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In *Educational Media Company at Virginia Tech, Inc. v. Swecker*,[1] the United States Court of Appeals for the Fourth Circuit considered whether a provision of the Virginia Administrative Code[2] that restricts alcohol advertising in college student publications unconstitutionally regulated commercial speech protected by the First Amendment.[3] The Fourth Circuit held that the regulations were constitutional because the ban on alcohol advertising met the four prongs of the Supreme Court of the United States' *Central Hudson*[4] commercial speech test.[5] The Supreme Court denied certiorari, but should have granted review to examine the effectiveness of the *Central Hudson* test. The Fourth Circuit used an incorrect "common sense" standard in the third *Central Hudson* prong to determine erroneously that the advertising ban directly and materially advanced the Commonwealth's interest in combating underage and abusive drinking by college students. Moreover, the Fourth Circuit erred in holding that the regulation reasonably fit the stated government interest because of the law's internal inconsistency. This lower standard impermissibly limits constitutional protection of commercial speech.

I. The Case

The Virginia Alcoholic Beverage Control Board ("the Board") regulates alcohol advertisements in all media in the state.[6] Among the regulated areas is advertising

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1. 602 F.3d 583 (4th Cir. 2010), *cert. denied*, 131 S. Ct. 646 (Nov. 29, 2010).

2. 3 Va. Admin Code § 5–20–40(B)(3) (2008).

3. 602 F.3d at 588; U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .").

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

5. 602 F.3d at 591.

6. *Id.* at 586–87. Section 4.1–111(A) of the Annotated Code of Virginia is the source of the Board's authority. *Id.*

that appears in "college student publications."[7] The regulation contained in Title 3 of the Virginia Administrative Code, at Section 5–20–40(B)(3) ("5–20–40(B)(3)") prohibits alcohol advertisements in college student publications unless they are in reference to a dining establishment.[8] Within that requirement, the regulation also prohibits any reference to brand names or prices, but allows generic terms such as "beer," "wine," "mixed beverages," and "cocktails."[9]

Educational Media Company at Virginia Tech, Inc. and The Cavalier Daily, Inc. are non-profit corporations that publish the college newspapers at Virginia Polytechnic Institute and State University (*Collegiate Times*) and the University of Virginia (*The Cavalier Daily*).[10] The *Collegiate Times* and *The Cavalier Daily* ("the college newspapers") are available free of charge at various locations on and around the campuses of their respective universities.[11] The majority of the readership of both papers is over twenty-one years of age.[12] Advertising revenue makes up almost all of the college newspapers' annual budgets.[13] Each paper estimated that it lost $30,000 per year in revenue because of the Board's restrictions on alcohol advertising.[14] The college newspapers brought a § 1983 claim against the individual members of the Board, alleging that two of the regulations violated the newspapers' First Amendment rights.[15] The college newspapers sought a declaratory judgment and a permanent injunction against enforcement of 5–20–40(B)(3), which specifically regulates alcohol advertising in college student publications.[16] Additionally, the *Collegiate Times* and *The Cavalier Daily* each sought $30,000 in

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7. 3 VA. ADMIN CODE § 5–20–40(B)(3) (2008) [hereinafter 5–20–40(B)(3)].

> A "college student publication" is defined as any college or university publication that is prepared, edited, and published by students at such institution, is sanctioned as a curricular or extra-curricular activity by such institution and which is distributed or intended to be distributed primarily to persons under 21 years of age.

Id. After Section 5–20–40 was amended on March 5, 2010, the ban on alcohol advertising in college student publications is now at Section 5–20–40(A)(2) (2010).

8. Educ. Media Co. at Va. Tech, Inc. v. Swecker, No. 3:06CV396, 2008 U.S. Dist. LEXIS 45590, at *24 (E.D. Va. Mar. 31, 2008). Section 5–20–40(B)(3) was enacted in the 1970s after Virginia lowered its drinking age for beer from twenty-one to eighteen. *Id.*

9. 5–20–40(B)(3).

10. Educ. Media Co. at Va. Tech, Inc. v. Swecker, No. 3:06CV396, 2008 U.S. Dist. LEXIS 45590, *3, *5 (E.D. Va. Mar. 31, 2008). The college newspapers are Virginia 501(c)(3) corporations. *Id.*

11. *Id.* at 4, 6.

12. *Id.* (Approximately fifty-nine percent of *Collegiate Times* readers are of age; roughly sixty percent of the readership of *The Cavalier Daily* is over twenty-one.).

13. *Id.* at 3, 6 ("Approximately 98.7% of the *Collegiate Times*' annual budget came from advertising in the year 2005."; "The annual budget for *The Cavalier Daily* is comprised almost exclusively of the revenue it generates through advertising.").

14. *Id.* at 5, 6. These amounts were based on estimated sales of one quarter-page of alcohol advertisements per issue, *id.*, which is a conservative figure based on at least six documented instances in which the college newspapers refused interested advertisers because of the ban. *Id.* at 10. This figure presumably did not take into account the prospective advertisers who already knew of the applicable law and thus did not even attempt to run alcohol ads even if they otherwise would have wanted to do so.

15. *Id.* at 7.

16. *Id.* at 2. The college newspapers also challenged Section 5–20–40(A), which restricted use of certain terms in all print and electronic media. *Id.* This section was amended on March 5, 2010, modifying the challenged passages. 3 VA. ADMIN CODE § 5–20–40(A).

damages for the previous year's lost advertising revenue.[17] After cross-motions for summary judgment, the United States District Court for the Eastern District of Virginia, Magistrate Judge Hannah Lauck, applied the *Central Hudson* commercial speech test and held that the plaintiff college newspapers were entitled to judgment as a matter of law because the regulations violated the First Amendment to the United States Constitution.[18] The Board appealed, and the United States Court of Appeals for the Fourth Circuit reviewed the case to determine whether 5–20–40(B)(3) unconstitutionally restricted the commercial speech rights of the college newspapers.[19]

II. LEGAL BACKGROUND

A. Section 1983 Claims

Title 42, Section 1983 of the United States Code creates a private right of action against government officials acting under color of law in violation of constitutional rights.[20] Section 1983 originally was enacted in response to racial violence as part of the Ku Klux Klan Act of 1871, but the Supreme Court's narrow interpretation limited the statute's effect for the first ninety years of its existence.[21] It was not until the Civil Rights movement of the 1960s that the Court reached its current interpretation of § 1983 as the primary vehicle for enforcing Constitutional rights.[22] To prevail on a § 1983 claim, a plaintiff first must assert that an existing right granted by the Constitution or a federal statute has been violated,[23] then must show

17. Educ. Media Co. at Va. Tech, Inc. v. Swecker, No. 3:06CV396, 2008 U.S. Dist. LEXIS 45590, at *10 (E.D. Va. Mar. 31, 2008).

18. *Id.* at 33–34; U.S. CONST. amend. I.

19. Educ. Media Co. at Va. Tech, Inc. v. Swecker, 602 F. 3d 583 (4th Cir. 2010). The Commonwealth of Virginia did not appeal the issue of § 5–20–40(A), and the Fourth Circuit accordingly did not review that portion of the district court's ruling. *Id.* at 586.

20. 42 U.S.C. § 1983. Section 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

Id.

21. State officials who were acting in their official capacities could escape § 1983 liability by breaking or refusing to enforce state laws. Because they were not acting in accordance with state law and therefore were not acting under color of statute, § 1983 did not cover their actions. Monroe v. Pape, 365 U.S. 167, 172 (1961), *overruled by* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 701 (1978). The Court in *Monell* overruled the holding in *Monroe* that municipal corporations were immune from liability under § 1983. *Monell*, 436 U.S. at 701.

