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Don't Tell Me What to Say: How AB 1541 Impacts the Freedom of Speech in Beer Distribution Contracts

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Don't Tell Me What to Say: How AB 1541 Impacts the Freedom of Speech in Beer Distribution Contracts

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I. INTRODUCTION

After enduring years of a distributor selling out-of-date beer and failing to meet sales goals, Brooklyn Brewery tried to escape its distribution contract.[1] The contract stated the popular craft brewer could terminate the contract without cause, but the process was not so simple.[2] The distributor took the brewer to court and argued New York's beer franchise law superseded the contract's termination language and prevented the brewer from leaving the contract.[3] Brooklyn Brewery won the lawsuit, but had to pay the distributor over $300,000 to terminate the contract.[4]

Craft brewers struggling to terminate beer distribution contracts is not unique to the State of New York.[5] Nationwide, distributors are consolidating and exerting greater pressure on state legislatures to enact beer franchise laws.[6] Beer franchise laws impose rigid, one-sided restrictions on manufacturer termination, even if a distribution contract allows the manufacturer to terminate or the distributor refuses to buy beer.[7] The typical beer franchise law also makes any beer shipment to a distributor a franchise agreement and limits a brewer's ability to terminate that agreement.[8] As a result of beer franchise laws, craft brewers have difficulty

1. *See* Steve Hindy, *Free Craft Beer!*, N.Y. TIMES (Mar. 29, 2014), https://www.nytimes.com/2014/03/30/opinion/sunday/free-craft-beer.html (on file with the *University of the Pacific Law Review*) (discussing Brooklyn Brewery's legal challenges and settlement in terminating a distribution contract).

2. *Id.*; *see generally Craft Brewer Definition*, BREWERS ASSOCIATION (2018), https://www.brewersassociation.org/statistics-and-data/craft-brewer-definition/ (on file with the *University of the Pacific Law Review*) (defining a craft brewer as small with an annual production of under 6,000,000 barrels of beer and independent with less than twenty-five percent of the brewery owned by a non-craft brewer alcohol industry member).

3. Hindy, *supra* note 1.

4. *Id.*

5. *See, e.g.*, Thom Vogelhuber, *Dogfish Head v. Glunz; No Settlement in Sight,* GUYS DRINKING BEER (Nov. 19, 2012), http://www.guysdrinking beer.com/glunz-v-dogfish-head-no-settlement-in-sight (on file with the *University of the Pacific Law Review*) (reporting on a legal battle between Dogfish Head Brewing and an Illinois distributor on contract termination rights).

6. *See, e.g.*, Kate Bernot, *Stuck in the Middle with Who?, Pt. 1 — What Reyes' Massive California Footprint Means for the State's Beer Landscape*, GOOD BEER HUNTING (Mar. 4, 2020), https://www.goodbeerhunting.com/sightlines/3/4/what-reyes-massive-california-footprint-means-for-the-states-beer-landscape (on file with the *University of the Pacific Law Review*) (reporting on the effects of distributor consolidation in California and mentioning the "nationwide reality of distributor consolidation"). *See generally* MARC E. SORINI, BEER FRANCHISE LAW SUMMARY 1–4 (2014), *available at* https://www.brewersassociation.org/wp-content/uploads/2015/06/Beer-Franchise-Law-Summary.pdf (on file with the *University of the Pacific Law Review*) (listing all states' beer franchise laws).

7. *See generally* CAL. BUS. & PROF. CODE §§ 25000.2–25000.9 (West 2020) (outlining mandatory contract terms for distribution territory, transfer and termination, and dispute resolution); *see* Kate Bernot, *Stuck in the Middle with Who?, Pt. 2 — What California's Distribution Consolidation Could Mean for Breweries*, GOOD BEER HUNTING (Mar. 5, 2020), https://www.goodbeerhunting.com/sightlines/3/5/what-californias-distribution-consolidation-could-mean-for-breweries (on file with the *University of the Pacific Law Review*) (discussing how distributors can refuse to buy beer).

8. *See* SORINI, *supra* note 6 (outlining the typical beer franchise laws, including termination limits, notice requirements, and informal agreements); *see also Craft Distribution Contracts*, BEER AND LAW (May 18, 2016),

terminating distribution contracts.[9]

AB 1541 would have established a more stringent beer franchise law than current California law, limiting a brewer's termination of distribution contracts to "good cause."[10] This legislation would have intruded into the brewer–distributor relationship by indefinitely binding brewers to distributors through distribution contracts containing good cause requirements that brewers do not want.[11] Beer franchise laws impose strict contractual terms that may unconstitutionally compel speech and violate the freedom of contract principles that courts routinely enforce.[12] Since contracts are a form of speech, it is plausible to infer freedom of contract principles from the First Amendment.[13] AB 1541 would have forced contract terms that only one party wants—substituting the terms both parties freely agreed to—in violation of the First Amendment and freedom of contract.[14]

Rather than addressing disparities in beer franchise law, AB 1541 would have locked brewers into nearly interminable contractual relationships.[15] AB 1541 would have trapped brewers into distribution contracts regardless of contractual

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http://www.beerandlaw.com/blog/craft-beer-distribution-contracts-myths-mistakes (on file with the *University of the Pacific Law Review*) ("Under some states' beer franchise laws, merely sending beer to a distributor for sale . . . locks that brewery into the distributor without an ability to terminate the 'contract.'").

9. *See, e.g.*, Letter from Maureen K. Ohlhausen, Director, Federal Trade Commission, et al., to Wesley Chesbro, Senator, Cal. State Senate (Aug. 24, 2005) (articulating that a proposal to prohibit a brewer from terminating a distribution contract except for "good cause" would effectively limit all brewer terminations by causing "substantial legal costs to switch wholesalers . . . even in circumstances where a wholesaler breached" the contract).

10. *See* AB 1541, 2019 Leg., 2019–2020 Sess. (Cal. 2019) (as amended on July 11, 2019, but not enacted) (requiring a brewer terminating with "good cause" to provide: evidence of the distributor's breach of the contract's reasonable terms, written notice of the distributor's failure to comply with the contract, and time to present a corrective action plan and cure the violation).

11. *See, e.g.*, Howard Weiss-Tisman, *Craft Brewers and Distributors Both Bitter over Updated Franchise Bill*, VT. PUB. RADIO (Apr. 30, 2018), https://www.vpr.org/post/craft-brewers-and-distributors-both-bitter-over-updated-franchise-bill (on file with the *University of the Pacific Law Review*) (discussing how craft brewers dislike beer franchise laws because they lock brewers into distribution contracts that limit brewers' "control over the future of their companies"); *see also* David Keith, *Massachusetts Franchise Law Reform is Top Priority for New Guild President in 2020*, ABSOLUTE BEER (Feb. 20, 2020), https://absolutebeer.com/news/massachusetts-franchise-law-reform-is-priority-for-new-guild-president-in-2020/ (on file with the *University of the Pacific Law Review*) (explaining that craft brewers oppose beer franchise laws because the limits on termination "leave [brewers] in limbo").

12. AB 1541, 2019 Leg., 2019–2020 Sess. (Cal. 2019) (as amended on July 11, 2019, but not enacted); *accord* Am. Int'l Specialty Lines Ins. Co. v. Res-Care Inc., 529 F.3d 649, 662 (5th Cir. 2008) (recognizing the strong judicial preference for freedom of contract); *see* Pac. Gas & Elec. Co. v. Pub. Util. Comm'n, 475 U.S. 1, 16 (1986) (holding that commercial entities have a protected right not to "propound political messages with which they disagree"); *see, e.g.*, Ogden v. Saunders, 25 U.S. 213, 222 (1827) ("[the obligation of contracts] springs from a higher source: from these great principles of universal law, which are binding on societies of men as well as on individuals."); *see also* Adkins v. Children's Hosp., 261 U.S. 525, 546 (1923) (explaining that freedom of contract is not absolute, but is "the general rule and restraint the exception . . . .").

13. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1975) (citing Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 385 (1973)) (protecting speech "propos[ing] a commercial transaction").

14. *See generally* AB 1541, 2019 Leg., 2019–2020 Sess. (Cal. 2019) (as amended on July 11, 2019, but not enacted) (recognizing prior contracts between beer manufacturers and distributors are unenforceable).

15. *See id.* (stating brewers can only terminate for good cause and have the burden of proof).

provisions they freely negotiated to protect themselves from distributors.[16] By requiring manufacturers of all sizes to remain in distribution contracts, AB 1541 would have hurt craft brewers, compelled speech in those contracts, and violated the First Amendment.[17]

II. LEGAL BACKGROUND

Recently, California legislators intervened in beer distribution contracts by passing beer franchise laws.[18] Meanwhile, the Supreme Court of the United States has expanded commercial speech jurisprudence to protect speech in economic activity.[19] Section A examines California's existing beer franchise law.[20] Section B discusses contracts and speech.[21] Section C outlines the Court's commercial speech jurisprudence, compelled speech jurisprudence, and judicial review standards in free speech cases.[22]

A. California Laws on Beer Distribution Agreements

While California has some of the most favorable alcohol laws for craft brewers, the Legislature has recently implemented laws providing more protection to beer distributors.[23] Subsection 1 provides a primer on tied-house laws in

16. *See id.* (limiting the circumstances under which a brewer may terminate a distribution contract, regardless of any contract provisions to the contrary).

17. *See Pac. Gas & Elec.*, 475 U.S. at 16 (holding that compelled speech violates the First Amendment); *see also* Sorrell v. IMS Health Inc., 564 U.S. 552, 565–66 (2011) (implying some commercial speech deserves greater protection than it traditionally receives).

18. *See generally* CAL. BUS. & PROF. CODE §§ 25000.2–25000.9 (West 2020) (establishing California's first beer franchise law with required terms regarding distribution territory, contract transfer and termination, and dispute resolution).

19. *See Sorrell*, 564 U.S. at 563–66 (stating "heightened scrutiny" should apply to content-based commercial speech restrictions and suggesting that this standard was strict scrutiny); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 562–64 (1980) (establishing intermediate scrutiny as the standard for commercial speech).

