MEMORANDUM

CONSTITUTIONALLY DEFENSIBLE RESTRICTIONS ON ALCOHOL ADVERTISING AND ALCOHOL SPONSORSHIP IN STATE PUBLICATIONS AND ON STATE-OWNED OR STATE-LEASED LANDS

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I. Introduction.

This memorandum presents the legal analysis in support of the conclusion that in order to reduce the exposure of underage youth to alcohol marketing, a state statute restricting alcohol advertising or alcohol sponsorship in or on the following types of property owned, leased or operated by the state is a permissible regulation of commercial speech under the First Amendment:

1) alcohol advertising in state publications[1]

2) alcohol advertising on the campuses and other properties of state educational institutions, including state university and college campuses[2]

3) alcohol advertising in state parks, sports arenas, state convention sites, and other state-owned or state-leased lands, whether developed or undeveloped[3]

4) alcohol advertising in state-owned buildings leased to private parties

5) alcohol sponsorship of state-sponsored civic events[4] held in state parks and other state lands

This legal analysis also describes some of the legal risks that states may face in enacting such statutes and strategies for addressing these risks.[5] This memorandum should be read in conjunction with the enclosed document "Model Statutory Language Restricting Alcohol Advertising and Alcohol Sponsorship in State Publications and on Property Owned, Leased, or Operated by the State."

II. Summary of Conclusions.

The United States Supreme Court has recognized that while they may not place complete statutory bans on truthful, non-misleading commercial speech, state and local governments may restrict commercial advertising, including alcohol or tobacco advertising, on private property.[6] It is significant here, however, that the manner in which a government regulates the use of private property is different from the way government manages the use of its *own* property. When a government restricts commercial speech on its own property, it may be acting either in a "regulatory" capacity (also known as a "market regulatory" capacity) or in a "proprietary" capacity (also known as a "market participatory" capacity). This distinction in governmental capacities is central to the determination of whether a state can restrict alcohol advertising on its own property.[7]

In most jurisdictions, there is no controlling legal authority at the federal level concerning alcohol advertising or alcohol sponsorship on public property. Several relevant federal court decisions support the conclusion, however, that a state is permitted under the free speech clause of the First Amendment to restrict alcohol advertising in state publications, at state educational institutions, such as universities and colleges, and on state lands, including parks, sports arenas,

and convention sites, and to restrict alcohol sponsorship at outdoor civic events held on state lands, including public parks.[8]

When a state decides to accept commercial advertising in its own publications; on college radio stations, dormitory walls, and campus newspapers; or in connection with the advertising spaces available in the state sports and convention centers; or to accept commercial sponsorship at major civic events such as the state fair, the state itself is engaged in "speech." Under these scenarios, the state is not acting as a regulator. Rather, the government is acting as a proprietor or market participant by seeking to raise governmental revenues from advertising and event sponsorship or to facilitate the conduct of its own internal business. When acting as a "proprietor" or "market participant," a state may exercise broad discretion in the operation of its own commercial interests to send a message of its own choosing, i.e., that it declines to accept or chooses to limit alcohol advertising or sponsorship in connection with state publications, state educational institutions, state lands and state-sponsored events.

Even when a state enters into a private agreement to lease a state-owned building to a third party,[9] the government can still be viewed as engaging in speech and acting in its proprietary or market participatory capacity. By entering into lease agreements, the state is engaged in commerce because it seeks to generate revenues for governmental purposes. Similarly, too, when a state permits third parties to use state property, such as a public park, for outdoor events for which the state is *not* acting as a sponsor, the government may still be viewed as engaging in speech and the state still is acting in its proprietary/market participatory capacity. By requiring licensing or permitting fees to cover the cost of providing administration and personnel for the event (e.g., on-site personnel to set up the event and to clean up during and after the event, law enforcement officers to provide security, or lighting and sound crews to handle staging), the state is engaged in commerce because it seeks to generate revenues for governmental purposes.

It may be argued that when the state bans alcohol sponsorship at civic events not sponsored by the state, it is acting less as a proprietor or market participant and more as a lawmaker, i.e., as a market regulator of the third party's speech. Courts have not addressed this issue specifically, and resolution may depend on the specifics of the event and in particular on the extent of state involvement in financing, planning and receiving revenues. If the argument is accepted, then the state's discretion to regulate alcohol advertising is more circumscribed, and courts will scrutinize such restrictions more closely than restrictions imposed in its proprietary/market participatory capacity. Even under this heightened level of scrutiny, however, restrictions on alcohol advertising and sponsorship that are consistent with the First Amendment can be developed, to promote the welfare and temperance of minors exposed to certain publicly visible advertisements of alcoholic beverages and to project a wholesome, family-oriented state image that rejects alcohol consumption by underage youth. Accordingly, careful drafting is needed to ensure that a statute restricting alcohol advertising and/or alcohol sponsorship at events on state land sponsored by private parties will be ruled constitutional, since a more stringent legal standard of review may be applicable.

Based on our legal analysis summarized above, we conclude that the state can restrict alcohol advertising in the five types of state-owned, leased or operated property and publications that follow:

State Publications

A state can restrict alcohol advertising in state publications by forbidding such advertisements in all publications of the executive, legislative and judicial branches and all state agencies. State publications include brochures of the state's tourism department listing the various museums and outdoor exhibits or of the state's fish and game department listing hunting and fishing sites within the state. State publications, including state Web sites, are not places of public assembly intended for the public's communication of ideas or for the exchange of differing points of view. Rather, they serve state government's purpose of providing information from the government to the public about government functions, services and programs. To the extent a state government accepts commercial advertising in its government publications, a state may exercise broad discretion to decline or limit advertising because the state is not restricting the speech rights of third parties but instead is engaged in its own speech activity.

State Educational Institutions

A state can restrict alcohol advertising on the campuses and other property of state educational institutions, whether the state institutions are primary, secondary, or post-secondary institutions.[10] As with state publications, the advertising "spaces" of state educational institutions—radio, television, and print media, promotional materials for campus events, campus newspapers (not including student-operated newspapers)—are sold to defray operational expenses. In the case of advertising on school campuses, a state may exercise broad discretion in the operation of its property to decline or limit alcohol sponsorship or advertising because the state is not restricting the speech rights of third parties but instead is engaged in its own speech activity. An exception not addressed in this memorandum involves advertising in student-operated newspapers, where the students' First Amendment rights may limit state authority to determine advertising policies. In addition, a state may impose restrictions on schools attended by underage minors without violating the First Amendment because a state has public health and proprietary/market participatory interests in promoting the welfare and temperance of minors exposed to certain publicly visible advertisements of alcoholic beverages and in projecting a wholesome, family-oriented state image.

State Sports Arenas and Convention Sites

A state can restrict alcohol advertising in its sports arenas, convention sites, and similar state structures, whether owned by the state or leased from private parties by the state. Neither the advertising space within these structures nor the structures that house them are places of public assembly intended for the communication of ideas or for the exchange of different points of view. Rather, as will be discussed below, these advertising spaces, and the types of structures that accommodate them, are commercial ventures by the state. The structures are constructed to meet the sports or convention facility needs of the state, and both the structures and advertising spaces within them provide economic benefits to the area.

State Property Leased to Private Parties

A state can restrict alcohol advertising as a condition to leasing state property to private parties. When government enters into lease agreements with private parties, it acts in a proprietary or market participatory capacity with respect to ownership, control and operation. In other words, when a state acts in its proprietary or market participatory capacity, it possesses the same rights and powers and is subject to the same restrictions and regulations as other like proprietors or market participants. Additionally, a state, while performing a proprietary or commercial function within its corporate powers, leases its property to an individual for a consideration, creates the legal relation of landlord and tenant, and is possessed of the right, immunities and liabilities of a landlord. This is because when a city embarks upon business enterprises for its own profit, it places its name and its sovereign position on the same plane as that of any private corporation or individual in a similar transaction.

Sponsorship of Civic Events Held on State Lands

A state can restrict alcohol sponsorship and related advertising in three major ways. The state could 1) itself decline to accept alcohol sponsorship and/or alcohol advertising of state events held in public parks or on some other form of public property; 2) agree to accept alcohol sponsorship of state events or alcohol advertising at state-sponsored events but require limitations on the location and manner of signage when underage youth are expected to be present; and/or 3) restrict alcohol sponsorship and advertising by private third parties using state property for events neither affiliated with nor sponsored by the state.

In the first two situations, a state may exercise broad discretion in the operation of its property to decline or limit alcohol sponsorship or advertising because the state is not restricting the speech rights of third parties but instead is engaged in its own speech activity. In the third instance, a state may impose restrictions on third party users without violating the First Amendment because a state has public health and proprietary/market participatory interests in promoting the welfare and temperance of minors exposed to certain publicly visible advertisements of alcoholic beverages and in projecting a wholesome, family-oriented state image. The restrictions should be carefully drafted to meet a stricter standard of court review that may be applied to ensure that they are narrowly tailored and substantially advance the state's interests.