22. *Monroe*, 365 U.S. at 187 (holding that state officials act "under color of law" when they abuse their positions to deprive citizens of Constitutional rights). After *Monell*, § 1983 applied to a broad range of rights, privileges, and immunities. 436 U.S. at 700–01 (determining that § 1983 "was intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights").

23. Section 1983 is not a source of rights in itself, but simply provides a vehicle to vindicate an underlying Constitutional right. Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 618–19 (1979).

that the right was deprived by a person acting under color of state law.[24] For § 1983 purposes, states, municipalities, and their agencies are persons who have the authority of the state.[25] The very fact that such a person's conduct violated a constitutional right is sufficient to give rise to a § 1983 claim, even if the plaintiff can show no further harm.[26] Plaintiffs suing under § 1983 may seek damages[27] and/or injunctive relief.[28]

B. Commercial Speech Doctrine

The Supreme Court defines commercial speech as "expression related solely to the economic interests of the speaker and its audience."[29] In 1942, the first Supreme Court case to introduce the concept of commercial speech, *Valentine v. Chrestensen*,[30] upheld Congress's authority to regulate speech that is purely commercial in nature.[31] Recognizing the value to consumers of open channels of information, the Supreme Court eventually rejected this "highly paternalistic"[32] approach and afforded commercial speech "a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values."[33] In limiting protection for speech that is purely commercial in nature, the Supreme Court reasoned that a common sense distinction between commercial and noncommercial speech would prevent dilution of traditional free speech rights.[34]

1. The Central Hudson *Test Established Intermediate Scrutiny for Review of Commercial Speech Regulations*

The Supreme Court's 1980 decision in *Central Hudson Gas & Electric Corp. v. Public Service Commission* is the benchmark for whether a regulatory burden on commercial speech violates the First Amendment.[35] In *Central Hudson*, the Supreme Court held that restrictions on truthful and non-misleading commercial speech are constitutional if they are not more extensive than necessary to serve a substantial government interest.[36] The case presented the question of whether the Public Service Commission of the State of New York unconstitutionally banned

24. West v. Atkins, 487 U.S. 42, 49 (1988).

25. *Monell*, 436 U.S. at 700 (overruling Monroe v. Pape, 365 U.S. 167 (1961)).

26. Carey v. Piphus, 435 U.S. 247, 266 (1978).

27. Farrar v. Hobby, 506 U.S. 103, 112 (1992).

28. 42 U.S.C. § 1983 (2006). The prevailing party may also recover attorneys' fees. 42 U.S.C. § 1988.

29. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 561 (1980).

30. 316 U.S. 52 (1942).

31. *Id.* at 54 ("We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.").

32. Va. Pharm. Bd. v. Va. Citizens Consumer Council, 425 U.S. 748, 770 (1976).

33. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978).

34. *Id.* at 455–56.

35. *See* Thompson v. W. States Medical Center, 535 U.S. 357, 360 (2002); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 499 (1996); Posadas de P.R. v. Toursim Co. of P.R., 478 U.S. 328, 340 (1986).

36. 447 U.S. at 571–72.

promotional advertising by an electrical utility.[37] In December 1973, during the oil embargo crisis, the Public Service Commission enacted a regulation banning all advertising that promotes energy use, because the Commission believed that New York State could not supply its customers through the winter at the current usage rate.[38] After the worst of the energy crisis, the Central Hudson Gas & Electric Corporation challenged the regulation on First Amendment grounds.[39] In response, the Commission issued a Policy Statement on February 25, 1977 that banned promotional advertising of utilities.[40] Central Hudson and other utility companies successfully challenged the Policy Statement in the state trial court, but the Commission's advertising ban was upheld at the intermediate appellate level and by the New York Court of Appeals.[41]

The Supreme Court of the United States in *Central Hudson* reversed New York's high court and reaffirmed that the Constitution protects commercial speech.[42] The Court also recognized that common sense plays a role in analyzing a commercial speech regulation's constitutionality.[43] In light of this distinction, the Court held that commercial speech merits less constitutional protection than other forms of expression.[44] The Supreme Court delineated the four criteria that a regulation on commercial speech must fulfill to justify infringing on this constitutional, albeit lesser, protection: (1) the commercial speech must be protected by the First Amendment, that is it must concern lawful activity and not be misleading, (2) the asserted government interest must be substantial, (3) the regulation must directly advance the government interest asserted, and (4) the regulation must not be more extensive than is necessary to serve that interest.[45] Applying these prongs to the case, the Court found that (1) promotional advertising of energy concerned lawful

37. *Id.* at 558.

38. *Id.* In 1973, OPEC responded to U.S. support of Israel in the Yom Kippur War with an embargo on crude oil. The resulting crisis spawned widespread conservation efforts across the U.S., including a nationwide 55 mph speed limit, the creation of national reserves, and public service advertising campaigns urging citizens to reduce consumption. See Ad Council, *Don't Be Fuelish*, (Jan. 12, 1975), *available at* http://www.webcitation.org/5jWimLA89, a thirty-second public service announcement that aired during the Super Bowl.

39. 447 U.S. at 559.

40. *Id.* The Commission split advertising into a "promotional" category and an "institutional and informational" category, banning the former because it ran "contrary to the national policy of conserving energy." *Id.*

41. Consol. Edison Co. v. Pub. Serv. Comm'n, 93 Misc.2d 313 (N.Y. Sup. Ct. 1978), *rev'd by* 63 A.D.2d 364, (N.Y. Ct. App. 1978), *aff'd by* 47 N.Y.2d 94 (1979).

42. 447 U.S. at 561 ("The First Amendment, as applied to the States through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation." (citing Va. Pharm. Bd. v. Va. Citizens Consumer Council, 425 U.S. 748, 761–62 (1976))).

43. *Id.* at 562 (acknowledging "the commonsense distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) (internal quotation marks omitted))).

44. *Id.* at 562–63 ("The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." (quoting *Ohralik*, 436 U.S. at 456) (internal quotation marks omitted)).

45. *Id.* at 563–66.

activity and was not misleading, (2) the government interest in energy conservation was substantial, and (3) a ban on such advertisements directly and materially advanced that interest, however the Court struck down the regulation because (4) the Commission could not show that a "more limited speech regulation would be ineffective," invalidating the total ban on speech ordinarily protected by the First Amendment.[46]

2. The Supreme Court Has Applied Central Hudson *Inconsistently*

At first, the stringent *Central Hudson* test mandated using the least restrictive regulations possible, but in the 1989 decision in *Board of Trustees v. Fox*,[47] the Supreme Court lowered the standard by holding that commercial speech regulations required only a reasonable fit to achieve the government's ends.[48] This relaxed standard had previously manifested itself in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*,[49] in which the Court declared that the government's interests in protecting the welfare of its citizens justified banning advertisements for casino gambling.[50]

While the Supreme Court has alternated between upholding commercial speech regulations[51] and striking them down,[52] in recent years the Court has taken a speech-protective stance.[53] These vacillating decisions hinged on the third and fourth prongs of the *Central Hudson* test.[54] In the 1996 decision *44 Liquormart v. Rhode Island*,[55] the Supreme Court shifted back to a more speech-protective analysis, invalidating a statute that prohibited the advertisement of alcohol prices because the ban provided only ineffective and remote support for promoting temperance, and higher prices could be maintained by other less speech-restrictive means.[56] Then, in *Lorillard Tobacco Co. v. Reilly*,[57] the Supreme Court struck down

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46. *Id.* at 566–71 (citing less speech-restrictive alternatives such as allowing advertisements for "devices or services that would cause no net increase in total energy use").

47. Bd. of Trustees v. Fox, 492 U.S. 469 (1989).

48. *Id.* at 480. The Court maintained that the reasonable fit test was not overly permissive, stating that "[i]t is far different, of course, from the 'rational basis' test used for Fourteenth Amendment equal protection analysis." *Id.*

49. Posadas de P.R. v. Toursim Co. of P.R., 478 U.S. 328 (1986).

50. *Id.* at 331.

