ARMING GOLIATH: INDEPENDENT CRAFT BEER IS IN JEOPARDY AT THE INTERSECTION OF A FIRST AMENDMENT CIRCUIT SPLIT, THE TWENTY-FIRST AMENDMENT, AND THE EROSION OF TIED-HOUSE LAWS

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INTRODUCTION

America's small and independent craft breweries are in serious trouble. Prior to the immediate challenge of COVID-19, America's craft beer scene was still blossoming into a vibrant, socially active economic powerhouse.[1] Economic pressure from COVID-19,[2] large corporate beer manufacturers, and an astronomical growth of new fizzy alcoholic beverages on the market have pushed many independent breweries to the brink and beyond in several cases.[3] COVID-19 has had a dramatic impact on the industry as a whole and has left thousands of small and independent craft breweries in desperate financial shape. The Brewers Association, the major national craft brewery trade group, provides an ominous warning about the seriousness of the situation: "For many small brewers, the current situation is not sustainable."[4] Breweries have already closed, and for many small breweries that are still open, closure is imminent if the pandemic continues much further into the future.[5]

A more long-term problem has recently reared its problematic head and is likely to make things substantially worse for independent craft breweries. Government restrictions on alcoholic beverage advertising, through what are known as "tied-house laws," have become a hotbed

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1. *See* Rachel Arthur, '*Craft Brewers Are Facing New Realities': US Craft Beer Grew 4% in 2019—But 2020 Will Be a Difficult Year*, BEVERAGEDAILY.COM (Apr. 15, 2020), https://www.beveragedaily.com/Article/2020/04/15/US-craft-beer-grew-4-in-2019-but-faces-difficult-2020-with-coronavirus [https://perma.cc/EM5R-H3JP]; *but see* Alicia Wallace, *American Craft Brewers Were Already in Trouble. Then Came the Coronavirus*, CNN BUSINESS (Mar. 27, 2020), https://www.cnn.com/2020/03/27/business/craft-brewers-coronavirus-closures-layoffs/index.html [https://perma.cc/KY2W-KJJG].

2. *See*, *e.g.*, Tim McKirdy, *The Complicated Impact of COVID-19 on the Craft Beer Industry*, VINEPAIR (Oct. 6, 2020), https://vinepair.com/articles/impact-covid-19-craft-beer-industry/ [https://perma.cc/2ME5-A3ZC]; *see also* Mike Snider, *America's Craft Beer Boom May Go Flat as Coronavirus Shutdown Slows Brewery Taps*, USA TODAY (Apr. 23, 2020), https://www.usatoday.com/story/money/business/2020/04/21/coronavirus-pandemic-creates-brewing-crisis-craft-beer-industry/5151514002/ [https://perma.cc/2QFH-9MCW[.

3. Bart Watson, *Brewery Sales Dropping Sharply, Many Set to Close*, BREWERS ASS'N, (Apr. 7, 2020), https://www.brewersassociation.org/insights/brewery-sales-dropping-sharply-many-set-to-close/ [https://perma.cc/AZN2-ED6M].

4. *Id.* (noting significant decreases in craft beer sales during the COVID-19 pandemic, including a nationwide 95% decrease in distributed draft beer).

5. *See* Chris Morris, *Craft Brewers Upend Their Business Models in Fight to Stay Alive*, FORTUNE (Oct. 14, 2020, 9:30 AM), https://fortune.com/2020/10/14/craft-beer-brewery-covid-businesss/ [https://perma.cc/D2JJ-BKZ5].

of First Amendment commercial speech challenges.[6] The ultimate goal of tied-house laws is to eliminate the undue influence that large corporate manufacturers have over retail outlets by prohibiting manufacturers from giving retailers anything of value.[7] Specifically, prohibiting manufacturers from paying retailers for advertising at retail outlets is one of the many methods that tied-house laws use to ensure that large corporate breweries cannot use economic pressure to influence retailers' decisions.[8] Such prohibitions raise obvious First Amendment concerns. In addition, the Supreme Court's pattern of awarding full First Amendment protections for commercial speech in general,[9] and in alcoholic beverage advertising specifically, makes it unlikely that prohibitions on manufacturers paying retailers for alcoholic beverage advertising will survive in the future without preemptive legislative and regulatory action. If the Supreme Court follows its current trend and strikes down prohibitions on alcohol manufacturers paying retailers for advertising, a scenario that would quickly devolve into unfettered commercial bribery, independent craft breweries will close at an even faster rate. Large corporate breweries will happily fill those shelf spaces and tap handles and check a big box for one of their long-term goals: eliminate the little guy.

I. RELEVANT BREWING INDUSTRY BACKGROUND AND HISTORY

As permitted by the Twenty-First Amendment and since the repeal of Prohibition, the states have created and implemented their own statutes and regulations governing the alcoholic-beverage industry.[10] Nearly every state and the federal government enacted a version of what is known as "the three-tier system" to prohibit unfair business practices in the alcoholic beverage market that were rampant prior to

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6. *See* 44 Liquormart, Inc., v. Rhode Island, 517 U.S. 484 (1996); Rubin v. Coors Brewing Co., 514 U.S. 476 (1995); Mo. Broads. Ass'n v. Schmitt, 946 F.3d 453 (8th Cir. 2020); Retail Digit. Network, LLC v. Prieto, 861 F.3d 839 (9th Cir. 2017); Actmedia, Inc. v. Stroh, 830 F.2d 957 (9th Cir. 1986).

7. *Retail Digit. Network,* 861 F.3d at 843.

8. Tied-house laws use a number of tactics to facilitate legislative goals, including prohibiting inducements to consumers to buy alcoholic beverages and prohibiting pay-to-play schemes whereby manufacturers with deep pockets can secure an advantage over small and independent breweries. *See* ALCOHOL & TOBACCO TAX & TRADE BUREAU, FEDERAL TRADE PRACTICES: WHAT EVERY INDUSTRY MEMBER SHOULD KNOW 16 (Apr. 10, 2018), https://www.ttb.gov/images/pdfs/faa-trade-practice-master.pdf [https://perma.cc/BKQ9-J29T].

9. Genevieve Lakier, *The First Amendment's Real Lochner Problem*, 87 U. CHI. L. REV. 1241, 1244 (2020) ("This article thus contests the claim that contemporary free speech law resurrects *Lochner* by extending too much protection to commercially oriented speech."); John Gilbertson, *Blunt Advice: A Crash Course in Cannabis Trademarks*, 60 IDEA 502, 509 (2020) (recognizing a broad deregulatory trend for commercial speech in Supreme Court jurisprudence).

10. *See 44 Liquormart, Inc.*, 517 U.S. at 484; *Mo. Broads. Ass'n*, 946 F.3d at 461 ("Missouri notes that nearly every state and the federal government have tied-house laws . . . .").

Prohibition and to promote temperance.[11] Under the three-tier system, manufacturers (tier one), wholesalers (tier two), and retailers (tier three) are to remain independent of each other, and members of a given tier cannot perform the functions of members of another tier.[12] In other words, under a strict three-tier system, a manufacturer cannot distribute or sell beverages for retail, a distributor cannot manufacture or sell for retail, and a retailer cannot manufacture or distribute alcoholic beverages.[13]

Maintaining distance between the tiers is meant to prohibit retail outlets from becoming beholden to large manufacturing interests through undue pressure and influence at the expense of smaller market competitors.[14] Hence, the three-tier system serves to protect consumers from being inundated with only one company's products or having their choices limited because the retailer owes the manufacturer loyalty. At the same time, the three-tier system minimizes aggressive marketing techniques that large manufacturers are known to employ and furthers states' interests in promoting temperance.[15]

With respect to beer specifically, the situation is more acute than with other alcoholic beverages. Independent craft beer has been a major financial challenge for large corporate manufacturers ("Big Beer").[16] More specifically, independent craft beer has taken a large chunk of the overall U.S. beer market from Big Beer in a short period of time.[17] To illustrate, consider the relatively recent proliferation of smaller breweries springing up and market share from many of the bigger names often associated with beer.[18] Brands such as Budweiser, Coors, and Miller have seen their collective dominance reduced as competition increases and consumer trends shift.[19]

Following Prohibition, a multitude of breweries began to fill the vacuum left by the failed constitutional amendment. However,

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11. *See, e.g.*, *Rubin,* 514 U.S. at 478-79; *Mo. Broads. Ass'n*, 946 F.3d at 453; *Retail Digit. Network*, 861 F.3d at 843; *Actmedia, Inc.*, 830 F.2d at 957.

12. *See Retail Digit. Network,* 861 F.3d at 850.

13. *See Mo. Broads. Ass'n*, 946 F.3d at 456.

14. *See Retail Digit. Network,* 861 F.3d at 850.

15. *Actmedia, Inc.,* 830 F.2d at 960.

16. *See Craft Beer vs. Big Beer*, CRAFTBEVERAGECONSULTANTS, https://craftbeverageconsultants.com/2015/01/craft-beer-vs-big-beer/ [https://perma.cc/8JE2-YBVR] (defining Big Beer generally to include large corporate brewers and their "sub-companies").

17. *National Beer Sales & Production Data*, BREWERS ASS'N, https://www.brewersassociation.org/statistics-and-data/national-beer-stats/ [https://perma.cc/MME8-66G4].

18. Beverage Information Group, *Beer Volume Declines Continue, Despite Gains in Craft and Imported Brews*, PR NEWSWIRE (Oct. 10, 2018, 6:00 AM) https://www.prnewswire.com/news-releases/beer-volume-declines-continue-despite-gains-in-craft-and-imported-brews-300727917.html [https://perma.cc/38EN-XB97].

19. Martin Stack, *A Concise History of America's Brewing Industry*, ECON. HIST. ASS'N, https://eh.net/encyclopedia/a-concise-history-of-americas-brewing-industry/ [https://perma.cc/984S-BCXK].

diversity in the marketplace dwindled. Consolidation of manufacturers is obvious when looking at market shares from 1947—when the top ten producers controlled 19% of the beer market—to 1978—when the same metric ballooned to 92.3%.[20] By 1980, a total of 44 companies produced beer throughout the nation, with ten of those companies controlling over 90% of the market; in short, a handful of breweries dominated essentially the entire market.[21]

Interest in producing beer on a smaller scale began to reemerge following the passage of House Rule 1337, which legalized the home production of a small amount of beer or wine for personal consumption.[22] Starting in 1980, the tides began to change, setting the foundations for the real growth of craft beer. For the next two decades, hundreds of breweries opened across the country; however, in 2000, three firms still controlled 81% of the market.[23] While the growing number of breweries did not impact the major players for the first twenty years, that would change beginning in 2000. By 2014, craft beer had ballooned to include 3,418 breweries who collectively enjoyed 19.3% domestic market share.[24] This number has continued to grow year after year, and while its growth has slowed, craft beer continues to eat away at Big Beer's dominance. Even while the United States experiences an overall decline in the consumption of beer, craft and independent breweries continue to make incremental gains on the market leaders.[25] By 2020, there were over 8,000 craft and independent brewers that account for just under 24% of the 94-billion-dollar market.[26]

II. BIG BEER'S STRATEGIES TO REGAIN LOST MARKET SHARE: OUTSPEND COMPETITORS WHO CANNOT AFFORD TO PAY-TO-PLAY

Big Beer wants its market share back and would not hesitate to use unfettered, paid advertising, and thus exertion of influence over retailers, to assist in recapturing what once belonged to it.[27] To achieve this

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20. Douglas F. Greer, *The Causes of Concentration in the Brewing Industry*, 21 Q. REV. OF ECON. & BUS. 87, 88-89 (1981).

21. Douglas F. Greer, *Beer: Causes of Structural Change*, *in* INDUSTRY STUDIES, 30 Table 2.1 (Larry Duetsch, ed., 1998).

22. 26 U.S.C.A. § 5053(e).

23. Stack, *supra* note 19 (observing America's largest brewers' production—in millions of barrels—Anheuser-Busch: 99.2, Miller: 39.8, Coors: 22.7; with Total Domestic Sales of 199.4 million barrels).

24. *2014 Craft Beer Data Infographic*, BREWERS ASS'N (Mar. 16, 2015), https://www.brewersassociation.org/association-news/2014-craft-beer-data-infographic/ [https://perma.cc/23GV-Z3N8].

25. *National Beer Sales & Production Data*, BREWERS ASS'N, https://www.brewersassociation.org/statistics-and-data/national-beer-stats/ [https://perma.cc/57EB-GVJZ].

26. *Id.*

27. Daniel Croxall, *Vader and the Borg: Pathways Toward Galactic Domination*, CRAFT BEER LAW PROF (May 11, 2017), https://www.craftbeerprofessor.com/2017/05/vader-borg-pathways-toward-galactic-domination/ [https://perma.cc/97RM-X9XE].

goal, Big Beer has engaged in several legal and illegal strategies.[28] On the legal side, Big Beer has consistently and vigorously pursued and sponsored legislative enactments favoring Big Beer's interests.[29] Further, Big Beer has purchased its own formerly independent craft breweries, transferred production locations, used its supply chain advantages, and churned out beer that many folks would deem to be "craft beer" for substantially less cost than an independent brewer could.[30] Further, as shown below, Big Beer has engaged in or supported various and continuous litigation to strike down laws that it sees as favorable to smaller, independent craft breweries.

On the illegal side, Big Beer and its beholden wholesalers[31] have engaged in pay-to-play tactics with retailers, conduct that is illegal in all states and under the Federal Alcohol Administration Act ("FAAA").[32] Anyone who has worked in the beer industry, or the restaurant industry can corroborate that pay-to-play is very common in this world.[33] Even a brief survey of national headlines demonstrates this fact. Here is how it works: the Big Beer agent can simply supply equipment, fixtures, or even televisions in exchange for favorable treatment by the retailer—as agents were caught doing in Los Angeles and Boston.[34] More commonly and perhaps a bit less brazen, the Big Beer agent might buy an $11 lunch from the local pub and leave an exorbitant tip with the knowing head nod or eye wink assuring that the retailer just might replace the local brewery's tap handle with a

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28. *Id*.