III. A State Has Broad Authority to Decline to Accept, or Limit Its Acceptance of, Alcohol Advertising in State Publications and on State Property and Alcohol Sponsorship Associated with State-Controlled Outdoor Civic Events on State Property.[11]

A state has broad authority to prohibit or restrict alcohol advertising in its own publications and on its own property provided: (1) when it does so, it is acting in its proprietary/market participatory capacity; (2) the restrictions or prohibitions apply to nonpublic rather than public fora; and (3) the restrictions or prohibitions are reasonable and viewpoint-neutral. Each of these three elements is analyzed below. If these conditions are met, a state may choose to decline all advertising or sponsorship from alcohol industry members without violating

commercial speech rights under the First Amendment. Alternatively, a state can choose to permit alcohol advertising or alcohol sponsorship with limits placed on the time, place and manner of alcohol advertising or sponsorship. Concerning alcohol sponsorship, for example, a state can impose time, location and manner limitations that minimize exposure of underage attendees to the alcohol advertising conducted at these events.

A. The State Must Be Acting in Its Proprietary/Market Participatory Capacity.

As the United States Supreme Court has recognized, in certain circumstances, the government itself acts as a speaker: "[W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes."[12] The same holds true even where the government conveys its message through private parties: "When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee."[13] Consequently, when the government is acting as a speaker, the government has broad discretion to speak on its behalf, to take a specific position on an issue and to enact statutes consistent with its position.

Decisions of federal appellate courts are in accord. In *Chicago Acorn v. Metropolitan Pier and Exposition Authority*, 150 F.3d 695, 699-700 (7th Cir. 1998), for instance, the Seventh Circuit Court of Appeals observed:

> Whenever the government is in the business of speech, whether it is producing television programs or operating a museum or making grants or running schools, the exercise of editorial judgment is inescapable. If there is any political or ideological resonance to the expressive activity involved, the good-faith exercise of that judgment may have unavoidable political or ideological consequences; and so (because they are unavoidable) these consequences do not condemn the judgment. [Citation omitted.] . . . A publicly owned art gallery, which has to decide which pictures to hang where, is not constitutionally debarred from placing the most offensive pictures in the least conspicuous exhibition area.[14]

Similarly, in *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404 (2d Cir. 2002), the Second Circuit Court of Appeals upheld a public school district's attempt to enforce a radio frequency emissions condition in its agreement to lease space on a high school roof for a cellular communications tower, finding that the school district had entered into the lease in its proprietary, not regulatory, capacity, and that the condition to which the lessee communications company had agreed was a condition that a private property owner would be free to demand:

> [A] private party who has the right to refuse outright to lease his property also has the right to decline to lease the property except on agreed conditions (assuming those conditions would not violate law or public policy). Since, so far as we are aware, nothing in the law requires a communications company to operate at the FCC Guidelines maximum permissible radiation exposure levels, the private owner could elect not to grant a communications company a lease for the

> construction and operation of a cellular tower unless the company agreed to limit its RF emissions to a lower level. To the same extent, the School District as a public entity, sought out by the company only in the District's capacity as property owner, is permitted to do the same. And if the property owner, public or private, declines to enter into a lease without such a condition, the communications company is faced with a choice: the company may agree to the requested condition, or, if it is unwilling to do so, it may seek a lease elsewhere from a property owner who does not insist on such a condition. There is nothing in the conduct of the School District here that prevents Sprint from negotiating a lease on other property whose owner does not request conditions on emissions.[15]

In declining to accept or in restricting acceptance of commercial advertising in state publications, in state buildings or on state lands and state campuses, or in declining to accept commercial sponsorship for state events or at state-sponsored events held on state lands, a state is not restricting the speech of third parties but instead is itself engaging in speech activity. As a proprietor or market participant, the state is speaking when it seeks to raise municipal revenues from advertising and event sponsorship to facilitate the conduct of its own internal business. Under these circumstances, the state may take a position on an issue, namely, that it opposes alcohol advertising in or on public property or that it opposes event sponsorship and related sponsorship advertising on public property where children are likely to be present, and that it may take steps in furtherance of its view by declining to accept, or by limiting its acceptance of, alcohol advertising and event sponsorship by alcohol industry members.

The use of the government-proprietary distinction for commercial speech analysis may be challenged based on case law that criticizes the use of the governmental-proprietary distinction for sovereign immunity and government procurement process analyses. In *Morningstar Water Users Ass'n, Inc. v. Farmington Mun. School Dist., supra,* for instance, the New Mexico Supreme Court held that for purposes of the state's Procurement Code, a city was to be defined by its status as a municipality, and broadly rejected the use of the governmental-proprietary distinction: "We also direct that henceforth, for the purposes of New Mexico law, the roles, liabilities, and duties of a government entity shall be evaluated without reference to the governmental-proprietary doctrine."[16]

We are unaware of any cases, however, either within or without New Mexico that reject the use of the governmental-proprietary distinction in the present context of analyzing government-owned or operated advertising space. Indeed, the United States Supreme Court has expressly approved the use of the governmental-proprietary distinction for commercial speech analysis. In determining the nature of the property, the Court has examined whether the government opened the property for speech in its "proprietary capacity" for the purpose of raising revenue or facilitating the conduct of its own internal business; if so, the Court has considered the forum non-public and allowed restrictions subject only to the test of reasonableness. See *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303, 94 S.Ct. 2714, 2717 (1974) ("Here, we have no open spaces, no meeting hall, park, street corner, or other public thoroughfare. Instead, the city is engaged in commerce."); *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678, 112 S.Ct. 2701, 2705 (1992) ("Where the government is acting as a proprietor, managing its internal operations, rather than acting as

lawmaker with the power to regulate or license, its action will not be subjected to the heightened review to which its actions as a lawmaker may be subject.").

Despite the New Mexico high court's criticism of the governmental-proprietary distinction in *Morningstar Water Users Ass'n, Inc.*, it nevertheless appears to accept that a closely related distinction between "market regulator" and "market participant" is a valid legal concept. It cited with approval the United States Supreme Court decision in *Reeves v. Stake*, 447 U.S. at 434, which recognized the market regulator/market participant distinction in the context of the U.S. Constitution's Commerce Clause. The U.S. Supreme Court stated in that opinion (*id.* at 438 n. 12):

> When a State buys or sells, it has the attributes of both a political entity and a private business. ... The Court ... heretofore has recognized that '*[l]ike private individuals and businesses*, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases.' [Citation omitted (emphasis added).] While acknowledging that there may be limits on this sweepingly phrased principle, we cannot ignore the similarities of private businesses and public entities when they function in the marketplace.

The New Mexico Supreme Court approved the *Reeves* case analysis, concluding that its distinction between market regulator and market participant was fundamentally different from the governmental/proprietary doctrine it was rejecting:

> [¶] The governmental-proprietary doctrine arbitrarily categorizes the kinds of activities that can be engaged in by a government. Thus a state water utility can be governmental in one jurisdiction not in another, or proprietary under one statute and not under another. On the other hand, characterizing the government as either market participant or market regulator draws a distinction based, not upon the kind of activity involved, but rather how the government uses its power in relation to that activity. Thus, if a state operates a water plant, it is a market participant. If, to the benefit of its own water company, it controls competing water plants in which it has no ownership interest, it is a market regulator.

Morningstar Water Users Ass'n, Inc. v. Farmington Mun. School Dist., 120 N.M. at 316.

In the commercial speech context, the market participant/market regulator distinction aptly applies. When a state sells advertising space in its publications or on its state campuses, parks, and sports arenas, it is a market participant. When a state controls advertising space in which it has no ownership interest, as when it restricts billboard advertising on privately owned property, the state is a market regulator. Consequently, regardless of the terms of art used, the conclusion is the same: a state, as a proprietor or market participant, is entitled to convey its own message and may restrict alcohol advertising and alcohol sponsorship on property it owns, leases or controls.

B. The State Must Apply the Restrictions Only to Advertising in Nonpublic Fora.

The United States Supreme Court has established a doctrine of "forum analysis" for analyzing regulations of speech on *public property*.[17] "The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue."[18] The analysis is applied primarily to noncommercial speech, but nevertheless has implications for commercial speech restrictions.

Under the Supreme Court's "forum analysis," there are three types of government-owned property: the traditional public forum, the designated public forum and the nonpublic forum.[19]

- Traditional public fora include those places which "by long tradition or by government fiat have been devoted to assembly and debate," such as public streets and parks.[20]

- Designated public fora are nontraditional fora that the government has opened for expressive activity by part or all of the public.[21] "The government does not create a [designated] public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional public forum for public discourse."[22]

- All remaining public property falls in the category of "nonpublic for a," that is, "[p]ublic property which is not by tradition or designation a forum for public communication is governed by different standards."[23]

Regulation of noncommercial speech on traditional public fora or property that the government has expressly dedicated to speech is examined under the same standard of "strict scrutiny." Under the strict scrutiny test, speech regulations are presumed invalid. The government can exclude a speaker from a traditional or designated public forum "only when the exclusion is necessary to serve a *compelling* state interest and the exclusion is *narrowly drawn* to achieve that interest."[24] A less stringent but still demanding standard of review is required for restrictions of commercial speech on public fora (discussed below).

