Case No. 13-56069

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RETAIL DIGITAL NETWORK, LLC,
Plaintiff-Appellant,

v.

RAMONA PRIETO, AS ACTING DIRECTOR
OF THE ALCOHOLIC BEVERAGE CONTROL BOARD,
Defendant-Appellee.

On Appeal from the United States District Court
for the Central District of California
The Honorable Consuelo B. Marshall
(No. 11-cv-09065)

BRIEF OF AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the Chamber of Commerce of the United States of America states that it is not a publicly traded corporation. It has no parent corporation, and there is no public corporation that owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry section, and from every region of the country. Nearly all of its members engage in commercial speech and rely on the protections of the First Amendment in order to advertise their lawful products and services. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.[1]

SUMMARY OF ARGUMENT

The panel correctly recognized that, even for commercial speech, state-sponsored discrimination based on content and the identity of the speaker is irreconcilable with the guarantees of free speech under the First Amendment. When such bias is involved, the Supreme Court has mandated that a "more demanding form of scrutiny" applies. *Retail Dig. Network, LLC v. Appelsmith*, 810 F.3d 638,

[1] Pursuant to Fed. R. App. P. 29, *amicus* states that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than the *amicus*, its members, and its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief. Cir. Rule 29-2(a).

650 (2016); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565–66 (2011). Otherwise, government would be able to "burden the speech of others in order to tilt public debate in a preferred direction" or "keep [citizens] in the dark for what the government perceives to be their own good." *Sorrell*, 564 U.S. at 577, 578–79 (quoting *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996)).

That is precisely what the State of California has attempted to achieve through its Prohibition-era "tied-house" laws. *See* Cal. Bus. & Prof. Code § 25503. In Section 25503, California exclusively targets the speech of particular speakers—alcohol manufacturers and wholesalers—as part of a regulatory regime with the conceded purpose of "reduc[ing] excessive purchases of alcoholic beverages." *Allied Properties v. Dept. of Alcoholic Beverage Control*, 53 Cal. 2d 141, 148 (1959). The statute accomplishes that end by preventing alcohol manufacturers and wholesalers from advertising in all retail stores that sell alcohol, while exempting the speech of the retailers themselves, as well as countless others. California does not dispute that the regulated speech is truthful, non-misleading speech regarding a lawful product. Instead, as this Court has expressly recognized, California passed these laws in order to "promote the goal of temperance." *Actmedia, Inc. v. Stroh*, 830 F.2d 957, 960 (9th Cir. 1986). But it is settled that a state "may not seek to remove a popular but disfavored product from the marketplace by prohibiting truthful, nonmisleading advertisements." *Sorrell*, 564 U.S. at 577–78. This is

especially true where the regulation was motivated by a "'fear that people would make bad decisions if given truthful information.'" *Id.* at 577 (quoting *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374 (2002)).

The Supreme Court's First Amendment cases hold that courts should be especially skeptical of regulations that single out particular content and particular speakers for disfavored treatment. Far too often the government attempts to use such "content-based burdens on speech" as a tool to "effectively drive certain ideas or viewpoints from the marketplace." *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991).

These same concerns apply with equal force in the context of commercial speech. As the Supreme Court has recognized, even in the commercial arena, a state will often seek "to achieve its *policy objectives* through the indirect means of restraining certain speech by certain speakers," by, for instance, spreading misinformation about a product or singling out a particular product for disfavored treatment. *Sorrell*, 564 U.S. at 577 (emphasis added).

Accordingly, the panel correctly held that where, as here, the state enacts a content- and speaker-based burden on protected commercial expression or attempts to regulate commercial speech because of disagreement with the message being conveyed, the Supreme Court requires application of heightened scrutiny. *See Sorrell*, 564 U.S. at 564–66. The panel's holding is compelled by the plain text of

Sorrell, as well as the numerous other courts that have considered this issue, including the Second, Third, and Fourth Circuits, and the most fundamental principles of the First Amendment.

Even California agrees that "heightened judicial scrutiny is appropriate where the government employs content- and speaker-based restrictions to regulate speech because of disagreement with the message it conveys." Pet. for Rehearing at 13 (internal quotations and citations omitted). But it nonetheless argues that California's tied-house laws were not passed because of disagreement with the content of alcohol advertising. It further asserts that even if the laws were enacted for that impermissible reason, heightened scrutiny in practice is no different than the "intermediate scrutiny" that governs content-neutral regulations of commercial speech under *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). Both contentions fail.