20. *Infra* Section II.A.

21. *Infra* Section II.B.

22. *Infra* Section II.C.

23. *See* Evan Pitchford, *Relationships Between Producers, Wholesalers, and Retailers: Beer Distribution and Franchise Laws in California (Part 2)*, CONKLE, KREMER & ENGEL (Nov. 16, 2017), https://www.conklelaw.com/relationships-between-producers-wholesalers-and-retailers-beer-distribution-and-franchise-laws-in-california-part-2 (on file with the *University of the Pacific Law Review*) ("California's beer franchise laws are some of the most accommodating in the country, because California allows the distribution agreement itself to control most of the important terms and dealings between the brewer and the wholesaler."); *see, e.g.*, AB 1541, 2019 Leg., 2019–2020 Sess. (Cal. 2019) (as amended on July 11, 2019, but not enacted) (proposing a good cause requirement for brewers in California's beer franchise law in 2019); *see also* Letter from Maureen K. Ohlhausen et al., to Wesley Chesbro, *supra* note 9 (advocating against a potential 2005 amendment to add a good cause requirement to California's beer franchise law because it would harm small craft brewers, reduce competition, and raise beer prices for the consumer). *See generally* CAL. BUS. & PROF. CODE §§ 25000.2–25000.9 (West 2020) (instituting California's beer franchise law in 2000).

California.[24] Subsection 2 discusses California's current beer franchise law.[25]

1. California's Tied-House Laws

California divides the beer industry into three tiers—manufacturing, distribution, and retail.[26] Manufacturers brew beer and either sell it in their taprooms, directly distribute it to retailers, or contract with a distributor that sells it to retailers.[27] A distribution contract is essential to a craft brewer's growth if it lacks the capital to scale up self-distribution beyond its local region.[28] State law separates the three tiers to prevent unfair competition by prohibiting manufacturers from owning or influencing the other tiers.[29] If manufacturers could integrate or influence a second tier (i.e., a retailer), they would decrease competition, reduce consumer choice, and raise beer prices.[30] Because of these restrictions, a brewer must enter into a distribution contract to expand beyond its taproom and self-distribution to local retailers.[31]

2. Current California Beer Franchise Law

Freedom of contract principles governed the brewer–distributor relationship for sixty-seven years until 2000 when the California Legislature enacted Senate Bill (SB) 1957.[32] The California Beer and Beverage Distributors sponsored SB 1957 to address disparities between manufacturers and distributors—large

24. *Infra* Subsection II.A.1.

25. *Infra* Subsection II.A.2.

26. Thomas A. Gerhart, *Undermining the Law: How Uninformed Legislating Helps Big Beer Erode California's Tied-House Laws*, 51 U. PAC. L. REV. 25, 30 (2019).

27. Evan Pitchford, *Producer, Wholesaler and Retailer Relationships: Beer Distribution and Franchise Laws in California (Part 1)*, CONKLE, KREMER & ENGEL (Sept. 10, 2017), http://www.conklelaw.com/producer-wholesaler-and-retailer-relationships-beer-distribution-and-franchise-laws-in-california-part-1 (on file with the *University of the Pacific Law Review*).

28. *See* BEER AND LAW, *supra* note 8 (mentioning how craft brewers "inevitably" enter into distribution contracts); Pitchford, *supra* note 23 ("As a brand increases in local popularity and the beer producer wants to expand its footprint and accelerate its competition . . . outside its home region, usually the producer will choose to enter into a distribution agreement."); *see also* Kary Shumway, *Brewbound Voices: Deconstructing Self-Distribution (Part I)*, BREWBOUND (July 3, 2017, 3:14 PM), https://www.brewbound.com/news/brewbound-voices-deconstructing-self-distribution-part (on file with the *University of the Pacific Law Review*) (observing the high barrier to entry in self-distribution and that successful self-distributing craft brewers operate locally).

29. Gerhart, *supra* note 26, at 30–31.

30. *See* Cal. Beer Wholesalers Ass'n v. Alcoholic Beverage Control Appeals Bd., 5 Cal. 3d 402, 408 (1971) (en banc) ("By enacting prohibitions against 'tied-house' arrangements, state legislatures aimed to prevent . . . large firms [from dominating] local markets through vertical and horizontal integration."); *see also* Allied Properties v. Dept. of Alcoholic Beverage Control, 53 Cal. 2d 141, 148 (1959) (en banc) (upholding tied-house laws because "the public will be adequately protected against excessive prices").

31. CAL. BUS. & PROF. CODE § 23357 (West 2020); CAL. BUS. & PROF. CODE § 25500 (West 2020).

32. *Compare* 1933 Cal. Stat. ch. 658, §§ 1–3, 39 at 1697–98, 1707 (establishing the first alcohol laws in California since Prohibition), *with* CAL. BUS. & PROF. CODE § 25000.7 (West 2020) (enacting California's first beer franchise law).

manufacturers pressured distributors into one-sided contracts that manufacturers could freely terminate.[33] SB 1957 prohibited a manufacturer's termination of a beer distribution contract for a distributor's failure to meet an unreasonable sales goal.[34]

The Legislature intended SB 1957 to reduce distributor loses by limiting brewers' ability to terminate distribution contracts.[35] However, large manufacturers ignore the law and continue to freely terminate agreements by leveraging their superior resources.[36] Ultimately, the distribution lobby is dissatisfied and has attempted to change the law for years.[37]

B. Contracts and Speech

The fundamental components of a contract are offer, acceptance, and consideration.[38] Contracting parties express these elements through words or actions that objectively form a promise.[39] The offeror proposes to do or give

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33. *See* SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 1957, at 1–4 (Aug. 29, 2000) (discussing how the California Beer and Beverage Distributors sponsored SB 1957 to solve unequal bargaining power between consolidating manufacturers and small distributors); *see also* Brian D. Anhalt, *Crafting a Model State Law for Today's Beer Industry*, 21 ROGER WILLIAMS U. L. REV. 162, 163–64 (2016) (explaining that beer franchise laws stem from past disparities between large manufacturers and small distributors); Pitchford, *supra* note 23. *Compare* The Beer Community, *Macro Brewery vs. Micro Brewery vs. Craft Brewery – What is the Difference?*, JUST BEER (Jan. 15, 2019), https://justbeerapp.com/article/macro-brewery-vs-micro-brewery-vs-craft-brewery-what-is-the-difference (on file with the *University of the Pacific Law Review*) ("A macro brewery is a large, national or international brewery that produces and distributes more than 6 million barrels of beer per year. . . . brewed in very large quantities."), *with* BREWERS ASSOCIATION, *supra* note 2 ("An American craft brewer is a small and independent brewer.").

34. CAL. BUS. & PROF. CODE § 25000.7 (West 2020).

35. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 1957, at 2–4 (Aug. 29, 2000).

36. *See, e.g.*, Justin Kendall, *Constellation Brands Forces Distributor Change in Northern San Diego County*, BREWBOUND (June 7, 2018, 5:20 PM), https://www.brewbound.com/news/constellation-brands-forces-distributor-change-northern-san-diego-county (on file with the *University of the Pacific Law Review*) (reporting that Constellation Brands freely terminated a distribution contract after the distributor agreed to the disadvantageous deal because it lacked resources to engage in a long and costly legal dispute); Jessica Infante, *Reyes Makes 3rd California Wholesaler Acquisition of 2019 with W.A. Thompson Deal*, BREWBOUND (Oct. 8, 2019, 5:25 PM), https://www.brewbound.com/news/reyes-makes-3rd-california-wholesaler-acquisition-of-2019-with-w-a-thompson-deal (on file with the *University of the Pacific Law Review*). *But see* Bernot, *supra* note 6 (discussing how there are currently a few consolidating distributors with unequal bargaining power compared to craft brewers).

37. *E.g.*, AB 1541, 2019 Leg., 2019–2020 Sess. (Cal. 2019) (as amended on July 11, 2019, but not enacted) (mandating good cause requirements in all beer distribution contracts); *see also* Letter from Maureen K. Ohlhausen et al., to Wesley Chesbro, *supra* note 9 (discussing a potential 2005 bill amendment to add good cause restrictions to California's beer franchise law).

38. *See* RESTATEMENT (SECOND) OF CONTRACTS § 17(1) (AM. LAW INST. 1981) (stating a contract is formed when there is a "manifestation of mutual assent to the exchange and a consideration"); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 22(1) (AM. LAW INST. 1981) (clarifying that "mutual assent to an exchange" is "an offer or proposal by one party followed by an acceptance by the other party"). *See generally* CAL. CIV. CODE § 1605–1606 (West 2020) (defining consideration as any bargained for benefit, forbearance, or legal or moral obligation given to the promisor "as an inducement").

39. *See* RESTATEMENT (SECOND) OF CONTRACTS § 1 (AM. LAW INST. 1981) ("A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."); *see, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 50(1) (AM. LAW INST. 1981)

something in exchange for a thing of value from the offeree.[40] Next, the offeree may accept, reject, or make a counteroffer.[41] Contracts operate through speech whether the parties vocalize, write, or perform it.[42]

Though contracts operate through speech, the Supreme Court has yet to determine whether contracts are constitutionally protected speech.[43] However, the Ninth Circuit touched on the issue in *Nordyke v. Santa Clara County*.[44] In *Nordyke*, gun show entrants challenged a county lease with a fairgrounds operator that prohibited "offering for sale" guns or ammunition at gun shows on the fairgrounds.[45] The Ninth Circuit held the ban violated the First Amendment because "offer[s] to sell" items propose commercial transactions, so they are constitutionally protected commercial speech.[46] The *Nordyke* holding came just short of stating contracts are speech.[47]

C. Supreme Court Free Speech Jurisprudence

Under the First Amendment, the government cannot abridge the freedom of speech.[48] Generally, speech is entitled to the highest level of protection under the First Amendment unless it falls within certain narrow exceptions.[49] However, the government may regulate protected speech if the law passes the appropriate

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(establishing acceptance as a "manifestation of assent" to the offer's terms); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 24 (AM. LAW INST. 1981) (defining offer as the "manifestation of willingness to enter into a bargain" so that another person would understand that "assent to that bargain is invited").