Where the forum is nonpublic, however, speech regulations are presumed valid.[25] The government may restrict speech as long as the restrictions are *reasonable* and not "an effort to suppress expression merely because public officials oppose the speaker's view."[26] In a nonpublic forum, the government has the "right to make distinctions in access on the basis of subject matter and speaker identity,"[27] but "must not [make distinctions] based on the speaker's viewpoint."[28] "The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves."[29] The advertising standards "need only be *reasonable*; [they] need not be the most reasonable or the only reasonable limitation."[30] In addition, "[w]here the government is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license, its action will not be subjected to the heightened review to which its actions as a lawmaker may be subject."[31]

A cursory review of case law might suggest that regulations of alcohol advertising and sponsorship should trigger the heightened level of scrutiny accorded traditional public fora. Indeed, states should anticipate this objection. For the following reasons, however, the lower "reasonableness" standard accorded nonpublic fora and government actions taken in the state's proprietary or market participatory capacity should apply.

First, the fact that the events take place on public property does not determine the standard of constitutional review. As noted by the United States Supreme Court, "[t]he mere physical characteristics of the property cannot dictate forum analysis."[32] Thus, the Court has determined that even though there may be sidewalks and streets within a military base that permit free civilian access to certain unrestricted areas, such a military base is a nonpublic forum.[33] Likewise, the Court has ruled that the sidewalk leading from the parking area of a post office to the front door of the office is not a traditional public forum sidewalk, but rather a nonpublic forum constructed solely to provide for the passage of individuals engaged in postal business.[34] In holding that the military base and the postal sidewalk were nonpublic fora, the Court applied the lower "reasonableness test," rather than the stringent "strict scrutiny" test applicable to traditional and dedicated fora, and sustained the government's restrictions against political speeches and demonstrations on the military base and solicitation by a political advocacy group on the postal sidewalk.

So too here, the relevant forum is not the state publication, the state campus, the state sports arena or state convention center, the state park, or the state street, but the advertising space in or on these venues and, in the particular case of civic events, the infrastructure of the event itself, *viz.*, the entertainment stages, the fencing, the posts, and the buildings.[35] (Conceivably, the event organizers may transform the existing state structures, such as state fences, state posts, and state buildings, into advertising panels for the event. Alternatively, fencing, posting, and buildings may be constructed solely for the event.) In all these cases, the forum relevant to "forum analysis" is the advertising space itself (or, in the case of sponsorship, the event infrastructure) and not the publication, campus, arena, convention center, park, or street where the advertisement is located (or where the sponsored civic event is held).

Second, contrary to the usual situation in which strict scrutiny is applied, regulation of alcohol advertising on public property and alcohol sponsorship of state-sponsored events does not threaten the free speech rights of citizens to engage in expressive activity on a public street or in a public park. As noted earlier, the First Amendment rights at issue are those of the state itself, where the state's decision to accept or decline sponsorship or advertising is one made within its proprietary or market participatory capacity. Where, as here, the government acts in a proprietary or market participatory capacity, the United States Supreme Court has found a nonpublic forum. In *Lehman v. Shaker Heights*, for instance, the Court upheld a ban on political advertising on public transit vehicles. The plurality opinion squarely rejected the argument that the advertising space on buses constituted a public forum protected by the First Amendment. Concluding that advertising panels are nonpublic fora, the Court noted that the state was engaged in commerce and had "discretion to develop and make reasonable choices concerning the type of advertising" it would display.[36] In *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, the Court upheld an executive order excluding legal defense and political advocacy groups from a charity drive aimed at federal employees.[37] The opinion rejected the argument that the

federal workplace where the charity drive took place constituted a public forum requiring the application of strict scrutiny. The Court concluded that the charity drive itself was the relevant forum and, further, that the charity drive was a nonpublic forum, observing that the federal government, as an employer, "has the right to exercise control over access to the federal workplace in order to avoid interruptions to the performance of the duties of its employees."[38] As with the advertising panels of the buses in *Lehman* and the charity drive in *Cornelius*, a local government, in its revenue raising capacity, should have the right to exercise control over access to the advertising space on public property and to the infrastructure of an event held on its own property.

Holdings of the federal and state appellate courts support the conclusion that it is the free speech rights of the state that are at stake, rather than those of a private citizen, and that the appropriate forum analysis is the advertising space on public property or event infrastructure, rather than the park or street itself.

In *Rutgers 1000 Alumni Council v. Rutgers, the State University of New Jersey*, the Appellate Division of the Superior Court of New Jersey determined that the advertising section of the state university's official university magazine was a limited public forum, that is, a nonpublic forum, and that its extant, but unwritten, policy against accepting "issue-oriented" or "advocacy" ads, to avoid exposing the magazine to controversy and criticism for certain positions, was reasonable and fair.[39] In concluding that the advertising section was a limited public forum, the court found that the magazine had enunciated a policy of limited access, permitting only advertisements that promoted Rutgers and its programs and that offered goods and services benefiting and of interest to "that audience," so long as the nature of the goods and services were not inconsistent with the magazine's limited purposes. The court also found that by selling advertising space, the university "acted in a proprietary capacity to raise money to defray the cost of the publication of the Magazine." *Ibid.*

In *DiLoreto v. Downey Unified School District Board of Education*, the Ninth Circuit Court of Appeals ruled that a district's refusal to post a paid advertisement containing the text of the Ten Commandments on a high school's field fence did not violate a would-be advertiser's First Amendment rights.[40] The Ninth Circuit held that the fence was a nonpublic forum open for a limited purpose because it excluded ads on certain subjects, including alcohol, taverns, Planned Parenthood, and religion. The court found that 1) the district reasonably could have believed that the controversy and distraction created by political and religious messages raised the potential for disruption of classes and school-sponsored events held on the field; 2) the district reasonably could have been concerned that the school would be associated with any controversial views expressed in advertisements; and 3) litigation over controversial signs would have cost the district money and deprived it of the financial benefit the advertising forum was intended to provide.

In *Hippopress, LLC v. SMG*, the Supreme Court of New Hampshire held that a newspaper publisher's First Amendment rights were not violated when the private management company of the Verizon Wireless Arena, a sports and entertainment arena owned by the City of Manchester, refused to permit the publisher to distribute its newspapers in racks and vending machines inside the arena on the ground that it had given another publisher the exclusive right to

sell and distribute newspapers there.[41] Preliminarily, the court ruled that there was no "state action" attributable to the private management company sufficient to support a violation of the publisher's free speech rights. The court decided there was no state action because the city did not participate in any way in the negotiation of the exclusivity contract, the publisher had failed to establish that the management and operation of a commercial arena was a function traditionally the exclusive domain of the State, the city did not take any part in the day-to-day management of the arena, and the exclusivity contract was not indispensable to the financial success of the joint participation of the city and the management company. Moreover, even assuming state action, the court concluded that the arena was a nonpublic forum and the exclusivity contract was a reasonable restriction of speech:

> SMG did not open the arena for public discourse by contracting with Union Leader for the exclusive newspaper distribution rights in the arena. SMG manages the arena for the City to provide the downtown area with economic stimulus. SMG enters into contracts with private parties that want to reach a particular audience. SMG provides a medium for musicians, sports teams and other entertainers to showcase their talents, as well as for advertisers to reach a target audience. These private parties, however, need to pay for the right to reach their audiences. SMG and the City are engaged in commerce. [Citation omitted.] SMG enters into profit-conscious contracts in the commercial marketplace. [Citation omitted.] Neither SMG nor the City has opened the doors of the arena to all parties wishing to disseminate their products. Nor is the arena open to the public for the free exchange of ideas. [Citation omitted.] To the contrary, entry is guarded, and only those parties able to pay for access, such as musicians, sports teams, spectators or newspapers, are allowed in.
>
> This is not a case where the City has opened the arena for public events, such as inaugurations or graduations, and attempted to exclude a particular speaker or point of view. ... SMG was hired to enter into private contracts in the commercial marketplace to bring economic vitality to the downtown area.[42]

In *Hubbard Broadcasting, Inc. v. Metropolitan Sports Facilities Commission*, the Eighth Circuit Court of Appeals ruled that First Amendment rights of an advertiser were not violated when he was denied advertising space on the scoreboard in a municipally owned sports complex.[43] The city had a policy of selling advertising space on the scoreboard under exclusive ten-year contracts on a first come/first served basis and of prohibiting competitors' advertising space elsewhere in the sports complex. The Eighth Circuit held the city's policy was a reasonable restriction on commercial speech where "the city, acting in a proprietary capacity, [had] allowed a small number of commercial advertisers access to a limited amount of advertising space on government property in order to generate revenue."[44]

If the advertising section of the state university magazine in *Rutgers 1000 Alumni Council*, the high school fence in *DiLoreto*, the municipal sports arena in *Hippopress, LLC* and the municipal sports arena scoreboard in *Hubbard* are nonpublic fora, the advertising space of state publications, state educational institutional campuses, state buildings, arenas, and convention centers, as well as fences, posts, and stages of event infrastructure surely constitute

nonpublic fora. As with the university's decision to decline issue-oriented advertisements, the school district's decision to decline fence advertising that could be disruptive to the learning environment, and the cities' decisions to limit the advertising space in their sports complexes to just a handful of businesses, a state certainly should be entitled to exercise its proprietary/market participatory judgment to limit alcohol advertising and sponsorship on its own property.