51. *See id.*; United States v. Edge Broad., 509 U.S. 418, 436 (1993).

52. *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996); Rubin v. Coors Brewing Co., 514 U.S. 476, 478 (1995); Edenfield v. Fane, 507 U.S. 761, 763 (1993); Cincinnati v. Discovery Network, 507 U.S. 410, 412 (1993).

53. Sorrell v. IMS Health Inc., ____ U.S. ____ , 131 S. Ct. 2653, 2659 (2011); Thompson v. W. States Medical Center, 535 U.S. 357 (2002); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 566 (2001).

54. Steps one and two are usually "the easy part," but prongs three and four create much more dispute. Clay Calvert, Wendy Allen-Brunner & Christina M. Locke, *Playing Politics or Protecting Children? Congressional Action & a First Amendment Analysis of the Family Smoking Prevention and Tobacco Control Act*, 36 J. LEGIS. 201, 230 (2010).

55. *44 Liquormart*, 517 U.S. 484 (1996).

56. *Id.*; *see also* Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 182–83 (1999). The United States Supreme Court decided *Greater New Orleans* on a second grant of certiorari after the Fifth Circuit reconsidered the case in light of *44 Liquormart*. *Id.* The Fourth Circuit also reconsidered a commercial speech

a ban on outdoor advertising of smokeless tobacco and cigars because the restriction was unduly broad and effectively prevented businesses from disseminating information about lawful products to adults.[58] Most recently, the First Amendment argument has prevailed in every Supreme Court commercial speech case.[59]

3. The Supreme Court's Inconsistency Has Led to a Circuit Split

A pair of Fourth Circuit decisions in the mid-1990s caused consternation because of their perceived inconsistency with the Supreme Court's overall protective stance toward commercial speech.[60] In *Anheuser-Busch, Inc. v. Schmoke*[61] and *Penn Advertising v. Mayor of Baltimore*,[62] the Fourth Circuit upheld bans on outdoor advertisements of alcohol and tobacco, respectively.[63] In both cases, the Fourth Circuit held that the bans met the third and fourth prongs of the *Central Hudson* test, deferring to the legislature on the questions of direct, material advancement and reasonable fit.[64] The three-judge panel reasoned that the ban met the third prong as long as it was reasonable to conclude that the regulation would directly and materially advance the stated interest.[65] Under the fourth prong, the Fourth Circuit recognized that other means could more effectively promote the welfare and temperance of minors, but concluded that banning outdoor advertisements

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decision in light of *44 Liquormart*, but the Supreme Court denied the second certiorari petition. *See infra* notes 60–68 and accompanying text.

57. 533 U.S. 525 (2001).

58. *Id.* at 571.

59. Calvert et al., *Playing Politics or Protecting Children?*, *supra* note 54, at 204. *See also Sorrell*, 131 S. Ct. at 2659; *Thompson*, 535 U.S. at 360; *Lorillard*, 533 U.S. at 571; *Greater New Orleans*, 527 U.S. at 176. Commentators perceive the Supreme Court's pro-commercial speech slant in *Citizens United v. Fed. Election Comm'n*, ____ U.S. ____ , 130 S. Ct. 876 (2010), where the Court held that corporations are people for First Amendment political speech purposes. Tamara R. Piety, *Citizens United and the Threat to the Regulatory State*, 109 Mich. L. Rev. First Impressions 16 (2010), http://www.michiganlawreview.org/assets/fi/109/piety.pdf. The *Citizens United* case is, for now, out of the scope of this article, but the decision may eventually result in heightened protection for commercial speech.

60. *See, e.g.*, Daniel E. Troy, *Taking Commercial Speech Seriously*, 2 FREE SPEECH & ELECTION L. PRACTICE NEWSL. (May 1, 1998), http://www.fed-soc.org/publications/detail/taking-commercial-speech-seriously ("Two recent Fourth Circuit decisions demonstrate the perils of such analysis, notwithstanding the outcome of *44 Liquormart* and most of the Supreme Court's decisions, which are generally protective of commercial speech."); *cf.* Yabo Lin, Note, *Put a Rein on That Unruly Horse: Balancing the Freedom of Commercial Speech and the Protection of Children in Restricting Cigarette Billboard Advertising*, 52 WASH. U. J. URB. & CONTEMP. L. 307, 313 (1997) (positing that the Fourth Circuit's ruling "will have significant impact on the Clinton administration's proposals restricting cigarette advertising in various media").

61. 63 F.3d 1305 (4th Cir. 1995) [hereinafter *Anheuser-Busch I*], *aff'd in part on remand*, 101 F.3d 325 (4th Cir. 1996).

62. 63 F.3d 1318 (4th Cir. 1995) [hereinafter *Penn Advertising I*], *aff'd in part on remand*, 101 F.3d 332 (4th Cir. 1996).

63. *Anheuser-Busch I*, 63 F.3d at 1311; *Penn Advertising I*, 63 F.3d at 1323.

64. *Anheuser-Busch I*, 63 F.3d at 1311; *Penn Advertising I*, 63 F.3d at 1323. The Fourth Circuit showed more deference when the legislature was regulating products considered socially harmful, even though there is no "vice" exception to commercial speech protection. *44 Liquormart*, 517 U.S. at 513–14.

65. *Anheuser-Busch I*, 63 F.3d at 1313–14; *Penn Advertising I*, 63 F.3d at 1318.

reasonably fit the advancement of the legislature's goal.[66] The Supreme Court granted certiorari, but remanded the cases for reconsideration in light of the decision in *44 Liquormart*, which struck down a ban on alcohol price advertising.[67] On remand, the Fourth Circuit concluded that the *44 Liquormart* decision did not require different results and upheld the bans on outdoor alcohol and tobacco advertising.[68]

Other Circuit Courts of Appeals have shown less deference to legislatures when analyzing prongs three and four of the *Central Hudson* test.[69] Most notably, the Third Circuit analyzed and struck down a ban on alcohol advertisements in collegiate media in its 2004 decision in *Pitt News v. Pappert*.[70] Pennsylvania's Liquor Code Act 199[71] prohibited alcohol advertisements in college newspapers.[72] *The Pitt News*, the college newspaper at the University of Pittsburgh, challenged the advertising ban, alleging that the law violated the First Amendment by unconstitutionally restricting commercial speech.[73] Applying the *Central Hudson* test, the court held that the Pennsylvania Legislature relied on "nothing more than speculation and conjecture" in justifying the ban in all college media, and that the statute failed to form a reasonable fit to the asserted state interest as required by *Board of Trustees v. Fox*.[74] The Third Circuit also found that the advertising ban "unjustifiably impose[d] a financial burden on a particular segment of the media, i.e., media associated with universities and colleges."[75]

The commercial speech regulation of alcohol advertising in college newspapers at issue in *Educational Media v. Swecker* was a matter of first impression in the Fourth Circuit.[76] However, despite the factual similarities between this case and *Pitt*

66. *Anheuser-Busch I*, 63 F.3d at 1316; *Penn Advertising I*, 63 F.3d at 1325–26.

67. 518 U.S. 1030 (1996); 517 U.S. 1206 (1996).

68. 101 F.3d 332 (4th Cir. 1996) [hereinafter *Penn Advertising II*]; 101 F.3d 325 (4th Cir. 1996) [hereinafter *Anheuser-Busch II*].

69. *See* Nat'l Advertising Co. v. Town of Babylon, 900 F. 2d 551, 553 (2d Cir. 1990); Ackerley Commc'ns of Mass. v. City of Somerville, 88 F. 3d 33, 34 (1st Cir. 1989).

