



XAVIER BECERRA
Attorney General

State of California
DEPARTMENT OF JUSTICE

2550 MARIPOSA MALL, ROOM 5090
FRESNO, CA 93721

Public: (559) 477-1691
Telephone: (559) 477-1688
Facsimile: (559) 445-5106
E-Mail: Nelson.Richards@doj.ca.gov

June 15, 2017

VIA ECF

Marianne Matherly
Clerk of Court
United States District Court for the
Eastern District of California
501 I Street, Suite 4-200
Sacramento, California 95814

RE: Tracy Rifle & Pistol LLC, et al. v. Becerra, et al.
United States District Court, E.D. Cal., Case No. 2:14-cv-02626-TLN-DB

Dear Ms. Matherly:

I am writing to notify the Court and the parties of new authority governing the pending cross-motions for summary judgment, ECF Nos. 51, 52: *Retail Digital Network, LLC, v. Prieto*, No. 13-56069, 2017 WL 2562047 (9th Cir. June 14, 2017) (en banc), *aff'g Retail Digital Network, LLC, v. Appelsmith*, 945 F. Supp. 2d 1119 (C.D. Cal. 2013). A copy of the opinion is attached to this letter as Exhibit A.

In *Retail Digital Network*, a company that sold in-store digital advertisements challenged a California law prohibiting alcohol manufacturers from paying for such advertisements. The trial court, applying intermediate scrutiny, upheld the law as a valid restriction on commercial speech under *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 477 U.S. 557 (1980). 945 F. Supp. 2d at 1123-26. A three-judge panel of the Ninth Circuit reversed, holding that the Supreme Court's decision in *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011), created a new "heightened scrutiny" standard for content- and speaker-based commercial speech regulations. *Retail Digital Network, LLC, v. Appelsmith*, 810 F.3d 638, (9th Cir. 2016) ("*Sorrell* requires heightened judicial scrutiny of content-based restrictions on non-misleading commercial speech regarding lawful products, rather than . . . intermediate scrutiny").

After granting rehearing en banc, the court disagreed with the panel's analysis, holding that "*Sorrell* did not modify the *Central Hudson* standard." 2017 WL 2562047, at *2; *see also id.* at *6 ("*Sorrell* did not mark a fundamental departure from *Central Hudson*'s four-factor test"). In so holding, the court confirmed that, consistent with the First Amendment, "commercial speech may be subject to greater regulation than non-commercial speech," and that intermediate scrutiny is the appropriate standard of review. *Id.* at *9.

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Here, the opinion of the en banc court forecloses Plaintiffs' argument that *Sorrell* imposes a form of "heightened scrutiny" more demanding than the *Central Hudson* test. *See, e.g.,* Pls.' Mem. of P. & A in Support of Mot. for Summ. J., ECF No. 51-1, at 5-6.

Sincerely,

/s/ Nelson Richards
NELSON R. RICHARDS
Deputy Attorney General

For XAVIER BECERRA
Attorney General

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