29. Telephone Interview with Tom McCormick, Exec. Dir., Cal. Craft Brewers Ass'n (Dec. 8, 2020) [hereinafter "McCormick Interview"] (notes on file with author) ("One of the ways large manufacturers engage the system is through direct sponsorship of legislative bills that further their interests, often at the expense of small [craft]brewers.").

30. *See generally*, Croxall, *supra* note 27.

31. McCormick Interview, *supra* note 29. Not all wholesalers are beholden. Indeed, many smaller independent wholesalers' interest align with small breweries' interests because the independent wholesalers cannot afford to engage in the pay-to-play type tactics that larger wholesalers can. *See id*.

32. *See generally* Sarah Bennett, *Wholesale Wars: The Battle for the Future of Beer Distribution*, BEERADVOCATE (Mar. 2016), https://www.beeradvocate.com/articles/13526/wholesale-wars-the-battle-for-the-future-of-beer-distribution/ [https://perma.cc/26GZ-8TR2].

33. *See* NAT'L BEER WHOLESALERS ASS'N, UNDERSTANDING TRADE PRACTICE LAWS UNDER THE FEDERAL ALCOHOL ADMINISTRATION ACT (Sept. 2016), https://www.nbwa.org/sites/default/files/Guide-to-Unfair-Trade-Practices-Under-the-FAA-Act.pdf [https://perma.cc/VTX4-P5J9] ("Tied-house practices are probably the most common violations found at both the federal and state levels in trade practices.").

34. *See* Anna Brigham, *Oops, They Did It Again: AB Fined for Pay-to-Play*, THORN BREWING (Mar. 8, 2017), https://thorn.beer/oops-ab-fined-pay-play/ [https://perma.cc/3VLL-Y39G]; Dave Eisenberg, *California Fines Anheuser-Busch Wholesalers for Pay-to-Play*, GOOD BEER HUNTING (Mar. 13, 2017), https://www.goodbeerhunting.com/sightlines/2017/3/13/california-fines-anheuser-busch-wholesalers-for-pay-to-play [https://perma.cc/KHJ7-62SH]; Dan Adams, *Anheuser-Busch Disputes Charge of $1 Million 'Pay-to-Play' Scheme*, BOSTON GLOBE (Nov. 28, 2017), https://www.bostonglobe.com/business/2017/11/28/anheuser-busch-disputes-alleged-million-pay-play-scheme/sO8clWXUUs77vDLv5fosYL/story.html [https://perma.cc/8ZDG-8UDY].

glossy Big Beer one.[35] All of this is prohibited by state law[36] and all of it happens every day.[37] Big Beer is thirsty for schemes allowing it to buy the loyalty of retailers everywhere with the goal of stamping out those pesky independent breweries.[38] This is where the circuit split regarding the stringency of intermediate scrutiny comes into play. If Big Beer could legally pay retailers for what is ostensibly advertising, truthfully legalized commercial bribery, it would use its vast resources to make sure retail outlets stock only approved brands—those with Big Beer's name on them.

III. ALCOHOLIC BEVERAGE ADVERTISING RESTRICTIONS AND A CIRCUIT SPLIT

States and the federal government enforce their versions of the three-tier system through what are known as "tied-house laws."[39] All states and the federal government have their own versions, though most are very similar.[40] These laws exist to dictate to manufacturers, wholesalers, and retailers the various privileges and restrictions their respective tiers must follow.[41] At their core, tied-house laws prohibit a manufacturer or wholesaler from giving a retailer "anything of value"[42] in an effort to prevent retailers from becoming beholden to manufacturers.[43] As the Ninth Circuit and the California Supreme Court put it, tied house laws were enacted to rectify "an inability on the part of small retailers to cope with pressures exerted by larger manufacturing or wholesale interests."[44] Stated simply, tied-house laws have kept independent craft beer "in the game" through economic market regulation so that Big Beer cannot exert undue influence over retailers and thus pay to force smaller breweries off the shelves.[45]

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35. McCormick Interview, *supra* note 29.

36. *See* Tara Nurin, *The Pay-To-Play Scandal In The Beer Biz: How Far It Goes Nobody Knows*, FORBES, https://www.forbes.com/sites/taranurin/2016/03/31/the-pay-to-play-scandal-in-the-beer-biz-how-far-it-goes-nobody-knows/?sh=1005d9d3b0d5 [https://perma.cc/S5BS-H5HZ]; *see e.g.,* Cal. BUS & PROF. CODE § 25503(f)-(h).

37. *See* sources cited *supra* note 33, 34, and 35.

38. *See* sources cited *supra* note 34.

39. *See, e.g.*, Retail Digit. Network, LLC v. Prieto, 861 F.3d 839, 843 (9th Cir. 2017).

40. *See* 27 U.S.C. § 205(b); *see, e.g.*, CAL. BUS. & PROF. CODE §§ 25500-25512 (West 2020); Mo. Broads. Ass'n v. Schmitt, 946 F.3d 453, 461 (8th Cir. 2020) ("Missouri notes that nearly every state and the federal government have tied-house laws . . . .").

41. *See Retail Digit. Network*, 861 F.3d at 843.

42. Many wholesalers or wholly owned by, or beholden to, Big Beer: "By the end of 2015, Anheuser-Busch owned and operated 21 out of the more than 500 [Anheuser-Busch] distributors on the US . . . ." Bennett, *supra* note 32.

43. *See* 27 U.S.C. § 205©; *see also* CAL. BUS. & PROF. CODE § 25500(a)(2) (2020).

44. Actmedia, Inc. v. Stroh, 830 F.2d 957, 960 (9th Cir. 1986) (quoting Cal. Beer Wholesalers Assoc. v. Alcoholic Beverage Control Appeals Bd., 5 Cal. 3d 402, 407 (1971)).

45. McCormick Interview, *supra* note 29.

A particular tied-house restriction that has long rankled Big Beer is that manufacturers are generally prohibited from paying retailers for advertising space in the retail outlet.[46] Big Beer has directly or indirectly challenged this restriction in various contexts and has seen some losses and some successes.[47] Of course, manufacturers paying retailers in any form is illegal and inconsistent with tied-house laws' purpose of preventing manufacturers from giving a thing of value to a retailer and thus the reciprocal expectation that the retailer will favor that manufacturer over others. The main reason for these restrictions is to "prevent or limit a specific evil: the achievement of dominance or undue influence by alcoholic beverage manufacturers and wholesalers over retail establishments."[48] Specifically regarding prohibiting manufacturers from paying retailers for advertising, these prohibitions are premised on minimizing "manufacturers and wholesalers from exerting undue and undetectable influence" over retailers in the form of cash payments.[49] Another stated interest is that such restrictions promote temperance by reducing the risk that beholden retailers might be subject to quotas and thus unscrupulously push certain alcoholic beverage products, as well as reducing paid advertisements in retailers advances the states' stated goal of actually reducing consumption.[50] But are those interests substantial enough to survive constitutional scrutiny? And is a blanket prohibition tailored enough to survive *Central Hudson's* intermediate scrutiny test regarding First Amendment analysis of commercial speech restrictions given the current Supreme Court trend towards full constitutional protection for commercial speech?[51]

The Ninth Circuit says yes; the Eighth Circuit says no.[52] One would much rather be an independent craft brewer in California than in Missouri—at least for now. As set forth below, the Ninth Circuit has twice found that a prohibition on manufacturers paying retailers for advertising withstands *Central Hudson's* traditional intermediate scrutiny analysis.[53] The Eighth Circuit, analyzing the same substantive restriction, has held that such a blanket prohibition cannot withstand a modern application of *Central Hudson's* test and is therefore

46. *See* 27 U.S.C. § 205(c); *see also* CAL. BUS. & PROF. CODE § 25500(a)(2) (2020).

47. McCormick Interview, *supra* note 29.

48. Retail Digit. Network, LLC v. Prieto, 861 F.3d 839, 845 (9th Cir. 2017) (quotation marks omitted) (quoting *Actmedia*, 830 F.2d at 966).

49. *Id.* at 850.

50. *Id.* at 845.

51. *See* Leslie Gielow Jacobs, *Regulating Marijuana Advertising and Marketing to Promote Public Health: Navigating the Constitutional Minefield*, 21 LEWIS & CLARK L. REV. 1081, 1083 (2017).

52. *Mo. Broads. Ass'n*, 946 F.3d at 461; Retail Digital Network, 861 F.3d at 844.

53. *Retail Digit. Network*, 861 F.3d at 844; *Actmedia, Inc.*, 830 F.2d at 965.

unconstitutional.[54] Given the Supreme Court's movement toward full First Amendment protection for commercial speech and its current constitution, it is highly unlikely that a prohibition on alcoholic beverage advertisements would survive a First Amendment challenge today in that Court.

This article examines tied-house restrictions that prohibit beer manufacturers from paying retailers for advertising space and why those laws are necessary. Sections III and IV examine the Supreme Court's developing commercial speech jurisprudence with particular focus on alcoholic beverage advertising restrictions. Section V and VI examine a circuit split between the Ninth Circuit and the Eighth Circuit regarding whether alcoholic beverage advertising restrictions survive the modern approach to *Central Hudson's* intermediate scrutiny. Lastly, Section VII proposes steps that state legislatures and regulating bodies should take to minimize the chances that their tied-house restrictions regarding advertising will be struck down under the First Amendment.

IV. THE IMPORTANCE OF TIED-HOUSE LAWS AND PREVENTING BIG BEER'S PAY-TO-PLAY MARKET CONDUCT

Tied-house laws are fundamental to the survival of independent craft breweries. These laws aim to provide "a fair and level playing field" for all alcohol beverage industry members, and they exist in order to support a marketplace based on consumer preference rather than on a manufacturer's ability to exclude its competitors' products through undue influence.[55] However, large manufacturer's and their agents often challenge or ignore tied-house laws because they would prefer a less competitive market.[56] While tied-house laws outlaw the behavior, the beer industry is full of pay-to-play opportunities—unethical or illicit arrangements in which payment is made by those who want certain privileges or advantages—for companies willing to ignore the law.[57]

The most common example of pay-to-play is providing compensation—either money or other things of value—to retail establishments to secure the right to serve alcoholic beverages.[58] Any member of the

54. *Mo. Broadcasters Ass'n*, 946 F.3d at 461.

55. ALCOHOL AND TOBACCO TAX AND TRADE BUREAU, TTB INDUSTRY CIRCULAR NO. 2018-7 (Nov. 8, 2018), https://www.ttb.gov/industry-circulars/ttb-industry-circulars-18-7 [https://perma.cc/ZHC9-BDCC].

56. Daniel J. Croxall, *Helping Craft Beer Maintain and Grow Market Shares with Private Enforcement of Tied-House and False Advertising Laws*, 55 GONZ. L. REV. 167, 183 (2019).

57. *See* Martin Pomeroy & Eric Speed, *The Impact of "Pay-to-Play" on Craft Brewers*, CRAFT BREWING BUS. (Dec. 1, 2014), https://www.craftbrewingbusiness.com/business-marketing/pay-play-craft-brewers/ [https://perma.cc/5LNQ-UCRA].

58. *See* Pomeroy & Speed, *supra* note 57.

alcohol industry can violate these provisions, but the largest manufacturers and distributors beholden to those manufacturers are most likely to engage in behaviors which violate these terms.[59] This is because they are the companies that can afford to pay and are willing to risk a fine that would put most independent breweries out of business.[60] There seemed to be many grumblings about frequent violations circulating throughout the industry for years, but much less enforcement of tied-house laws than one might expect.[61] That changed, at least on a federal level, in 2017 when the Alcohol and Tobacco Tax and Trade Bureau (the "TTB") committed five million dollars to the enforcement of federal tied-house laws.[62] The most significant action was in Massachusetts where the agency found that Anheuser-Busch had violated various anticompetition laws and agreed to settle with the company for a total of five million dollars.[63] The charged violations included the following:

- entering into sponsorship agreements with various entities in the sports and entertainment industries requiring concessionaires and other retailers to purchase A-B's malt beverages and prohibiting them from purchasing specific competitor brands;
- inducing sports industry concessionaires to purchase A-B's malt beverages by furnishing fixtures, equipment, and services;
- reimbursing, through credit card swipes, retailers for the cost of installing malt beverage draft dispensing systems, thereby inducing them to purchase A-B's malt beverages;
- requiring retailers to purchase A-B's malt beverages in return for such retailers' use of equipment A-B furnished them free of charge or below market value;
- using third parties (business entities and payment services) to provide money or things of value to retailers in exchange for placement of A-B's malt beverages; and

59. McCormick Interview, *supra* note 29.

60. *See* 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://perma.cc/65S4-WGUT] (noting AB InBev was fined $400,000 for pay-to-play conduct in Southern California in 2017); *but 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/4ELE-Y889] (noting that $400,000 was less than 3% of the profit that AB InBev made in a single day at that time).

61. Pomeroy & Speed, *supra* note 57.

62. Joseph Lewczak & Louis Dilorenzo, *The TTB Ramps Up Enforcement Over Trade Practices*, DAVIS & GILBERT, LLP (July 10, 2019), https://www.dglaw.com/press-alert-details.cfm?id=957 [https://perma.cc/6LJF-FRHA].

63. Justin Kendall & Jessica Infante, *Anheuser-Busch to Pay Record $5 Million Offer In Compromise for Trade Practice Violations Tied to Sports and Entertainment Sponsorships*, BREWBOUND (July 9, 2020), https://www.brewbound.com/news/anheuser-busch-to-pay-record-5-million-offer-in-compromise-for-trade-practice-violations-tied-to-sports-and-entertainment-sponsorships/ [https://perma.cc/EU39-T32P].

- paying retailers purportedly for items such as consumer samplings, when, in fact, the retailers did not receive the goods or services purportedly purchased, and such payments were actually for A-B product placement.[64]

The scope of alleged violations demonstrates Big Beer's routine flouting of tied-house laws, and the huge settlement begs the question of how severe the penalties could be if the TTB had continued without settling. The recent federal settlement is only one of many times in recent history that AB InBev, Anheuser Busch's parent company, has been the center of an investigation about providing value to other tiers of the alcohol industry.

State statutes and enforcement also play a large role in minimizing tied-houses. In 2016, the Washington State Liquor and Cannabis Board gave the company a 150,000 dollar fine for entering an exclusive agreement with two concert venues.[65] Additionally, the California Department of Alcoholic Beverage Control fined a distributor wholly owned by the company four hundred thousand dollars for illegally paying for refrigeration units, television sets, and draft systems for retailers.[66] These examples provide evidence of the real danger of Big Beer to the craft beer industry. Not only do they engage in widespread violations of tied house laws, but they are also willing to pay a massive fine in lieu of claiming innocence. While settlement negotiations never provide the public with an entirely transparent picture of the wrongdoing of the accused, it is clear that the company recognized their actions as punishable and agreed to a hefty fine in lieu of further investigation. Even breaking these laws is often an example of engaging in pay-to-play tactics. Big Beer's ability to influence distributors and retailers continues, and it appears that Big Beer considers any regulatory enforcement and fines against them simply part of the cost of doing business.[67]

There is another way a member of the industry can engage in tied-house violations. Any poker player knows that you cannot sit at the table unless you have chips; the same holds true with tied house laws. The richest companies invest huge amounts of money to lobby for

64. Ashley Brandt, *The Scariest Thing About the TTB / Anheuser-Busch Offer in Compromise and Suspension Agreement Over Sponsorship and Advertising Practices is What Wasn't Written . . . Assertions of Verbal Agreements Require Vigorous Enforcement*, LIBATION L. BLOG (July 28, 2020), https://libationlawblog.com/2020/07/28/the-scariest-thing-about-the-ttb-anheuser-busch-offer-in-compromise-and-suspension-agreement-over-sponsorship-and-advertising-practices-is-what-wasnt-written-assertions-of-verbal-a/ [https://perma.cc/3YXV-6FAR].

65. Kendall Jones, *Anheuser-Busch Gets $150,000 Fine for Liquor Law Violations in Seattle*, WASH. BEER BLOG (May 17, 2016), http://washingtonbeerblog.com/anheuser-busch-gets-fine-for-liquor-law-violations-seattle/ [https://perma.cc/X3JT-3JN4].

66. Eisenberg, *supra* note 34.

67. *See* source cited *supra* note 60.

changes and exceptions to the laws.[68] Companies like Anheuser-Busch have spent untold dollars and time to change these laws, leading to a huge number of exceptions to the general rule.[69] As an example, California recently passed the "Glassware Bill," which gives manufacturers the privilege to legally provide an item of value—free glassware—directly to retailers throughout the state.[70] Of course, without the Glassware Bill, this conduct would be illegal under the tied-house laws. Anheuser-Busch was the only private party that supported the bill while it was before the Legislature.[71] Only Big Beer can afford to play this game. Similar laws exist in other states; Florida was the most recent to adopt a similar provision in 2018, while an attempt to raise the number of cases of glassware from two to four failed in Ohio in the same year.[72] There are various examples of the erosion of tied-house laws because the lobbying efforts of interested parties, including numerous examples in California alone.[73] While this lobbying is a widely accepted practice in our democratic system, the reality is that if a manufacturer has the money, it is able to either ignore or influence the laws, driving out competition and ultimately securing its place atop a multi-billion dollar industry.

Without tied-house restrictions, such as those that seek to limit commercial bribery and undue influence by prohibiting manufacturers from buying influence through payments to retailers for advertising space, Big Beer manufacturers and their beholden retailers will undoubtedly seize the opportunity to pay-to-play.[74] The result, over time, will be catastrophic to small, independent breweries that will see their market share diminished because they cannot afford to pay for product placement.[75] In addition, alcoholic beverage control agencies are "simply not equipped to handle" policing contractual provisions between retailers and manufacturers to ensure that the manufacturers are actually paying for advertising and not to curry favor to the

68. McCormick Interview, *supra* note 29.

69. *Id.*

70. Colin Nystrom, *Who Stands to Benefit From Chapter 623's Exception to California's Tied-House Laws?*, 51 U. PAC. L. REV. 227, 233 (2019).

71. *Id.* at 234 n.65.

72. Keith Gribbins, *Ohio Craft Brewers Association Calls Anheuser-Busch-Backed Glassware Amendment Pay to Play (Updated)*, CRAFT BREWING BUS. (Dec. 3, 2018), https://www.craftbrewingbusiness.com/featured/ohio-craft-brewers-association-calls-anheuser-busch-backed-glassware-amendment-pay-to-play/ [https://perma.cc/DBX9-NQZK]; Pete Johnson, *Florida Glassware Legislation Signed into Law*, BREWERS ASS'N (Apr. 12, 2018), https://www.brewersassociation.org/current-issues/florida-glassware-legislation-signed-into-law/ [https://perma.cc/8DY5-HAT4].

73. Thomas A. Gerhart, *Undermining the Law: How Uninformed Legislating Helps Big Beer Erode California's Tied-House Laws*, 51 U. PAC. L. REV. 25, 33-44 (2019).

74. McCormick Interview, *supra* note 29.

75. *Id.*

detriment of others.[76] Thus, whether states can constitutionally regulate alcoholic beverage advertisements, a form of commercial speech, has a significant impact on the survival of independent craft breweries in the United States.

V. THE SUPREME COURT'S COMMERCIAL SPEECH ANALYSIS AND *CENTRAL HUDSON'S* INTERMEDIATE SCRUTINY

Given that tied-house restrictions often implicate advertising and thus speech, a brief examination of the Supreme Court's commercial speech jurisprudence is necessary. The Supreme Court has defined commercial speech several times to mean speech "which does 'no more than propose a commercial transaction.'"[77] Since the 1970s, the Court has provided substantial protection to both individuals and corporations exercising their First Amendment right of freedom of speech, even in the commercial speech context.[78] However, this protection is not without limits, and the Supreme Court has held that certain forms of speech, including commercial speech, are subject to increased governmental censorship.[79] The Court held that the First Amendment "accords a lesser protection to commercial speech than to other constitutionally guaranteed expression."[80] In other words, commercial speech is "sandwiched" somewhere between hate speech or obscene speech (no protection) and personal or political speech (strict scrutiny).[81] The main reason the Supreme Court has allowed for lesser protections of commercial speech is because "the 'commonsense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech."[82]

Notably, *Central Hudson v. Public Service Comm'n* established the current structure for analyzing commercial speech restrictions, in which the Supreme Court examined a Public Service Commission regulation that prohibited public utility companies from using advertising to sell electricity to consumers.[83] The Public Service Commission

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76. *Id.*

77. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976) (quoting Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973)).

78. *See id.* at 770 (recognizing constitutional protection for commercial speech but failing to establish an analytical framework); *see also* Jacobs, *supra* note 49, at 1107 (describing history of commercial speech protections).

79. *See Va. Citizens Consumer Council, Inc.*, 425 U.S. at 771-72; Cent. Hudson Gas v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 563-64 (1980).

80. *Cent. Hudson Gas*, 447 U.S. at 563.

81. Sean P. Costello, *Strange Brew: The State of Commercial Speech Jurisprudence Before and After 44 Liquormart, Inc. v. Rhode Island*, 47 CASE W. RES. L. REV. 681, 682 (1997).

82. Rubin v. Coors Brewing Co., 514 U.S. 476, 482 (1995) (quoting Ohralik v. Ohio State Bar Ass'n., 436 U.S. 447, 455-56 (1978)).

83. *Cent. Hudson Gas*, 447 U.S. at 558-59.

asserted that the purpose of the ban was that such advertisements would be antithetical to public policy concerns, namely, energy conservation and fair and efficient energy rates for consumers, interests the Court countenanced.[84] In considering the regulation, the Court recognized some value in commercial speech in terms of "assist[ing] consumers and further[ing] the societal interest in the fullest possible dissemination of information."[85] Of course, the Court also recognized that commercial speech serves economic functions of the commercial speaker in the form of a proposed business transaction.[86] Essentially, the Court concluded that commercial speech is informational and thus valuable to consumers and the public.[87] The Court thus saw inherent value in truthful commercial speech because of its informational aspects and potential value to consumers in their decision making.[88] Accordingly, the Court struck down the statute, finding that a regulation that completely bans truthful promotional advertising by an electrical utility was more extensive than necessary to further the state's interest in energy conservation.[89]

In reaching this conclusion, the *Central Hudson* Court adopted four considerations to determine if a law unconstitutionally burdens commercial speech: (1) whether the commercial speech at issue concerns unlawful activity or is misleading; (2) whether the "governmental interest is substantial"; (3) whether the challenged "regulation directly advances the government['s]" asserted interest; and (4) whether the regulation is no "more extensive than [] necessary" to further the government's interest.[90]

The path to adopting this test, however, was far from obvious or unanimous. The Court found the first two prongs of the analysis easily satisfied. Specifically, the Court quickly determined that the utility's advertisements were truthful and not misleading.[91] Second, the Court analyzed whether the government's asserted interests in conserving energy and fair and efficient energy rates were substantial.[92] As to energy conservation, the Court held, "In view of our country's dependence on energy resources beyond our control, no one can doubt the importance of energy conservation."[93] Regarding fair and efficient rates for consumers, the Court held that "[t]he choice among rate structures involves difficult and important questions of economic supply and

84. *Id.* at 568-69.
85. *Id.* at 561-62.
86. *Id.*
87. *Id.* at 563.
88. *Cent. Hudson Gas* at 563.
89. *Id.* at 570.
90. *Id.* at 566.
91. *Id.* at 567-70.
92. *Id.* at 569.
93. *Cent. Hudson Gas* at 568.

distributional fairness. The State's concern that the rates be fair and efficient represents a clear and substantial governmental interest."[94] The next two prongs were more controversial, as is the case in most commercial speech bans.

Considering whether the Commission's ban directly advanced the government's stated interest, Justice Powell first took issue with the connection between Central Hudson's rate structure and the prohibition.[95] Noting, "The link between the advertising prohibition and appellant's rate structure is, at most, tenuous. The impact of promotional advertising on the equity of appellant's rates is highly speculative."[96] Ultimately, the Court rejected the fair and efficient rates argument: "[t]he Commission's laudable concern over the equity and efficiency of appellant's rates does not provide a constitutionally adequate reason for restricting protected speech . . . . Such conditional and remote eventualities simply cannot justify silencing appellant's promotional advertising."[97]

The Court, however, considered energy conservation differently despite its reservations about conditional or remote eventualities. Without reference to empirical evidence, the Court accepted that banning promotional advertisements is directly linked to the government's interest in energy conservation:

> In contrast, the State's interest in energy conservation is directly advanced by the Commission order at issue here. There is an immediate connection between advertising and demand for electricity. Central Hudson would not contest the advertising ban unless it believed that promotion would increase its sales. Thus, we find a direct link between the state interest in conservation and the Commission's order.[98]

Stated plainly, the Court found the third prong satisfied with respect to energy conservation based on reasoning, not hard evidence. Indeed, it was the same reasoning that the Court used to reject rate efficiency in the very same analysis. This third prong has become controversial in modern commercial speech cases, particularly with respect to alcoholic beverage advertising, and since *Central Hudson*, courts have required stricter and more solid evidentiary bases.[99]

Regarding the last prong, whether the ban was no more extensive than necessary to further the state's interest in energy conservation,

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94. *Id.* at 569.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Cent. Hudson Gas* at 569.

99. *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 504 (1996); Rubin v. Coors Brewing Co., 514 U.S. 476, 487-89 (1995); Mo. Broads. Ass'n v. Schmitt, 946 F.3d 453, 460 (8th Cir. 2020).

the Court found the ban to be too broad.[100] The Court stated, "[t]he Commission's order reaches all promotional advertising, regardless of the impact of the touted service on overall energy use. But the energy conservation rationale, as important as it is, cannot justify suppressing information about electric devices or services that would cause no net increase in total energy use."[101] Further, the Court held that the Commission failed to show that "a more limited restriction on the content of promotional advertising would not serve adequately the State's interests."[102] Thus, the Court essentially required the Commission to prove a negative: "In the absence of a showing that more limited speech regulation would be ineffective, we cannot approve of the complete suppression of Central Hudson's advertising."[103] The fourth prong thus presents a difficult challenge for the government. Before the Court will find a ban on commercial speech to be constitutional, the government must prove that a lesser restriction will not further the state's interest to a sufficient degree. Like the third prong, this fourth prong has become hotly contested in later cases, particularly those involving alcoholic beverage advertising bans.[104]

Other Justices on the Court did not universally accept Justice Powell's opinion; however, there was an eight-member plurality that voiced many different ideas throughout their concurrences.[105] Justice Blackmun doubted whether suppression of information concerning the availability and price of a legally offered product is ever a constitutionally permissible way for the State to dampen demand for or use of the product.[106] However, he agreed with Justice Powell that even though commercial speech is involved, it is protected by the First Amendment.[107] Justice Brennan, in a separate concurrence, wrote that a ban on all "promotional" advertising includes more than "commercial speech"; thus the First Amendment would strike the government action as a violation of ordinary speech.[108]

In a similar vein, Justice Stevens wrote that he could not precisely define what Commercial Speech was but took issue with both definitions that Justice Powell accepted.[109] Regardless of the differing views, all but Justice Rehnquist agreed with the decision in the case. Alone

100. *Cent. Hudson Gas*, 447 U.S. at 570.

101. *Id.*

102. *Id.*

103. *Id.* at 571.

104. *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 505 (1996); Rubin v. Coors Brewing Co., 514 U.S. 476, 490 (1995); Mo. Broads. Ass'n v. Schmitt, 946 F.3d 453, 461 (8th Cir. 2020).

105. *See generally Cent. Hudson Gas*, 447 U.S. 557.

106. *Id.* at 573.

107. *Id.*

108. *Id.* at 572.

109. *Id.* at 579.

in dissent, Rehnquist did not believe commercial speech should enjoy any part of the First Amendment protection of free speech.[110] If this sort of economic regulation were to be afforded any sort of First Amendment protection, it should be have "a significantly more subordinate position in the hierarchy of First Amendment values than the Court gives it today."[111] Justice Rehnquist opined that the court was using its decision to "improperly substitute its own judgment for that of the State in deciding how a proper ban on promotional advertising should be drafted."[112]

Despite murkiness among the Justices, *Central Hudson* has been the analytical framework courts apply to commercial speech regulations since 1980, with ebbs and flows and differing interpretations and emphases among the circuits. In the alcohol context, and particularly with respect to beer, several circuit court challenges to state restrictions of commercial speech have failed.[113] Big Beer would love nothing more than to win a big one, as it seemingly did in 2020 in *Missouri Broadcasters*.[114] As set forth below, the Ninth Circuit has followed a traditional *Central Hudson* analysis and upheld commercial speech restrictions while the Eighth Circuit has taken a more demanding approach that seems to be in-line with current Supreme Court trends. Following the Eighth Circuit's model regarding the beer industry needlessly hands Big Beer a method to drastically outspend independent craft beer and thus garner undue influence over retailers—precisely what the three-tier system and tied-house laws are designed to prohibit.

VI. AFTER *CENTRAL HUDSON*: TOWARDS MORE FIRST AMENDMENT PROTECTION FOR COMMERCIAL SPEECH IN THE ALCOHOL CONTEXT

The trend in the Supreme Court has been one towards strict scrutiny protection for commercial speech.[115] In fact, in the last two decades, the Supreme Court has not upheld a single commercial speech restriction, while striking down several.[116]

With respect to commercial speech generally, it has become clear that the Supreme Court is dissatisfied with *Central Hudson's*

110. *Cent. Hudson Gas*, at 583.

111. *Id.* at 584.

112. *Id.*

113. Retail Digit. Network v. Prieto, 861 F.3d 839, 841-42 (9th Cir. 2017); Actmedia, Inc. v. Stroh, 830 F.2d 957, 958 (9th Cir. 1986).

114. *See* Mo. Broads. Ass'n v. Schmitt, 946 F.3d 453, 462 (8th Cir. 2020).

115. Jacobs, *supra* note 51, at 1083.

116. Oleg Shik, *The Central Hudson Zombie: For Better or Worse, Intermediate Tier Review Survives Sorrell v. IMS Health*, 25 FORDHAM INTELL. PROP., MEDIA, & ENT. L.J. 561, 565-66 (2015); *see also* Costello, *supra* note 81, at 682-86.

intermediate scrutiny standard. Two Supreme Court cases[117] concerning alcohol advertisements in particular provide examples of what seems to have become something of "a de facto strict scrutiny analysis" that places tied-house laws premised on states' interests in preventing vertical integration and promoting temperance in grave danger.[118] Those cases include *Rubin v. Coors Brewing Co.* and *44 Liquormart v. Rhode Island*.[119]

In 1995, the Supreme Court in *Rubin v. Coors Brewing Co.* reviewed a Federal Alcohol Administration Act ("FAAA") provision, 27 U.S.C. section 205(e), that prohibited beer manufacturers from stating the alcohol content in the beverage on labels and advertisements.[120] In addition to prohibiting numerical ABV[121] indications of alcohol content, regulations promulgated by the Bureau of Alcohol Tobacco and Firearms prohibited descriptive terms as they related to high alcohol content on labels and advertisements—words like "strong," "full strength," "extra strength," "high test," "high proof," "pre-war strength," and "full oldtime alcoholic strength."[122] However, the ban was expressly subordinate to state law if that state law required alcohol content to be placed on the label or advertisement.[123] The government argued that this ban on alcohol content posted on beer labels was necessary to prevent "strength wars" between manufacturers seeking to increase sales based on stronger beer and to facilitate "state efforts to regulate alcohol under the Twenty-first Amendment."[124]

Applying *Central Hudson*, the Court first noted that the parties agreed the ban applied only to "truthful, verifiable, and non-misleading factual information" contained on beer labels, thus satisfying the first *Central Hudson* prong.[125] As to the second prong, the Court recognized that strength wars are the type of societal harms that would qualify as a substantial interest of the government.[126] But in a perhaps

117. Lower courts have historically, and even modernly, deferred to regulators' authority to fashion advertising regulations to further public safety in the food and beverage context. *See* N.Y. State Rest. Ass'n v. Bd. of Health, 556 F.3d 114, 118 (2d Cir. 2009) (holding that First Amendment was not violated by regulation requiring restaurants to disclose caloric information about menu items); *see also* POM Wonderful, LLC v. F.T.C., 777 F.3d 478, 484 (D.C. Cir. 2015) (same for administrative order mandating claims of health benefits in beverage advertisements must be supported by evidence).

118. Shik, *supra* note 116, at 564-65.

119. *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996); Rubin v. Coors Brewing Co., 514 U.S. 476 (1995).

120. *Rubin*, 514 U.S. at 478.

121. ABV is an abbreviation for "alcohol by volume," the industry standard for measuring the strength of an alcoholic beverage.

122. *Rubin*, 514 U.S. at 481.

123. *Id.*

124. *Id.* at 485.

125. *Id.* at 483.

126. *Rubin*, 514 U.S. at 485.

stricter fashion than in *Central Hudson* itself, the Court read into the analysis of the third and fourth prongs a higher burden and evidentiary standard.

Regarding the third prong, the opinion first noted *Central Hudson's* language that the challenged regulation must "advance[] the [g]overnment's interest in a direct and material way."[127] But the Court went further and stated that the "burden 'is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that *the harms it recites are real and that its restriction will in fact alleviate them to a material degree*.'"[128] Against this standard, the Court rejected a history and consensus approach to the third prong. Unlike *Central Hudson* the Court instead focused on the myriad exceptions and inconsistencies in the FAAA itself.[129] The Court recognized that many surrounding sections of the FAAA allowed alcohol content on labels for distilled spirits and wine (but not beer).[130] Additionally, the FAAA allowed brewers to advertise alcohol content in other manners, but just not on labels.[131] Ultimately, as to the third prong, the Court held that while "the Government's interest in combating strength wars remains a valid goal . . . the irrationality of this unique and puzzling regulatory framework ensures that the labeling ban will fail to achieve that end."[132] In addition, the Court stated that the government's brief submitted only "anecdotal evidence and educated guesses" that strength wars were occurring and would become uncontrollable without the restriction.[133] Thus the Court rejected Section 205(e)(2) under a fairly strict application of *Central Hudson's* third prong and followed an emerging trend towards more protection for commercial speech.[134]

Just one year later, the Court had the opportunity to evaluate alcohol advertising restrictions again in *44 Liquormart v. Rhode Island* further strengthening protections for alcoholic beverage advertisements and, to some degree, reformulating the *Central Hudson* analysis into a much more difficult test for the government to satisfy.[135]

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127. *Id.* at 487.

128. *Id.* (emphasis added) (quoting Edenfeld v. Fane, 507 U.S. 761, 770-71 (1993)).

129. *Id.* at 489.

130. *Id.*

131. *Rubin*, 514 U.S. at 489.

132. *Id.*

133. *Id.* at 490.

134. *See id.* at 490-91 (also finding that Section 205(e)(2) failed to satisfy *Central Hudson's* fourth prong because it was not "sufficiently" tailored to the stated goals); *see also id.* (where the Court pointed out several non-speech methods to combat strength wars including "directly limiting the alcohol content of beers, prohibiting marketing efforts emphasizing high alcohol strength (which is apparently the policy in some other western nations), or limiting the labeling ban only to malt liquors . . . .").

135. *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 501-03 (1996).

In *44 Liquormart*, the Court examined two Rhode Island prohibitions against advertising the retail price of alcoholic beverages.[136] The first prohibited manufacturers and wholesalers from advertising the price of alcoholic beverages except for price tags or signs displayed along with the beverages in a retail location.[137] The second prohibited the advertisements containing alcoholic beverage price in any news media within the state.[138]

After providing a lengthy history on the development of the Court's commercial speech doctrine, the Court commenced its *Central Hudson* analysis. The Court showed its hand early when it stated that

> [T]here is no question that Rhode Island's price advertising ban constitutes a blanket prohibition against truthful, nonmisleading speech about a lawful product. There is also no question that the ban serves an end unrelated to consumer protection. Accordingly, we must review the price advertising ban with "special care," [citation] mindful that speech prohibitions of this type rarely survive constitutional review.[139]

Regarding *Central Hudson's* third prong, Rhode Island argued that its bans on alcohol advertisements directly advanced its interest in promoting temperance—what the Court understood to mean reduced alcohol consumption.[140] The Court rejected a commonsense justification, or one based on reasoning instead of hard evidence:

> We can agree that common sense supports the conclusion that a prohibition against price advertising, like a collusive agreement among competitors to refrain from such advertising, will tend to mitigate competition and maintain prices at a higher level than would prevail in a completely free market. *Despite the absence of proof on the point*, we can even agree with the State's contention that it is reasonable to assume that demand, and hence consumption throughout the market, is somewhat lower whenever a higher noncompetitive price level prevails. However, *without any findings of fact, or indeed any evidentiary support whatsoever,* we cannot agree with the assertion that the price advertising ban will significantly advance the State's interest in promoting temperance.[141]

In other words, the Court rejected a consensus and history analysis, calling it instead "speculation or conjecture."[142] And for good measure, the Court threw in that it most definitely does not countenance commercial a speech restriction that "takes aim at accurate commercial

136. *Id.* at 489-90.

137. *Id.* at 489.

138. *Rubin*, 514 U.S. at 489-90.

139. *Id.* at 504.

140. *Id.*

141. *Id.* at 505 (emphasis added).

142. *Id.* at 507.

information for paternalistic ends."[143] The Court thus found that Rhode Island's ban on alcoholic beverage price advertising failed *Central Hudson's* third prong.[144]

The opinion also made quick work of whether the Rhode Island Statutes satisfy *Central Hudson's* fourth prong—that the restriction should be "no more extensive than necessary."[145] Instead of a speech ban, the plurality found there to be several alternatives:

> As the State's own expert conceded, higher prices can be maintained either by direct regulation or by increased taxation. Per capita purchases could be limited as is the case with prescription drugs. Even educational campaigns focused on the problems of excessive, or even moderate, drinking might prove to be more effective.[146]

Accordingly, the court found there was no reasonable fit between the ban and Rhode Island's goal of temperance and struck down Rhode Island's prohibitions.[147] Thus, the *44 Liquormart* Court did not hesitate to require direct and substantial evidence that any commercial speech bans would substantially advance the state's asserted interest.

Out of several concurrences, Justice Thomas's lengthy concurrence stands out as a bulwark towards strict scrutiny for commercial speech bans, particularly in light of their paternalistic tendencies.[148] Justice Thomas's approach seems to reject the government's attempt to look out for the public by keeping information from it:

> I do not join the . . . application of the *Central Hudson* balancing test because I do not believe that such a test should be applied to a restriction of "commercial" speech, at least when, as here, the asserted interest is one that is to be achieved through keeping would-be recipients of the speech in the dark.[149]

Justice Thomas's concurrence thus foreshadowed an increasing distrust of *Central Hudson's* test and instead all but advocated for commercial speech to be put in the same position as core speech. In other

143. *Rubin*, 514 U.S. at 507.

144. *Id.* at 489. ("We now hold that Rhode Island's statutory prohibition against advertisements that provide the public with accurate information about retail prices of alcoholic beverages is also invalid. Our holding rests on the conclusion that such an advertising ban is an abridgement of speech protected by the First Amendment and that it is not shielded from constitutional scrutiny by the Twenty-first Amendment.").

145. *Id.* at 504.

146. *Id.* at 507.

147. *Id.* at 505.

148. *Rubin*, 514 U.S. at 519.

149. *Id.* at 523.

words, as seen through the Supreme Court's trend towards full protection for commercial speech since *44 Liquormart*,[150] Justice Thomas just might receive his wish.

VII. TIED-HOUSE RESTRICTIONS ON MANUFACTURERS PAYING RETAILERS FOR ADVERTISING SPACE SURVIVE THE NINTH CIRCUIT'S *CENTRAL HUDSON* ANALYSIS.

Two Ninth Circuit cases concerning alcoholic beverage advertisement restrictions buck the Supreme Court trend towards heightened scrutiny. Both challenge the same laws.[151] Those laws prohibit a manufacturer or a wholesaler from paying a retailer for advertising.

Specifically, one of the laws challenged was California Business and Professions Code § 25503(h),[152] which provides "[n]o manufacturer . . . 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."[153] The California legislature enacted this provision in 1935 "as part of California's 'tied-house' statutes, so named because they were intended to prevent the return of saloons operated by liquor manufacturers, which had been prevalent in the early 1900s."[154] The California Supreme Court recognized that the stated purposes behind this provision are two-fold.[155] First, "to prevent large-scale manufacturers and wholesalers of alcoholic beverages from dominating local markets for their

150. Jonathan H. Adler, *Persistent Threats to Commercial Speech*, 25 J.L. & POL'Y 289, 316 (2016).

151. Retail Digit. Network v. Prieto, 861 F.3d 839, 841 (9th Cir. 2017); Actmedia, Inc. v. Stroh, 830 F.2d 957, 958 (9th Cir. 1986).

152. Most states have similar prohibitions. *See*, *e.g.*, ARIZ. REV. STAT. ANN. § 4-243(5) (2020) (general prohibition against manufacturer or retailer paying or crediting a retailer "for advertising, display or distribution service"); HAW. REV. STAT. ANN. § 281-42(a)(4) (West 2020) (prohibiting manufacturer and wholesaler from "paying or crediting a retail licensee for any advertising, display or distribution service, whether or not the advertising, display or distribution service received is commensurate with the amount paid by the retail licensee"); IDAHO CODE ANN. § 23-1033(1)(c) (West 2020) (prohibiting brewers and wholesalers from aiding or assisting "any licensed retailer by furnishing, giving, renting, lending or selling any equipment, signs, supplies, services, or other thing of value to the retailer which may be used in conducting the retailer's retail beer business . . ."); MONT. CODE ANN. § 16-3-241(1)(a) (West 2020) (prohibiting "any brewer, beer importer, or wholesaler" from leasing, furnishing, giving, or paying for "any premises, furniture, fixtures, equipment, or any other advertising matter or any other property" to a retailer; NEV. REV. STAT. ANN. § 369.485(3)(b) (West 2020) (prohibiting wholesalers from investing money, directly or indirectly, in a retail store); OR. REV. STAT. ANN. § 471.398(2) (West 2020) (prohibiting a wholesaler from directly or indirectly providing any money to retailers); WASH. REV. CODE ANN. § 66.28.305 (West 2020) (prohibiting manufacturers and wholesalers from advancing moneys or money's worth under an agreement written or unwritten).

153. CAL. BUS. & PROF. CODE § 25503(h) (West 2020).

154. *Actmedia, Inc.*, 830 F.2d at 959.

155. *See* Cal. Beer Wholesalers Assoc. v. Alcoholic Beverage Appeals Bd., 5 Cal. 3d 402, 407 (1971).

products through vertical and horizontal integration."[156] Second, "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."[157] The California legislature enacted this provision, and others like it, due to "an inability on the part of small retailers to cope with pressures exerted by larger manufacturing or wholesale interests" in order to promote an orderly market and to promote temperance.[158] The Ninth Circuit put it bluntly when it stated:

> [b]y prohibiting integration of retail and wholesale outlets for alcoholic beverages and by preventing wholesalers and manufacturers from extending credit to retailers or otherwise gaining economic influence over them, the legislature sought to prevent the emergence of exclusive dealing arrangements in the alcoholic beverage industry that could lead to an overabundance of retail outlets, the imposition of quotas on retailers by individual manufacturers or wholesalers, and forms of unfair competition that would further disrupt the structure of the industry and create disorderly marketing conditions.[159]

The Federal Alcohol Administration Act's prohibition is nearly identical in scope and in purpose. Title 27 Section 205(b)(4) of the U.S. Code prohibits "paying or crediting the retailer for any advertising, display, or distribution service." Indeed the FAAA is also the bedrock for Treasury Department regulations that define "paying or crediting a retailer for any advertising, display, or distribution service" as a means to induce a retailer to exclude competing products within the meaning of the FAAA.[160] Federal regulations promulgated under the FAAA define prohibited advertising inducements in detail: manufacturer and wholesaler payments for advertisements in retail location (27 C.F.R. § 6.52);[161] purchase of advertisements in retailer publications (27 C.F.R. § 6.54);[162] reimbursements to retailers for setting up product or other displays (27 C.F.R. § 6.55);[163] and promotions where a manufacturer or wholesaler rents display space a retail establishment.

These laws are not without controversy or challenge. Two Big Beer friendly challenges to state prohibitions of manufacturers paying for alcohol advertisements, specifically Section 25503(h), were briefed and

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156. *Actmedia, Inc.*, 830 F.2d at 959.

157. *Id.*

158. *Id* at 960 (citing Cal. Beer Wholesalers Assoc. v. Alcoholic Beverage Control Appeals Bd., 5 Cal. 3d 402, 407 (1971)).

159. *Actmedia*, 830 F.2d at 960.

160. 27 C.F.R. § 6.51 (2020).

161. 27 C.F.R. § 6.52 (2020).

162. 27 C.F.R. § 6.54 (2020).

163. 27 C.F.R. § 6.55 (2020).

argued before the Ninth Circuit, positing similar theories.[164] Despite the Supreme Court trend towards strict scrutiny for commercial speech regulations described above both challenges ultimately failed.[165]

A. Actmedia, Inc. v. Stroh: An Early Challenge

In 1986, the Ninth Circuit faced its first challenge to regulations prohibiting alcohol manufacturers from paying retailers for advertisements.[166] Actmedia was a company that contracted with supermarkets, such as Albertson's, Ralphs, etc., to display advertising on nearly a half-million shopping carts in the U.S.[167] Anyone born before 1980 might remember the square advertisements on shopping carts advertising anything from cereal to diapers. To make money, Actmedia would then sublet the spaces it leased on shopping carts to advertisers.[168] Actmedia would then charge the advertisers based on the number of transactions in the stores where its ads appeared and then paid the participating supermarkets 25% of its gross billings to the advertisers. Actmedia would retain 75% of the revenue it received from participating advertisers.[169] These advertisement schemes seemed harmless enough.

However, a problem arose when The Adolph Coors Company decided to participate and leased shopping cart space from Actmedia in 1981 in the Los Angeles and San Francisco areas.[170] In 1982, the California Alcoholic Beverage Control Board (the "ABC") determined that Coors violated California Business and Professions Code section 25503(h) because "by and through its agency, Actmedia, Inc., [Coors] pa[id] money for the privilege of placing a sign or advertisement in . . . premises selling alcoholic beverages at retail."[171] Coors settled with the ABC in 1983, and terminated its use of Actmedia's services, leaving Actmedia short $250,000 under their contract.[172] Actmedia then sued the ABC and sought injunctive relief and money damages, asserting that the advertising scheme "did not violate section 25503(h), and that if it did, section 25503(h) violates the 'free speech' clauses of the California Constitution and the first amendment to the

164. Retail Digit. Network, LLC v. Prieto, 861 F.3d 839, 841-42 (9th Cir. 2017); *Actmedia*, 830 F.2d at 958.

165. *Id.*

166. *See generally Actmedia*, 830 F.2d 957.

167. *Id*. at 959.

168. *Id*. at 958.

169. *Id*.

170. *Id*.

171. *Actmedia*, 830 F.2d at 961 (alteration in original).

172. *Id*.

United States Constitution."[173] The claim was a direct First Amendment commercial speech attack on Section 25503(h) because it claimed that the ABC's enforcement action "directly infringed upon its rights to advertise products within retail stores."[174]

The court immediately recognized that it had to apply *Central Hudson's* four-prong test.[175] As with most commercial speech cases, the Ninth Circuit found the first two elements easily satisfied. First, the court held that Actmedia's advertisements "concern lawful activity and [are] not [] misleading."[176] Accordingly, Coors' advertisements through Actmedia "constitute protected commercial speech under the first amendment."[177]

But as is common in commercial speech analysis cases, the challenge boiled down to the third and fourth *Central Hudson* prongs.[178] That is, "whether [section 25503(h)] directly advances the government interests that it is asserted [to advance], and whether it is not more extensive than necessary to serve [those] interests."[179] The court first turned to the asserted interest: "The drafters believed that if manufacturers and wholesalers were permitted to gain influence through economic means over various retail establishments, they would inevitably attempt to use that influence to obtain preferential treatment for their products and either exclusions of or less favorable treatment for the brands of their competitors."[180]

The court noted that such "exclusive dealing" arrangements would lead to "the establishment of quotas for retailers and the need to justify the advertising fees they were being paid"[181] The court also looked to California's other tied-house laws and found that they also prohibited gifts and the buying of favor of retailers and noted that "[t]he concern that advertising payments could be used to conceal illegal payoffs to alcoholic beverage retailers appears to have been widely held at the time" California's tied-house laws were enacted.[182] The court further

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173. *Id*.

174. *Id*. at 965.

175. *Id*. (citing Zauderer v. Off. of Disciplinary Counsel, 471 U.S. 626 (1985)) (recognizing that "advertising pure and simple . . . falls within the bounds [of commercial speech]" and that "restrictions on advertising must be reviewed under the *Central Hudson* analysis").

176. *Actmedia*, 830 F.2d at 965.

177. *Id*.

178. *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 505 (1996); Rubin v. Coors Brewing Co., 514 U.S. 476, 490 (1995); Mo. Broadcasters Ass'n v. Schmitt, 946 F.3d 453, 461 (8th Cir. 2020).

179. *Actmedia*, 830 F.2d at 966 (alteration in original) (quoting Bolger v. Young Drug Products Corp., 463 U.S. 60, 69 (1983)).

180. *Id*.

181. *Id*.

182. *Id*. at 967.

stated that "we 'hesitate to disagree with the accumulated, commonsense judgments of [the] lawmakers' who originally enacted the provision or who have retained it in effect."[183]

The court held that the government satisfied *Central Hudson's* third prong because Section 25503(h) directly advanced the asserted interests above.[184] Without reference to evidence or statistics, the court reasoned that

> [b]ecause prohibiting alcoholic-beverage manufacturers and wholesalers from paying retailers to advertise in their stores will eliminate any danger that such payments will be used to conceal illegal payoffs and violations of the tied-house laws, we conclude that section 25503(h) furthers the same interests that led California to enact the tied-house laws.[185]

In other words, the court found that California's asserted interest in prohibiting commercial bribery, and thus vertical and horizontal integration, in the alcohol market is served by "flatly proscribing such payments."[186] But that is not all. The court also found that Section 25503(h) advanced California's temperance interests. "Moreover, in reducing the quantity of advertising that is seen in retail establishments selling alcoholic beverages, the provision also directly furthers California's interest in promoting temperance."[187] It is noteworthy that the court relied on "common sense" and reason in arriving at this conclusion, and that it did not charge the ABC to put on direct and substantial evidence supporting its assertions.

Finally, as to the last *Central Hudson* prong, the Ninth Circuit engaged in similar high-level reasoning to find that Section 25503(h) was narrowly drawn enough to survive the challenge. Regarding the integration concerns, the court recognized that those concerns could be addressed without Section 25503(h) "by careful policing of any advertis[ement] agreements . . . between retailers and manufacturers or wholesalers" but also recognized such a task is impossible for an agency like the ABC to undertake.[188] "Thus, section 25503(h)'s blanket prohibition of paid advertising in retail establishments appears to be as narrowly drawn as possible to effectuate California's first purpose."[189] Regarding temperance interests, the court held that "to the extent that the California legislature has determined that point-of-purchase advertising is a direct cause of excessive alcohol

183. *Id.* (alteration in original) (quoting Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 509 (1981)).

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

consumption, limiting that advertising is 'obviously the most direct and perhaps the only effective approach' available."[190] Lastly, the court went on to stress the "narrowness" of 25503(h)'s scope: "It prohibits only paid advertising in retail stores, not unpaid advertising in those stores or paid advertising anywhere else."[191]

Accordingly, the common prohibition on manufacturers and wholesalers paying retailers for advertising survived its first challenge under *Central Hudson*. The court's analysis, which may be considered government friendly, did not focus on proof or evidence that Section 25503(h) directly advanced the goals of prohibiting vertical and horizontal integration or temperance; instead, it took more of a consensus and history approach. Those times are likely behind us if these restrictions reach the Supreme Court.

B. Retail Digital Network: A Modern Challenge

Twenty-nine years after *Actmedia* upheld Section 25503 under the *Central Hudson* analysis, that very same section was under the constitutional microscope yet again.[192] This time, in light of *Sorrell's* potentially "heightened scrutiny" standard discussed above, the California craft beer community, and even smaller wholesalers unconnected to Big Beer, was petrified.[193] According to Tom McCormick, then Executive Director of the California Craft Brewers Association (the "CCBA"), the craft beer industry knew and understood that if Section 25503(h) failed, Big Beer inducements to retailers disguised as advertising payments would cripple small brewers who cannot afford to play that game and ultimately force them off of shelves and tap handles.[194]

1. The District Court Challenge

In facts similar to *Actmedia* in all but technology,[195] Retail Digital Network, LLC installed digital display advertisements in retail locations that sold alcohol and contracted with businesses seeking to use that medium to increase sales.[196] Retail Digital Network would then pay the retail outlet a percentage of the advertising fees generated by the display. Like Actmedia, Inc., Retail Digital Network failed to enter into contracts with alcoholic beverage manufacturers because those manufacturers believed the contracts violated California Business & Professions Code sections 25503(h)—the same statute upheld years

190. *Id*. (quoting *Metromedia, Inc.*, 453 U.S. at 508).

191. *Id*. at 968.

192. Retail Digit. Network, LLC v. Appelsmith, 945 F. Supp. 2d 1119, 1121 (C.D. Cal. 2013).

193. McCormick Interview, *supra* note 29.

194. McCormick Interview, *supra* note 29.

195. *Appelsmith*, 945 F. Supp. 2d at 1121.

196. *Id*.

earlier in *Actmedia*.[197] Retail Digital Network thus sued the Director of the California Alcoholic Beverage Control Board, seeking declaratory relief and an injunction enjoining the ABC and its agents from enforcing Section 25503.[198] Armed with *Sorrell's* language referencing "heightened scrutiny," Retail Digital Network argued that *Actmedia* was no longer binding because *Sorrell*'s intervening "heightened scrutiny" test rendered § 25503 unconstitutional as a content and speaker-based restriction.[199] More specifically, Retail Digital Network argued that because *Sorrell's* heightened scrutiny language is "clearly irreconcilable" with *Central Hudson's* intermediate scrutiny standard, the district court could not rely on *Actmedia*.[200]

The District Court for the Central District of California rejected Retail Digital Network's renewed attack on Section 25503 and expressly relied on *Actmedia's* application of the *Central Hudson* analysis.[201] Instead, the court decided that *Sorrell* was indeed consistent with the *Central Hudson* analysis used in *Actmedia*.[202] The court came to this conclusion by emphasizing that *Sorrell* actually adhered to *Central Hudson*: 1) *Sorrell* based its holding on cases that applied *Central Hudson* in its traditional form; 2) *Sorrell* applied *Central Hudson* despite the heightened scrutiny language in the *Sorrell* opinion; 3) the Supreme Court chose not to define heightened scrutiny; and 4) the dissent considered the heightened scrutiny language to be a forward-looking suggestion instead of a holding.[203]

To conclude, the court found that even if *Sorrell* did create a new heightened analysis, heightened scrutiny would not apply because Section 25503 was not a complete ban on speech.[204] Accordingly, the district court held that *Sorrell* was not "clearly irreconcilable" with the *Actmedia*—the controlling precedent in the Ninth Circuit.[205] The court thus granted the Director's motion for summary judgment without analyzing Section 25503 under the *Central Hudson* framework on the merits. The independent craft beer community breathed a sigh of short-lived relief.[206]

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197. *Id*.

198. *Id*. at 1120-21.

199. *Id*. at 1124.

200. *See* Miller v. Gammie, 335 F.3d 889, 900 (9th Cir. 2003) (only "[i]n . . . cases of such clear irreconcilability . . . district courts should consider themselves bound by the intervening higher authority and reject the prior opinion of [the Ninth Circuit]").

201. *Appelsmith*, 945 F. Supp. 2d at 1124-25.

202. *Id*. at 1125.

203. *Id*.

204. *Id*.

205. *Id*. at 1125-26.

206. McCormick Interview, *supra* note 29.

2. The Panel Opinion

The precarious nature of *Central Hudson's* traditional scrutiny, and thus, Section 25503(h), became obvious when Retail Digital Network appealed the district court's decision. A Ninth Circuit panel reversed the district court but not by means of a substantive *Central Hudson* merits analysis.[207] Instead, the three-judge panel held that *Sorrell*'s heightened scrutiny was "clearly irreconcilable" with *Central Hudson* and remanded the case to analyze Section 25503 with "heightened" scrutiny.[208]

In deciphering what the Supreme Court meant by heightened scrutiny, the panel looked to *Central Hudson* itself.[209] The court explained that "heightened judicial scrutiny may be applied using the familiar framework of the four-factor *Central Hudson* test," but the panel foresaw stricter third and fourth prongs.[210] According to the panel, the *Central Hudson* third prong became more demanding than what the Court applied in cases prior to *Sorrell*.[211] "[T]he 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.'"[212] This standard is stricter in degree than *Central Hudson's* traditional third prong in an evidentiary sense because the traditional prong only requires that the restriction "directly advance[] the governmental interest asserted."[213] And the fourth prong morphed into a two-part analysis that considers the actual legislative purpose of the law (not asserted

207. Retail Digital Network, LLC v. Appelsmith, 810 F.3d 658, 642 (9th Cir. 2016).

208. *Id.*

209. *Id.* at 648.

210. *Id.* at 648-49.

211. *Id.* at 648. The three-judge panel found that *Sorrell*'s "heightened scrutiny" language altered the third prong of the *Central Hudson* analysis: "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.* (quoting Rubin v. Coors Brewing Co., 514 U.S. 476, 487 (1995)). Prior iterations of the test merely required the government to show that the law "directly advances the governmental interest asserted." Cent. Hudson Gas v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).

212. *Appelsmith*, 810 F.3d at 648 (quoting Rubin v. Coors Brewing Co., 514 U.S. 476, 487 (1995)).

213. *Cent. Hudson Gas*, 447 U.S. at 566.

interests or post-hoc rationalizations);[214] then the new formulation considers whether the law is "drawn to achieve that interest."[215]

The court also all but stated that Section 25503 would not survive a constitutional challenge under what it viewed as *Sorrell's* potentially new standard.[216] Giving a nod to the temperance justification, the court noted that "[t]he broad goal of 'temperance' also remains 'a valid and important interest of the State under the Twenty-first Amendment.'"[217] But the court went on to express its view that temperance probably would not carry the day on remand, at least as positioned in this case: "we cannot say on the record before us that the State's Prohibition-era concern about advertising payments leading to vertical and horizontal integration, and thus leading to other social ills, remains an actual problem in need of solving."[218] The Court seems to have never worked in a retail establishment selling alcohol because if it had, it would immediately recognize that pay-to-play, and thus undue influence, is very common. In addition, regarding the fourth prong, the court pointed out that numerous exceptions to Section 25503(h)'s ban render the entire structure weak and "call[s] into doubt whether the statute" materially advances either the goal of temperance or an orderly marketplace free of commercial bribery.[219] The court thus remanded to the district court for it to apply the new and undefined heightened scrutiny that *Sorrell* allegedly adopted.[220]

The craft beer community was in full-blown panic mode.[221] Everyone in the community knew what this meant. Big Beer would now be allowed to legally pay for advertisements because it was quite clear that Section 25503 would not survive strict scrutiny—if that was the standard the three-judge panel adopted. Of course, what precisely the new standard entailed was nothing short of a mystery.

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214. The three-judge panel looked to an Arizona district court case to modify first step of the fourth *Central Hudson* prong, not *Sorrell*. Friendly House v. Whiting, 846 F. Supp. 2d 1053, 1057-58 (D. Ariz. 2012). The *Friendly House* court found that by using "drawn to achieve" an interest, the *Sorrell* court was changing the fourth prong that examines the history of the law to ascertain if it was specifically crafted to achieve the government's asserted interest. *Id.* at 1059-61 ("The fact that [the laws at issue] were created as part of a package of statutes . . . related to unlawful immigration also weighs against a finding that the provisions are 'drawn to' address a traffic problem.").

215. *Appelsmith*, 810 F.3d at 648-49. The modified second step of the fourth prong is also not found in *Sorrell*; this "narrowly tailored" requirement is a common formulation of the fourth prong that has been evolving over time in cases such as *Fox*. *Id.* (quoting Bd. of Trs. of State Univ. v. Fox, 492 U.S. 469, 480 (1989)). The fourth prong has previously looked to a reasonable and proportional fit in cases before *Sorrell*. *Bd. of Trs. of State Univ.*, 492 U.S. at 480. Similar to the modified third prong, this component of the fourth prong is not novel.

216. *Appelsmith*, 810 F.3d at 653.

217. *Id.* at 652.

218. *Id.*

219. *Id.* at 653.

220. *Id.* at 653-54.

221. McCormick Interview, *supra* note 29.

3. The Ninth Circuit En Banc: Reversing Course

Before the case got back to the district court for application of the new *Sorrell* standard, the Ninth Circuit stepped in and decided to review the three-judge panel *en banc*. In a two-part, in-depth analysis, the Ninth Circuit determined that *Sorrell* did not create a new standard to test commercial speech regulations, and thus *Actmedia's* analysis and holding under the traditional *Central Hudson* analysis controlled.[222] However, the Ninth Circuit also left a crack in the armor for Big Beer to exploit at a later date.

Retail Digital Network again strenuously argued that *Sorrell* created a new and heightened scrutiny for commercial speech regulations and thus Section 25503 must fail.[223] In response, the court initially pointed out that "[i]n the years that have followed [the *Central Hudson* opinion], the Supreme Court has engaged in considerable debate about the contours of First Amendment protection for commercial speech, and whether *Central Hudson* provides a sufficient standard."[224] But, the court stressed that "[w]hat the Supreme Court repeatedly has declined to do, however, is to fundamentally alter *Central Hudson's* intermediate scrutiny standard."[225]

The Ninth Circuit quickly pointed out that *Sorrell* used the term "heightened scrutiny" in analyzing the regulation in that case.[226] However, that reference was in response to the argument that the statute at issue did not concern commercial speech and instead was directed solely at "commerce, conduct, and access to information" and that rational basis review should therefore apply.[227] But that was nothing new: "There is nothing novel in *Sorrell's* use of the term 'heightened scrutiny' to distinguish from rational basis review . . . . Nor is *Sorrell* the first time the Court has referred to intermediate scrutiny as 'heightened' scrutiny."[228] After examining the cases that *Sorrell* relied on in arriving at its holding, the Ninth Circuit held, "We are therefore not persuaded by RDN's first argument that *Sorrell's* references to 'heightened scrutiny' mean something greater than intermediate scrutiny applies in commercial speech cases."[229]

Retail Digital Network's second argument was that *Actmedia* simply failed to properly apply the third and fourth prongs of the *Central Hudson* test.[230] Thus, the Court analyzed whether the state's

222. Retail Digit. Network v. Prieto, 861 F.3d 839, 849-50 (9th Cir. 2017).

223. *Id.* at 846.

224. *Id.* at 845 (citations omitted).

225. *Id.* at 846.

226. *Id.* at 847.

227. *Id.*

228. *Id.*

229. *Id.* at 848.

230. *Id.* at 850.

interests in an orderly marketplace in alcohol and temperance were substantial interests and whether Section 25503(h) materially advanced those interests.[231] Regarding the state's Twenty-first Amendment rights to create a three-tier system to promote an orderly marketplace, the court held as follows:

> To the extent that *Actmedia* upheld Section 25503(h) on the basis that it directly and materially advances the State's interest in maintaining a triple-tiered distribution scheme, we agree with the court's sound analysis. Furthermore, we concur that Section 25503(h) . . . serves the important and narrowly tailored function of preventing alcohol manufacturers and wholesalers from exerting undue and undetectable influence over retailers. Without such a provision, retailers and wholesalers could side-step the triple-tiered distribution scheme by concealing illicit payments under the guise of "advertising" payments. Although RDN argues that the numerous exceptions to Section 25503(f)-(h) undermine its purpose, RDN fails to recognize that the exceptions do not apply to the vast majority of retailers, and they therefore have a minimal effect on the overall scheme. This stands in stark contrast to cases in which conflicting regulations have rendered the regulatory scheme "irrational" or where the regulatory scheme is "so pierced by exemptions and inconsistencies" that it lacks "coherence."[232]

Thus, the Court reaffirmed Section 25503(h) for the second time and approved of *Actmedia's* analysis regarding market oversight. Like *Actmedia*, the *Retail Digital Network* case seemingly approved of the more government-friendly approach to the third and fourth prongs of *Central Hudson*. In other words, the Court accepted history and consensus as a basis for upholding Section 25503 instead of concrete and substantial evidentiary showings of direct advancement or that the harms are real and need to be addressed.[233]

But that is where the Ninth Circuit's approval of *Actmedia* ends. Recall that temperance is and has been a significant interest that states have relied on since Prohibition in regulating alcohol advertising.[234] This is where the Ninth Circuit has left the door open to challenges against tied-house restrictions in general and commercial speech regulations specifically.

> We do not, however, reach the same conclusion with respect to *Actmedia's* holding that section 25503(h) directly and materially advances California's interest in promoting temperance. *Even assuming that promoting temperance is a substantial interest*, *Actmedia* erroneously concluded that Section 25503(h) directly and materially advances that

231. *Id.* at 850-51.

232. *Id.* (citations omitted).

233. *But see id.* at 852 (Thomas, C.J, dissenting) ("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.").

234. Actmedia, Inc. v. Stroh, 830 F.2d 957, 960 (9th Cir. 1986).

> interest by "reducing the quantity of advertising that is seen in retail establishments selling alcoholic beverages. Section 25503(h) applies solely to advertising in retail establishments, which comprises a small portion of the alcoholic advertising visible to consumers. In addition, it prohibits only *paid* advertisements, and therefore, by its terms, does not reduce the quantity of advertisements whatsoever . . . We therefore disapprove of *Actmedia's* reliance on promoting temperance as a justification for Section 25503(h).[235]

The significance of the Ninth Circuit's rejection of temperance as a justification for burdening alcoholic beverage advertisements cannot be overstated. Most, if not all, states rely on temperance as an asserted interest in all of their tied-house restrictions—not just advertising regulations.[236] This holding thus provides further ammunition for Big Beer and those with similar interests to challenge tied-house laws and to argue for legalized pay-to-play.

Nonetheless, Section 25503(h) remains the law today in California, and large manufacturers still cannot use payments for advertisement to garner influence over retailers. But not all circuits agree with the Ninth Circuit.[237] The battle lines are drawn, and until the Supreme Court speaks to whether *Sorrell* modified the *Central Hudson* standard or clarifies how to apply *Central Hudson's* third and fourth prongs in light of the trend towards protecting commercial speech,[238] commercial speech regulations that prohibit a manufacturer from purchasing advertising space are in grave danger. And as a result, tied-house laws generally and independent brewers specifically are at risk in those jurisdictions.

VIII. THE EIGHTH CIRCUIT APPLIES A STRICTER INTERMEDIATE SCRUTINY TO TIED-HOUSE ADVERTISING RESTRICTIONS

The Eighth Circuit sees it differently; in fact, it sees alcoholic beverage advertising restrictions the same way the three-judge panel of the Ninth Circuit saw it.[239] In a landmark 2020 opinion, the Eighth Circuit struck down a Missouri statute and its attendant regulations that limited a manufacturer's ability to advertise its alcoholic beverages, laws that were substantively the same from a commercial speech viewpoint as those the Ninth Circuit upheld.

Unlike the Ninth Circuit in *Retail Digital Network*, the Eighth Circuit did not countenance the argument that *Sorrell* created a new and

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235. *Retail Digit. Network*, 861 F.3d at 851 (first emphasis added) (citations omitted).

236. *See, e.g.*, CAL. BUS. & PROF. CODE § 23001.

237. Mo. Broads. Ass'n v. Schmitt, 946 F.3d 453, 461-63 (8th Cir. 2020).

238. Adler, *supra* note 147, at 316.

239. *Mo. Broads. Ass'n*, 946 F.3d at 461-63.

heightened analysis.[240] Indeed, *Missouri Broadcasters* only mentions *Sorrell* once as support for the proposition that "[t]he First Amendment 'does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech.'"[241] Instead, the Eighth Circuit focused extensively on the third and fourth prongs of the *Central Hudson* test.

Missouri, like every other state in the nation, regulates the alcoholic beverage industry under its Twenty-first Amendment powers and includes a version of the three-tier system and its attendant tied-house laws.[242] Missouri's stated purpose of these laws is to "promote responsible consumption, combat illegal underage drinking, and achieve other important state policy goals such as maintaining an orderly marketplace composed of state-licensed alcohol producers, importers, distributors, and retailers."[243] Section 311.070.1 of the Missouri Liquor Control Law was directly at issue in this lawsuit, and it provides that

> brewers or their employees, officers or agents shall not, except as provided in this section directly or indirectly have any financial interest in the retail business for sale of intoxicating liquors, and shall not, except as provided in this section, directly or indirectly loan, give away or furnish equipment, money, credit or property of any kind, except ordinary credit for liquors sold to such retail dealers."[244]

Missouri has interpreted this statute to mean the same thing as California's Section 25503(h); that is, it prohibits manufacturers from paying for retail advertising because "this type of advertising would qualify as a 'financial interest in the retail business.'"[245] In addition, two Missouri tied-house regulations were front and center in the Eighth Circuit.[246] One prohibited retailers from advertising discounted prices for alcoholic beverages outside their establishment,[247] and the other prohibited retailers from advertising prices below the retailers' actual cost.[248] Thus, at its core, *Missouri Broadcasters* is substantively the same as *Retail Digital Network* and is concerned with the propriety of regulating commercial speech in the form of alcoholic beverage advertisements.