40. RESTATEMENT (SECOND) OF CONTRACTS § 17(1) (AM. LAW INST. 1981); RESTATEMENT (SECOND) OF CONTRACTS § 22(1) (AM. LAW INST. 1981).

41. RESTATEMENT (SECOND) OF CONTRACTS § 35(1) (AM. LAW INST. 1981); RESTATEMENT (SECOND) OF CONTRACTS § 38 (AM. LAW INST. 1981); RESTATEMENT (SECOND) OF CONTRACTS § 39 (AM. LAW INST. 1981).

42. Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 177, 185 (2015).

43. *See* VICTORIA L. KILLION, CONG. RESEARCH SERV. IN FOCUS, IF11072, THE FIRST AMENDMENT: CATEGORIES OF SPEECH (2019) (mentioning that "many aspects of 'human communication remain[] untouched by the First Amendment . . .'" including contracts (citing JESSE H. CHOPER ET AL., CONSTITUTIONAL LAW: CASES, COMMENTS, AND QUESTIONS 788 (12th ed. 2015))); *see also* Shanor, *supra* note 42, at 205 ("The regulation of contracts . . . is generally not subject to First Amendment review."). *But see* Sorrell v. IMS Health Inc., 564 U.S. 552, 570–71 (2011) (suggesting the sale of data may be constitutionally protected speech).

44. Nordyke v. Santa Clara Cty., 110 F.3d 707 (9th Cir. 1997).

45. *Id.* at 708–10.

46. *See id.* at 710 (citing Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976)) (holding that offers for the legal sale of guns and ammunition are commercial speech because they "propose a commercial transaction").

47. *Id.* at 710.

48. *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech.").

49. *See* United States v. Stevens, 559 U.S. 460, 468–69 (2010) (listing obscenity, defamation, fraud, incitement, and "speech integral to criminal conduct" as types of speech traditionally subject to censorship or punishment); *see, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (denying fighting words—the "very utterance [of which] inflict injury or tend to incite an immediate breach of the peace"—protection under the First Amendment because they fall into a "well-defined and narrowly limited [class] of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem"); *see also* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 563 (1980) (providing commercial speech less protection than political speech).

standard of review.[50] Subsection 1 tracks Supreme Court commercial speech jurisprudence.[51] Subsection 2 reviews the compelled speech doctrine.[52] Subsection 3 considers standards of judicial review.[53]

1. Supreme Court Commercial Speech Jurisprudence

Though Supreme Court commercial speech jurisprudence affords protection to commercial speech, it provides less protection to commercial speech than other forms of speech.[54] As a result, the Court often hesitates to strike down economic regulations that restrict commercial speech.[55] The Court explained this weaker protection in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc*.[56] In *Virginia Pharmacy*, the Court protected commercial speech—i.e., speech "propos[ing] a commercial transaction"—but identified a "commonsense" difference between commercial speech and other types of speech.[57] The Court held commercial speech serves the First Amendment's goals, explaining the Framers intended it to protect enlightened decision making and the free flow of speech.[58] However, the Court noted that it accords commercial speech less protection because proposing a transaction has slightly less value in facilitating free thought and democratic decision-making.[59]

Recently, the Court expanded *Virginia Pharmacy*'s holding in *Sorrell v. IMS Health Inc*.[60] In *Sorrell*, the Court held that a government prohibition on the "sale

50. *See* KATHLEEN ANN RUANE, CONG. RESEARCH SERV., 95-815, FREEDOM OF SPEECH AND PRESS: EXCEPTIONS TO THE FIRST AMENDMENT 1 (2014) (noting that the government may regulate speech even if it is constitutionally protected).

51. *Infra* Subsection II.C.1.

52. *Infra* Subsection II.C.2.

53. *Infra* Subsection II.C.3.

54. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 761–62 (1975) (protecting advertising as speech, but distinguishing commercial speech from other types of speech).

55. *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 562–64 (1980) (expressing that commercial speech restrictions receive less scrutiny and commercial speech receives less protection than other speech).

56. *Va. State Bd. of Pharmacy*, 425 U.S. at 770–73.

57. *Id.* at 771 n.24 (citing Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 385 (1973)).

58. *Id.* at 765.

> It is a matter of public interest that [private economic decisions in a free enterprise economy], in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decision-making in a democracy, we could not say that the free flow of information does not serve that goal. (citations omitted).

Id.

59. *See id.* at 762–63 (stating that parties to a transaction enjoy First Amendment protection, but their interests relate to economics and the free flow of information as opposed to an interest in democratic decision-making).

60. *See* Sorrell v. IMS Health Inc., 564 U.S. 552, 563–64 (2011) (articulating conduct in a commercial transaction constitutes speech).

[and] disclosure" of marketing information unconstitutionally abridged speech because it limited the free flow of information.[61] The Court found the restriction was content-based and disfavored marketing from pharmaceutical companies because those companies could not obtain marketing information that other speakers could freely purchase and use.[62] Since the law explicitly prohibited pharmaceutical companies from disclosing or agreeing to sell information, the Court held it was unconstitutional under "heightened scrutiny."[63]

In *Sorrell*, the Court implicitly acknowledged contracts are constitutionally protected speech because it suggested the dissemination of information—even by sale—is speech.[64] Though the Court came close to subjecting contract regulation to First Amendment review, it did not decide whether a contract is constitutionally protected speech.[65] The Court's focus on whether the restriction was content-based is a test the Court traditionally reserves for noncommercial speech.[66] As a result, the Court shifted its analysis and expanded commercial speech protections.[67]

2. The Compelled Speech Doctrine

The First Amendment also limits the government from compelling speech.[68] For example, in *Riley v. National Federation of the Blind of North Carolina, Inc.*, the Court held as unconstitutional a government-compelled disclosure of a charity's prior revenues.[69] The Court stated distinctions between compelled and restricted speech are insignificant because the First Amendment protects "both

61. *See id.* ("On its face, Vermont's law enacts content- and speaker-based restrictions on the sale, disclosure, and use of prescriber-identifying information. . . . The statute thus disfavors marketing, that is, speech with a particular content. More than that, the statute disfavors specific speakers, namely pharmaceutical manufacturers.").

62. *Id.*; *see Government Restraint on Content of Expression*, CORNELL LAW SCH. LEGAL INFO. INST., https://www.law.cornell.edu/constitution-conan/amendment-1/government-restraint-of-content-of-expression (last visited Aug. 10, 2020) (on file with the *University of the Pacific Law Review*) (explaining that content-based restrictions regulate speech based on "message, ideas, subject matter, or content").

63. *Sorrell*, 564 U.S. at 563–65 (2011).

64. *Id.* at 570–71; *see also* Seth E. Mermin & Samantha K. Graff, *The First Amendment and Public Health, at Odds*, 39 AM. J.L. & MED. 298, 303–04 (2013) (discussing how companies re-define non-expressive practices "as protected speech" by claiming all activities are marketing because courts "consider marketing to be protected speech").

65. *See Sorrell*, 564 U.S. at 570–71 ("[T]his case can be resolved even assuming . . . that prescriber identifying information is a mere commodity [as opposed to speech].") (finding unconstitutional a prohibition on pharmacies selling data to pharmaceutical companies for marketing but not deciding whether the sale of data itself was constitutionally protected speech).

66. *Id.* at 563–67.

67. *See id.* at 563–65 (applying "heightened scrutiny" rather than the traditional commercial speech analysis).

68. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (establishing the compelled speech doctrine after a law required children to salute the American flag in school, but a child refused to do so for religious reasons).

69. Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 784 (1988).

what to say and what *not* to say."[70]

However, the Court's holding in *Riley*—the distinction between compelled speech and restricted speech lacks constitutional significance—is not the complete body of compelled speech jurisprudence.[71] One year before *Riley*, the Court upheld a compelled disclosure in *Meese v. Keene* requiring "persons engaging in [foreign] propaganda" to disclose certain information.[72] The Court held the disclosures did not restrain speech but instructed propagandists to make disclosures allowing the public to evaluate the information fairly.[73] Rather than suppressing the fact that the information was propaganda, these government-compelled disclosures facilitated the free flow of information—a goal of the First Amendment.[74] As a result, the Court found the disclosure requirement was constitutional.[75]

Compelled speech receives less protection in the commercial context than in the noncommercial context.[76] For example, in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, the Court held government-compelled disclosures of facts in advertising are constitutional.[77] The Court found commercial speakers' rights "not to divulge accurate information" about their services are not "fundamental."[78] Like in *Meese*, the Court claimed it was beneficial for commercial speakers to provide additional, non-misleading information.[79] Accordingly, the Court interprets the First Amendment to protect against compelled commercial speech, but to a lesser degree than noncommercial speech.[80]

3. Basic Standards of Judicial Review

The Court does not interpret the First Amendment to protect speech equally; rather, the level of judicial deference to the political branches defines the level of

70. *Id.* at 796–97.

71. *See* Meese v. Keene, 481 U.S. 465, 480–82 (1987) (finding that a statute making a citizen disclose information was constitutional and benefitted the public by promoting the free flow of information); *see, e.g.*, Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985) (holding that compelled commercial disclosures are constitutional under certain circumstances); *see also* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 366 (2010) (citing Buckley v. Valeo, 424 U.S. 1, 64 (1976)) (finding that a required disclosure of electioneering funding sources was constitutional even though it burdens speakers because the disclosures were of facts, did not require the speaker to communicate a message they disagreed with, did not prevent speech, and "impose[d] no ceiling on campaign-related activities"). *See generally* Turner Broad. Sys., Inc. v. Fed. Comm. Comm'n, 520 U.S. 180, 185 (1997) (upholding must-carry channel rules imposed on cable companies because they "further important governmental interests; and . . . do not burden substantially more speech than necessary").

72. *Meese*, 481 U.S. at 469.

73. *Id.* at 480–82.

74. *Id.* at 481–82.