70. 379 F.3d 96, 101 (2004) (unanimous three judge panel: Circuit Judge Samuel A. Alito, Circuit Judge Michael Chertoff, Senior District Judge Dickinson R. Debevoise, sitting by designation).

71. 47 Pa. Stat. Ann. § 4–498.

72. *Id.* § 4–498(e)(5) (banning alcohol advertising in any newspaper "published by, for or in behalf of any educational institution").

73. *Pitt News*, 379 F.3d at 103. *The Pitt News* relied on advertising for its entire operating budget. *Id.*

74. *Id.* at 107–08. Then-Circuit Judge Alito called the statute "both severely over- and under-inclusive" because it applied only to college newspapers and not other media, yet the majority of the readers affected were over twnty-one years old. *Id.* at 108.

75. *Id.* at 109. Such laws are presumptively invalid. The government would have to show that the law is "necessary to achieve an overriding governmental interest." Minneapolis Star & Tribune Co. v. Comm'r, 460 U.S. 575, 582 (1983).

76. Despite the fact that the statute has been on the books in one form or another since the repeal of Prohibition, Bryce L. Friedman, *Alcohol Ad Ban Upheld Based on "Common Sense" View of 1st Amendment Rights*, The Legal Pulse, Washington Legal Foundation, May 3, 2010, *available at* http://wlflegalpulse.com/2010/05/03/friedman_alcohol-ad-ban_swecker, neither state nor federal courts have construed this statute. Educ. Media Co. at Va. Tech, Inc. v. Swecker, No. 3:06CV396, 2008 U.S. Dist. LEXIS 45590, at *16 (E.D. Va. Mar. 31, 2008). The Board later argued that because a state court has not construed the statute, the Supreme Court should deny the college newspapers' petition for certiorari. Brief in Opposition of

News v. Pappert, the Fourth Circuit reached the opposite conclusion.[77] The Supreme Court of the United States denied the college newspapers' petition for certiorari, leaving the Third and Fourth Circuits with opposite rulings in nearly identical factual situations.[78]

III. THE COURT'S REASONING

A three-judge panel of the United States Court of Appeals for the Fourth Circuit reversed the district court's order that had granted summary judgment in favor of Educational Media Company at Virginia Tech, Inc. and The Cavalier Daily, Inc.[79] Judge Dennis W. Shedd, joined by Senior Judge Clyde H. Hamilton, held that Title 3 of the Virginia Administrative Code, Section 5–20–40(B)(3) constitutionally regulates commercial speech because it meets all four prongs of the *Central Hudson* test.[80] Judge Norman K. Moon dissented.[81]

A. The Majority

The Fourth Circuit panel reviewed the district court's grant of summary judgment *de novo*, viewing the facts in the light most favorable to the Board.[82] The district court had found the statute facially unconstitutional and had not reached the question of whether it was unconstitutional as applied to the college newspapers.[83] The Fourth Circuit thus considered only whether 5–20–40(B)(3) is unconstitutional on its face.[84]

Both parties agreed that the four-part *Central Hudson* test would be dispositive of the question whether 5–20–40(B)(3) violates the college newspapers' First Amendment rights.[85] First, the Fourth Circuit considered whether the commercial speech in this case concerns lawful activity and is not misleading.[86] The Board argued that 5–20–40(B)(3) concerns unlawful activity because it applies only to student newspapers primarily intended for distribution to persons under twenty-

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Petition for Writ of Certiorari at 10, Educ. Media Co. at Va. Tech, Inc. v. Swecker, 602 F.3d 583 (4th Cir. 2010) (No. 10-278), 2010 WL 4278716 at *10.

77. 603 F.3d 583, 586 (4th Cir. 2010).

78. 131 S. Ct. 646 (Nov. 29, 2010). The Board maintains that there is no circuit split because the two cases "constitute fact-specific applications of legal principles to different regulations based on differing evidentiary records." Brief in Opposition of Petition for Writ of Certiorari at 7, Educ. Media Co. at Va. Tech v. Swecker, 602 F.3d 583 (4th Cir. 2010) (No. 10-278), 2010 WL 4278716 at *7.

79. 602 F.3d 583, 586 (2010).

80. *Id.*

81. *Id.* at 591 (Moon, J., dissenting). Judge Moon is a United States District Judge for the Western District of Virginia and was sitting by designation in this case. *Id.* at 586.

82. *Id.*

83. *Id.* at 587.

84. *Id.* at 588.

85. *Id.*

86. *Id.* at 588–89.

one years of age.[87] The court rejected this argument based on precedent, holding that "advertisements for age-restricted-but otherwise lawful-products concern lawful activity where the audience comprises both underage and of-age members."[88] In this facial, pre-enforcement challenge, the court assumed that the speech was not misleading because the Board offered no evidence that the speech was actually misleading.[89] The court held that the First Amendment protects alcohol advertisements in college newspapers.[90]

The college newspapers did not dispute the Board's contention that it has "a substantial interest in combating the serious problem of underage and abusive drinking by college students."[91] Accordingly, the court then found that the asserted government interest was substantial enough to satisfy the second prong of the *Central Hudson* test.[92]

Next, the court inquired into the third prong of the *Central Hudson* test: whether 5–20–40(B)(3) "directly and materially advances the government's substantial interest."[93] Focusing on the relationship between the State's interests and the advertising ban, the court stated that while the "relationship, or link, need not be proven by empirical evidence . . . it may be supported by history, consensus, and simple common sense."[94] The court qualified, however, that "the link is insufficient if it is irrational, contrary to specific data, or rooted in speculation or conjecture."[95] The court reasoned that the college newspapers target college students and "play an inimitable role on campus," strengthening the correlation between advertising contained in them and student demand for those products and services.[96] In support of this conclusion, the court attempted to use common sense, stating that "the fact that alcohol vendors *want* to advertise in college student publications" established the link between advertisements and demand, because it would be counterintuitive for restaurant owners to spend their money if they did not believe the advertisements would stimulate college student demand.[97] Because the college newspapers failed "to provide evidence to *specifically* contradict this link or to recognize the distinction between advertisements in mass media and those in targeted local media," the Fourth Circuit held that the advertising ban directly and materially advanced the asserted substantial government interest in curbing

87. *Id.* at 589.

88. *Id.* (citing W. Va. Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave, 553 F.3d 292, 302 (4th Cir. 2009) and *Anheuser-Busch I*, 63 F.3d 1305, 1313 (4th Cir. 1995)).

89. *Id.* at 589 (citing *Musgrave*, 553 F.3d at 302).

90. *Id.* at 589.

91. *Id.*

92. *Id.*

93. *Id.* (citing *Musgrave*, 553 F.3d at 303) (internal quotation marks omitted).

94. *Id.* (quoting Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 555 (2001) (quoting Fla. Bar v. Went For It, Inc., 515 U.S. 618, 628 (1995) (internal quotation marks omitted))).

95. *Id.* (citing *Musgrave*, 553 F.3d at 304).