As this Court and the California Supreme Court have repeatedly found, the California Legislature enacted its tied-house laws in the wake of prohibition in order to encourage temperance and thus to discourage its citizens from purchasing alcoholic beverages. *See Actmedia*, 830 F.2d at 960–61 (collecting sources). To achieve this goal, the State sought to restrict the "advertising of low [alcohol] prices," *Allied Properties*, 53 Cal. 2d at 148, and to "minimize the use of aggressive marketing techniques" by alcohol manufacturers to promote their products,

Actmedia, 830 F.2d at 960. Far from incidentally regulating speech, as California half-heartedly contends, the tied-house laws *specifically target* the speech of alcohol manufacturers.

Nor is *Sorrell*'s heightened scrutiny standard equivalent to *Central Hudson*'s intermediate scrutiny. The proof is in the very text of *Sorrell*, which expressly distinguishes between *Central Hudson*'s "commercial speech inquiry" and "a stricter form of judicial scrutiny." 564 U.S. at 571. Additionally, numerous other circuits have concluded that *Central Hudson* imposes a "*less rigorous*" test than *Sorrell*. *See, e.g.*, *United States v. Caronia*, 703 F.3d 149, 164 (2d Cir. 2012) (emphasis added). The full Court should reject California's invitation to create an explicit circuit split with at least three other circuits.

Of course, California is free to use its *own* speech, without conscripting the speech of others, to encourage its citizens to reduce their consumption of alcohol and to advance its view of social policy. And the State can impose burdens on the *purchase* of alcohol, such as by raising alcohol taxes or restricting where and when it can be purchased, in order to discourage its use. But the State cannot exclusively target alcohol manufacturers and burden their truthful and nonmisleading speech about their products in order to achieve its societal goal of temperance. That is what California has done in Section 25503, and this Court should affirm the panel's application of *Sorrell*'s heightened scrutiny.

ARGUMENT

I. REGULATIONS THAT DISCRIMINATE AGAINST PARTICULAR SPEECH AND PARTICULAR SPEAKERS ARE SUBJECT TO HEIGHTENED SCRUTINY

This Court should take care to align its holding with the central mandate of the First Amendment: The government has no place attempting to distort or manipulate the marketplace of ideas. As described below, this mandate—which applies with full force in the commercial context—calls for heightened scrutiny of content- and speaker-based regulations that attempt to "tilt public debate in a preferred direction," *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 578–79 (2011), and thus discourage the purchase of a lawful product.

A. The Central Purpose Of The First Amendment Is To Prevent Government Interference In The Marketplace Of Ideas

The common thread running throughout the Supreme Court's First Amendment jurisprudence is that the government may not regulate the marketplace of ideas in order to manipulate citizens' views on matters of opinion or personal choice.

Few notions are "so engrained in our First Amendment jurisprudence" as the principle that "'[r]egulations which permit the government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.'" *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115–16 (1991) (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 648–49 (1972)). This is

because such regulations "rais[e] the specter that the government may effectively drive certain ideas or viewpoints from the marketplace." *Id.* at 116; *see also Hill v. Colorado*, 530 U.S. 703, 743 (2000) (Scalia, J., dissenting) ("The vice of content-based legislation . . . is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes." (quotation marks omitted)). Nor may the state attempt "to compel a private party to express a view with which the private party disagrees," *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2253 (2015), as such regulations are often "structured in a manner" to ensure "the suppression of certain ideas," *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 659–61 (1994). The "First Amendment presumptively places this sort of discrimination beyond the power of the government." *Simon & Schuster*, 502 U.S. at 116; *see also Sorrell*, 564 U.S. at 578–79 ("The State may not burden the speech of others in order to tilt public debate in a preferred direction.").

This principle applies whether the speaker is an individual or a corporation. *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos.*, 515 U.S. 557, 574 (1995) ("Nor is the [First Amendment's] benefit restricted to the press, being enjoyed by business corporations generally and by ordinary people engaged in unsophisticated expression as well as by professional publishers."). It applies whether the government attempts to prohibit speech or to compel it. *Pac. Gas &*

Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 16 (1986) (plurality opinion) ("For corporations as for individuals, the choice to speak includes within it the choice of what not to say."). And it applies whether the government attempts to regulate ideas through direct prohibitions or by indirect burdens. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 812 (2000) ("The Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans.").

B. Content- And Speaker-Based Regulations Are Subject To Heightened Scrutiny In The Commercial As Well As Non-Commercial Context

As the panel recognized, the Supreme Court's decision in *Sorrell* squarely held that even in the context of commercial speech, "heightened judicial scrutiny is warranted" when the government seeks "to impose a specific, content-based burden on protected expression." 564 U.S. at 565; *see also id.* (explaining that the Vermont statute "imposes burdens that are based on the content of speech and that are aimed at a particular viewpoint"). This is because the serious concerns that the government may use content- and speaker-based speech restrictions as a "weapon" to "'drive certain ideas . . . from the marketplace,'" *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387, 395 (1992), do not disappear in the commercial speech context.

In a commercial society, it is difficult, if not impossible, to separate social policy questions from commercial questions. Accordingly, allowing a state to impose value-based distinctions in the regulation of commercial speech threatens to

deprive its citizens of "the decision as to what views shall be voiced," thus endangering "the premise of individual dignity and choice upon which our political system rests." *Leathers v. Medlock*, 499 U.S. 439, 448–49 (1991) (quoting *Cohen v. California*, 403 U.S. 15, 24 (1971)).

The Supreme Court has repeatedly recognized the "substantial" value of commercial speech:

> [T]he consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue. Moreover, significant societal interests are served by such speech. Advertising, though entirely commercial, may often carry information of import to significant issues of the day. And commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system. In short, such speech serves individual and societal interests in assuring informed and reliable decisionmaking.

Bates v. State Bar of Ariz., 433 U.S. 350, 364 (1977) (citations omitted).

In a society where everything from holidays to weddings to political campaigns have significant commercial aspects, the distinction between commercial speech and other speech is elusive, and debates about commercial products often turn on points of view about the social value of the products themselves. *See 44 Liquormart, Inc. v. Rhode Island*, 517 US. 484, 520 & n.2 (1996) (Thomas, J., concurring) ("[T]he Court, and individual Members of the Court, have continued to stress . . . the near impossibility of severing 'commercial' speech from speech necessary to democratic decisionmaking."). As the Supreme Court has recognized,

governments often exercise regulatory control over commercial products and commercial speech for ideological, political, or paternalistic reasons. *See, e.g.*, *Sorrell*, 564 U.S. at 577 ("The State seeks to achieve its *policy objectives* through the indirect means of restraining certain speech by certain speakers." (emphasis added)); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 n.9 (1980) (noting that "a ban on [commercial] speech could screen from public view the *underlying governmental policy*" (emphasis added)).

Examples of such paternalistic government action abound. Regulations governing access to or speech regarding birth control, vaccines, and alcohol are all too often an attempt to dampen demand or stigmatize a product based on policy motives, and thereby manipulate consumer behavior. Similarly, a government may seek to scare consumers away from a product by forcing companies to feed consumers misinformation about it, such as by warning consumers that the product may be unsafe despite a lack of scientific evidence to support that opinion or governmental findings to the contrary. For example, a law that required vaccine manufacturers to issue a "disclosure" that suggests their product may cause autism, even though the federal Center for Disease Control has found no such link, will cause consumers to believe that vaccination is unsafe and avoid this beneficial medical procedure. Or the government may seek to stigmatize a product by manipulating the product's advertising message or by singling out speech about a particular product

while leaving the speech of other similar products untouched. For example, a law that requires coffee bean manufacturers to put a health warning on their product discussing the dangers of caffeine, but that exempts soda, tea, and even espresso manufacturers, will have the inevitable effect of reducing a consumer's consumption of coffee while increasing her consumption of other caffeinated beverages.

As the Supreme Court recognized, a state will often "assert that disfavored speech has adverse effects" or that disfavored speakers' "marketing has a strong influence" as a justification for burdening or manipulating a product's speech. *Sorrell*, 564 U.S. at 577. Indeed, this Court has repeatedly found that the California Legislature passed the tied-house statutes at issue in this case, in substantial part, to "minimize the use of aggressive marketing techniques . . . and thereby to promote the goal of temperance." *Actmedia, Inc. v. Stroh*, 830 F.2d 957, 960 (9th Cir. 1986); *see also Allied Properties v. Dept. of Alcoholic Beverage Control*, 53 Cal. 2d 141, 148 (1959) (noting that the tied-house statutes further the goal of temperance "because the elimination at the retail level of price cutting, bargain sales, and *advertising of low prices* tends to reduce excessive purchases of alcoholic beverages" (emphasis added)); *see also* Resp. Br. at 17, 21, 27.

Yet "'[t]he First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good.'" *Sorrell*, 564 U.S. at 577 (quoting *44 Liquormart*, 517 U.S.

at 503). "[T]he 'fear that people would make bad decisions if given truthful information'" simply cannot justify burdening truthful, nonmisleading speech. *Id.* at 577 (quoting *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374 (2011)). Rather, "[i]t is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).

This is why the Supreme Court in *Sorrell* held that "[c]ommercial speech is no exception" to the rule that the "First Amendment requires heightened scrutiny whenever the government creates 'a regulation of speech because of disagreement with the message it conveys.'" *Sorrell*, 564 U.S. at 566 (quoting *Ward*, 491 U.S. at 791). Where the government seeks to scare consumers away from or stigmatize a particular product by imposing content- and speaker-based burdens on speech, *Sorrell* requires courts to view such regulations with skepticism by applying heightened scrutiny.

Other circuits have followed *Sorrell*'s plain language to conclude that content- and speaker-based distinctions among commercial speech warrant "heightened scrutiny" beyond the intermediate scrutiny traditionally applied in *Central Hudson*. The Eighth Circuit, for example, concluded that *Sorrell* "devised a new two-part test for assessing restrictions on commercial speech." *1-800-411-Pain Referral Serv.,*

LLC v. Otto, 744 F.3d 1045, 1054 (8th Cir. 2014). "The first question to ask is whether the challenged speech restriction is content- or speaker-based, or both . . . . If a commercial speech restriction is content- or speaker-based, then it is subject to 'heightened scrutiny.'" *Id.* at 1054–55 (citations omitted). Similarly, the Second Circuit has interpreted *Sorrell* to require heightened scrutiny of content- or speaker-based restrictions on commercial speech, *see United States v. Caronia*, 703 F.3d 149, 164–65 (2d Cir. 2012), as has the Fourth, *Educ. Media Co. at Va. Tech. v. Insley*, 731 F.3d 291, 298–99 (4th Cir. 2013).

This Court should follow the clear text of *Sorrell* and hold that heightened scrutiny applies to governmental attempts to stigmatize commercial products through content- and speaker-based burdens.

C. "Heightened Scrutiny" Is Necessarily More Stringent Than Intermediate Scrutiny

In light of the foregoing, California falls back on the argument that *Sorrell*'s heightened scrutiny is the same as the "intermediate scrutiny" conventionally applied under *Central Hudson.* That reading is not only wrong based on the plain text of *Sorrell*, but it would render the *Sorrell* decision incoherent and create an express split with at least three other circuits.

1. In *Sorrell*, the Supreme Court expressly distinguished between *Central Hudson*'s general "commercial speech inquiry" and "a stricter form of judicial scrutiny." *Sorrell*, 564 U.S. at 571. The Court specifically chose the word

"heightened" to describe the applicable level of scrutiny, not "intermediate," despite the dissent's repeated use of that term. *Id*. at 583, 587. The Court also recognized that "[i]n the ordinary case it is *all but dispositive* to conclude that a law is content-based and, in practice, viewpoint-discriminatory," and thus, that heightened scrutiny applies. *Id.* at 571 (emphasis added).

These statements can only be understood to hold that a content- and speaker-based burden on commercial speech that works to manipulate consumer choice is subject to heightened scrutiny. Words matter. Because the Supreme Court specifically chose the word "heightened" to describe the applicable level of scrutiny, not "intermediate," that distinction is entitled to respect. Put differently, "heightened" scrutiny must mean something greater than "intermediate" scrutiny given that the Court made the effort to distinguish the two standards in the very same sentence. *Sorrell*, 564 U.S. at 577. Even the dissent recognized that the Court's decision "suggest[ed] a standard yet stricter than *Central Hudson*." *Id.* at 588 (Breyer, J., dissenting).

A contrary reading would render superfluous *Sorrell*'s analysis of the question whether Vermont's law was content- and speaker-based. If intermediate scrutiny applies equally to content- and speaker-based regulations and those that are not, then a court need not *first* determine whether a law is content-neutral on its face. After all, it would be pointless for a court to determine whether a law is content- and

speaker-based if courts applied the *same* level of scrutiny that applies to content-neutral regulations. This Court should reject such a nonsensical interpretation of *Sorrell*.