As these cases demonstrate, the state has broad discretion to regulate alcohol advertising in nonpublic fora. At least one case, however, has held that a state-controlled advertising space can be transformed from a nonpublic to a public forum in certain circumstances. In *New York Magazine, a Div. of Primedia Magazines, Inc. v. Metropolitan Transp. Authority*,[45] the Second Circuit Court of Appeals ruled that the advertising space on buses operated by the City of New York's public transit authority was a designated public forum, subjecting the city's restrictions on advertising to heightened scrutiny under the First Amendment. The court reasoned that the advertising space was a designated public forum because the transit authority accepted both commercial and noncommercial advertising and because the authority's rejection of New York Magazine's advertisement, based on its use of the name of the mayor of New York to promote the magazine, was a regulatory, as opposed to a proprietary, action. In so holding, the court observed that "[d]isallowing political speech, and allowing commercial speech only, indicates that making money is the main goal. Allowing political speech, conversely, evidences a general intent to open a space for discourse, and a deliberate acceptance of the possibility of clashes of opinion and controversy that the Court in *Lehman* recognized as inconsistent with sound commercial practice."[46] This case suggests that states should clearly designate their advertising venues and should restrict materials in the venues to commercial messages only so as to ensure a public forum is not inadvertently established.[47]

C. A State's Restriction Must Be Both Reasonable and Viewpoint-Neutral.

The third criteria for establishing a state's broad discretion in restricting alcohol advertising and sponsorship and advertising on state property and in state publications involves the application of the restrictions of reasonableness and viewpoint-neutrality. These are relatively easy requirements to establish. When applying the reasonableness standard, the regulation in question is assumed to be valid and will be ruled unconstitutional only if it is shown to be arbitrary. Restricting alcohol advertising is a reasonable means to advance the important state interests of reducing exposure of alcohol advertising to children, promoting temperance, and reinforcing state policies and messages that address alcohol problems among the state's citizens.

Viewpoint discrimination occurs when the government "targets not subject matter, but particular views taken by speakers on a subject."[48] The United States Supreme Court has observed that the "government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."[49] On the other hand, as further recognized by a plurality of the Supreme Court, in evaluating the strength of, or distinguishing between, various communicative interests, "[a state] may distinguish between the relative value[s] of different categories of commercial speech."[50]

A regulation that restricts alcohol sponsorship or advertising can be drafted to be viewpoint-neutral. While it is true that such a regulation is not subject-matter-neutral, as it is concerned only with *alcohol* sponsorship and advertising, it does not have to be; the First Amendment requires only *viewpoint* neutrality. "Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property."[51] As discussed previously, in *DiLoreto*, the Ninth Circuit determined that the school district's screening of ads based on their religious content or controversial nature, such as those for alcohol or Planned Parenthood, was permissible. Likewise, in *Hippopress, LLC*, the court determined there was no viewpoint discrimination because of the exclusivity contract with the single publisher: "Without the ability to enter into exclusive contracts for advertising and distributing products, SMG would be severely hampered in its ability to compete in the marketplace. [Citation omitted.]"[52]

IV. A State May Restrict Alcohol Sponsorship and Related Sponsorship Advertising at Civic Events Held on State Property but Not Sponsored by the State, Provided the Restrictions Meet A Stricter Standard of Review.

As noted above, for purposes of this memorandum, "state-sponsored" events are defined as civic events that the state agrees to sponsor or endorse or as events for which the state has agreed to act as a beneficiary of revenues generated from alcohol advertising and sponsorship. In these circumstances, the state appears to be acting in its proprietary/market participatory capacity, and the venues for the advertising or sponsorship should be treated as nonpublic fora. However, suppose the event is organized by a private party that contracts with the state for the use of the state property and the state has little or no connection to the event itself. Does the decreasing involvement of the state in the event result in transforming its role from a proprietor to a regulator?

The courts provide little guidance for answering this question. In general, the proprietary/regulatory distinction rests on the extent of involvement of the state in planning and implementing the event and on the direct revenue flows between the state and the event. Using this general principle, an argument can be made that the fact that the event occurs on state property is sufficient for maintaining its proprietary and nonpublic forum status. The simple fact that an event occurs on state property may create an impression in the public's mind that the state endorses the event's sponsors or advertisers. In addition, in its capacity as an administrator of streets, parks, and other state property, the state inevitably plays some role, however minor, in the conduct of all events held on its property, state-sponsored or not. For instance, a state may provide law enforcement and sanitary service personnel to manage security and clean-up, particularly at large-scale events. [53]

Although an argument can be made that the fact the event occurs on state property is sufficient to maintain the proprietary status, the lack of judicial guidance suggests that states developing regulations should be cautious in their approach. They should prepare for the possibility of adverse court rulings regarding the regulatory/proprietary determination and establish statutes that will also meet requirements for regulating commercial speech.

A. The *Central Hudson* Test and Related Cases

In *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*,[54] the U.S. Supreme Court established a four-part test for determining whether a government regulation of commercial speech is valid under the First Amendment:

1. whether the speech concerns lawful activity and is not misleading
2. whether the government's interest in regulating the speech is substantial
3. whether the regulation directly advances the asserted government interest
4. whether the regulation is narrowly tailored to serve the government's interest[55]

If the first element or "prong" is satisfied, then the remaining three prongs must be analyzed. The government must establish that all three are satisfied or the regulation in question fails to meet the test and will be found to be unconstitutional. This is the test that would apply if the courts reject the proprietary status of the state in permitting private events on state property.

The *Central Hudson* test, announced in 1980, constitutes an "intermediate" level of scrutiny for commercial speech that lies somewhere between the less demanding "reasonableness" test (the standard ordinarily applied to noncommercial expressive activity in nonpublic fora and to government actions taken in a state's proprietary/market participatory capacity) and the more burdensome "strict scrutiny" test (the standard customarily applied to noncommercial expressive activity in traditional and designated public fora). In *Central Hudson*, the Court advanced the distinction between the protection accorded commercial and other forms of speech under the First Amendment, stating: "The Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression. [Citation omitted.] The protection available for a particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation."[56] It is the government's interest in protecting consumers from "commercial harm" that provides "the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech."[57] On the other hand, it is also the government's interest not to tread on commercial speech given that "bans that target truthful nonmisleading commercial messages rarely protect consumers from such harms. … Instead, such bans often serve only to obscure an 'underlying governmental policy' that could be implemented without regulating speech."[58]

Applying the principles of *Central Hudson*, a state statute restricting alcohol sponsorship and sponsorship advertising can be consistent with the First Amendment if properly drafted. As administrator of the public health of its residents and/or as a proprietor/market participant, a state has interests in promoting the welfare and temperance of minors exposed to certain publicly visible advertisements of alcoholic beverages and in projecting a wholesome, family-oriented state image that rejects alcohol consumption by underage youth. The restrictions on alcohol sponsorship and related advertising will be valid under *Central Hudson* if they directly advance

those interests and if the restrictions are no more extensive than necessary to serve those interests.[59]

The Supreme Court has not applied the *Central Hudson* test specifically to alcohol advertising restrictions involving public parks or outdoor civic events on public property. Nevertheless, both the Supreme Court and federal circuit courts have considered constitutional challenges to complete bans on outdoor advertising as well as narrower prohibitions against the placement of outdoor advertising in particular areas where children are expected to walk to school or play in their neighborhood. These cases can guide the development of statutory provisions that address the regulation of alcohol sponsorship on state property.[60]

44 Liquormart

In the 1996 Supreme Court decision *44 Liquormart*, Rhode Island had prohibited all advertising throughout the state, "in any manner whatsoever," of the price of alcoholic beverages except for price tags or signs displayed with the beverages and not visible from the street.[61] The State contended that the ban served the State's interest in promoting temperance by keeping alcoholic prices high and therefore consumption low.[62] The Supreme Court held the blanket ban unconstitutional as "an abridgement of speech protected by the First Amendment."[63]