96. *Id.* at 590. Though the Court correctly stated that the relationship need not be proven by empirical data, there was no empirical data as to any correlation between advertising in college newspapers and student demand. *Id.*

97. *Id.* (emphasis in original).

underage and abusive drinking by college students, satisfying the third *Central Hudson* prong.[98]

Finally, the court considered whether the restrictions under 5–20–40(B)(3) were "narrowly drawn."[99] The majority stressed that a state must consider alternative means of regulation.[100] The court reasoned that because Virginia has a comprehensive scheme to serve its interest in reducing underage and abusive drinking, the Board could not use commercial speech regulations to replace alternatives that do not limit speech.[101]

The Fourth Circuit found that 5–20–40(B)(3) is narrowly tailored to serve the Board's substantial interest because the ban only prohibits certain types of advertisements and the restriction only applies to college student publications.[102] First, the court observed that the provision is not a complete advertising ban and allows restaurants to indicate what types of alcohol they serve.[103] Second, the court noted that the ban applies only to college student publications that are targeted to underage students, and does not apply on its face to all possible student publications.[104]

The court also noted that 5–20–40(B)(3) complements the Board's other non-speech related efforts, such as education and enforcement programs.[105] The college newspapers argued that the advertising ban is not the least restrictive means to achieve the asserted government interest, but the court rejected that argument because 5–20–40(B)(3) needs only to be in proportion to the interest it serves, and the Board showed the reasonable fit required under *Central Hudson* and *Board of Trustees v. Fox*.[106]

The United States Court of Appeals for the Fourth Circuit found that 5–20–40(B)(3) concerned commercial speech protected by the First Amendment, but held that the advertising ban passed Constitutional muster under *Central Hudson* because it is a narrowly tailored regulation that directly and materially advances a substantial government interest.[107] The Fourth Circuit denied the college

98. *Id.* (emphasis in original).

99. *Id.* (quoting Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 565 (1980)).

100. *Id.* (inquiring not whether the restrictions are the least restrictive means possible, but whether they have a "reasonable fit with the government's interest . . . that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served").

101. *Id.* at 590 (advertising regulations must "complement non-speech alternatives, not serve as substitutes for them." (quoting W. Va. Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave, 553 F.3d 292, 306 (4th Cir. 2009) (internal quotation marks omitted))).

102. *Id.* at 590.

103. *Id.* at 590–91.

104. *Id.* at 591.

105. *Id.* at 591 (the advertising regulation is a "cost-effective prevention method that properly complements" the overall regulatory scheme).

106. *Id.* (citing *Musgrave*, 553 F.3d at 305 (quoting Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 188 (1999))).

107. *Id.*

newspapers' petition for rehearing and ordered the permanent injunction vacated.[108]

B. The Dissent

Judge Moon dissented. He began by examining the issue of whether 5–20–40(B)(3) applies to the *Collegiate Times* and *The Cavalier Daily* at all.[109] Judge Moon stated that the college newspapers should not fall under the ambit of the advertising ban because the majority of their readers are over twenty-one years of age.[110] Thus, Judge Moon wrote that he would resolve the case on the grounds that the statute does not on its face apply to the college newspapers, without reaching the First Amendment question.[111] His solution would provide the college newspapers with complete relief without any burden on the Board.[112] However, because both the district court and the majority considered the case on the merits, Judge Moon did as well.[113]

As to the constitutionality of the regulation, Judge Moon also followed the four-part *Central Hudson* test, but concluded that 5–20–40(B)(3) did not meet the third and fourth *Central Hudson* prongs.[114] Judge Moon first reasoned that the Board did not demonstrate that the advertising ban directly advanced the asserted government interest to a material degree.[115] The burden cannot be satisfied, Judge Moon wrote, by "mere speculation or conjecture," and it is insufficient if the law provides only "ineffective or remote support,"[116] or if there is little chance that the law will advance the asserted interest.[117] Stressing that the government had the burden to show the law's effectiveness, Judge Moon agreed with the district court that the Board failed to make this showing.[118]

Judge Moon found the United States Court of Appeals for the Third Circuit's opinion in *Pitt News v. Pappert* persuasive in this case.[119] In *Pitt News v. Pappert*, the Third Circuit invalidated a Pennsylvania statute banning alcohol advertising by college media.[120] Like the Pennsylvania law, which failed the third and fourth

108. *Id.*

109. 602 F.3d at 591 (Moon, J., dissenting). Indeed, *The Cavalier Daily* and *Collegiate Times* both state on their mastheads that they serve the community associated with their respective universities.

110. *Id.* (reasoning that "these college newspapers are not 'distributed or intended to be distributed primarily to persons under the age of 21 years of age'") (quoting 5–20–40(B)(3)).

111. *Id.* (citing Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)). Avoiding a Constitutional question by resolving a case on other grounds is a "cardinal principle" of Supreme Court jurisprudence. Crowell v. Benson, 285 U.S. 22, 62 (1932).

112. 602 F.3d at 592 n.1.

113. *Id.* at 592.

114. *Id.* at 592, 594.

115. *Id.* at 592.

116. *Id.* (quoting Edenfield v. Fane, 507 U.S. 761, 770–71 (1993)).

117. *Id.* (citing Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 555 (2001)).

118. *Id.*

119. *Id.* at 592–93.

120. Pitt News v. Pappert, 379 F.3d 96 (3d Cir. 2004).

prongs of the *Central Hudson* test, Judge Moon found that 5–20–40(B)(3) was supported by no more than "speculation and conjecture."[121] Judge Moon found that the record did not support the link between the advertising ban and decreased student demand for alcohol.[122] The *Pitt News v. Pappert* court found that the Pennsylvania advertising ban applied only to a very narrow sector of the media, which in Judge Moon's opinion paralleled 5–20–40(B)(3)'s application to college newspapers.[123] Judge Moon pointed to the *Pitt News v. Pappert* court's reasoning that students are exposed to a "torrent" of alcohol advertisement on television and in other media, including other free newspapers available at the same location as *The Pitt News*, as illustrative of the situations at Virginia Tech and UVA.[124]

Next, as to the third prong, Judge Moon found inapposite the argument that advertisers would not spend money on advertisements in college newspapers if they did not believe doing so would increase demand among college students.[125] Judge Moon appeared to make the point that this fact does not prove the link between the regulation and combating abusive and underage drinking.[126] He reasoned that the regulation did not materially advance the stated goal of reducing underage and abusive drinking among college students because it impermissibly infringes the constitutional rights of adults who are eighteen to twenty years old, adults over twenty-one years old, as well as the advertisers themselves.[127]

Judge Moon also found that 5–20–40(B)(3) did not meet the fourth *Central Hudson* prong because the regulation's internal inconsistency makes it a poor fit to serve the asserted government interest.[128] The law bans references to specific events or types of alcohol, but allows the promotion of drinking in general.[129] Judge Moon compared this internal inconsistency to the ban on broadcast advertising of casino gambling in *Greater New Orleans Broadcast Ass'n v. United States* that was "so pierced by exemptions and inconsistencies" that the Supreme Court struck it down.[130] For example, Judge Moon pointed out the Board's argument that the regulation is meant to prevent advertisers from attracting purchasers to a particular

121. 602 F.3d at 593 (quoting *Pitt News*, 379 F.3d at 107–08).

122. *Id.* at 593 ("The evidence in the record indicates such a link is speculative, at best.").

123. *Id.*

124. *Id.* at 593 (citing *Pitt News*, 379 F.3d at 107).

125. *Id.* at 593–94.

126. *Id.* at 594. Judge Moon also relates this point to prong four. *See id.* at 595.

127. *Id.* at 594.

128. *Id.*

129. *Id.* ("It is inconsistent to maintain that a regulation that permits advertisements for 'beer night' or 'mixed drink night' 'in reference to a dining establishment' forms a reasonable fit with the goal of curbing underage or excessive drinking merely because if forbids advertisements for keg delivery, 'mojito night,' or the 'Blacksburg Wine Festival.'").

130. *Id.* at 594–95 (citing *Greater New Orleans*, 527 U.S. at 190–91 (holding that a regulation was too "pierced" when it prohibited advertisement of privately operated casino gambling, but allowed advertisements for other types of gambling such as racing and lottery, for "Vegas-style excitement" when referring to casino amenities, and for Native American casino gambling)).

outlet or venue, while it allows a particular outlet or venue, e.g. a restaurant, to advertise "beer night" or "mixed drink night."[131]

Judge Moon then returned to his point that the majority of the college newspapers' readership is over twenty-one years old to show that 5–20–40(B)(3) is not sufficiently narrow to meet the *Central Hudson* test's fourth prong.[132] Though the Board's stated purpose is to combat underage and abusive drinking among college students, Judge Moon argued that the ban is "both severely over- and under-inclusive" because it prohibits of-age readers from receiving accurate information while exposing underage readers to general enticement for alcohol.[133] The Board contended that the facial challenge could not succeed because the ban would be valid in at least one instance: the case of an institution whose population is composed mostly of under-twenty-one-year-olds.[134] However, Judge Moon disposed of this argument by pointing out that in the First Amendment context, a law may be facially invalid "when a substantial number of the law's applications are unconstitutional."[135]

Judge Moon closed by arguing that a cost-benefit analysis shows the disproportional effect of the advertising ban.[136] Arguing that the Commonwealth of Virginia, like the Commonwealth of Pennsylvania in *Pitt News v. Pappert*, could serve its interests by far more direct means that are not speech restrictive, Judge Moon reasoned that the alcohol advertising ban offered only ineffective or remote support.[137] Specifically, Judge Moon cited increases in taxation on alcohol and in counter-advertising as means that more directly serve the Board's interest.[138]

IV. Analysis

The United States Court of Appeals for the Fourth Circuit erred in applying the third and fourth prongs of the *Central Hudson* test. As to the third prong, the Fourth Circuit erroneously based its decision almost solely on "common sense" to find 5–20–40(B)(3) constitutional.[139] In its analysis of prong three, the Fourth Circuit used an unconstitutionally low standard to determine that the Board met

131. *Id.* at 594 n.6.

132. *Id.* at 595.

133. *Id.* at 595 (quoting Pitt News v. Pappert, 379 F.3d 96, 108 (3d Cir. 2004)).

134. *Id.* at 595 n.7 (citing Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449–51 (2008)). Judge Moon stated that "in most circumstances a facial challenge to the constitutionality of a law can succeed only by establishing that there is no set of circumstances under which the law would be valid." *Id.*

135. *Id.* at 595 (quoting *Wash. State Grange*, 552 U.S. at 450 n.6). The Supreme Court in *Washington State Grange* also cautioned that "[i]n determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." 552 U.S. at 449–50.

136. *Educ. Media v. Swecker*, 583 F.3d at 595–96 (when "the costs and benefits associated with" 5–20–40(B)(3) are "carefully calculated," the regulation is "far out of proportion to the interest served." (quoting W. Va. Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave, 553 F.3d 292, 305 (4th Cir. 2009))).

137. *Id.* at 596 (citing *Pitt News*, 379 F.3d at 108).

138. *Id.* at 596 n.8 (stating that the Board's expert acknowledged that increased taxation and counter-advertising are more effective than banning advertising in particular segments of the media).

139. *Id.* at 589–90.

the burden of showing that 5–20–40(B)(3) directly and materially advanced the goal of combating underage and abusive drinking among college students.[140] The Fourth Circuit should have required the Board to support the link between its regulation and reducing underage and abusive drinking with more than "common sense."[141] Moreover, the Fourth Circuit should have found the link insufficient because it is irrational, and it is rooted in speculation and conjecture.[142] These defects also implicate the fourth prong of the *Central Hudson* test because the advertising ban is not sufficiently narrow to justify restricting commercial speech.[143] In addition, the restriction ignores less speech-restrictive alternatives that should tilt the cost-benefit analysis in favor of allowing alcohol advertising in college newspapers.[144] The Fourth Circuit's flawed application of prongs three and four of the *Central Hudson* test allowed an unconstitutional commercial speech regulation to remain in effect. The college newspapers were, and continue to be deprived of their First Amendment rights, which should have been grounds for the Fourth Circuit to affirm the district court's grant of summary judgment on the college newspapers' § 1983 claims.

A. The Fourth Circuit's Reliance on "Common Sense" Effectively Lowers the Constitutional Standard for Commercial Speech Regulation to Rational Basis Scrutiny

The Fourth Circuit used "common sense" as the only rationale required for the Board to meet the direct and material advancement burden in prong three. This reasoning runs counter to Supreme Court[145] and Fourth Circuit precedent,[146] which

140. *See* Shannon M. Hinegardner, *Abrogating the Supreme Court's De Facto Rational Basis Standard for Commercial Speech: A Survey and Proposed Revision of the Third* Central Hudson *Prong*, 43 NEW ENG. L. REV. 523, 529–30 (2009) (arguing that using "common sense" as the sole rationale for upholding a regulation amounts to "*de facto* rational basis" review because it "provides absolutely no basis for the judiciary to review legislative decisions").

141. 602 F 3d. at 589.

142. *Id.* at 592 (Moon, J., dissenting).

143. *Id.* at 595 (Moon, J., dissenting). The analysis of the Central Hudson prongs at times necessarily runs together. *Id.*

144. *Id.* at 595–96 (Moon, J., dissenting) (citing W. Va. Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave, 553 F.3d 292, 305 (4th Cir. 2009)). Judge Moon also argued that the regulation is not sufficiently narrow because the college newspapers are not targeted at students under twenty-one as required by the definition in 5–20–40(B)(3). *Id.* at 595. Although it is seemingly difficult to argue that the student newspapers at Virginia Tech and UVA are not college student publications, on remand the district court felt that the determination was close enough to certify a question to the Supreme Court of Virginia. In response to the certified question of whether 5–20–40(B)(3) covers college newspapers whose readership is mostly over twenty-one, the Supreme Court of Virginia responded that college student publications "may include publications of which at least half of the readers are age 21 or older if the publications are 'distributed or intended to be distributed primarily to persons under 21 years of age' and otherwise meet the definition set forth" in the regulation. Educational Media Co. at Va. Tech, Inc. v. Swecker, No 110992, 2011 WL 5603789, at *1 (Va. Nov. 4, 2011) (emphases in original).

145. Although the Supreme Court stated in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001), that a commercial speech restriction could be justified based solely on history, consensus, and simple common sense, the Fourth Circuit in *Educational Media v. Swecker* did not address history or consensus directly. 602 F.3d at 589–90. No history or consensus is apparent here beside the fact that 5–20–40(B)(3) has been a law for decades

mandate that while common sense is one factor, the party seeking to enforce a commercial speech regulation must show that the law is supported by more than conjecture and speculation.[147]

Despite having the burden of proof, the Board was not required by the majority to provide any statistical or even anecdotal evidence that the advertising ban reduces drinking in any way.[148] On the other side, the college newspapers presented tangible evidence to the contrary.[149] Nevertheless, the Court found that the college newspapers' evidence failed to distinguish between targeted and mass media, making the proffered data insufficiently specific to contradict the link between the advertising ban and reduced underage and abusive drinking.[150] The Fourth Circuit in effect shifted the burden of proof from the Board to the college newspapers to show that 5–20–40(B)(3) is invalid.[151]

Even under this flawed analysis, the college newspapers should have been able to shoulder this undue burden because of the advertising ban's irrational construction. The Supreme Court held in *Greater New Orleans* that internal inconsistency is grounds for striking down commercial speech regulation.[152] When a law is "so pierced by exemptions" that it cannot accomplish its regulatory purpose, there can be no direct and material advancement under prong three.[153] Here, 5–20–40(B)(3) allows restaurants to advertise "beer night," but not "Budweiser night," or "mixed drink night," but not "martini night."[154] The advertising ban's internal

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without challenge. For the reasons stated in this Part, the Fourth Circuit's reasoning shows that they inadequately considered common sense as well.

146. *Musgrave*, 553 F.3d at 303 ("Accordingly, we do not simply defer to defendant's contention because it is a legislative judgment." (citing *Anheuser-Busch II*, 101 F.3d 325, 327 n.1 (4th Cir. 1996) ("Because we do not defer blindly to the legislative rationale, but rather agree with it based on our own independent conclusion about the fit between legislative objective and the regulation used to achieve that objective, the holding in *Posadas* is not necessary to our opinions upholding Baltimore City's ordinance."))).