Applying heightened scrutiny is also consistent with the rationale underlying *Sorrell*, namely that the "choice 'between the dangers of suppressing information, and the dangers of its misuse if it is freely available' is one that 'the First Amendment makes for us.'" *Sorrell*, 564 U.S. at 578 (quoting *Va. State Bd. of Pharmacy*, 425 U.S. at 770). Because speech regulations that discriminate against particular content and particular speakers in order to stigmatize a product are antithetical to the First Amendment, the state is required to satisfy a higher burden in order to justify the regulations. *See* supra Part I.A.

2. At least three other circuits have reasoned that *Sorrell*'s heightened scrutiny is more stringent than *Central Hudson*'s intermediate scrutiny. This Court should refuse California's invitation to create a circuit split on this issue.

In *Caronia*, the Second Circuit rejected the idea that heightened scrutiny under *Sorrell* is somehow equivalent to the intermediate scrutiny discussed in *Central Hudson*. 703 F.3d at 164. The court, following *Sorrell*, concluded that a statute that criminalized the promotion of off-label drug use "impose[d] content- and speaker-based restrictions on speech," and was thus "subject to heightened scrutiny."

Id. The court noted that, compared with *Sorrell*'s heightened scrutiny, *Central Hudson* imposed a "*less rigorous intermediate test*." *Id.* (emphasis added).

Similarly, in *Insley*, the Fourth Circuit considered whether *Sorrell*'s heightened scrutiny in effect required application of strict scrutiny. 731 F.3d at 298–99. The court held, however, that it could leave that question "unanswered," because the regulation "could not even withstand *intermediate scrutiny* under *Central Hudson*." *Id.* at 298 & n.4 (emphasis added). And in *King v. Governor of the State of New Jersey*, 767 F.3d 216 (3d Cir. 2014), the court, citing *Sorrell*, concluded that "content-based regulations are highly disfavored and subjected to strict scrutiny . . . even when the law in question regulates unprotected or lesser protected speech." *Id.* at 236 (citations omitted). This Court should adhere to the plain text of *Sorrell* and avoid a split with at least three other circuits, and reject California's argument that heightened scrutiny means intermediate scrutiny.

D. Under Heightened Scrutiny, The Government Cannot Rely On Post Hoc Rationalizations To Save A Discriminatory Regulation Of Commercial Speech

The panel also correctly held that the government cannot rely on post hoc rationalizations to save a regulation of commercial speech under heightened scrutiny. *Retail Dig. Network, LLC v. Appelsmith*, 810 F.3d 638, 648 (2016). At bottom, the heightened scrutiny standard applies where "the government creates 'a regulation of speech because of disagreement with the message it conveys.'"

Sorrell, 564 U.S. at 566 (quoting *Ward*, 491 U.S. at 791). In light of that purpose, a court may not blind itself to the discriminatory interests actually undergirding a regulation simply because the state, in the course of litigation, can conjure up a non-discriminatory reason for its content-based distinction. California's argument to the contrary is not only unfaithful to *Sorrell* and a litany of other Supreme Court cases, it would neuter the heightened scrutiny inquiry.

Under *Sorrell*, courts should consider "the legislative purposes that the court finds *actually* animated a challenged law," not just "the specific interests asserted by the government" in litigation. *Retail Digital*, 810 F.3d at 648 (emphasis added); *Sorrell*, 564 U.S. at 564–65 (considering the "law's express purpose and practical effect"). In order to determine whether the regulation is predicated on the illegitimate end of discrimination, the court (unsurprisingly) must consider the government's purpose in regulating the speech.

Nevertheless, California contends that while an inquiry into the government's true interest is relevant when determining *whether* heightened scrutiny applies, the court should not consider that interest in the *application* of heightened scrutiny, assuming the government can proffer new reasons to justify its law. On this theory, a court must ascertain the government's true reasons for enacting a law, and having found that the law was built on a discriminatory purpose and that heightened scrutiny

thus applies, proceed to completely *ignore* that finding and instead rely solely on the justifications asserted by the government's litigation counsel.