75. *Id.*

76. *See, e.g.*, *Zauderer*, 471 U.S. at 651 (finding that compelled commercial disclosures are constitutional if they are reasonably related to a government interest).

77. *Id.* at 651 & n.14.

78. *Id.*

79. *Id.*

80. Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 796–97 (1988); *Zauderer*, 471 U.S. at 651 & n.14.

protection.[81] Unless a law presents significant constitutional issues, courts often defer to the government.[82] The applicable standard depends on the speech and law at issue.[83] The three main standards are rational basis, intermediate scrutiny, and strict scrutiny.[84] These standards of review are fundamental to assess constitutionality.[85] Subsection a outlines the rational basis test.[86] Subsection b reviews intermediate scrutiny.[87] Subsection c explains strict scrutiny.[88]

a. Rational Basis Review

Under rational basis review, the Court affords the government the greatest amount of deference.[89] In other words, a law is constitutional if the government reasonably related it to a legitimate government interest.[90] The Court considers nearly any purpose legitimate.[91] Yet the particular interest and whether the law is achieving this purpose are not determinative; the law can be over-inclusive or under-inclusive.[92] Rather, the Court focuses on whether there is "any reasonably

81. KILLION, *supra* note 43; RUANE, *supra* note 50, at 1.

82. *See generally* Richard Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CALIF. L. REV. 519, 522 (2012) (outlining the history of judicial deference).

83. Turner Broad. Sys., Inc. v. Fed. Comm. Comm'n, 512 U.S. 622, 642 (1994); KILLION, *supra* note 43.

84. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980) (establishing intermediate scrutiny as the proper standard of review for commercial speech restrictions, even if they are content based); *see, e.g.*, *Zauderer*, 471 U.S. at 651 (holding that compelled disclosures are constitutional so long as they are to inform customers of "purely factual and uncontroversial information" and are reasonably related to a state interest); *see also Turner Broad. Sys.*, 512 U.S. at 642 (articulating how strict scrutiny applies to content-based speech restrictions).

85. *Infra* Section IV.B.

86. *Infra* Subsection II.C.1.a.

87. *Infra* Subsection II.C.1.b.

88. *Infra* Subsection II.C.1.c.

89. *See Zauderer*, 471 U.S. at 651 ("[A]n advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest . . .").

90. *Id*.

91. *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 834–35 (1987) (citations omitted) ("Our cases have not elaborated on the standards for determining what constitutes a 'legitimate state interest' . . . . however, . . . a broad range of governmental purposes and regulations satisfies these requirements."); *see, e.g.*, City of New Orleans v. Dukes, 427 U.S. 297, 303–04 (1976) (finding that protecting the "appearance and custom valued by the [French] Quarter's residents and attractive to tourists" to be a legitimate interest because "the judiciary may not . . . judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines"). *But see* U.S. Dept. of Agric. v. Moreno, 413 U.S. 528, 534–35 (1973) (holding that a bare desire to harm an unpopular group cannot be a legitimate purpose unless there is a rationally related public purpose supporting the desire).

92. *See* Fed. Comm. Comm'n v. Beach Comm., Inc., 508 U.S. 307, 315 (1993) (finding that government actions can be based on "rational speculation" and that the party challenging the regulation must "negat[e] every conceivable basis which might support it"); *see, e,g.*, Jana-Rock Constr., Inc. v. N.Y. State Dept. of Econ. Dev., 438 F.3d 195, 213–14 (2d Cir. 2006) (upholding an affirmative action statute under rational basis even though it was under-inclusive); *see also* N.Y. State Bd. of Elections v. Lopez Torres, 522 U.S. 196, 209 (2008) (Stevens, J., concurring) ("[A]s I recall my esteemed former colleague, Thurgood Marshall, remarking on numerous occasions: 'The Constitution does not prohibit legislatures from enacting stupid laws.'"). *But see* First Nat'l Bank of Bos. v. Bellotti 435 U.S. 765, 792–93 (1978) ("The statute is said to serve [a legitimate] interest by preventing

conceivable state of facts" that indicate "plausible reasons" for government action.[93] Rational basis review no longer applies to commercial speech by default, but the Court still occasionally applies it to commercial speech.[94]

b. Intermediate Scrutiny

Intermediate scrutiny is more demanding than rational basis review and requires the government to show the law is substantially related to an important government interest.[95] The Court applies intermediate scrutiny to commercial speech restrictions and content-neutral restrictions on speech.[96] Content-neutral restrictions do not limit speech based on content but rather on "the time, place, and manner of expression."[97] Intermediate scrutiny applies even though commercial speech regulations are inherently content-based (i.e., the regulations limit speech based on message or viewpoint).[98]

Under intermediate scrutiny in the commercial speech context, the Court applies the four-prong test from *Central Hudson Gas & Electric Corporation v. Public Services Commission of New York*.[99] *Central Hudson* first requires that the speech is lawful and not misleading.[100] Next, the government interest must be substantial, and then the law must "directly advance" that interest.[101] Finally, the restriction must not be "more extensive than is necessary" to effectuate the government's interest.[102] A law violates the First Amendment if the speech

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the use of corporate resources in furtherance of views with which some shareholders may disagree. This purpose is belied, however, by the provisions of the statute, which are both underinclusive and overinclusive.").

93. *Beach Comm.*, 508 U.S. at 313–14.

94. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938) ("[L]egislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless . . . it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators."); *see, e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483, 490–91 (1955) (upholding an advertising regulation under rational basis review); *see also* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 562–63, 566 (1980) (applying intermediate scrutiny to commercial speech). *But see, e.g.*, *Zauderer*, 471 U.S. at 651, 652 & n.14 (upholding a compelled disclosure preventing consumer deception under rational basis because "[an advertiser's] constitutionally protected interest in not providing any particular factual information in his advertising is minimal. . . . The right of a commercial speaker not to divulge accurate information regarding his services is not . . . a fundamental right").

95. *See Cent. Hudson*, 447 U.S. at 562–63, 566 (using a four-part test for intermediate scrutiny that includes determining whether a regulation directly advances a substantial government interest).

96. *Id.*

97. RUANE, *supra* note 50, at 9.

98. *See, e.g., Cent. Hudson*, 447 U.S. at 564 n.6, 566 (finding that "[i]n most other contexts" the First Amendment prohibits content-based regulations, but that the government may restrict commercial speech based on content unless the law fails the intermediate scrutiny test); *see* Consol. Edison Co. v. Pub. Ser. Comm'n, 447 U.S. 530, 538 & n.5 (1980) (stating commercial speech is a "narrow circumstance" in which "regulation based on subject matter" is acceptable); RUANE, *supra* note 50, at 9.

99. *Cent. Hudson*, 447 U.S. at 566.

100. *Id.*

101. *Id.*

102. *Id.*

satisfies prong one and the law fails prongs two, three, or four.[103] If the speech fails prong one, it is not subject to the *Central Hudson* test but to the rational basis test.[104] *Central Hudson* is the default test for commercial speech restrictions.[105]

c. Strict Scrutiny

Strict scrutiny is the most rigorous standard of review.[106] This test requires that the government "narrowly tailor" a speech restriction to use the "least restrictive means" to achieve a compelling government interest.[107] The Court rarely finds an interest compelling, reflecting the demands of strict scrutiny as the Court reserves it for when the government favors one idea over another.[108]

As such, the Court applies strict scrutiny to content-based restrictions—i.e., laws that limit speech based on topic or message—unless it is commercial speech.[109] The Court views laws that compel noncommercial speech as content-based restrictions, and so the Court analyzes those laws under strict scrutiny.[110] However, the Court suggested "heightened scrutiny" applies to restrictions singling out one commercial speaker based on content.[111] There is a circuit split on the definition of "heightened scrutiny"—courts dispute whether intermediate or

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103. *Id.*

104. *Id.*; *see, e.g.*, Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985) (applying rational basis to misleading commercial speech).

105. KILLION, *supra* note 43; RUANE, *supra* note 50, at 15.

106. Turner Broad. Sys., Inc. v. Fed. Comm. Comm'n, 512 U.S. 622, 642 (1994).

107. *See Turner Broad. Sys.*, 512 U.S. at 680 ("Content based speech restrictions are generally unconstitutional unless they are narrowly tailored to a compelling state interest."); Sable Comm. of Cal., Inc. v. Fed. Comm. Comm'n, 492 U.S. 115, 126 (1989).

108. *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 205 (2003) (holding that preventing perceived corruption and maintaining election integrity are compelling interests) (*overturned by* Citizens United v. Fed. Election Comm'n, 558 U.S 310); *see, e.g.*, *Sable Comm.*, 492 U.S. at 126 (reiterating that "protecting the physical and psychological well-being of minors" is a compelling interest); *see also* Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995).

> Discrimination against speech because of its message is presumed to be unconstitutional. . . . When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale . . .

Rosenberger, 515 U.S. at 828–29.

109. *See Cent. Hudson*, 447 U.S. at 564 & n.6, 566 (explaining that "the First Amendment prohibits content-based regulations" in other contexts, but commercial speech is analyzed under intermediate scrutiny); Consol. Edison Co. v. Pub. Ser. Comm'n, 447 U.S. 530, 538 & n.5 (1980); RUANE, *supra* note 50, at 5, 9.

110. *See* Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 795, 800 (1988) ("Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech. We therefore consider the act as a content-based regulation of speech. . . . [Content-based restrictions require] compelling necessity.").