147. Today's students enter college having grown up with technology and are now more connected through various media than any generation before. Matt Richtel, *Growing Up Digital, Wired for Distraction*, N.Y. Times, Nov. 21, 2010, at A1. It is unrealistic to claim that these people will somehow be affected by a lack of information in the free daily college newspaper, when one person can reach thousands through e-mail, Facebook, Twitter, and other means.

148. See *supra* notes 96–98 and accompanying text.

149. The Board's expert, Dr. Henry Saffer, did opine as to a relationship between advertising and alcohol consumption, but his most recent scholarship and his deposition testimony reflect the conclusion that alcohol advertising does not increase demand. Petition for a Writ of Certiorari at 6, Educ. Media at Va. Tech, Inc. v. Swecker, 602 F.3d 583 (4th Cir. 2010) (No. 10-278), 2010 WL 3355821 at *6. Dr. Saffer also testified that a ban on alcohol advertisement in one segment of the media will result in increased advertising in other areas. *Id.* ("A ban in one or two media, such as television or radio, will result in substitution to available alternative media.").

150. Educ. Media Co. at Va. Tech, Inc. v. Swecker, 602 F.3d 583, 590 (4th Cir. 2010).

151. Edenfield v. Fane, 507 U.S. 761, 770–71 (1993) ("[T]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it.").

152. Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 190 (1999); *see also* W. Va. Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave, 553 F.3d 292, 304 (4th Cir. 2009).

153. *Greater New Orleans*, 527 U.S. at 190.

154. *Supra* at Part IV.B. As Judge Moon argued in dissent, the ineffective concept of the ban itself is compounded by "exemptions" that point readers to particular drinking outlets or venues. *Educ. Media v. Swecker*, 602 F.3d at 595 (Moon, J., dissenting).

inconsistency should have been grounds for the Fourth Circuit to declare it unconstitutional under *Central Hudson*, as refined by *Greater New Orleans*.[155]

The consequence of using "common sense" as the principle justification for a law restricting commercial speech is to lower First Amendment protection from intermediate scrutiny to rational basis level.[156] The court in *Educational Media v. Swecker* purported to use more than a common-sense/rational-basis test, but by stating that the link is "amply supported by the record," the court took a conclusory shortcut past the true *Central Hudson* standard.[157] A secondary effect is that the decision in *Educational Media v. Swecker* will contribute to the Fourth Circuit's own "history and consensus" on the matter of commercial speech regulation, allowing future unconstitutional advertising restrictions to bootstrap on this erroneous holding.[158]

Courts must require parties to meet their burdens of proof to justify commercial speech restrictions. If all that is required for an administrative agency or legislature to ban a certain product or practice it deems objectionable is to present a single expert's testimony,[159] businesses and consumers will be deprived of the right to

155. 527 U.S. at 190. Advertisers' desire to buy ad space does not prove that ads increase demand. The U.S. market for alcohol is "mature," and advertisers want market share. Jon P. Nelson, *Beer Advertising and Marketing Update: Structure, Conduct, and Social Costs*, 26 REV. INDUS. ORG. 269, 275–76 (2004) ("The null relationship between consumption and advertising has not gone unnoticed by industry officials (*Brewers Digest*, 1990), and illustrates the fact that advertising in a 'mature' industry primarily affects brand shares (Nelson, 1997, 2001)."). Unlike with other so-called vices, such as the lottery, gambling, and smoking, the alcohol advertiser's focus is on fostering brand loyalty and not attracting new customers. *Id.* The government's asserted goal, on the other hand, is not to decrease demand, but to combat underage and abusive drinking among college students. *Educ. Media v. Swecker*, 602 F.3d at 594 (Moon, J., dissenting). The two goals are not mutually exclusive; it is not a zero sum game with a guaranteed winner and loser.

156. *See* Hinegardner, *supra* note 140, at 529–30.

157. 602 F.3d at 590. For example, the Fourth Circuit in *Educational Media v. Swecker* wrote that the State must show more than speculation or conjecture to support the link between a regulation and the asserted interest, but did not require the Board to cite any evidence that rose above conclusory, speculative, and conjectural. *Id.* None of these types of evidence should meet the third *Central Hudson* prong. A similar lack of evidence for the relationship, or link, between price advertising and temperance in *44 Liquormart v. Rhode Island* formed the basis for the Supreme Court to strike down an advertising ban for providing only "ineffective or remote support for the government's purpose." 517 U.S. 484, 505 (1996) (a ban on alcohol price advertising had no effect on temperance). *See also* Rubin v. Coors Brewing Co., 514 U.S 476, 485–86 (1995) (declaring unconstitutional a prohibition on the display of alcohol content on beer labels).

158. *Cf.* Cory L. Andrews, *High Court's Cert Denial in Advertising Case Leaves in Place a Precedent Worth Ignoring*, The Legal Pulse, WASHINGTON LEGAL FOUNDATION, Dec. 1, 2010, *available at* http://wlflegalpulse.com/2010/12/01/high-courts-cert-denial-in-advertising-case-leaves-in-place-a-precedent-worth-ignoring/ (discussing the *Educational Media v. Swecker* decision's lack of precedential force outside the Fourth Circuit). Nevertheless, the case remains persuasive authority for courts inclined to uphold advertising regulations.

159. The Board only considered its expert Dr. Saffer's opinions decades after the enactment of 5–20–40(B)(3). Educ. Media Co. at Va. Tech, Inc. v. Swecker, No. 3:06CV396, 2008 U.S. Dist. LEXIS 45590, at *22 (E.D. Va. Mar. 31, 2008). The trial court found that "[t]his *post hoc* presentation of the record does not explain the conduct of the regulatory board when considering its action, which is the traditional anchor on which the reasonableness evaluation rests" and "[did] not see any guiding precedent allowing after-created studies to justify an earlier restriction on protected commercial speech." *Id.*

transact based on the exchange of accurate information.[160] It is unnecessary to burden commercial speech based on common sense alone, because doing so assumes that people do not possess the requisite sense to decide for themselves.[161] The United States Supreme Court has held that "the governmental interest in protecting children from harmful materials . . . does not justify an unnecessarily broad suppression of speech addressed to adults."[162] The Commonwealth of Virginia, through the Board, Virginia Tech, and UVA, clearly has a substantial interest in combating underage and abusive drinking among its college students.[163] However, a majority of the college newspapers' readers are over twenty-one years of age and have a constitutional interest in accurate information about lawful products.[164] Moreover, the underage population that the Board seeks to protect with its regulation will soon turn twenty-one years old, and should have the same access to information.[165] The remedy for this weakening of commercial speech protection is for courts faithfully to apply the stated standards under the third

160. *44 Liquormart*, 517 U.S. at 496 (commercial speech plays an important role in the marketplace of ideas). Justice Thomas intimates that for many, commercial speech is more important than political speech, because they care more on a daily basis about goods and services than they do about political candidates or issues. *Id.* at 518–19 (Thomas, J., concurring) ("[A] 'particular consumer's interest in the free flow of commercial information' may be as keen as or keener than his interest in 'the day's most urgent political debate . . . .'" (quoting Va. Pharm. Bd. v. Va. Citizens Consumer Council, 425 U.S. 748, 763 (1976))). However, Justice Scalia raises the point that it is paternalistic to strike down laws because the Court thinks they are paternalistic, unless there is a specific Constitutional reason for doing so. *Id.* at 517 (Scalia, J., concurring).

161. Common sense is supposed to mean that "reasonable jurists will reach similar conclusions about similar regulations." Petition for a Writ of Certiorari at 15 n.6, Educ. Media Co. at Va. Tech, Inc. v. Swecker, 602 F.3d 583 (4th Cir. 2010) (No. 10-278), 2010 WL 3355821 at *15 n.6. Then-Judge Alito, who is now an Associate Justice on the Supreme Court, is presumably a reasonable jurist, but he reached the opposite conclusion when writing for the Third Circuit about a remarkably similar advertising ban. Pitt News v. Pappert, 379 F.3d 96 (2004).

162. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 564 (2001) (quoting Reno v. ACLU, 521 U.S. 844, 875 (1997)); *see also 44 Liquormart*, 517 U.S. at 514 ("[A] 'vice' label that is unaccompanied by a corresponding prohibition against the commercial behavior at issue fails to provide a principled justification for the regulation of commercial speech about that activity.").

163. *Educ. Media v. Swecker*, 602 F.3d at 589 (the college newspapers did not dispute that the Board's interest is substantial).

164. *Id.* at 591.

165. Almost all college students are legal adults or become legal adults soon after arriving on campus. *See* Brief of *Amici Curiae* Association of National Advertisers, et al. in Support of Petitioner at 8, Educ. Media at Va. Tech, Inc. v. Swecker, 602 F.3d 583 (4th Cir. 2010) (No. 10-278), 2010 WL 3738672 at *8. When these young adults turn twenty-one, they are not automatically ready and responsible enough to drink alcohol. *See* Abby Goodnough & Dan Frosch, *F.D.A. Expected to Take a Stand on Safety of Alcoholic Energy Drinks*, N.Y. Times, Nov. 16, 2010, at A14 (discussing pressure on states to protect youth by banning drinks that combine alcohol and caffeine). It is in the Commonwealth's interest to educate college students in the years between reaching legal adulthood and the drinking age. *Id.* Although these students who are seventeen to twenty years old get substantially identical information as their older peers through every medium except the college newspaper, the fact that the same information is available elsewhere is a basis for striking down a regulation as unconstitutional, not for upholding it. *See* Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 192–93 (1999) (holding that a ban on certain types of gambling advertisements was unconstitutional because the information was so immediately available in the media).

Central Hudson prong. Only then will commercial speech enjoy the appropriate intermediate constitutional protection.[166]

B. The Court Improperly Weighed the Costs and Benefits of the Restriction Under the Fourth Prong of the Central Hudson Test

The Fourth Circuit also erred in its analysis under the fourth prong of the *Central Hudson* test. The court failed to recognize the irrationality of 5–20–40(B)(3) itself, as well as the imbalances in the costs and benefits of enforcing it.[167] It is irrational to ban advertisements in such a small slice of media in the face of a "torrent" of information coming through other channels.[168] Such laws also impermissibly and irrationally target one segment of the media.[169] In an age where advertisements become personalized based on individual web browsing and online shopping history, focusing the efforts of legislators and those tasked with enforcing such regulations on college newspapers misses the big picture.[170]

Given the ubiquity of alcohol advertising in media, a ban on advertising in college newspapers will have a negligible effect on the total number of advertisements a person reads, sees, or hears.[171] Instead, the Board can more

166. *Cf.* Hinegardner, *supra* note 140, at 554. Hinegardner proposes a "material evidence" test, but if courts apply the Supreme Court's existing refinements of the Central Hudson test without omitting crucial factors, the results will be satisfactorily consistent while affording commercial speech the requisite constitutional protection.

167. *Musgrave*, 553 F.3d at 305 (regulations must be "in proportion to the interest served"); *Coors Brewing*, 514 U.S. at 490 ("educated guesses" cannot overcome irrational regulations).

168. Pitt News v. Pappert, 379 F.3d 96, 107 (3d Cir. 2004). The selective restriction on advertising in the college newspapers is especially nonsensical when the university itself glorifies its drinking tradition. *See, e.g.*, *The Rise and Fall of Easters*, UNIVERSITY OF VIRGINIA MAGAZINE, Spring 2011, at 94 (describing how Easters, a traditionally alcohol-free formal dance, degenerated over decades into drunken, mud-soaked, "stupefying collegiate gambols" that the administration formally terminated in 1982). Despite the end of Easters, "Big Weekends" continue with UVA approval. *Id.* In 2011, UVA sent a message to its student body regarding alcohol safety at the Foxfield Spring Races, a large outdoor (non-UVA affiliated) party at a horse race. Communication from Patricia M. Lampkin, Vice President and Chief Student Affairs Officer, University of Virginia, to "All U.Va. Students," (Apr. 25, 2011), *available at* http://www.virginia.edu/vpsa/communications/10-11/042511-foxfield-safety.html. The UVA administrator who wrote the message gently reminded of-age students who wished to bring alcohol to Foxfield that they would be strictly limited to one cooler, per person. *Id.*

169. *Educ. Media v. Swecker,* 602 F.3d at 588 n.4. After the Supreme Court of the United States denied the petition for certiorari, the district court is considering this "as applied" question on remand. The district court heard arguments on September 14, 2011.

170. The presence or absence of alternatives that restrict speech less or not at all informs whether the regulation in question is a rational exercise of legislative power. Judge Moon scratched the surface of less speech-restrictive means in his dissenting opinion, pointing out alternatives such as counter-advertising and increased enforcement. He did not, however, explicitly state how lifting the advertising ban could help implement those means more effectively without burdening speech, which this article attempts to do. *Id.* at 596 (Moon, J., dissenting).

171. Research has shown that the average person sees 100,000 beer commercials by age eighteen. American Medical Association, *Opinion: Break Needed From Alcohol Ads*, AM. MED. NEWS, Feb. 24, 2003, *available at* http://www.ama-assn.org/amednews/2003/02/24/edsa0224.htm. Even a college newspaper itself can provide the same information; at Virginia Tech, *Collegiate Times* ran a special section (free of advertisements), entitled "*The Booze News*." COLLEGIATE TIMES, Oct. 28, 2011. In anticipation of Halloween weekend, *The Booze News* was

effectively combat underage and abusive drinking by tapping the flow of beer money currently leaking through its fingers because of the advertising ban, and use the funds to further its educational and enforcement efforts.[172] As Judge Moon alluded in his dissenting opinion, lost potential revenue to the Board was not adequately figured into the balance of restricting commercial speech in this case.[173]

The court in *Educational Media v. Swecker* did not adequately weigh the costs and benefits of the college newspaper advertising ban. In the Fourth Circuit, the government must carefully calculate the costs and benefits associated with a commercial speech regulation.[174] The majority points to the Board's limited resources as justification for the advertising ban.[175] However, infringing on the right to free speech must be a "last – not first – resort,"[176] and there are other non-speech restrictive means readily available, not to mention measures which could increase the Board's revenue.[177] Meanwhile, the college newspapers rely on advertising money for almost their entire budgets and the regulation cost each of them at least $30,000 per year in lost advertising fees.[178] Though there is no constitutional right to profitability, college newspapers exist largely in recognition of students' right to free speech.[179] Lost revenue limits the length of the papers, the quality of their equipment and facilities, and most importantly, the number of students who can participate in publishing them.[180] The Board's advertising ban limits opportunities

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touted as the "comprehensive guide to everything alcohol-related in Blacksburg." COLLEGIATE TIMES, Oct. 27, 2011, at 4.

172. One of the ABC Board's stated missions is to "provide a reliable source of revenue"; the motto under its logo reads, "Control • Service • Revenue." Virginia Department of Alcoholic Beverage Control, http://www.abc.virginia.gov/admin/aboutabc.html, last visited Oct. 27, 2011.

173. *Educ. Media v. Swecker*, 583 F.3d at 595 (citing W. Va. Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave, 553 F.3d 292, 305 (4th Cir. 2009)). