrigeration equipment, to Boston-area retailers.<sup>163</sup> The upshot is that pay-to-play conduct is more common than laypersons might imagine, especially in the face of increased market share loss.<sup>164</sup> Despite its illegality, pay-to-play happens in large and small scale across the country.

Direct pay-to-play agreements aside, one might argue that even if Big Beer were allowed to purchase advertising space from retailers and thus curry favor (like shelf space and prominent placement), that should not have an impact on independent craft breweries because the products are so different that they are not truly in competition. That argument fails. First, the more Big Beer can squeeze independent craft breweries out of the shelves and tap handles, the harder it is for the independent brewer to move product. Retailers only have so much shelf space or tap handles.

Second, Big Beer creates further confusion with its newly purchased "craft" breweries. If a retailer wanted to sell "craft" beer but was beholden to a Big Beer manufacturer because of anticompetitive payments or gifts, that retailer would simply fulfill its reciprocal obligation to its Big Beer patron by offering the patron's "craft" beer—or at least giving it better treatment. Otherwise, the retailer could be in breach of the agreement or lose its lucrative patronage.

This is where POP advertising comes to the forefront as an illusion of choice. For example, AB InBev now owns at least ten formerly independent breweries or breweries it created to look like independent craft breweries.<sup>165</sup> Known internally as AB InBev's "high-end," these brands

---

<sup>162</sup> See Adam Vaccaro, *Explaining the Massachusetts Pay-to-Play Beer Scandal*, BOSTON.COM (Nov. 14, 2014), <https://www.boston.com/news/business/2014/11/14/explaining-the-massachusetts-pay-to-play-beer-scandal> [https://perma.cc/JB5Q-VH9G].

<sup>163</sup> See Dan Adams, *Bars and Packies Got Free Equipment to Push Budweiser, State Says*, BOSTON GLOBE (May 9, 2017), <https://www.bostonglobe.com/business/2017/05/09/budweiser-owner-accused-stifling-competition-with-giveaways-hundreds-bars-and-stores-massachusetts/ZK4GID6BTUTSkpQwMuP4uN/story.html> [https://perma.cc/ZF6Z-ZNJT].

<sup>164</sup> *Id.*

<sup>165</sup> See Daniel Croxall, *Defining Craft Beer Is Tough, But We Should At Least Know Who Made Whatever Is In The Glass*, CRAFT BEER LAW PROF (Apr. 10, 2017), <https://www.craftbeerprofessor.com/2017/04/defining-craft-beer-tough-least-know-made-whatever-glass> [https://perma.cc/NE74-Y933].



include powerhouse breweries Goose Island, Elysian, 10 Barrel Brewing, Wicked Weed Brewing, and percentage interests of Kona Brewing and Widmer to name a few.<sup>166</sup> Similarly, MillerCoors owns several craft-like breweries such as Saint Archer Brewing, Hop Valley, Blue Moon, and Leinenkugel's Brewery.<sup>167</sup> Heineken owns Lagunitas, and Constellation Brands (the company that owns Corona) owns Ballast Point.<sup>168</sup> These breweries are enormous compared to the average independent craft brewery and can be found in most states.<sup>169</sup> While exact statistics are nearly impossible to find, reports suggest that AB InBev's high end will produce up to 3 million cases of "craft" beer per year in New England alone.<sup>170</sup> And if these breweries could legally buy influence over retailers through advertising payments, retailers would stock on the shelves and tap handles with these brands. Thus, many consumers would mistakenly purchase these brands, incorrectly assuming that they are purchasing independent craft beer. That, it seems, is precisely Big Beer's goal.

One last problem: assuming Section 25503(h) and laws like it in the other forty-nine states are unconstitutional and manufacturers are allowed to pay retailers for advertising space, someone will have to examine those advertising agreements to ensure that the compensation provided to the retailer was truly for advertising. As noted above, California Business and Professions Code Section 25600(a)(1) and California ABC Rule 106 prohibit a manufacturer from providing any "thing of value" to a retailer.<sup>171</sup> Thus, if payments for advertisements are allowed, they will be an exception to the rule. Accordingly, ABC boards will be left to police each and every agreement. This raises several untenable issues.

As an initial matter, the California ABC consists of only twenty-two district offices.<sup>172</sup> Most other states have even less capacity.<sup>173</sup> In 2017,

---

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> See Alastair Bland, *Craft Beer, Brought to You by Big Beer*, NPR (July 20, 2017, 12:03 PM), <https://www.npr.org/sections/thesalt/2017/07/28/539760477/craft-beer-brought-to-you-by-big-beer> [<https://perma.cc/8FH6-PJBS>].

<sup>169</sup> See Bart Watson, *supra* note 136.

<sup>170</sup> See Brew Studs News Serv., *AB InBev Will Produce up to Three Million Cases of 'Craft Beer' Per Year in New England*, BREW STUDS (Dec. 5, 2017), <http://wearebrewstuds.com/stories/news/craft-beer-inbev-impostors-being-made-merrimack-nh> [<https://perma.cc/2BEZ-SZ3W>].

<sup>171</sup> CAL. BUS. & PROF. CODE § 25600(a)(1) (West 2018); CAL. CODE REGS. tit. 4, § 106 (1973).

<sup>172</sup> *ABC District Offices*, CAL. DEP'T OF ALCOHOLIC BEVERAGE CONTROL, <https://abc.ca.gov/distmap.html> [<https://perma.cc/7B9A-ZBKW>].

<sup>173</sup> See, e.g., *Contact Directory*, N.Y. LIQUOR AUTH.: DIV. OF ALCOHOLIC BEVERAGE CONTROL <https://www.sla.ny.gov/contact-directory> [<https://perma.cc/W8GE-PY76>] (listing three offices in New York); *Informational Bulletin*, ILL. LIQUOR CONTROL COMM'N <https://www.illinois.gov/ilcc/Pages/Home.aspx> [<https://perma.cc/W8GE-PY76>] (listing two offices in Illinois).

California had 4,657 bars and nightclubs,<sup>174</sup> and this does not count liquor stores, grocery stores, and other event locations where beer is sold. Absent a major increase in funding and personnel, the California ABC is simply not equipped to handle reviewing this magnitude of contracts to ensure compliance. Perhaps more importantly, the ABC would be put in the position of controlling the advertising sales market. The ABC would have to tell retailers and manufacturers what constitutes a fair payment for advertising and what bleeds into paying for favorable treatment. This injection of the government into private party contracts could violate the Constitution.<sup>175</sup>

Without restrictions on payments for advertising, states would essentially be legalizing pay-to-play conduct. Only those manufacturers who can afford to pay retailers will reap the rewards of superior product placement. Statistically speaking, those products will sell more and thus put independent brewers at a significant disadvantage. The more ominous examples above also show that the temptation to curry favor with retailers through advertising payments would likely lead to more than just product placement. Indeed, as is traditionally expected in a pay-to-play relationship, retailers would be obligated to treat their patron breweries in a favorable manner or risk losing the extra cash flow brought in by advertising sales. The result would be less shelf space and fewer tap handles for independent craft breweries, and less consumer choice for the beer drinking public. Finally, there is no entity or agency in place that is equipped to review, analyze, and determine the “adequacy” of any payments or consideration to retailers for advertising space. The result would be a regulatory free-for-all with no oversight.

#### VI. REGULATIONS SUCH AS SECTION 25503(H) WOULD LIKELY FAIL UNDER HEIGHTENED SCRUTINY

While the *Sorrell* Court did not explain a heightened scrutiny test in the commercial speech context, the three-judge panel from the Ninth Circuit’s *Retail Digital Network* opinion attempted to do so by tightening

---

<sup>174</sup> *Bars & Nightclubs in California - US Market Research Report*, IBISWORLD (Oct. 2017), <https://www.ibisworld.com/industry-trends/market-research-reports/california/accommodation-food-services/bars-nightclubs-in-california.html> [<https://perma.cc/R47K-UBEJ>].

<sup>175</sup> See U.S. CONST. art. I, § 10, cl. 1; *Energy Reserves Grp., Inc. v. Kan. Power & Light*, 459 U.S. 400, 411–13 (1983) (setting forth a three-part test concerning Contracts Clause interference). To analyze whether the government has violated the Contracts Clause, courts examine whether (1) there is “a substantial impairment of a contractual relationship”; (2) if so, whether the impairment serves a “significant and legitimate public purpose”; and (3) whether the impairment is reasonably related to achieving the goal. *Id.* (citations omitted).

*Central Hudson*'s third and fourth prongs.<sup>176</sup> Specifically, the traditional formulation of *Central Hudson*'s third prong is "whether the regulation directly advances the governmental interest asserted."<sup>177</sup> But the three-judge panel reformulated the prong as follows: the "Government carries the burden of showing that the challenged regulation advances the Government's interest *in a direct and material way*."<sup>178</sup> Similarly, *Central Hudson*'s fourth prong traditionally analyzes "whether the regulation is not more extensive than is necessary to serve that interest."<sup>179</sup> But the heightened version, at least according to the three-judge panel, requires a "fit between the legislature's ends and the means chosen to accomplish those ends."<sup>180</sup> In addition, the panel expressed serious doubts as to whether Section 25503 could satisfy these requirements on the grounds of temperance or vertical and horizontal integration: "[W]e 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."<sup>181</sup> Accordingly, the panel thought, based on the district court record, Section 25503(h) would fail under a heightened scrutiny.<sup>182</sup>

While Section 25503(h) ultimately survived *Actmedia* and the en banc opinion in the Ninth Circuit under *Central Hudson*'s scrutiny, the three-judge panel's reformulation, if adopted by other circuits, presents an insurmountable hurdle. As an evidentiary matter, the government would be hard-pressed to present evidence that Section 25503(h) advances its stated goals of prohibiting vertical and horizontal integration and promoting temperance *in a material way* simply because Section 25503(h) has been the law for so long. There is no frame of reference for a market in California without this restriction. The task would be akin to proving a negative. Moreover, as to the fourth prong, proving the desired "fit" between the goals and the regulation remains elusive. The proposed test would require the government to point to evidence and facts that are not ascertainable given that the market simply has not existed without Section 25503(h) since the pre-Prohibition era. Thus, as an evidentiary matter

---

<sup>176</sup> *Retail Digital Network, LLC v. Appelsmith*, 810 F.3d 638, 652–53 (9th Cir. 2016) *overruled by* *Retail Digital Network, LLC v. Prieto*, 861 F.3d 839 (9th Cir. 2017) (en banc).

<sup>177</sup> *Id.* at 643–44 (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980)).

<sup>178</sup> *Id.* at 652 (emphasis added) (citation omitted).

<sup>179</sup> *Id.* at 643 (citing *Cent. Hudson*, 447 U.S. at 566.)

<sup>180</sup> *Id.* at 653 (quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 560 (2011)).

<sup>181</sup> *Id.* at 652.

<sup>182</sup> *Id.* at 652–53.

alone, Section 25503(h) and others like it (including the federal Act<sup>183</sup>) would likely fail under a heightened scrutiny analysis.

#### CONCLUSION

For now, the Ninth Circuit has resolved the issue of whether *Sorrell* created a scrutiny standard higher than that required by *Central Hudson* with respect to commercial speech regulations.<sup>184</sup> Thus, Section 25503(h)'s prohibition of manufacturer payments for advertising space in retail outlets survives. But that is not the case in every circuit. Indeed, as shown by the *Retail Digital Network* trilogy, even courts in the Ninth Circuit seem somewhat unsure of what to do with *Sorrell* and whether it actually created a heightened standard. The bottom line is that Big Beer is making a push to take back as much of the national beer market as possible through several tactics, like purchasing "craft" breweries to further reduce consumer choice and using illegal pay-to-play strategies with retailers. Commercial speech regulations like Section 25503(h) help level the playing field such that independent craft beer has a chance to compete against endlessly deep pockets and questionable business tactics of Big Beer. Without such commercial speech regulations, independent craft beer will certainly shrink, perhaps disappear, and with it an enterprising industry will be swallowed whole.

---

<sup>183</sup> See 27 U.S.C. § 205(b)(4) (2000).

<sup>184</sup> *Retail Digital Network, LLC v. Prieto* 861 F.3d 839, 850–51 (9th Cir. 2017).