The opinion for the Court did not provide a rationale for its conclusion that the ban violated the First Amendment, and no opinion addressing the First Amendment violation commanded a majority of the Court. Nevertheless, eight justices in three separate opinions concluded that the mechanism of keeping alcoholic prices high as a way to keep consumption low imposed too broad a prohibition on speech to be justified by the end.[64] Justice Stevens, joined by Justices Kennedy, Souter, and Ginsburg, noted, "without any findings of fact, or indeed any evidentiary support whatsoever, we cannot agree with the assertion that the price advertising ban will significantly advance the State's interest in promoting temperance."[65] Justice Stevens also noted that alternative forms of regulation were available that would not impinge speech and would "be more likely to achieve the State's goal of promoting temperance. As the State's own expert conceded, higher prices can be maintained either by direct regulation or by increased taxation."[66] Similarly, Justice O'Connor, writing an opinion in which Chief Justice Rehnquist, Justice Souter and Justice Breyer joined, concluded,

> If the target is simply higher prices generally to discourage consumption, the regulation imposes too great, and unnecessary, a prohibition on speech in order to achieve it. ... "'[T]he objective of lowering consumption of alcohol by banning price advertising could be accomplished by establishing minimum prices and/or by increasing sales taxes on alcoholic beverages.'"[67]

Justice O'Connor concluded that because the regulation failed "even the less stringent standard set out in *Central Hudson*, nothing here requires adoption of a new analysis for the evaluation of commercial speech regulation."[68] Eight justices thus concluded that keeping legal users of alcoholic beverages ignorant of prices through a blanket ban on price advertising did not further any legitimate end.[69]

Anheuser-Busch

In the 1996 decision *Anheuser-Busch v. Schmoke*, the Fourth Circuit Court of Appeals upheld against a constitutional challenge a city ordinance prohibiting the placement of stationary, outdoor advertising that promoted alcoholic beverages in certain areas of Baltimore City.[70] The ordinance was designed to promote the welfare and temperance of minors exposed to advertisements for alcoholic beverages by banning such advertisements in particular areas where children were expected to walk to school or play in their neighborhood.[71]

Applying the four-prong test for evaluating commercial speech announced in *Central Hudson*, the appellate court concluded that the ban of outdoor advertising of alcoholic beverages in limited areas directly and materially advanced Baltimore's interest in promoting the welfare and temperance of minors.[72] The Fourth Circuit "recognized the reasonableness of Baltimore City's legislative finding that there is a 'definite correlation between alcoholic beverage advertising and underage drinking.'"[73] It also concluded that the regulation of commercial speech was not more extensive than necessary to serve the governmental interest. Noting that in the regulation of commercial speech there is some latitude in the "fit" between the regulation and the objective, the appellate court concluded "no less restrictive means may be available to advance the government's interest."[74]

While the court in *Anheuser-Busch* acknowledged that the geographical limitation on outdoor advertising could also reduce the opportunities for adults to receive the information, the court recognized that there were numerous other means of advertising to adults that did not subject the children to "'involuntary and unavoidable solicitation [while] ... walking to school or playing in their neighborhood.'"[75] The court concluded that although no ordinance of this kind could be so perfectly tailored as to encompass all and only those areas to which children are daily exposed, Baltimore's efforts to tailor the ordinance by exempting commercial and industrial zones from its effort rendered it not more extensive than is necessary to serve the governmental interest under consideration.[76]

Lorillard

In the 2001 Supreme Court decision *Lorillard,* Massachusetts had promulgated regulations governing the advertising and sale of cigarettes, smokeless tobacco, and cigars. Applying the *Central Hudson* test, the Supreme Court assumed that the First Amendment protected the rights of manufacturers and sellers to sell and advertise their tobacco products and that the State had an interest in preventing the use of tobacco by minors, but then struck down virtually all of the regulations.

One of the regulations ruled unconstitutional prohibited outdoor advertising of smokeless tobacco or cigars within 1,000 feet of schools or playgrounds. The Court found that this regulation directly advanced the government's substantial, even "compelling" interest in preventing underage tobacco use, given the evidence before the Court of the problem with underage use of smokeless tobacco and cigars.[77] The Court disagreed with Massachusetts' claim, however, that the regulation met *Central Hudson's* fourth test, concluding that in some metropolitan areas, the regulation, given its wide geographic reach, constituted "nearly a

complete ban on the communication of truthful information about smokeless tobacco and cigars to adult consumers."[78] The Court further found that the range of restricted communications, including a ban on oral communications and signs of any size, demonstrated a lack of tailoring to target only advertising and promotion practices that appeal to youth, while permitting others.[79]

Another regulation ruled unconstitutional prohibited indoor, point-of-sale advertising of smokeless tobacco and cigars lower than five feet from the floor of retail stores located within 1,000 feet of schools or playgrounds. The Court held that this regulation failed both the third and fourth prongs of *Central Hudson*, on the ground that the five-foot rule did not advance the goals of preventing minors from using tobacco products and curbing demand for the activity by limiting youth to the activity, since not all children are less than five feet and those who are can look up and take in their surroundings.[80] The Court also concluded that the blanket height restriction did not constitute a reasonable fit with the goal of targeting tobacco advertising that entices children, finding that the height restriction was an attempt to regulate directly the communicative impact of indoor advertising.[81]

B. A State Can Justify a Statute Restricting Alcohol Sponsorship and Related Sponsorship Advertising at Private Events Held on State Property under the *Central Hudson* Test.

Applying the teachings of *44 Liquormart*, *Anheuser-Busch*, and *Lorillard*, it is reasonable to conclude that the first and second elements of *Central Hudson* are present and will not be contested issues in any potential lawsuit. Adults can legally purchase and consume alcohol, and the proposed regulations do not distinguish between misleading and non-misleading advertising or sponsorship. The possible interests a state could assert in support of a statute restricting alcohol sponsorship and related advertising are in promoting the welfare and temperance of minors exposed to certain publicly visible advertisements of alcoholic beverages and in projecting a wholesome, family-oriented image that rejects alcohol consumption by underage youth. Numerous U.S. Supreme Court and appellate court cases have recognized these as substantial governmental interests that satisfy the second prong of the *Central Hudson* test. The key to satisfying *Central Hudson*, then, is establishing that the statute directly advances the state's substantial interests (third prong) and is no more extensive than necessary to serve those interests (fourth prong).

Third Element of Central Hudson

In order to meet the third element of *Central Hudson*, a state must show that "the harms it recites are real and that its restriction will in fact alleviate them to a material degree."[82] The state is not required to show that "empirical data come ... accompanied by a surfeit of background information .... [Courts] have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and 'simple common sense.'"[83]

To satisfy this element, a statute restricting alcohol sponsorship and related advertising at private events on state property should therefore include strong findings of fact with respect to

the government's interest in promoting the welfare and temperance of minors and in projecting a wholesome, family-oriented image that rejects alcohol consumption by underage youth. The state can show that the harms of youth exposure to alcohol advertising are real and will materially affect the state's problems with underage drinking. Underage youth are exposed heavily to this marketing with its youthful themes and images and its placements in media with large youth audiences.[84] Limiting youth exposure to alcohol marketing is a major public health goal since underage drinking is a significant contributor to youth alcohol-related motor vehicle crashes, other forms of injury, violence, suicide, and problems associated with school and family.[85] The concern about alcohol marketing and underage drinking has been heightened by recent findings in the scientific research community.[86] Studies have established that alcohol advertising exposure influences a young person's beliefs about alcohol and his/her intention to drink.[87] They also suggest that advertising may have a direct impact on youth drinking practices and drinking problems.[88] They further show that African-American and Hispanic underage youths, who reasonably can be expected to attend state events, are exposed to even more alcohol marketing than non-African-American and non-Hispanic youth.[89]

It is noted here that the "reasonableness" test discussed above in connection with a state's restriction of alcohol sponsorship and related advertising at state-sponsored events does not require the inclusion of findings of fact to justify the state's restriction. Nevertheless, the findings of fact discussed here, which support a state's restriction on private events, also provide important justification for a state's restriction at *state-sponsored* events. States should anticipate that reviewing courts might decide that the more rigorous *Central Hudson* standard applies to state-sponsored events, rather than the "reasonableness" test. Therefore, in drafting statutes, states should use the same set of findings to support both restrictions on private events and restrictions on state-sponsored events.