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240. *See generally id.*

241. *Id.* at 458.

242. *Id.* at 456.

243. MO. ANN. STAT. § 311.015 (West 2020).

244. MO. ANN. STAT. § 311.070(1) (West 2020).

245. *Mo. Broads. Ass'n*, 946 F.3d at 457.

246. MO. CODE REGS. ANN. tit. 11, § 70-2.240(5)(G) (2020); MO. CODE REGS. ANN. tit. 11, § 70.240(5)(I) (2020).

247. MO. CODE REGS. ANN. tit. 11, § 70-2.240(5)(G) (2020).

248. MO. CODE REGS. ANN. tit. 11, § 70.240(5)(I) (2020).

Similar to *Retail Digital Network*, Missouri argued three positions on appeal: (1) "the Statute does not implicate the First Amendment" because it regulates conduct and economic activity, not speech; (2) "even if the Statute implicates the First Amendment, it passes the *Central Hudson* test for commercial speech; and (3) the Regulations are also constitutional under *Central Hudson*."[249]

The court quickly rejected the argument that the statute and regulations do not restrict speech, "[t]he Statute imposes content-based restrictions by limiting what producers and distributors can say in their advertisements."[250] Further, the court held that the statute is also a speaker-based regulation because it allows retailers to say things that manufacturers cannot.[251] Thus while almost wholly ignoring *Sorrell*, beginning its analysis with a content and speaker analysis, unlike *Retail Digital Network*, reflects a departure from the traditional *Central Hudson* test and reflects the trend towards greater protection seen dramatically in *Sorrell* itself.[252] In relation to Missouri's constitutional guarantee of authority over alcohol, the court also reiterated that "the Twenty-first Amendment does not qualify the constitutional prohibition against laws abridging the freedom of speech embodied in the First Amendment."[253]

The court then accepted that Missouri has a "substantial interest in preventing producers and distributors from unduly influencing retailers" for the purpose of its *Central Hudson* analysis.[254] With respect to *Central Hudson's* third prong, that the restriction materially advance the state's substantial interest, the court phrased the test in more demanding terms than seen in *Actmedia* thirty-four years prior.[255] The Court held, "[t]his burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."[256] The court added that "Missouri must show that the Statute 'significantly reduces' the alleged harms."[257] What this

249. *Mo. Broads. Ass'n*, 946 F.3d at 458.

250. *Id*. at 459.

251. *Id*.

252. Sorrell v. IMS Health, Inc., 564 U.S. 552, 571 (2011) (discussing content and speaker based analyses.).

253. *Mo. Broads. Ass'n*, 946 F.3d at 459 (quoting 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 516 (1996)).

254. *Id*. at 460 (declining to rule on whether that interest is in fact substantial because "[w]e need not wade into this debate any further, however, because the Statute still fails to meet the third and fourth prongs of *Central Hudson*.").

255. *Mo. Broads. Ass'n*, 946 F.3d at 460; *but see* Actmedia, Inc. v. Stroh, 830 F.2d 957, 966 (9th Cir. 1986) (using the more lenient standard that the restriction "directly advances the government interests").

256. *Mo. Broads. Ass'n*, 946 F.3d at 460.

257. *Id*.

means, then, is that the Eighth Circuit has abandoned the "history and consensus" approach of earlier cases applying *Central Hudson*, including *Retail Digital Network*, and has moved with the trend towards a more demanding evidentiary standard to uphold commercial speech restrictions in the alcoholic beverage advertising context.

Against this tougher third prong, the Eighth Circuit had no problem finding the Missouri Statute and its attendant regulations unconstitutional. "Missouri fails to show how the Statute, as applied, alleviates to a significant degree the harm of undue influence. Missouri alleges that the Statute—as shown through 'consensus and history'—advances its interest because the three-tiered system prevents undue influence of alcohol producers and distributors over retailers."[258] But the court held that proof is required:

> Consensus and history, at best, speaks to an arguable need for a three-tiered system generally; they do not show how the Statute, as applied here, directly and materially advances Missouri's interest in preventing undue influence. Missouri has not demonstrated that the harm of undue influence is real or that the Statute alleviates this harm to a material degree.[259]

In short, in the Eighth Circuit's view, *Central Hudson's* third prong is a demanding evidentiary standard whereby the State must prove much more than history and consensus.[260] This movement is consistent with the Supreme Court's trend towards full First Amendment protection for commercial speech.[261]

In addition, the court pointed out that the several exceptions to the Missouri Statute rendered it "irrational and ineffective."[262] Specifically, the court took issue with the fact that a manufacturer cannot advertise a message, like "Drink Coors Light, now available at Joe's Bar" but the manufacturer could "give Joe's Bar a product display that advertises the exact same message, and Joe's Bar could use that product display however it wishes."[263] "A statutory framework with such advertising exemptions and inconsistencies renders the statute as applied ineffective in preventing undue influence in a 'direct and material way.'"[264]

Like the three-judge panel in *Retail Digital Network*, the *Missouri Broadcasters* court continued its demand for hard evidence with

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258. *Id*.

259. *Id*. at 461.

260. *Id*. at 461-63.

261. *See* Martin H. Redish, *Commercial Speech and the Values of Free Expression*, CATO INST. (June 19, 2017), https://www.cato.org/publications/policy-analysis/commercial-speech-values-free-expression [https://perma.cc/CNK6-DDTW].

262. *Mo. Broads. Ass'n*, 946 F.3d at 461-63.

263. *Id.*

264. *Id*.

respect to temperance, not just prohibiting vertical integration.[265] "As to the third prong, we agree with the district court that the State offered no empirical or statistical evidence, study, or expert opinion demonstrating how these regulations further protected the State's interest [in reducing alcohol consumption and underage drinking]."[266] Temperance, it seems, without hard evidence like studies, experts, and statistics, is doomed to fail as a justification for restrictions on alcoholic beverage advertising restrictions under *Central Hudson's* third prong regardless of the circuit hearing the case.

The Eight Circuit also applied a tougher fourth prong of *Central Hudson*. Recognizing that *Central Hudson* does not require a least restrictive means "conceivable" standard, the court nonetheless seemed to require something approaching that:

> Missouri provides no evidence that the Statute as applied is not more extensive than necessary to further its alleged interest in preventing undue influence. Instead, Missouri argues that the Statute does not target speech at all, but instead preserves all avenues of speech and simply regulates what activities licensed manufacturers and distributors can engage in with a retail licensee. But this argument goes to whether the Statute implicates speech, not whether the Statute is narrowly tailored to further this interest. Without more Missouri does not meet its burden for *Central Hudson's* fourth prong.[267]

Unlike *Retail Digital Network*, then, the Eighth Circuit seems to have accepted a heightened evidentiary standard to a near insurmountable level because there will almost always be some non-speech restrictive alternatives like, in the words of the court, "policing rather than banning inter-tier advertising arrangements, restoring the three-tier separation by removing other exceptions that do not affect free speech, monitoring wholesale and producer advertising and any cooperative advertising payments through a self-reporting system, or limiting non-advertising related financial incentives and assistance that could be provided to retailers."[268] Thus the court held that Missouri did not carry its burden of satisfying the fourth *Central Hudson* prong essentially because it was not narrow enough and alternatives exist.[269] As phrased and as applied by the court, that sounds a lot like traditional strict scrutiny.[270]

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265. *Id*. at 462-63.

266. *Mo. Broads. Ass'n*, 946 F.3d at 462.

267. *Id*. at 462.

268. *Id*.

269. *Id*.

270. *See* Reed v. Town of Gilbert Ariz., 576 U.S. 155, 163 (2015) ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.")

In summary, the Eighth Circuit and the Ninth Circuit agree that wholesale bans on manufacturers paying retailers for alcoholic beverage advertising cannot withstand intermediate scrutiny if predicated on the states' interests in promoting temperance.[271] Where they differ, and where the Supreme Court should clarify, is whether such prohibitions further the states' interest in minimizing and prohibiting retailers from becoming beholden to manufacturers through deceptive or disguised advertising payments when everyone knows they come with a reciprocal obligation. States who value this independence, essentially those who favor the cultural significance of independent craft breweries, must begin taking steps to ensure satisfaction of the *Central Hudson* third and fourth prongs. And while Justice Kavanaugh proclaimed that he loves beer in his confirmation hearings, the dissents in prior commercial speech cases and the general dissatisfaction among the Court with the *Central Hudson* test suggests that the Court, given its pro big business views and trend toward strict scrutiny, would very likely strike down most, if not all, alcoholic beverage advertising restrictions as they are currently written.

IX. STEPS STATE LEGISLATURES AND ALCOHOLIC BEVERAGE CONTROL AGENCIES SHOULD TAKE TO MAXIMIZE CHANCES OF SUCCESS AGAINST A FIRST AMENDMENT CHALLENGE TO TIED-HOUSE ADVERTISING RESTRICTIONS

The time has come for states and their alcoholic beverage agencies to re-evaluate and re-envision their tied-house laws, particularly with respect to legalizing pay-to-play schemes like allowing brewers to pay retailers for advertising. In light of the Supreme Court trend towards full protection for commercial speech, states must carefully consider their statutory and regulatory frameworks as they apply to tied-house laws. Supreme Court and circuit case law provides guidance on how states and regulatory agencies can bolster the chances of a given tied-house law surviving a First Amendment commercial speech challenge.[272]

A. The Twenty-first Amendment Will Not Insulate Alcohol-Based Commercial Speech Challenges From First Amendment Scrutiny

As an initial matter, states might be tempted to argue that the Twenty-first Amendment grants them unfettered control and

271. *Mo. Broads. Ass'n*, 946 F.3d at 457 (recognizing "responsible consumption" as a basis for the challenged laws); Retail Digit. Network v. Prieto, 861 F.3d 839, 850-51 (9th Cir. 2017) (disapproving of temperance as grounds to support alcohol advertising restrictions).

272. *See generally* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996); Rubin v. Coors Brewing Co., 514 U.S. 476, 476 (1995); *Mo. Broads. Ass'n*, 946 F.3d at 462-63; *Retail Digit. Network*, 861 F.3d at 849-50; Actmedia, Inc. v. Stroh, 830 F.2d 957 (9th Cir. 1986).

authority over alcohol regulation in their states. In other words, a state might argue that the Twenty-first Amendment provides "an added presumption [of] validity" to regulate alcoholic beverage advertising.[273] Not so.

At first glance, this argument appears to have some merit in light of *California v. LaRue*, where the Supreme Court used the Twenty-first Amendment to uphold California's ban of graphic sexual exhibitions in establishments licensed to sell alcoholic beverages at retail.[274] "Specifically, the opinion [*LaRue*] stated the Twenty-first Amendment required that the prohibition be given an added presumption in favor of its validity."[275] But noting that the Twenty-first Amendment does not diminish the protections of the Supremacy Clause, the Establishment Clause, or the Equal Protection Clause, the Court in *44 Liquormart* squarely rejected the notion that the Twenty-first Amendment provides any added protection for commercial speech bans: "[W]e now hold that the Twenty-first Amendment does not qualify the constitutional prohibition against laws abridging the freedom of speech embodied in the First Amendment."[276] Accordingly, states should not rely on their Twenty-first Amendment powers to argue that it provides added constitutional authority to regulate commercial speech.

Similarly, states might be tempted to argue that because the Twenty-first Amendment grants them the authority to prohibit alcohol manufacturing and sales in total, they should therefore have the ability to limit alcohol advertising.[277] But the Court has already foreclosed that argument in *44 Liquormart* when it rejected the "greater-includes-the-lesser" syllogism."[278] More specifically, the Court stated, "[i]n short, we reject the assumption that words are necessarily less vital to freedom than actions, or that logic somehow proves that the power to prohibit an activity is necessarily 'greater' than the power to suppress speech about it."[279]

Prior Supreme Court case law suggested that this approach might have some merit, suggesting that it is up to the legislature to choose suppression over a less speech-restrictive policy.[280] But the *44*

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273. *44 Liquormart, Inc.*, 517 U.S. at 491 (1996) (alteration in original) (quoting S & S Liquor Mart, Inc, v. Pastore, 497 A.2d 729, 732 (R.I. 1985)).

274. California v. LaRue, 409 U.S. 109, 118-19 (1972).

275. *44 Liquormart, Inc.*, 517 U.S. at 515.

276. *Id.* at 516.

277. *See* United States v. Edge Broad., Co., 509 U.S. 419, 428 (1993); Posadas de P. R. Assocs. v. Tourism of P.R., 478 U.S. 328, 345-46 (1986) (abrogated by *44 Liquormart, Inc.*, 517 U.S. at 508.

278. *44 Liquormart, Inc.*, 517 U.S. at 511; Jacobs, *supra* note 51, at 1086.

279. *44 Liquormart, Inc.*, 517 U.S. at 511 (1996).

280. *See Posadas de Puerto Rico Assocs.*, 478 U.S. at 345-46 ("the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of

Liquormart Court overturned the reasoning of those cases.[281] The lesson, therefore, is that the Twenty-first Amendment will not save statutes or regulations that ban truthful commercial speech, and the Twenty-first Amendment powers to fully regulate alcohol, while great, do not include the "lesser" power to ban its truthful advertising.

B. States Must Wisely Choose the Asserted Interest Behind the Restriction to Survive a First-Amendment Challenge

It is clear that the Supreme Court, and thus the circuit courts will not countenance post-hoc rationalizations[282] but instead will look specifically to the asserted purpose behind the advertising restriction—the motivating factor at the time the law was passed.[283] Between the two primary purposes behind tied-house laws and alcohol advertising restrictions, prohibition of vertical integration and promotion of temperance,[284] temperance appears to be the weaker of the two.

Temperance as a justification for alcohol advertising restrictions is on shaky ground.[285] While most courts that have considered whether reducing alcohol consumption is a substantial interest of the state have indeed found that it likely is a substantial interest,[286] support for that position seems to be waning even in courts applying a more lenient intermediate scrutiny.[287] More specifically, the Ninth Circuit strongly hinted at its view that temperance is no longer, or never was, a sufficient interest to withstand constitutional scrutiny for commercial speech restrictions.[288] After upholding Section 25503(h) based on California's interest in maintaining the three-tier system, the court held that *Actmedia's* reliance on temperance was misguided, "[e]ven assuming that promoting temperance is a substantial interest."[289]

Instead, states should assert that the substantial interest is in prohibiting vertical integration and undue influence, with a focus on the

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casino gambling"); *see also Edge Broad., Co.*, 509 U.S. at 425 (government arguing that the power to prohibit vices in total includes the lesser power to regulate advertisement of such vices).

281. *44 Liquormart, Inc.*, 517 U.S. at 508 (rejecting *Posadas's* greater includes the lesser reasoning).

282. Sorrell v. v. IMS Health, Inc., 564 U.S. 552, 573-75 (2011).

283. Rubin v. Coors Brewing Co., 514 U.S. 476, 488 (questioning the asserted purpose: "if combating strength wars were the goal, we would assume that Congress would regulate disclosure of alcohol content for the strongest beverages as well as for the weakest ones"); *see Sorrell*, 564 U.S. at 573-75 (requiring purposive inquiry into the restrictive statute).

284. Actmedia, Inc. v. Stroh, 830 F.2d 957, 960 (9th Cir. 1986).

285. Retail Digit. Network, LLC v. Prieto, 861 F.3d 839, 841-42 (9th Cir. 2017) (disapproving of *Actmedia's* reliance on temperance as a justification for Section 25503(h)).

286. *See 44 Liquormart*, 517 U.S. at 506; *Rubin*, 514 U.S. at 491; *Retail Digit. Network*, 861 F.3d at 851.

287. *Retail Digit. Network*, 861 F.3d at 848, 851.

288. *Id.* at 851.

289. *Id.*

benefits to consumers. In other words, the Supreme Court and circuit courts have looked less harshly on restrictions that are consumer focused, rather than those that simply seek to keep the consuming public in the dark.[290] Specifically, the Court noted in *44 Liquormart* that its commercial speech jurisprudence allows governments to "restrict some forms of aggressive sales practices that have the potential to exert 'undue influence' over consumers."[291] Thus, there appears to be a fine line that states and regulators need to tread:

> When a State regulates commercial messages to *protect consumers* from misleading, deceptive, or *aggressive sales practices*, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review. However, when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages *for reasons unrelated to the preservation of a fair bargaining process*, there is far less reason to depart from the rigorous review that the First Amendment generally demands.[292]

In sum, states and regulatory agencies should be careful to note in their statutes, regulations, or legislative history that the primary purpose for the tied-house restrictions is the states' interest in promoting an orderly alcoholic beverage marketplace and prohibiting vertical integration for the benefit of consumers rather than suppression of a message the state does not like. Secondarily, temperance might still be viable as a substantial interest, but the safer route[293] is to rely on market conditions as the asserted interest.

C. States Must Marshall Evidence That Advertising Restrictions Directly Advance Their Interest in Prohibiting Vertical Integration

It is clear that states will need substantial evidence to show that alcoholic beverage advertising restrictions directly and materially advance the asserted interest in prohibiting vertical integration and undue influence over retailers.[294] Returning to *Rubin v. Coors*, the Court was clear that the "burden 'is not satisfied by mere speculation or

290. *See* Bates v. State Bar of Ariz., 433 U.S. 350, 366 (1977) (noting that government may restrict aggressive sales practices that can exert undue influence over consumers).

291. *44 Liquormart*, 517 U.S. at 498.

292. *44 Liquormart*, 517 U.S. at 501 (1996) (emphases added); *see also id.* at 502-03 (recognizing that "bans that target truthful, nonmisleading commercial messages rarely protect consumers from such harms").

293. *See 44 Liquormart*, 517 U.S. at 505; *Rubin* v. Coors Brewing Co., 514 U.S. at 491 ("To be sure, the Government's interest in combating strength wars remains a valid goal.").

294. *44 Liquormart*, 517 U.S. at 506 ("However, without any findings of fact, or indeed any evidentiary support whatsoever, we cannot agree with the assertion that the price advertising ban will significantly advance the State's interest"); *Rubin*, 514 U.S. at 487 (rejecting government's attempt to "meet its burden by pointing to current developments in the consumer market" concerning beer strength wars).

conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that *the harms it recites are real and that its restriction will in fact alleviate them to a material degree*.'"[295] In response to the government's evidence, the Court noted,

> The Government's brief submits anecdotal evidence and educated guesses to suggest that competition on the basis of alcohol content is occurring today and that § 205(e)(2)'s ban has constrained strength wars that otherwise would burst out of control. These various tidbits, however, cannot overcome the irrationality of the regulatory scheme and the weight of the record.[296]

Thus, states must become armed with substantial, direct evidence that their regulations directly advance the asserted interest.

However, satisfying this evidentiary standard is truly a difficult task because tied-house laws have generally been on the books since Prohibition.[297] In other words, the prohibited conduct has been illegal for decades, so it will be a challenge to show that without such restrictions, Big Beer would behave in a way that has been restricted for so long.

Because consensus and history arguments and commonsense justifications are likely to fail under the modern intermediate scrutiny analysis,[298] states will have to use expert testimony to prove that without restrictions on payments for advertising, Big Beer would attempt to assert improper influence over retailers.[299] Industry experts will have to testify that Big Beer and its agents commonly engage in pay-to-play tactics without regard to legality, as noted in Section II.[300] Further, they will have to show that advertising restrictions directly advance the goal of controlling deceptive payments intended to achieve influence instead of true payments for advertising.

In a seemingly preemptive fashion, the Iowa legislature recently conducted a full-study of the efficacy of its tied-house laws through its Alcoholic Beverages Division.[301] The study, which is detailed and

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295. *Rubin*, 514 U.S. at 487 (emphasis added) (quoting Edenfeld v. Fane, 507 U.S. 761, 770-71 (1993)).

296. *Rubin*, 514 U.S. at 490.

297. *See Actmedia*, 830 F.2d at 959 (noting that tied-house laws were "enacted in 1935, shortly after the repeal of the eighteenth amendment").

298. *44 Liquormart*, 517 U.S. at 505; *Rubin*, 514 U.S. at 487-90; *Mo. Broadcasters Ass'n*, 946 F.3d at 460-61.

299. *See 44 Liquormart*, 517 U.S. at 508 (considering expert witness testimony).

300. PINTS BEVERAGE ADVISORS, http://www.pintsllc.com [https://perma.cc/L6BY-TZEE] (noting that Kimberly A. Clements of Pints LLC provides expert witness services to the beer industry in particular); *see supra* Part II.

301. *See generally* STATE OF IOWA ALCOHOLIC BEVERAGES DIV., ALCOHOLIC BEVERAGE CONTROL STUDY (July 1, 2018), https://www.legis.iowa.gov/docs/publications/DF/967633.pdf [https://perma.cc/GG8G-88K4].

complex, lays out the bases for tied-house restrictions, compares Iowa law to that of many other states, and provides conclusions for the Iowa Legislature to consider regarding its Alcohol Control Law.[302] Indeed, the Administrator of the Alcoholic Beverages Division clearly stated that the purpose of the study "is to provide [the Iowa Legislature] with relevant information to help you better understand the complex—but important—system of laws *meant to protect the independence of the individual tiers within the three-tier system*, often referred to as 'tied house' laws."[303] In addition, the study concludes that the three-tier system has furthered that goal:

> The aggressive retail sales focus of the manufacturer-owned saloon, which arguably brought about Prohibition, promoted over-consumption *to the detriment of the consumer* in specific and society in general. The three-tier system has been credited with the additional benefits of an orderly marketplace, a level playing field, product availability, [and] safer products [among other interests].[304]

As Iowa has seemingly done, states need to gather as much evidence as they can to show that commercial speech restrictions in the alcoholic beverage industry in general, and the beer market specifically, directly advance goals that ultimately protect consumers.

D. States Must Review the Structure of Their Tied House Laws to Minimize Inconsistencies and Exceptions

Several courts have found that logical inconsistencies and numerous exceptions to tied-house restrictions on advertising are grounds to find that a given restriction does not advance the state's interest.[305] Specifically, *Rubin* and *Missouri Broadcasters* struck down, at least in substantial part, commercial speech restrictions because the relevant regulatory schemes were seemingly inconsistent and illogical due to exceptions in the regulatory scheme.[306] More specifically, *Missouri Broadcasters'* court noted that "the Statute's operation and attendant regulatory regime are 'so pierced by exemptions and inconsistencies' that they render the Statute as applied irrational and ineffective."[307] Further, the Supreme Court in *Rubin* held that "[t]here is little chance

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302. *See generally id.*

303. *See generally id.*

304. *See generally id.*

305. Rubin v. Coors Brewing Co., 514 U.S. 476, 489 (1995); Mo. Broads. Ass'n v. Schmitt, 946 F.3d 453, 461 (8th Cir. 2020); *but see* Retail Digital Network, LLC v. Prieto, 861 F.3d 839, 850-51 (9th Cir. 2017) (finding that California's tied-house exceptions do not undermine Section 25503(h)).

306. *Rubin*, 514 U.S. at 489; *Mo. Broads. Ass'n*, 946 F.3d at 461; *but see Retail Digital Network*, 861 F.3d at 850-51 (finding that California's tied-house exceptions do not undermine Section 25503(h)).

307. *Mo. Broads. Ass'n*, 946 F.3d at 461 (quoting Greater New Orleans Broad. Ass'n, Inc. v. United States, 527 U.S. 173, 190 (1999)).

that [the FAAA's ban on alcohol content advertising] can directly and materially advance its aim, while other provisions of the same Act directly undermine and counteract its effects."[308] Accordingly, states must review their tied-house laws to eliminate such glaring inconsistencies that could undermine the states' substantial interests.

As but one example, California has a myriad of tied-house exceptions that seemingly do nothing but further Big Beer's interests while at the same time making the regulatory foundation unstable.[309] For example, the California Business & Professions Code generally prohibits manufacturers from purchasing advertising space from retailers but there are several exceptions.[310] To illustrate, California Business and Professions Code section 25503.23 provides that "a beer manufacturer . . . may purchase advertising space and time from, or on behalf of, an on-sale retail licensee who is the owner of a stadium with a seating capacity in excess of 3,000 seats during the use of the stadium for an annual water ski show."[311] Similar exceptions exist for sporting arenas, which is why large manufacturers frequently pay for advertising at professional sports events and concerts.[312]

Obviously, these exceptions exist because of one thing: Big Beer's lobbying efforts to continuously erode tied-house laws.[313] But they serve no other purpose. Accordingly, states should carefully review the tied-house restrictions on their books to ensure a logical system supports the states' asserted interests and repeal those that stand out as inconsistent or illogical. The less exceptions, the greater the likelihood that a prohibition on manufacturers paying retailers for advertising will survive.

CONCLUSION

The truth, if one cares to look, is that pay-to-play tactics are extremely harmful to independent craft breweries.[314] Indeed, the practice is so common that unscrupulous bar or restaurant managers will often "start bidding wars between wholesalers."[315] Of course, only the largest

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308. *Rubin*, 514 U.S. at 489.

309. Gerhart, *supra* note 73, at 33-43.

310. *See* CAL. BUS. & PROF. CODE §§ 25503.6, 25503.8, 25503.23, 25503.26 (West 2020) (creating fact-specific scenarios where manufacturers can sponsor or publicly advertise at retail locations).

311. CAL. BUS. & PROF. CODE § 25503.23 (West 2020).

312. *Id.* § 25503.6.

313. McCormick Interview, *supra* note 29.

314. Tara Nurin, *The Pay-To-Play Scandal in the Beer Biz: How Far it Goes, Nobody Knows*, FORBES (Mar. 31, 2016) ("A lot of bar owners have got their hands out because they know there are too many brands."), https://www.forbes.com/sites/taranurin/2016/03/31/the-pay-to-play-scandal-in-the-beer-biz-how-far-it-goes-nobody-knows/?sh=4bc88642b0d5 [https://perma.cc/JP5W-92J6].

315. *Id.*

and wealthiest breweries can play that game or seem to have the willingness to act in such a blatantly illegal manner.

Making it legal for manufacturers and wholesalers to pay retailers for "advertising" when everyone knows that such payments are to gain influence over the retailer would do nothing more than make pay-to-play legal across the board. Further, state regulatory bodies are simply not equipped in terms of personnel or funding to determine whether a given payment was for advertising space or something more nefarious.[316] In light of a Supreme Court with decidedly strong leanings towards full First-Amendment protection for commercial speech, states must bolster their restrictions to conform with a higher scrutiny than *Central Hudson* contemplated. To do so, states must directly state that their asserted interest in prohibiting payment for advertising is one of commercial and consumer concern, not temperance. Further, wholesale bans are less likely to withstand a constitutional challenge; thus, prohibitions should be as narrowly drawn as possible. One example is California. In that state, not all advertising in retail outlets is banned; rather, only paying a retailer for advertising is banned.[317] Within limitations, manufacturers and retailers are allowed to give retailers various advertising materials.[318] Lastly, states must review their tied-house laws. Like the game Jenga®, too many exceptions to the tied-house structure will cause it to fall.[319] Thus, states should minimize exceptions to prevent the absurdity that can result from Big Beer's whittling away at tied-house laws over time.

The U.S. seems to love craft beer. Unless we want to return to the days of only being able to find bland and uninteresting beer, manufactured and advertised purely for corporate profit, legislatures and regulators must take preemptive action for their tied-house restrictions on advertising to survive a modern commercial speech challenge. Without such action, it is quite likely that a Supreme Court challenge will further erode an important component of tied-house laws and thus, in that sense, arm Goliath.

316. *See* Pomeroy & Speed, *supra* note 57 (noting that Massachusetts had only 14 investigators at the time of the article).

317. CAL. BUS. & PROF. CODE § 25503(h) (West 2020).

318. *See* 4 CAL. CODE REGS. tit. § 106 (allowing manufacturers and wholesalers to give retailers certain advertising specialties and related materials).

319. *See Mo. Broads. Ass'n*, 946 F.3d at 461.