111. *See* Sorrell v. IMS Health Inc., 564 U.S. 552, 565–66 (2011) (stating "heightened scrutiny" should apply to content-based commercial speech restrictions and suggesting that this standard was strict scrutiny). *But see* Retail Dig. Network, LLC v. Prieto 861 F.3d 839, 847–49 (9th Cir. 2017) (en banc) (holding that *Sorrell*'s "heightened scrutiny" is intermediate scrutiny).

strict scrutiny applies.[112] Accordingly, the analysis of whether a law compelling commercial speech is constitutional—say in beer distribution contracts—changes depending on the relevant circuit's definition of heightened scrutiny.[113]

III. AB 1541

AB 1541 would have prohibited a brewer from terminating a beer distribution contract unless the brewer satisfied certain "good cause" requirements.[114] To establish good cause, the brewer needed to show the distributor did not satisfy the contract's commercially reasonable terms without justification or excuse.[115] Next, the bill required the brewer to provide the distributor evidence and written notice of the distributor's failure to comply with the contract.[116] The brewer needed to provide the distributor written notice within a certain number of months of discovering the distributor's failure.[117] If the brewer failed to provide the distributor notice within the timeframe, the brewer would have waived its right to terminate the agreement.[118] Finally, AB 1541 required the brewer to give the distributor time to create and implement a corrective action plan that would cure the violation.[119] The bill left all timeframes undefined.[120]

Even if a brewer could establish good cause, the brewer needed to satisfy additional conditions.[121] For example, a brewer must have demonstrated it acted in good faith—i.e., the brewer acted in a "commercially reasonable" and honest manner.[122] If the distributor failed to cure the violation in time, the brewer would need to provide the distributor with additional written notice of termination before

112. *See Retail Dig. Network*, 861 F.3d at 847–48 (finding that *Central Hudson* applies to content-based commercial speech restrictions). *But see* Educ. Media Co. at Va. Tech, Inc. v. Insley, 731 F.3d 291, 297–98 (4th Cir. 2013) (acknowledging that the *Central Hudson* test is likely not *Sorrell*'s heightened scrutiny); *accord* Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) (suggesting "heightened scrutiny" is strict scrutiny).

113. *Compare Retail Dig. Network*, 861 F.3d at 848 (finding that *Central Hudson* applies to content-based commercial speech restrictions), *with Educ. Media*, 731 F.3d at 297–98 (acknowledging that the *Central Hudson* test is likely not *Sorrell*'s heightened scrutiny).

114. AB 1541, 2019 Leg., 2019–2020 Sess. (Cal. 2019) (as amended on July 11, 2019, but not enacted).

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *See* AB 1541, 2019 Leg., 2019–2020 Sess. (Cal. 2019) (as amended on July 11, 2019, but not enacted) (failing to define timeframes for waiver and for a distributor to provide a compliance plan or cure a violation; e.g., "The beer manufacturer first acquired knowledge of the failure . . . not more than __ months before the date notification was given to the beer wholesaler.").

121. *Id.*

122. *Id.*; *see* Gifford v. J & A Holdings, 63 Cal. Rptr. 2d 253, 259 (Cal. Ct. App., 2d Dist. 1997) ("Commercial reasonableness is not expressly defined in the statute, but has been defined elsewhere to include commonly accepted commercial practices of responsible businesses which afford all parties fair treatment."); *see also* Citri-Lite Co. v. Cott Beverages, Inc., 721 F. Supp. 2d 912, 924–26 (E.D. Cal. 2010) (holding that "commercial reasonableness" is based on what a reasonable business would do under similar circumstances).

exiting the contract.[123] The bill would have forced a brewer to explicitly state its intent to terminate the contract, the particular reasons for termination, and the date of effective termination.[124] AB 1541 required the brewer to prove it acted in good faith, had good cause, and satisfied the notice requirements.[125] A brewer could only terminate a distribution contract if it could demonstrate it satisfied these requirements and the distributor failed to cure the violation before the effective termination.[126]

IV. ANALYSIS

AB 1541 would have harmed craft brewers because it made terminating a distribution contract nearly impossible.[127] Delays in the termination process might not have harmed large manufacturers, but they would have burdened small craft brewers who often have fewer resources to put into litigating a dispute.[128] Most craft brewers remain in distribution contracts despite poor sales, effectively "super-glu[ing]" brands to distributors.[129]

AB 1541 would have burdened craft brewers by altering brewers' speech and compelling contractual language that restricts their ability to terminate a beer distribution contract.[130] The Court's commercial speech jurisprudence indicates contracts are speech because contracts propose and regulate commercial transactions.[131] AB 1541 would have compelled commercial speech by mandating that a brewer and distributor include certain provisions within a distribution agreement that neither party included on its own.[132] In fact, craft brewers avoid good cause restrictions because those provisions could trap brewers in distribution contracts with neglectful distributors.[133] Nevertheless, the Court's application of a particular standard of review is inconsistent in this context.[134]

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123. AB 1541, 2019 Leg., 2019–2020 Sess. (Cal. 2019) (as amended on July 11, 2019, but not enacted).

124. *Id.*

125. *Id.*

126. *Id.*

127. Michael Carroll, *Bill Would Impede Competition in California Beer Industry, Critics Say*, N. CAL. REC. (Mar. 26, 2020), https://norcalrecord.com/stories/528707518-bill-would-impede-competition-in-california-beer-industry-critics-say (on file with the *University of the Pacific Law Review*).

128. *See id.* ("'In many, many cases . . . craft brewers . . . simply don't have the resources to litigate' . . . such cases could cost millions of dollars and take years to adjudicate.") (quoting the California Craft Brewers Association director).

129. *Id.*

130. *See* Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 795 (1988) (holding that a compelled disclosure altered speech because it forced people to say things they otherwise would not).

131. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 n.24 (1975) (citing Pittsburg Press Co. v. Human Relations Comm'n, 413 U.S. 376, 385 (1973)) (protecting speech "propos[ing] a commercial transaction"); *see also* Sorrell v. IMS Health Inc., 564 U.S. 552, 570–71 (2011) (considering the dissemination of information—even by sale—to be speech).

132. AB 1541, 2019 Leg., 2019–2020 Sess. (Cal. 2019) (as amended on July 11, 2019, but not enacted).

133. Weiss-Tisman, *supra* note 11.

134. *See Sorrell*, 564 U.S. at 565–66 (stating "heightened scrutiny" should apply to content-based

Section A evaluates how AB 1541 would have implicated and violated the First Amendment.[135] Section B focuses on standards of review to explain AB 1541's unconstitutionality.[136] Section C proposes a constitutional solution to the problem that protects craft brewers from harmful distribution contracts.[137]

A. AB 1541 and the First Amendment

The Supreme Court first defined commercial speech as "speech that . . . propose[s] a commercial transaction" in the context of advertising restrictions.[138] Contracts similarly propose commercial transactions through offer and acceptance.[139] AB 1541 would have mandated terms in beer distribution contracts, altering speech by substituting the parties' freely negotiated speech for Legislative judgments.[140] As a result, AB 1541 likely would have unconstitutionally compelled commercial speech.[141] Courts should afford commercial speech protections to contracts.[142] Subsection 1 explains why contracts are speech.[143] Subsection 2 evaluates how AB 1541 would have compelled speech.[144]

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commercial speech restrictions and suggesting that this standard was strict scrutiny); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985) (applying rational basis review to restrictions on misleading commercial speech); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980) (explaining that intermediate scrutiny is the proper standard to apply to a content-based commercial speech restrictions).

135. *Infra* Section IV.A.

136. *Infra* Section IV.B.

137. *Infra* Section IV.C.

138. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 n.24 (1975) (citing Pittsburg Press Co. v. Human Relations Comm'n, 413 U.S. 376, 385 (1973)).

139. RESTATEMENT (SECOND) OF CONTRACTS § 17(1) (AM. LAW INST. 1981); RESTATEMENT (SECOND) OF CONTRACTS § 22(1) (AM. LAW INST. 1981); RESTATEMENT (SECOND) OF CONTRACTS § 24 (AM. LAW INST. 1981); RESTATEMENT (SECOND) OF CONTRACTS § 50(1) (AM. LAW INST. 1981); RESTATEMENT (SECOND) OF CONTRACTS § 2(1)–(3) (AM. LAW INST. 1981); RESTATEMENT (SECOND) OF CONTRACTS § 18 (AM. LAW INST. 1981); Shanor, *supra* note 42, at 182, 185.

140. AB 1541, 2019 Leg., 2019–2020 Sess. (Cal. 2019) (as amended on July 11, 2019, but not enacted); *see* Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 795 (1988) ("Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech."); *see also* Nordyke v. Santa Clara Cty., 110 F.3d 707, 710 (9th Cir. 1997) (finding that an offer to sell a firearm is commercial speech entitled to First Amendment protection).

141. AB 1541, 2019 Leg., 2019–2020 Sess. (Cal. 2019) (as amended on July 11, 2019, but not enacted); *see Riley*, 487 U.S. at 784, 795 (finding that a North Carolina law mandating charities to disclose revenues unconstitutionally altered speech); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985) (noting that "unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech"); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980) (detailing the intermediate scrutiny standard for commercial speech cases); Sorrell v. IMS Health Inc., 564 U.S. 552, 565–66 (2011).

142. *See Va. State Bd. of Pharmacy*, 425 U.S. at 771 (explaining that commercial speech that is non-misleading receives First Amendment protection because laws restricting commercial speech are inherently content-based); *see also Sorrell*, 564 U.S. at 563–64 (finding a Vermont law restricting pharmaceutical companies from selling, disclosing, or using prescriber data was an unconstitutional commercial speech restriction).

143. *Infra* Subsection IV.A.1.

144. *Infra* Subsection IV.A.2.

1. Beer Distribution Contracts are Commercial Speech

Treating contracts as speech is intuitive—nearly every interaction involves expressive speech, including contracting—but a court has not yet explicitly recognized this reasoning.[145] The logical conclusion from *Nordyke*'s holding is that contracts are commercial speech because—like advertisements—they propose commercial transactions through offer and acceptance.[146] When parties enter into a beer distribution contract, they make promises and communicate terms that define the transaction and regulate their relationship.[147] In other words, making a promise is a form of speech when the parties articulate an offer and acceptance that both proposes and ratifies a transaction.[148] Following *Nordyke*'s logic, a contract is commercial speech because it communicates offer and acceptance.[149] Thus, courts should treat beer distribution contracts as commercial speech.[150] As a result, laws regulating contracts would receive First Amendment review.[151]

2. How AB 1541 Would Have Compelled Speech

AB 1541 would have compelled speech by mandating that manufacturers have good cause to terminate their beer distribution contracts, despite not contracting

145. *See* Shanor, *supra* note 42, at 177 ("Nearly all human action operates . . . through speech, or at least in such a fashion that another human being could understand it as expressive. . . . The conduct of buying a car, for instance, involves conversations with the dealer, the offer of a price, and the signing of a contract that is written in words."); *see, e.g.*, Thomas B. Colby & Peter J. Smith, *The Return of Lochner*, 100 CORNELL L. REV. 527, 564–79 (2015) (discussing different legal theories and approaches to return to constitutional protection of freedom of contract); *cf. Nordyke*, 110 F.3d at 710 (holding an offer to sell firearms or ammunition is commercial speech).