Fourth Element of Central Hudson

The fourth element of the *Central Hudson* analysis "complements" the third element, "whether the speech restriction is not more extensive than necessary to serve the interests that support it."[90] "The least restrictive means" is not the standard; instead, the case law requires a reasonable "'fit' between the legislature's ends and the means chosen to accomplish those ends ... a means narrowly tailored to achieve the desired objective.'"[91]

Since the primary purpose for restricting alcohol sponsorship on state property is protecting youth and projecting a wholesome, family-oriented image that rejects youth alcohol consumption, the regulations themselves should be carefully tailored to address these specific goals. The Fourth Circuit U.S. Court of Appeals addressed this issue in the *Anheuser-Busch* case and described four reasons for concluding that the Baltimore ordinance was narrowly tailored. [92] First, the ordinance "[did] not ban outdoor advertising of alcoholic beverages but merely restrict[ed] the time, place, and manner of such advertisements."[93] Second, Baltimore's ordinance "did not foreclose the plethora of newspaper, magazine, radio, television, direct mail, Internet, and other media available to Anheuser-Busch and its competitors."[94]

Third, in Baltimore's case, "neither the state nor the city [was] attempting to undermine democratic processes and circumvent public scrutiny by substituting a ban on advertising for a

ban on the product, as the *44 Liquormart* Court feared was the situation with [Rhode Island]."[95] Rather, in Baltimore, the possession and consumption of alcoholic beverages by minors had already been banned directly through legislation.[96] Thus, the appellate court found, "Baltimore's restrictions . . . reinforce the democratic decisionmaking mechanism's conclusion as to the dangerousness of underage drinking by protecting children from exposure to advertising which the legislature reasonably considers harmful in itself to children's maturation."[97]

Fourth, in contrast to the Rhode Island regulations in *44 Liquormart*, which evidenced Rhode Island's desire to enforce adult temperance through an artificial budgetary constraint, the Baltimore regulations in *Anheuser-Busch* showed the city's interest was "to protect children who are not yet independently able to assess the value of the message presented."[98] The Fourth Circuit thus conformed its decision to the Supreme Court's repeated recognition that children deserve "special solicitude in the First Amendment balance because they lack the ability to assess and analyze fully the information presented through commercial media."[99] In the context of cable television, the court noted, the U.S. Supreme Court upheld restrictions on programming imposed by the Cable Television Consumer Protection and Competition Act as a means of protecting children from indecent programming.[100] In the context of the radio medium, the Court approved extra restrictions on indecent speech because of the pervasiveness of the medium and the presence of children in the audience.[101] Similarly, the Supreme Court sustained a law that protected children from non-obscene literature.[102] And, while it has recognized a right to private possession of adult pornography in the home,[103] the Court distinguished child pornography and allowed a stronger legislative response "to destroy a market for the exploitative use of children."[104] Consequently, the Fourth Circuit concluded, the underlying reason for the special solicitude of children was articulated long ago: "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens."[105] In light of these cases, the court concluded that the Supreme Court had indicated "its desire to ensure that children do not become lost in the marketplace of ideas."[106]

A similar analysis of the fourth element of *Central Hudson* applies here. First, a state statute restricting sponsorship and sponsorship advertising at events on public property merely restricts the time, place, and manner of such sponsorship and advertising, rather than outright banning the practice throughout the state. Additionally, any statutes on the subject are not intended to preclude sponsorship and sponsorship advertising at adults-only events. Second, such a statute does not foreclose alcohol industry sponsors from advertising private events in newspapers, magazines, radios, direct mail, Internet, and other media. Third, alcohol purchase and consumption by persons under 21 years of age are unlawful. Therefore, restrictions protecting children from exposure to alcohol advertising reinforce democratic decision-making. Fourth, such a statute is not intended to enforce adult temperance. The state's interest is to protect children who are not yet independently able to assess the value of the alcohol advertisements with which they are presented.

States should be prepared to counter an argument that the analysis in *Lorillard*, which struck down several tobacco advertising regulations intended to prevent underage smoking, supersedes the analysis in *Anheuser-Busch*, and that therefore *Anheuser-Busch* should not be relied upon to uphold regulations restricting alcohol sponsorship and sponsorship advertising. States should respond that, unlike the broad sweep of the regulations in *Lorillard*, the Baltimore

ordinance restricting alcohol advertising and sponsorship in *Anheuser-Busch* was narrowly tailored. In *Lorillard*, the outdoor advertising regulations prohibited all smokeless tobacco or cigar advertising within 1,000 feet of schools or playgrounds, preventing advertising in 87% to 91% of Boston, Worcester, and Springfield, Massachusetts, that is, "a substantial portion of the major metropolitan areas of Massachusetts." The substantial geographical reach of the outdoor advertising regulations was compounded by the fact that "outdoor" advertising included not only advertising located outside an establishment, but also advertising inside a store if that advertising was visible from outside the store. Moreover, the regulations restricted advertisements of any size, and the term "advertisement" also included oral statements. Consequently, in some geographical areas, the Massachusetts regulations constituted nearly a complete ban on the communication of truthful information about smokeless tobacco and cigars to adult consumers.[107]

In contrast here, sponsorship and advertising restrictions should be limited with respect to location, i.e., to sponsorship and sponsorship advertising on public property at civic events attended by underage youth. None of the restrictions should affect advertising away from the event, and none should affect advertising unrelated to the event, general outdoor advertising, or advertising at retail stores. Furthermore, the regulations should be tailored to oppose the "captive audience" effect inherent in event sponsorship and advertising at family-oriented civic events on public property, not the general exposure of children to outdoor alcohol advertising elsewhere in the state. Consequently, unlike the tobacco advertising restrictions in *Lorillard*, restrictions involving event sponsorship and advertising should constitute neither a "total ban" nor even a "near-complete ban" of outdoor alcohol advertising. Accordingly, *Anheuser-Busch* analysis remains valid, persuasive authority for upholding restrictions on alcohol advertising and sponsorship.

States should simultaneously consider, consistent with preemption principles, a statute restricting the sale and consumption of alcoholic beverages at civic events on public property and ensuring that these drinking restrictions mirror the advertising/sponsorship restrictions. At large events, states may consider allowing adult drinking in cordoned-off areas where youth are not permitted to enter. If the decision of the state is to permit drinking but only in designated areas, then signage should be permitted in the area where alcohol is served and consumed. If drinking is prohibited entirely, then the signage and sponsorship can also be prohibited. Creating parallel provisions for consumption/sales and advertising/sponsorship strengthens the state's *Central Hudson* defense in two ways: (1) it avoids the argument that the state has failed to take direct action to reduce youth exposure to alcohol that does not involve restrictions on speech, given that the courts are suspicious of commercial speech restrictions when alternative measures are available that do not restrict speech; and (2) by permitting signage in cordoned-off, adult-only drinking areas at events, the state demonstrates that the statute is "narrowly tailored" to meet its goal of restricting youth exposure.

V. CONCLUSION.

A state can regulate alcohol advertising on public property (including property leased from private parties by the state), and alcohol sponsorship at outdoor events on public property without violating the First Amendment. Federal decisional authority recognizes a government's

right to convey a message of its own choosing in connection with government activities on public property. Federal court decisions also acknowledge constitutional limitations on commercial speech where substantial government interests are at stake, such as a state's interest in promoting the welfare and temperance of minors, and where the government restrictions directly advance government interests and are narrowly tailored to support such effort. To be successful, states must exercise care in drafting statutes and establishing its rules for alcohol advertising and event sponsorship. States should also note that this is a rapidly changing area of law, which future cases likely will modify.

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[1] Not all states have advertising policies for state publications. For instance, the state of New Mexico has promulgated regulations concerning the style and format of state publications, but these regulations do not concern advertising. *See generally* N.M. Admin. Code 1.25.10.

[2] A state's most well known educational institutions usually are its universities and/or colleges, but many states operate other types of educational institutions. For instance, in New Mexico, in addition to state universities and colleges, there are several other types of state educational institutions established by the New Mexico Constitution: University of New Mexico, New Mexico State University, New Mexico Highlands University, Western New Mexico University, Eastern New Mexico University, New Mexico Institute of Mining and Technology, New Mexico Military Institute, New Mexico School for the Visually Handicapped, New Mexico School for the Deaf, and Northern New Mexico State School. N.M. Const., Art. 12, § 11. The median age of students at state universities in New Mexico was 21 years of age. The median age of students at its state community colleges was 27 years of age. The median age of undergraduate students enrolled statewide in New Mexico in fall 2001 was 23 years of age. See "Overview of the Status of Public Higher Education in New Mexico," at http://nmche.state.nm.us/reports/2002condition.pdf (located on May 24, 2004).

As is the case in New Mexico, the control and management of a state educational institution may be vested in a board of regents established for each institution. *Id.*, Art. 12, § 13. States should consider the fact that the boards of regents of individual state educational institutions may have promulgated their own alcohol advertising policies. For example, pursuant to the policies on alcohol advertising of the University of New Mexico ("UNM"), alcoholic beverage businesses that sponsor or co-sponsor University events may engage in alcohol marketing on campus or at University events, subject to approval by the Student Activities Center. In addition, UNM student publications and publishers of non-promotional materials distributed on campus are encouraged to follow the same advertising policies, alcohol must not be mentioned in any advertisements for an event to encourage participation, and fraternities and sororities are prohibited from advertising off-campus events. *Ibid.*

In contrast, the control and management of advertising at local school institutions may be delimited by state authorizing rules and regulations. For example, the state transportation division of the State of New Mexico Department of Education authorizes local school boards to sell advertising space on the interior and exterior of school buses for primary and secondary schools, but state law forbids advertisements on school buses that "involve ... alcohol. ..." N.M.S.A. 1978, § 22-28-1, N.M. Admin. Code 6.40.2

[3] States may determine that they already have statutes or regulations restricting alcohol advertising on public property, but that these restrictions do not apply to all forms of public property. For instance, New Mexico has promulgated state-wide provisions concerning alcohol advertising on school buses, but not on state parks.

[4] For purposes of this memorandum, "state-sponsored" events are either state events that the state agrees to sponsor or endorse or state events for which the state has agreed to act as a beneficiary of revenues generated from alcohol advertising and sponsorship. State-wide restrictions concerning alcohol sponsorship at state-sponsored civic events may be less common than restrictions limiting alcohol sponsorship at individual venues. For example, there are no state-wide provisions in New Mexico concerning alcohol sponsorship of civic events, but there may be individual state-sponsored events that currently limit restrictions on alcohol (or even tobacco) sponsorship. Accordingly, in

enacting state-wide restrictions concerning alcohol sponsorship, states should determine whether individual state-sponsored events already have rules restricting alcohol advertising and sponsorship.

[5] This memorandum refers to states and the drafting of state advertising and state sponsorship legislation. The same constitutional analysis applies to local entities, such as cities, towns or counties. In considering First Amendment issues regarding regulation of the alcohol industry, local entities must analyze a jurisdiction's relevant state preemption doctrine. This memorandum does not address the state preemption doctrine.

[6] *Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525, 121 S.Ct. 2404 (2001) (holding unconstitutional under free speech clause of First Amendment Massachusetts regulation of advertising to reduce underage tobacco use, but upholding restriction on manner of sale); *44 Liquormart, Inc. v. State of Rhode Island*, 517 U.S. 484, 116 S.Ct. 1495 (1996) (holding unconstitutional, in violation of free speech clause of First Amendment, Rhode Island's complete statutory ban on price advertising for alcoholic beverages).

[7] The regulatory/proprietary distinction in governmental actions has been criticized by several courts as it applies to the sovereign immunity doctrine and the interpretation of contracts entered into by governmental entities. Courts have questioned traditional interpretations of the distinction that assume that proprietary functions of government remove the government from its role as a protector of the public (so that, for example, the sovereign immunity doctrine should not apply) *Morningstar Water Users Ass'n, Inc. v. Farmington Mun. School Dist.,* 120 N.M. 307, 320 (1995). Courts have rightly pointed out that all governmental functions, including proprietary functions, include a public interest component, since this is the fundamental purpose of government. The New Mexico Supreme Court, in fact, has declared that the distinction is no longer recognized as a legal concept in New Mexico. *Ibid.* However, courts, including the U.S. Supreme Court and the New Mexico Supreme Court, continue to recognize the fundamental distinction between state actions that regulate the marketplace and actions in which the state is a marketplace participant. *Reeves v. Stake*, 447 U.S. 429, 434, 100 S.Ct. 2271, 2276 (1980); *Morningstar Water Users Ass'n, Inc. v. Farmington Mun. School Dist.,* 120 N.M. at 320. Cases addressing First Amendment speech and Interstate Commerce issues continue to apply the distinction, sometimes using alternative terminology.

[8] To determine whether a statute restricting advertising or sponsorship by the alcohol industry implicates free speech rights, it first must be determined whether state constitutional law or federal constitutional law applies. Both the United States and state constitutions recognize the right of free speech. If the state constitutional standard is more protective of speech, state courts may be required to determine how to apply the state constitutional standard in the context of the facts of a particular case. For instance, the New Mexico Supreme Court has observed that even where the language of the state constitution is almost identical to the federal constitution, federal decisions do not control the nature and scope of the rights guaranteed by the state constitution. *City of Farmington v. Fawcett*, 843 P.2d 839, 846-847 (N.M.App. 1992), citing in *State v. Cordova*, 109 N.M. 211, 212, n. 1 (1989). Although state constitutional standards may apply, states typically defer to federal interpretations of both commercial and noncommercial speech rights. The New Mexico Supreme Court has noted that Article II, Section 17, of the New Mexico Constitution, "reads substantially the same" as the First Amendment. *Nall v. Baca*, 95 N.M. 783, 787 (1980) (dictum; state statute prohibiting indecent dancing "in a licensed liquor establishment" held constitutional as applied under state and federal constitutions). This memorandum will analyze the instant facts under case law applying the First Amendment standard rather than a particular state constitutional standard.

[9] States should examine their current statutes and regulations concerning whether a state may lease public property for private use. In New Mexico, for example, the state's Property Control Division of the General Services Department "may lease any land or building under its jurisdiction to private use until the land or building is needed for public use. All income from the leases shall be deposited in the public buildings repair fund." N. M. S. A. 1978, § 15-3B-7.

[10] The state should consider whether such a restriction should be enacted through legislative action, in the form of a statute, or through the relevant state department of education or board of regents, in the form of an agency regulation or board policy.

[11] A state's case law or statutes may address whether a state statute restricting alcohol advertising and sponsorship on public property is a permissible restriction of commercial speech for First Amendment purposes. This

memorandum has not analyzed the matter of commercial speech under a particular state's jurisdiction; instead, it addresses federal constitutional law only. Under federal constitutional law, this memorandum concludes that such statutes likely will survive a First Amendment challenge.

[12] *Rust* v. *Sullivan,* 500 U.S. 173, 194, 111 S.Ct. 1759, 1773 (1991) (upheld the government's prohibition on abortion-related advice applicable to recipients of federal funds for family planning counseling). In *Rust*, the government did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program.

[13] *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 115 S.Ct. 2510 (1995).

[14] *Id.* at 701. *See also McQueary v. Laird*, 449 F.2d 608, 612 (10th Cir. 1971) ("In its proprietary military capacity, federal government has traditionally exercised unfettered control with respect to internal management and operation of federal military establishments").

[15] *Id.* at 421.

[16] *Morningstar Water Users Ass'n, Inc. v. Farmington Mun. School Dist., supra,* 120 N.M. at 320.

[17] *Vasquez v. Housing Authority of the City of El Paso*, 271 F.3d 198, 202 (5th Cir. 2001).

[18] *Perry Educ. Ass'n. v. Perry Local Educators' Assn* , 460 U.S. 37, 44, 103 S.Ct. 3439 (1983).

[19] *Perry Educ. Ass'n. v. Perry Local Educators' Assn.*, 460 U.S. at 37.

[20] *Perry*, 460 U.S. at 49.

[21] *Perry*, 460 U.S. at 46.

[22] *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800, 802, 105 S.Ct. 3439 (1985).

[23] *Perry*, 460 U.S. at 45.

[24] *Cornelius*, 473 U.S. at 800.

[25] We note that even under the low level of constitutional scrutiny of the "reasonableness" test, courts have determined that speech regulations violated the First Amendment, albeit rarely. In *Vasquez*, the federal Fifth Circuit Court of Appeals concluded that although a city housing authority was a "nonpublic" forum for First Amendment purposes, the housing authority's trespassing regulations barring political candidates from engaging in door-to-door campaigning violated the free speech rights of a nonresident seeking to distribute literature and to engage in door-to-door campaigning at the housing units owned by the authority. *Id.*, 271 F.3d at 204.

[26] *Perry*, 460 U.S. at 45.

[27] *Id.* at 49.

[28] *Arkansas Educational Television Comm'n v. Forbes*, 523 U.S. 666, 682, 118 S.Ct. 1633, 1643 (1998).

[29] *Perry*, 460 U.S. at 49.

[30] *Cornelius*, 473 U.S. at 808.

[31] *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678, 112 S.Ct. 2701 (1992) (*ISKCON*) (Court upheld the political advertisement ban "even though the city permitted other types of advertising" on the buses).

[32] *United States v. Kokinda*, 497 U.S. 720, 727, 110 S.Ct. 3115 (1990).

[33] *Greer v. Spock*, 424 U.S. 828, 835-837, 96 S.Ct. 1211 (1976).

[34] *United States v. Kokinda*, 497 U.S. at 728.

[35] *Lehman v. City of Shaker Heights*, 418 U.S. at 303, 94 S.Ct. at 2714 (advertising panels on buses were nonpublic forum); *Rutgers 1000 Alumni Council v. Rutgers, the State University of New Jersey*, 353 N.J.Super. 554, 574, 803 A.2d 679 (2002) (advertising space in university magazine was a nonpublic forum); *DiLoreto v. Downey Unified School District Board of Education*, 196 F.3d 958, 969 (9th Cir. 1999) (advertising space on a school's baseball field fence was a nonpublic forum); *Hubbard Broadcasting, Inc. v. Metropolitan Sports Facilities Commission*, 797 F.2d 552 (8th Cir. 1986) (advertising space on municipal sports facility scoreboard was not a public forum); *Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 978 (9th Cir. 1998) (advertising space on buses was a nonpublic forum); *Lebron v. National R.R. Passenger Corp.*, 69 F.3d 650, 656 (2d Cir. 1995) (billboard space owned by Amtrak was limited public forum).

[36] *Lehman v. City of Shaker Heights*, 418 U.S. at 298, 94 S.Ct. at 2714. *Lehman* appears to dispel the argument that state sports arenas, convention centers, and state-sponsored park events not only are not traditional public fora, but also they are not designated fora, merely because the states have opened their property for communication for some commercial advertising.

[37] *Cornelius*, 473 U.S. at 788.

[38] *Cornelius*, 473 U.S. at 805-806.

[39] *Rutgers 1000 Alumni Council v. Rutgers, the State University of New Jersey*, 353 N.J.Super. 554 at 574.

[40] *DiLoreto v. Downey Unified School District Board of Education*, 196 F.3d at 969.

[41] *Hippopress, LLC v. SMG*, 150 N.H. 304, 837 A.2d 347 (2003).

[42] *Hippopress, LLC v. SMG*, 150 N.H. at 357.

[43] *Hubbard Broadcasting, Inc. v. Metropolitan Sports Facilities Commission*, 797 F.2d at 552.

[44] *Hubbard*, 797 F.2d. at 556.

[45] *New York Magazine, a Div. of Primedia Magazines, Inc. v. Metropolitan Transp. Authority*, 136 F.3d 123, 130 (2d Cir. 1998).

[46] *Ibid.*

[47] *Accord, Children of the Rosary v. City of Phoenix*, *supra,* 154 F.3d at 978 (advertising space on buses was a nonpublic forum because city had consistently restricted political and religious advertising); *Lebron v. National R.R. Passenger Corp.*, *supra,* 69 F.3d at 656 (billboard space owned by Amtrak was limited public forum opened for purely commercial speech because Amtrak excluded noncommercial advertisements from its billboards).

[48] *Rosenberger*, 515 U.S. at 829.

[49] *Ibid.*

[50] *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 514, 101 S.Ct. 2882, 2896-97 (1981) (plurality opinion) (billboards containing commercial speech located on private property).

[51] *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. at 49.

[52] *Hippopress, LLC v. SMG*, 837 A.2d at 358.

[53] In *Lehman*, the fact that advertising space was managed by a private entity under contract with the city did not preclude the Court from deciding that advertising panels in city buses were nonpublic fora. Sponsorship or advertising is often a matter of contract between the sponsors/advertisers and event organizer, rather than between the sponsors/advertisers and government.

[54] *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 100 S.Ct. 2343 (1980).

[55] *Central Hudson*, 447 U.S. at 566.

[56] *Central Hudson*, 447 U.S. at 562-563.

[57] *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426, 113 S.Ct. 1505 (1993).

[58] *44 Liquormart*, 517 U.S. at 502-503, citing *Central Hudson*, 447 U.S. at 566, n. 9.

[59] *Ibid.*

[60] *See* J. F. Mosher, JD and Stacy Saetta, JD, *Model State Statute for Regulating Billboard and Other Forms of Outdoor Alcohol Advertising (With Commentaries)* (Washington, DC: Center on Alcohol Marketing and Youth, 2004). Available at http://camy.org/research/statelaws0403/modelbillboard.pdf (cited 3 June 2004).

[61] *44 Liquormart,* 517 U.S. at 489-490.

[62] *See ibid.*

[63] *44 Liquormart*, 517 U.S. at 515.

[64] *See 44 Liquormart*, 517 U.S. at 515 (Stevens, J., concurring in the judgment); *id*. at 524 (Thomas, J., concurring in the judgment); id. at 528-534 (O'Connor, J., concurring in the judgment).

[65] *Id.* at 505.

[66] *Id.* at 507.

[67] *Id.* at 530 (O'Connor, J., concurring in the judgment) (quoting *44 Liquormart, Inc. v. Rhode Island*, 39 F.3d 5, 7 (1st Cir.1994) (quoting Rhode Island's expert witness)).

[68] *Id.* at 532 (O'Connor, J., concurring in the judgment).

[69] *See id.* at 506-507 (Stevens, J., concurring in the judgment); *id.*at 522-523 (Thomas, J., concurring in the judgment); *id.* at 531 (O'Connor, J., concurring in the judgment).

[70] *Anheuser-Busch v. Schmoke*, 101 F.3d 325, 327 (4th Cir. 1996).

[71] *Ibid.*

[72] *See Anheuser-Busch*, 101 F.3d at 327.

[73] *Ibid.*

[74] *Ibid.*

[75] *Ibid.*

[76] *Ibid.*

[77] *Lorillard Tobacco Co. v. Reilly*, supra, 533 U.S. at 564.

[78] *Id.* at 562.

[79] *Id.* at 563.

[80] *Id.* at 567.

[81] *Ibid.*

[82] *Edenfield v. Fane*, 507 U.S. 761, 770-771, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993).

[83] *Florida Bar v. Went For It, Inc*., 515 U.S. 618, 628, 115 S.Ct. 2371 (citations and internal quotation marks omitted).

[84] Center on Alcohol Marketing and Youth, *Overexposed: Youth a Target of Alcohol Advertising in Magazines* (Washington, D.C.: Center on Alcohol Marketing and Youth, 2002). See also Center on Alcohol Marketing and Youth, *Television: Alcohol's Vast Adland* (Washington D.C.: Center on Alcohol Marketing and Youth, 2002).

[85] Center on Alcohol Marketing and Youth, *State Alcohol Advertising Laws: Current Status and Model Policies* (Washington, D.C.: Center on Alcohol Marketing and Youth, 2003).

[86] Center on Alcohol Marketing and Youth, *State Alcohol Advertising Laws: Current Status and Model Policies* (Washington, D.C.: Center on Alcohol Marketing and Youth, 2003).

[87] J. W. Grube, "Television alcohol portrayals, alcohol advertising and alcohol expectancies among children and adolescents," in *Effects of the Mass Media on the Use and Abuse of Alcohol*, ed. S.E. Martin and P. Mail (Bethesda: National Institute on Alcohol Abuse and Alcoholism, 2002), 105-121.

[88] J. Grube, "Alcohol advertising-a study of children and adolescents: preliminary results," (19 Nov. 2002); H. Saffer, "Alcohol advertising and motor vehicle fatalities," *Review of Economics and Statistics*, 79: 431-442.

[89] Center on Alcohol Marketing and Youth, *Exposure of African-American Youth to Alcohol Advertising* (Washington, D.C.: Center on Alcohol Marketing and Youth, 2003); Center on Alcohol Marketing and Youth, *Exposure of Hispanic Youth to Alcohol Advertising* (Washington, D.C.: Center on Alcohol Marketing and Youth, 2003).

[90] *Greater New Orleans Broadcasting Assn., Inc. v. United States*, 527 U.S. 173, 188, 119 S.Ct. 1923 (1999).

[91] *Went For It, Inc., supra*, at 632, 115 S.Ct. 2371 (quoting *Board of Trustees of State Univ. of N.Y. v. Fox,* 492 U.S. 469, 480, 109 S.Ct. 3028 (1989)).

[92] *Anheuser-Busch*, 101 F.3d at 329.

[93] *Ibid.*

[94] *Ibid.*

[95] *Ibid.*

[96] *Ibid.*

[97] *Ibid.*

[98] *Ibid.*

[99] *Ibid.*

[100] *Id.* at 329-330.

[101] *See FCC v. Pacifica Foundation*, 438 U.S. 726, 750-51, 98 S.Ct. 3026, 3040-41 (1978) (comparing indecent speech during hours when children are listening to the proverbial pig in the parlor); see also *Action for Children's Television v. FCC*, 58 F.3d 654, 657 (D.C.Cir.1995) (upholding the Public Telecommunications Act against a First Amendment challenge based on the state's compelling interest in protecting minors), cert. denied, --- U.S. ----, 116 S.Ct. 701 (1996).

[102] *See Ginsberg v. New York*, 390 U.S. 629, 639-40, 88 S.Ct. 1274, 1280-81 (1968).

[103] *See Stanley v. Georgia*, 394 U.S. 557, 566, 89 S.Ct. 1243, 1248-49 (1969).

[104] *Osborne v. Ohio*, 495 U.S. 103, 109, 110 S.Ct. 1691, 1696 (1990); *see also New York v. Ferber*, 458 U.S. 747, 759, 102 S.Ct. 3348, 3355-56 (1982).

[105] *Prince v. Massachusetts*, 321 U.S. 158, 168, 64 S.Ct. 438, 443 (1944).

[106] *Anheuser-Busch*, 101 F.3d at 329.

[107] *Lorillard,* 533 U.S. at 562-563.