California's head-in-the-sand approach would create an end-run around heightened scrutiny and, unsurprisingly, finds *zero* support in the case law. To the contrary, the Supreme Court has squarely held that, under heightened scrutiny, "[t]he [government's] justification must be genuine, not hypothesized or invented *post hoc* in response to litigation." *United States v. Virginia*, 518 U.S. 515, 533 (1996); *see also Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 730 (1982) (analyzing whether the State's recited justification for enacting the challenged law was "the *actual* purpose" behind the law (emphasis added)). This Court has similarly held. *See Latta v. Otter*, 771 F.3d 456, 468 (9th Cir. 2014) ("*SmithKline* [*Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481–82 (9th Cir. 2014)] instructs us to consider the states' actual reasons, and not post-hoc justifications, for enacting the laws at issue."). Five other circuits agree. *See, e.g.*, *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 238 (4th Cir. 2016) (under heightened scrutiny, justification for the challenged law cannot be "invented *post hoc* in response to litigation"); *Morales-Santana v. Lynch*, 804 F.3d 520, 528 (2d Cir. 2015) (same); *NRA v. McCraw*, 719 F.3d 338, 348 (5th Cir. 2013) (same); *Haight v. Thompson*, 763 F.3d 554, 562 (6th Cir. 2014) (rejecting post hoc rationalizations where state is required to assert compelling interest); *see also Libertarian Party of N.H. v. Gardner*, __ F.3d __, 2016

WL 7030625, at *8 (1st Cir. Dec. 2, 2016) (recognizing that, under heightened scrutiny, state cannot rely on post hoc rationalizations). Additionally, the Supreme Court has instructed courts to consider, in the course of determining whether the government's interests are substantial, whether such interests are "related to the suppression of free expression." *Turner*, 512 U.S. at 662–63; *see also United States v. O'Brien*, 391 U.S. 367, 377 (1968) ("[A] government regulation is sufficiently justified" when it "is unrelated to the suppression of free expression."). The Court has never instructed lower courts to ignore the government's discriminatory purpose.

The cases on which California relies are inapposite because each involved application of intermediate scrutiny. *See Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71 (1983) (applying *Central Hudson*); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460 (1978) (applying intermediate scrutiny to commercial speech restriction); *Valley Broad. Co. v. U.S.*, 107 F.3d 1328, 1330–31 (9th Cir. 1997) (applying *Central Hudson*); *Clear Channel Outdoor, Inc. v. City of N.Y.*, 594 F.3d 94, 103 (2d Cir. 2010) (same). Where a commercial speech restriction was not spawned by legislative disagreement with the message being conveyed, it may make sense to allow a state to assert new justifications as a basis for upholding the law. But where a commercial speech restriction has the purpose or effect of tilting public debate in a government-preferred direction, and where heightened scrutiny therefore applies, it is fundamentally inconsistent with the skepticism due such regulation to

allow the government to rely on post hoc justifications as a basis for upholding the law.

II. SECTION 25503 IS SUBJECT TO HEIGHTENED SCRUTINY

On its face, Section 25503 is a content- and speaker-based regulation of truthful commercial speech about an often-disfavored product. Even more troubling, the regulation, from its inception until today, has been justified by California as a means of depriving consumers of truthful information lest they decide to purchase a lawful product. Accordingly, Section 25503 is subject to heightened scrutiny under *Sorrell*.

Section 25503 is, on its face, a content- and speaker-based regulation of protected speech that was passed for the conceded purpose of discouraging consumers from purchasing a lawful product. Section 25503 is explicitly content-based because it prevents alcohol manufacturers from providing a thing of value "in connection with the advertising and sale of distilled spirits" or "for the privilege of placing or painting a sign or advertisement, or window display, on or in any premises selling alcoholic beverages at retail." Cal. Bus. & Prof. Code § 25503(f), (h). It "regulate[s] speech by its function or purpose," namely only speech *promoting* a particular product, and thus is content-based on its face. *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2227 (2015). There is no suggestion that the speech at which it aims is somehow misleading.

Similarly, Section 25503 is speaker-based because it applies only to a targeted group of particular speakers: alcohol manufacturers, winegrowers, distillers, bottlers, wholesalers, and their officers, directors, and agents. Cal. Bus. & Prof. Code § 25503. What is more, because Section 25503 exclusively burdens the speech of "disfavored speakers," this differential treatment "suggests that the goal of the regulation is not unrelated to [the] suppression of expression, and such a goal is presumptively unconstitutional." *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 585 (1983). In other words, by "target[ing] those speakers and their messages for disfavored treatment," Section 25503, "'[i]n its practical operation . . . goes even beyond mere content discrimination, to actual viewpoint discrimination.'" *Sorrell*, 564 U.S. at 565 (quoting *R.A.V.*, 505 U.S. at 391). Because advertisements that are purchased by manufacturers of alcohol will inevitably promote the sale of alcohol, a restriction on such advertisements necessarily discriminates against a particular viewpoint—that consumers should purchase alcohol. Section 25503 is accordingly subject to "a stricter form of judicial scrutiny." *Id*.

Although California offers several reasons why heightened scrutiny should not apply, none are persuasive. California first argues that Section 25503 is not content-based because manufacturers and wholesalers are not just "barred from paying for advertising that promotes their brand . . . . [t]hey cannot pay for

advertising *at all*, even for products that have no relation to alcohol." Pet. for Rehearing at 14 (emphasis in original). As an initial matter, this argument is forfeited because the State never raised it in their answering brief. *See United States v. Gamboa-Cardenas*, 508 F.3d 491, 502 (9th Cir. 2007) (where appellees fail to raise an argument in their answering brief, "they have waived it") (citing *United States v. Nunez*, 223 F.3d 956, 958–59 (9th Cir. 2000)).

In any event, the State misunderstands the test for whether a restriction is content-based. Because Section 25503 prohibits manufacturers from paying money to place a "sign or advertisement, or window display" in an alcohol retail store, "[t]he statute thus disfavors [advertising], that is, speech with a particular content." *Sorrell*, 564 U.S. at 564. Moreover, the State ignores that, by "target[ing] those speakers and their messages for disfavored treatment," Section 25503, "[i]n its practical operation . . . goes even beyond mere content discrimination, to actual viewpoint discrimination." *Id.* at 565 (quoting *R.A.V.*, 505 U.S. at 391). If a state banned candidates for political office from purchasing advertisements, it surely could not defend that regulation as "content neutral" simply because the candidates would be banned from advertising soap as well as their candidacy. California likewise cannot defend a restriction on advertising by purveyors of alcohol by pretending it has not targeted alcohol advertisements.

Even if the statute were content neutral (and it is not), that would not matter because the California Legislature enacted Section 25503 based on its disagreement with the content of alcohol manufacturers' advertising. As this Court has explained, the California Legislature enacted the tied-house statutes in order to "minimize the use of aggressive marketing techniques . . . and thereby to promote the goal of temperance." *Actmedia*, 830 F.2d at 960. In other words, the State sought to restrict the "advertising of low [alcohol] prices" because it found that such regulations "ten[d] to reduce excessive purchases of alcoholic beverages." *Allied Properties*, 53 Cal. 2d at 148. The Legislature's rationale that "the force of speech can justify the government's attempts to stifle it" is simply "incompatible with the First Amendment." *Sorrell*, 564 U.S. at 577.

The State next argues that California's law does not have the goal or effect of skewing public discourse on a particular topic because alcohol manufacturers and wholesalers are free to advertise by others means and, thus, *Sorrell* is inapplicable. Pet. for Rehearing at 15. The Supreme Court has repeatedly rejected this argument. Indeed, *Sorrell* itself involved a law that prevented pharmacies and health insurers from selling prescription data to marketers, but allowed them to sell the same information to a variety of other entities such as those engaged in "health care research," those checking "'compliance' with health insurance formularies," or those engaged in "educational communications" provided to patients. *Sorrell*, 564

U.S. at 559–60. Yet the fact that the regulated speaker in *Sorrell* could share the information with other listeners did not diminish the scrutiny the Court applied to the restriction at issue. Likewise, that the State allows alcohol manufacturers to speak freely *outside* of alcohol retail stores cannot cure the unconstitutionality of Section 25503's prohibition. There is "no general principle that freedom of speech may be abridged when the speaker's listeners could come by his message by some other means." *Va. State Bd. Pharmacy*, 425 U.S. at 757 n.15.

Lastly, California and various *amici* argue that *Sorrell* does not apply to Section 25503 because that statute does not prohibit speech, only payment in return for speech. Pet. for Rehearing at 15–16. But the distinction they seek to draw—between the dissemination of information and the *paid* dissemination of information—is illusory and would upend large swaths of First Amendment jurisprudence. As this Court has recognized, "'the creation and dissemination of information are speech within the meaning of the First Amendment.'" *Beeman v. Anthem Prescription Mgm't, LLC*, 689 F.3d 1002, 1009 (9th Cir. 2012) (quoting *Sorrell*, 564 U.S. at 570). This right means little if the speaker is prohibited from using her financial resources to disseminate the information. For "[w]hat good is the right to print books without a right to buy works from authors? Or the right to publish newspapers without the right to pay deliverymen? The right to speak would be largely ineffective if it did not include the right to engage in financial transactions

that are the incidents of its exercise." *McConnell v. FEC*, 540 U.S. 93, 251 (2003) (Scalia, J., dissenting); *see also Ward*, 491 U.S. at 809 ("[T]he First Amendment means little if it permits government 'to allow a speaker in a public hall to express his views while denying him the use of an amplifying system.'" (quoting *FEC v. Nat'l. Conservative Pol. Action Comm.*, 470 U. S. 480, 493 (1985)).

This is why the Supreme Court has repeatedly affirmed the principle that an attack upon the funding of speech is an attack upon speech itself. *See, e.g.*, *Schaumburg v. Citizens for a Better Env't.*, 444 U.S. 620, 622 (1980) (striking down an ordinance that limited the amount charities could pay their solicitors); *Simon & Schuster*, 502 U.S. at 123 (holding unconstitutional state statute that appropriated the proceeds of criminals' biographies for payment to the victims); *Buckley v. Valeo*, 424 U.S. 1, 16 (1976) ("[T]this Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment."); *New York Times Co. v. Sullivan*, 376 U.S. 254, 265–66 (1964) (holding that paid advertisements in a newspaper were entitled to full First Amendment protection).

If the rule were otherwise, the government could simply squelch speech by banning the use of money to promulgate that speech, as opposed to directly regulating the speech itself. That result is untenable under the First Amendment. Indeed, if California's logic were adopted, states could ban individuals from paying

money to buy a gun, hire a lawyer, conduct a religious practice, purchase birth control, or obtain any other constitutional right, all without having to satisfy the constitutional standards protecting those rights. This Court should reject California's suggestion that burdens on constitutional rights are meaningfully different than prohibitions on the exercise of rights.

Nor is there any merit to California and its *amici*'s argument that treating Section 25503 as a prohibition on speech will undermine traditional areas of government regulation, such as professional referrals, broadcaster regulations, or pay-to-play schemes. Pet. for Rehearing at 17–18; Am. Br. of Cal. Beer & Beverage Distributors, *et al.* at 18. As the Supreme Court observed in *Sorrell*, "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." 564 U.S. at 567. Laws prohibiting kickbacks in exchange for professional referrals or outlawing pay-to-play schemes fall comfortably within this framework, *see id.*, as would a law prohibiting an alcohol manufacturer from making payments to induce a retailer to carry the manufacturer's products.

But that is not what Section 25503 does. Section 25503 is a direct restriction on alcohol advertising that in both purpose and effect burdens truthful speech in

order to dissuade consumers from purchasing a lawful product. As such, heightened scrutiny applies.[2]

* * *

The en banc Court should confirm that *Sorrell* meant what it said. When the government imposes content- and speaker-based speech restrictions in order to manipulate consumer choices, the resulting regulation is subject to heightened scrutiny.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* Chamber of Commerce of the United States of America respectfully requests that this Court reverse the decision of the district court.

[2] Because the panel remanded the case to the district court for application of the proper standard of review, *Retail Digital*, 810 F.3d at 653–54, this Court has yet to determine whether Section 25503 would survive heightened scrutiny. But plainly it would not, because its content- and speaker-based burdens are admittedly designed to manipulate consumer behavior. Moreover, and in any event, Section 25503's furtherance of the paternalistic goal of temperance is fatally under-inclusive as it ignores numerous other avenues for advertising alcohol. Even as an attempt to prevent tied-house arrangements, Section 25503 is a wildly over-inclusive prophylactic measure that unnecessarily burdens speech as a means of discouraging payments that are *already* unlawful and can readily be detected without stamping out truthful speech.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the *Amicus Curiae* Brief of the Chamber of Commerce of the United States of America is proportionately spaced, has a typeface of 14 point, and contains 6371 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ Helgi C. Walker
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CERTIFICATE OF SERVICE

I, Helgi C. Walker, hereby certify that I electronically filed the foregoing *Amicus Curiae* Brief of the Chamber of Commerce of the United States of America 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 December 21, 2016, which will send notice of such filing to all registered CM/ECF users.

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