146. *Nordyke*, 110 F.3d at 710; RESTATEMENT (SECOND) OF CONTRACTS § 17(1) (AM. LAW INST. 1981); RESTATEMENT (SECOND) OF CONTRACTS § 22(1) (AM. LAW INST. 1981); RESTATEMENT (SECOND) OF CONTRACTS § 24 (AM. LAW INST. 1981); RESTATEMENT (SECOND) OF CONTRACTS § 50(1) (AM. LAW INST. 1981); Shanor, *supra* note 42 at 182, 205; *see Va. State Bd. of Pharmacy*, 425 U.S. at 771 (finding that restrictions on prescription drug advertisements were unconstitutional content-based commercial speech restrictions).

147. RESTATEMENT (SECOND) OF CONTRACTS § 17(1) (AM. LAW INST. 1981); RESTATEMENT (SECOND) OF CONTRACTS § 22(1) (AM. LAW INST. 1981); RESTATEMENT (SECOND) OF CONTRACTS § 24 (AM. LAW INST. 1981); RESTATEMENT (SECOND) OF CONTRACTS § 50(1) (AM. LAW INST. 1981).

148. *See* RESTATEMENT (SECOND) OF CONTRACTS § 2(1)–(3) (AM. LAW INST. 1981) (defining a promise as "a manifestation of intention to act or refrain from acting in a specified way" which the parties understand to make a commitment); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 18 (AM. LAW INST. 1981) ("Manifestation of mutual assent to an exchange requires that each party either make a promise or begin or render a performance.").

149. *Nordyke*, 110 F.3d at 710; Shanor, *supra* note 42 at 182.

150. *See Va. State Bd. of Pharmacy*, 425 U.S. at 770–71 (finding a Virginia prohibition on prescription drug advertising to be an unconstitutional commercial speech restriction, but noting that the government can still regulate commercial speech in certain circumstances); *see also* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564 & n.6 (1980) (explaining the intermediate scrutiny test for commercial speech cases and that in other contexts the First Amendment prohibits content-based speech restrictions).

151. *See* Shanor, *supra* note 42 at 182 ("[I]f banning sales—under the logic that they involve the communicative elements of offer and acceptance—triggers First Amendment review, little if any commercial activity falls outside of the First Amendment's ambit.").

for that requirement.[152] These mandatory provisions would compel speech because—as in *Riley*—AB 1541 would have forced manufacturers to adopt contractual language that is not their own.[153] Good cause termination restrictions do not protect craft brewers, yet AB 1541 would have forced brewers to include those restrictions in distribution contracts.[154]

Unlike *Meese*, nothing about AB 1541's compelled good cause termination provisions related to the free flow of information.[155] Therefore, *Meese* is irrelevant while *Riley* is on point because AB 1541 and beer distribution contracts do not involve the flow of information but merely define commercial transactions.[156] Instead, AB 1541 would have compelled speech by forcing craft brewers to include specific terms in distribution contracts rather than allowing them to contract for different terms.[157] AB 1541 would have precluded craft brewers from including brewer-friendly terms, or even terminating with cause to sell to other distributors, because brewers usually lack resources to litigate.[158] Craft brewers would have no "satisfactory alternative channels" to negotiate no-cause terms or form contracts with different distributors, so AB 1541 would compel speech.[159]

AB 1541 would have unconstitutionally compelled speech because brewers could not include certain speech in contracts or freely contract with other distributors to include that speech.[160] As a result, AB 1541 would not have facilitated free thought and educated decision making.[161] Rather, AB 1541 would

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152. *See* Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 795 (1988) (explaining how a law mandating speech necessarily alters and compels speech); AB 1541, 2019 Leg., 2019–2020 Sess. (Cal. 2019) (as amended on July 11, 2019, but not enacted).

153. *See Riley*, 487 U.S. at 795 (detailing how compelling speech by altering what the speaker would say is necessarily a content-based regulation).

154. AB 1541, 2019 Leg., 2019–2020 Sess. (Cal. 2019) (as amended on July 11, 2019, but not enacted); Letter from Bilal K. Sayyed, Director, Federal Trade Commission, et al., to Jim Wood, Assembly Member, State of California (Mar. 20, 2020) (on file with the *University of the Pacific Law Review*); Carroll, *supra* note 127.

155. *See* Meese v. Keene, 481 U.S. 465, 480 (1987) (upholding compelled disclosure because it related to the free flow of information).

156. AB 1541, 2019 Leg., 2019–2020 Sess. (Cal. 2019) (as amended on July 11, 2019, but not enacted); *see Riley*, 487 U.S. at 795 (analyzing the nature of commercial speech); *Meese*, 481 U.S. at 480 (identifying the flow of information); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564 n.6 (1980) (defining commercial speech); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 776 (1975) (holding that "a communication which does no more than propose a commercial transaction is not 'wholly outside the protection of the First Amendment'") (Stewart, J., concurring).

157. AB 1541, 2019 Leg., 2019–2020 Sess. (Cal. 2019) (as amended on July 11, 2019, but not enacted); *see* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 502–03 (1996) (expressing concern that a commercial speech restriction targeted "truthful, nonmisleading" speech because it "not only hinder[ed] consumer choice, but also imped[ed] debate over central issues of public policy").

158. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 502–03 (1996); AB 1541, 2019 Leg., 2019–2020 Sess. (Cal. 2019) (as amended on July 11, 2019, but not enacted); Carroll, *supra* note 127.

159. *44 Liquormart*, 517 U.S. at 501–02; Carroll, *supra* note 127; *see Riley*, 487 U.S. at 797 ("[T]he First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what not to say.").

160. AB 1541, 2019 Leg., 2019–2020 Sess. (Cal. 2019) (as amended on July 11, 2019, but not enacted).

161. *See Meese*, 481 U.S. at 480 n.15 (citing Viereck v. United States, 318 U.S. 236, 251) (articulating that free thought and educated decision making are the goals of the First Amendment, and that compelled speech

have restricted speech based on content and would have allowed the Legislature to favor distributor speech over brewer speech.[162] Because the Court disfavors content-based restrictions, AB 1541 likely would have violated the First Amendment.[163]

B. Why AB 1541 is Unconstitutional

Since contracts are commercial speech, intermediate scrutiny presumably would have applied to AB 1541.[164] However, it is important to distinguish AB 1541 from other speech restrictions because of the *Zauderer* standard.[165] Laws correcting misleading speech receive rational basis review because the speech fails *Central Hudson's* first prong.[166] But good cause restrictions do not prevent consumer deception because distribution contracts are not public.[167] Distribution contracts are also lawful and factual, so the speech passes *Central Hudson*'s first prong.[168] Therefore, a court should apply the more demanding intermediate scrutiny.[169]

The second prong of the *Central Hudson* test is that the government interest must be substantial.[170] Here, the government's purpose for AB 1541 was to reduce "monopolistic tendencies," protect consumer choice, and stabilize prices.[171] The

facilitating those goals is constitutional).

162. *See Riley*, 487 U.S. at 795 (explaining that laws mandating speech alters what the speaker would otherwise say, and so such laws are content-based restriction and compel speech).

163. *See 44 Liquormart*, 517 U.S. at 501 ("[C]omplete speech bans . . . are particularly dangerous because they all but foreclose alternative means of disseminating certain information."); *see* RUANE, *supra* note 50, at 1, 5 (noting that the Court applies strict scrutiny—the most difficult standard—to content-based speech restrictions).

164. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980).

165. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985); *Cent. Hudson'*, 447 U.S. at 566; *see generally* Jennifer M. Keighley, *Can You Handle the Truth? Compelled Commercial Speech and the First Amendment*, 152 U. PA. L. REV. 539, 557 (2012) (distinguishing *Zauderer* from *Central Hudson* by noting that the speech in *Zauderer* fails *Central Hudson*'s first prong).

166. *Zauderer*, 471 U.S. at 651; *Cent. Hudson*', 447 U.S. at 566; Keighley, *supra* note 165.

167. *Cf. Zauderer*, 471 U.S. at 651 (citations omitted) ("[I]n virtually all our commercial speech decisions to date, we have emphasized that because disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech, 'warning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception.'").

168. *See* CAL. BUS. & PROF. CODE § 25000.5(1) (West 2020) (requiring a written contract with a brewer for distributors to sell beer); *Cent. Hudson*, 447 U.S. at 566.

169. *Zauderer*, 471 U.S. at 651; *Cent. Hudson*, 447 U.S. at 566.

170. *Cent. Hudson*, 447 U.S. at 566.

171. Carroll, *supra* note 127; *see Benefits of Beer Franchise Laws*, NAT'L BEER WHOLESALERS ASS'N, https://www.nbwa.org/government/benefits-of-beer-franchise-laws (last visited Oct. 18, 2020) (on file with the *University of the Pacific Law Review*) (listing "consumer choice–product diversity," "brewer access–distributor independence," and "public safeguards–responsible sales" as key reasons for beer franchise laws). *Compare* Letter from Maureen K. Ohlhausen et al., to Wesley Chesbro, *supra* note 9 ("One of [the] purported goals is to 'foster vigorous and healthy inter-brand competition in the beer industry.' . . . however, the Proposal is likely to have the opposite effect."), *with* Letter from Bilal K. Sayyed et al., to Jim Wood, *supra* note 154 (explaining that Chapter X would have an even greater anticompetitive impact than the 2005 Proposal due to industry changes in the past fifteen years).

interest in preventing monopolies and maintaining the three-tiered system is a substantial interest because American law disfavors monopolies.[172] Additionally, the Twenty-First Amendment permits states—not the federal government—to regulate the alcohol industry; therefore, the interest is substantial.[173] Because states regulate the alcohol industry to prevent monopolies, this interest is substantial, and it would pass prong two.[174]

Next, AB 1541 must "directly advance" the interest in preventing monopoly.[175] AB 1541 may have prevented monopolies and promoted competition because franchise laws act as vertical restraints in three-tiered systems; however, if too strict these restraints become anticompetitive.[176] AB 1541's termination restrictions purportedly promoted competition, but—according to the Federal Trade Commission—they were actually anticompetitive, harm consumer choice, and will likely increase beer prices.[177] While AB 1541 at first blush appeared to prevent monopolies, the bill in reality could not advance this interest because it had severe anticompetitive effects.[178] AB 1541 would have impeded the government interest, so it fails *Central Hudson*'s third prong and is unconstitutional.[179]

But assuming the bill would have directly advanced the interest, AB 1541 could not be "more extensive" than necessary.[180] Namely, AB 1541 would need to be "as narrowly drawn as possible to effectuate" the purpose of preventing monopolies.[181] AB 1541 would have failed this prong because it treated all brewers and distributors the same regardless of size, financing, and power.[182] Small brewers lack the same resources and strength as large manufacturers, so AB 1541 would have captured brewers that pose little threat to the three-tiered system.[183] The

172. *See* Consol. Edison Co. v. Pub. Ser. Comm'n, 447 U.S. 530, 549 (1980) (Blackmun, J., dissenting) ("[M]onopolies are generally against the public policies of the United States."); *see, e.g.*, CAL. BUS. & PROF. CODE § 25500.1 (West 2020) ("The Legislature finds that it is necessary and proper to [separate] manufacturing interests, wholesale interests, and retail interests in the production and distribution of alcoholic beverages in order to prevent suppliers from dominating local markets through vertical integration.").

173. U.S. CONST. amend. XXI; Retail Dig. Network, LLC v. Prieto, 861 F.3d 839, 844, 850 (9th Cir. 2017) (en banc).

174. *Retail Dig. Network*, 861 F.3d at 844, 850; *Cent. Hudson*, 447 U.S. at 566.

175. *Cent. Hudson*, 447 U.S. at 566; NAT'L BEER WHOLESALERS ASS'N, *supra* note 171.

176. Francine Lafontaine & Margaret E. Slade, *Transaction Cost Economics and Vertical Market Restrictions*, 55 ANTITRUST BULLETIN 587 (2010); James C. Cooper et al., *Vertical Antitrust Policy as a Problem of Inference*, 23 INT'L J. INDUS. ORG. 639 (2005); Margaret E. Slade, *Beer and the Tie: Did Divestiture of Brewer-Owned Public Houses Lead to Higher Beer Prices?*, 108 ECON. J. 565 (1998); Letter from Bilal K. Sayyed et al., to Jim Wood, *supra* note 154; *see* NAT'L BEER WHOLESALERS ASS'N, *supra* note 171 ("Combined with three-tier requirements, franchise laws prohibit vertical integration of the brewing, distribution and retail tiers, preventing monopolies.").

177. Letter from Bilal K. Sayyed et al., to Jim Wood, *supra* note 154.

178. *Id.*; NAT'L BEER WHOLESALERS ASS'N, *supra* note 171.

179. *Cent. Hudson*, 447 U.S. at 566, 569.

180. *Id.* at 566.

181. Retail Dig. Network, LLC v. Prieto, 861 F.3d 839, 845 (9th Cir. 2017) (en banc).

182. AB 1541, 2019 Leg., 2019–2020 Sess. (Cal. 2019) (as amended on July 11, 2019, but not enacted).

183. *Id.*; Carroll, *supra* note 127; Letter from Bilal K. Sayyed et al., to Jim Wood, *supra* note 154.

government should rein in near-monopoly manufacturers that bully distributors, but AB 1541 was overbroad because it would have burdened the speech of brewers that cannot possibly monopolize.[184] In doing so, AB 1541 was over-inclusive and would have burdened more speakers than necessary to advance the legislation's purpose.[185] Furthermore, AB 1541 would have imposed terms on manufacturers without any similar restrictions on beer distributors.[186] In that regard, AB 1541 was under-inclusive and therefore less extensive than necessary because it only attempted to prevent manufacturers' monopolistic activities but not distributors' monopolistic activities.[187] For these reasons, AB 1541 would have failed *Central Hudson*'s fourth prong and been unconstitutional.[188]

Since AB 1541 would have failed intermediate scrutiny, it is unnecessary to see if the bill could have survived strict scrutiny.[189] But it is worth exploring given *Sorrell*'s holding that "heightened scrutiny" applies to content-based commercial

184. *See* United States v. Stevens, 559 U.S. 460, 473, 482 (2010) (citing Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449, n. 6) ("[T[his Court recognizes 'a second type of facial challenge,' whereby a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'); SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 1957, at 4–5 (Aug. 29, 2000) (identifying an issue with consolidating breweries pressuring small distributors into unfavorable contracts); Adam Davidson, *Are We in Danger of a Beer Monopoly?*, N.Y. TIMES (Feb. 26, 2017, 3:09 AM), https://www.nytimes.com/2013/03/03/magazine/beer-mergers.html (on file with the *University of the Pacific Law Review*); *see, e.g.*, CAL. BUS. & PROF. CODE § 25500.1 (West 2020) (explaining the importance of maintaining separation of the three tiers to prevent monopoly); *see also Legal Near-Monopolies*, CORP. FIN. INST., https://corporatefinanceinstitute.com/resources/knowledge/economics/legal-near-monopolies (on file with the *University of the Pacific Law Review*) ("Near-monopolies are companies that . . . have taken over a significant portion of the market share. . . . they can virtually be considered monopolies. . . . Examples . . . Anheuser-Busch: Controls about 45% of the beer market share."); Carroll, *supra* note 127*;* Letter from Bilal K. Sayyed et al., to Jim Wood, *supra* note 154.

185. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 569–70 (1980) (finding that a law limiting all electricity advertising to conserve energy without regard for the service's impact on energy use was over-inclusive because it suppressed "information about electric devices or services that would cause no net increase in total energy usage" and the government made no showing that other alternatives would fail to advance the legislation's purpose).

186. Letter from Bilal K. Sayyed et al., to Jim Wood, *supra* note 154.

187. *See* Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2375 (2018) ("[T]he licensed notice cannot survive even intermediate scrutiny. . . . If California's goal is to educate low-income women about the services it provides, then the licensed notice is 'wildly underinclusive.'") (holding that a required notice in clinics informing pregnant women of publicly-funded family-planning services was under-inclusive and insufficiently drawn to achieve the asserted purpose and therefore did not survive intermediate scrutiny); Letter from Bilal K. Sayyed et al., to Jim Wood, *supra* note 154.

188. *See Cent. Hudson*, 447 U.S. at 566 (indicating that the commercial speech restriction in question must not be "more extensive than is necessary to serve" the substantial interest the government asserts).

189. *See* Retail Dig. Network, LLC v. Prieto, 861 F.3d 839, 850 (9th Cir. 2017) (en banc) (agreeing with prior precedent that laws governing California beer manufacturer and distributor relationships advance the state's substantial interest in having a three-tiered system and are sufficiently tailored to serve that interest); Educ. Media Co. at Va. Tech, Inc. v. Insley, 731 F.3d 291, 298 (4th Cir. 2013) ("However, like the Court in *Sorrell*, we need not determine whether strict scrutiny is applicable here, given that, as detailed below, we too hold that the challenged regulation fails under intermediate scrutiny set forth in *Central Hudson*."); *see also* United States v. Caronia, 703 F.3d 149, 164 (2d Cir. 2012) ("[W]e conclude the government cannot justify a criminal prohibition of off-label promotion even under *Central Hudson*'s less rigorous intermediate test.").

speech restrictions that single out one speaker.[190] Similar to the law in *Sorrell*, AB 1541 targeted manufacturers by compelling contract terms for manufacturers but not distributors.[191] Distributors and other speakers would have had the full freedom of contract while AB 1541 singled out manufacturers, prohibiting their ability to contract for no-cause termination or form new contracts.[192] Additionally, AB 1541 would have altered the content of brewers' speech by forcing them to include terms they do not want to include.[193] A law mandating speech from brewers substitutes freely negotiated speech for the Legislature's policy preferences.[194] As a result, AB 1541 would have been subject to "heightened scrutiny"—which trends suggest is strict scrutiny.[195]

Under strict scrutiny, the government must "narrowly tailor" the law to use the "least restrictive means" in furtherance of a compelling government interest.[196] The interest in preventing monopoly is not only substantial but also compelling because American law disfavors monopolies, and the Twenty-First Amendment permits government regulation of the alcohol industry.[197] However, AB 1541 was not the least restrictive means because it would have burdened small brewers that cannot possibly acquire a monopoly.[198] Instead, the bill was over-inclusive because it would have treated all manufacturers as threats to the three-tier system, but the thousands of small craft brewers hardly represent such a threat.[199] AB 1541 was

190. Sorrell v. IMS Health Inc., 564 U.S. 552, 565–66 (2011).

191. *Sorrell*, 564 U.S. at 563–64.

192. AB 1541, 2019 Leg., 2019–2020 Sess. (Cal. 2019) (as amended on July 11, 2019, but not enacted).

193. *Id.*; *see* Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 795 (1988) (discussing how laws mandating certain speech both alter speech based on content and compel speech); *see also* Carroll, *supra* note 127 (noting AB 1541 makes it expensive and difficult for brewers to amend or terminate distribution contracts, even when wholesalers underperform).

194. AB 1541, 2019 Leg., 2019–2020 Sess. (Cal. 2019) (as amended on July 11, 2019, but not enacted); *cf. Riley*, 487 U.S. at 795 (holding that the North Carolina Charitable Solicitations Act mandated disclosures from professional fundraisers because the State claimed an interest in dispelling charity misperceptions); Nordyke v. Santa Clara Cty., 110 F.3d 707, 710 (9th Cir. 1997) (discussing how an offer to purchase a firearm is commercial speech concerning lawful activity, making a prohibition on such offers subject to intermediate scrutiny).

195. *See* Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) (citing *Sorrell* as an example of content-based speech subject to strict scrutiny); Sorrell, 564 U.S. at 565–66; Educ. Media Co. at Va. Tech, Inc. v. Insley, 731 F.3d 291, 298 (4th Cir. 2013) (holding the *Central Hudson* test is not *Sorrell*'s "heightened scrutiny"); *but see* Retail Dig. Network, LLC v. Prieto, 861 F.3d 839, 848 (9th Cir. 2017) (en banc) (defining "heightened scrutiny" as intermediate scrutiny).

196. Turner Broad. Sys., Inc. v. Fed. Comm. Comm'n, 512 U.S. 622, 680 (1994); Sable Comm. of Cal., Inc. v. Fed. Comm. Comm'n, 492 U.S. 115, 126 (1989).

197. U.S. CONST. amend. XXI; Consol. Edison Co. v. Pub. Ser. Comm'n, 447 U.S. 530, 549 (1980) (Blackmun, J., dissenting); NAT'L BEER WHOLESALERS ASS'N, *supra* note 171; *see* A.H. MARTIN & E.E. MCCLEISH, MARKETING LAWS SURVEY, STATE LIQUOR LEGISLATION 19 (1941) (reasoning that "the right to deal in intoxicating liquors is not an inherent right, but is subject to the . . . legitimate exercise of [state] police power" and that many alcohol laws if applied to other industries would be "unconstitutional extension[s] of State authority" had the liquor industry not been "differentiated from all other occupations" in that it is "placed under the ban of the law).

198. Carroll, *supra* note 127; Letter from Bilal K. Sayyed et al., to Jim Wood, *supra* note 154.

199. *See* Nat'l Inst. of Family and Life Advocates v. Becerra, 138 S. Ct. 2361, 2377 (2018) ("The unlicensed notice imposes a government-scripted, speaker-based disclosure requirement . . . to post California's

simultaneously under-inclusive in that it would have failed to address the speech of other speakers in the alcohol industry—like beer distributors and other alcoholic beverage manufacturers.[200] Such overbreadth and under-inclusivity could have risked a "chilling [of] protected speech," as craft brewers could not have negotiated for no-cause termination or freely terminate distribution contracts later.[201] Existing beer franchise law does not trap small brewers in distribution contracts indefinitely, yet it still protects the three-tiered system.[202] The prior law and the alternative below represent other ways to advance this interest without burdening small brewers, which indicates that AB 1541 was too restrictive.[203] As a result, AB 1541 would have failed strict scrutiny.[204]

C. An Alternative Approach to Address Beer Distribution Issues

The government cannot avoid compelling speech if it imposes good cause requirements in beer distribution contracts.[205] However, legislators should re-tool AB 1541 to avoid unconstitutionally compelling speech through a small brewer exemption to the good cause provisions.[206] Legislators should define "small brewer" by the annual number of barrels the brewer produces.[207] This exemption addresses the power imbalance between large manufacturers and distributors,

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precise notice, no matter what the facilities say on site or in their advertisements.") (suggesting that a notice requirement applied too broadly); *see also* Gerhart, *supra* note 26, at 28 (documenting that 6,266 craft brewers made up about twenty-three percent of total retail sales in 2017).

200. AB 1541, 2019 Leg., 2019–2020 Sess. (Cal. 2019) (as amended on July 11, 2019, but not enacted); *cf. Nat'l Inst. of Family and Life Advocates*, 138 S. Ct. at 2377–78 (finding the notice requirement unduly burdened speech by covering "a curiously narrow subset of speakers").

201. *Nat'l Inst. of Family and Life Advocates*, 138 S. Ct. at 2377 (citing Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985)); AB 1541, 2019 Leg., 2019–2020 Sess. (Cal. 2019) (as amended on July 11, 2019, but not enacted).

202. *Compare* CAL. BUS. & PROF. CODE § 25000.7 (West 2020) (imposing contract terms preventing brewer termination of beer distribution contracts for failure to meet unreasonable sales goals), *with* AB 1541, 2019 Leg., 2019–2020 Sess. (Cal. 2019) (as amended on July 11, 2019, but not enacted) (instituting good cause termination provisions in beer distribution contracts).

203. Carroll, *supra* note 127; Letter from Bilal K. Sayyed et al., to Jim Wood, *supra* note 154; *see infra* Section IV.C (arguing for an adjustment to AB 1541 exempting small brewers).

204. *Cf.* Sable Comm. of Cal., Inc. v. Fed. Comm. Comm'n, 492 U.S. 115, 131 (1989) (finding a prohibition on indecent commercial telephone services was insufficiently tailored to the compelling interest of protecting minors).

205. *See* Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 796–97 (1988) (explaining that the Constitution protects "what to say and what not to say").

206. *See* OKLA. STAT. ANN. tit. 37A, § 3-111(F)(1) (providing an exemption to mandatory good cause requirements in distribution agreements for small brewers provided that the brewer pays the distributor fair market value for the loss of distribution rights prior to termination); *see also* N.Y. ALCO. BEV. CONT. LAW § 55-c(4)(c)(i) (exempting small brewers from mandatory good cause requirements in distribution contracts so long as the brewer pays the distributor fair market value for the loss of distribution rights or the prior to termination).

207. *See* OKLA. STAT. ANN. Tit. 37A, § 3-111(F)(1) (defining "small brewer" as a brewer that produces fewer than 25,000 barrels of beer a year); *see also* N.Y. ALCO. BEV. CONT. LAW § 55-c(4)(c)(i) (defining "small brewer" as a brewer that produces fewer than 300,000 barrels of beer a year).

avoids harming small brewers, and results in a more competitive market.[208]

This change allows the government to assert its interest in preventing monopolies without issue.[209] Small brewer exemptions advance the government interest by focusing exclusively on manufacturers that can acquire a monopoly.[210] Furthermore, this change is "narrowly tailored" to use the "least restrictive means" because it does not extend to small brewers outside the government interest's scope.[211] Unlike AB 1541, this proposal is narrowly drawn to directly advance the government interest, legitimizing intrusions on large manufacturers' freedom of contract.[212] This solution is constitutional because it advances the government interest, is not over-inclusive, and survives strict scrutiny.[213]

V. CONCLUSION

Because of good cause provisions in beer franchise laws, craft brewers around the country struggle to make ends meet.[214] AB 1541 would have imposed good cause restrictions in beer distribution contracts on all manufacturers, even when the parties freely negotiate no-cause termination.[215] These mandated restrictions would have harmed California's craft beer industry and would have violated the First Amendment by unconstitutionally compelling speech.[216]

However, lawmakers can avoid this constitutional issue by creating a small brewer exception.[217] This exception would please craft brewers and distributors by

208. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 1957, at 3–4 (Aug. 29, 2000); Carroll, *supra* note 127; Letter from Bilal K. Sayyed, et al., to Jim Wood, *supra* note 154.

209. *See* Consol. Edison Co. v. Pub. Ser. Comm'n, 447 U.S. 530, 549 (1980) (Blackmun, J., dissenting) (noting that "monopolies generally are against the public policies of the United States.").

210. Carroll, *supra* note 127; *cf.* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 569 (1980) (discussing how the interest in fair and efficient utility rates had a tenuous link to the state's advertising ban, but noting an "immediate connection" between the interest in energy conservation and the advertising ban which the ban sought to advance).

211. Retail Dig. Network, LLC v. Prieto, 861 F.3d 839, 850 (9th Cir. 2017) (en banc); *see* Sable Comm. of Cal., Inc. v. Fed. Comm. Comm'n, 492 U.S. 115, 130 (1989) (discussing how a law cannot be narrowly tailored if alternatives that advance the interest but do not burden speech as much exist); *cf. Cent. Hudson*, 447 U.S. at 569–70 (finding that a public utility advertising ban was not more extensive than necessary to advance the interest in energy conservation because it touched all promotional advertising even if it provided "information about devices or services that would cause no net increase in total energy consumption" and there was no showing that "more limited restrictions" would fail to conserve energy).

212. *See* Adkins v. Children's Hosp., 261 U.S. 525, 546 (1923) (stating that the freedom of contract is not absolute); *see also* RUANE, *supra* note 50, at 1 (noting that the government may regulate even the most protected speech).

213. *Cf. Sable Comm.*, 492 U.S. at 131 (holding a speech regulation was unconstitutional because it was not the least restrictive means to advance a compelling government interest).

214. Carroll, *supra* note 127.

215. AB 1541, 2019 Leg., 2019–2020 Sess. (Cal. 2019) (as amended on July 11, 2019, but not enacted).

216. Carroll, *supra* note 127; *see* Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 796–97 (1988) ("There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say.").

217. N.Y. ALCO. BEV. CONT. LAW § 55-c(4)(c)(i); OKLA. STAT. ANN. tit. 37A, § 3-111(F)(1).

protecting distributors from the abuse of massive manufacturers without harming small craft brewers.[218] This entirely avoids the constitutional issue while allowing the government to prevent monopolistic behaviors, restore balance to the brewer–distributor relationship, and keep the craft beer industry healthy.[219] AB 1541 would have unconstitutionally harmed brewers and the greater craft beer industry.[220] But with this solution in mind and a better understanding of AB 1541's constitutional pitfalls, legislators could continue to keep the craft beer industry healthy.[221]

218. *See supra* Section IV.C.

219. *See supra* Section IV.C.

220. *See Riley*, 487 U.S. at 796–97 (finding compelled speech unconstitutional as a content-based regulation); *see also* Letter from Bilal K. Sayyed et al., to Jim Wood, *supra* note 154 (explaining that AB 1541 would severely harm the craft beer industry).

221. Letter from Bilal K. Sayyed et al., to Jim Wood, *supra* note 154; *see also supra* Section IV.C.

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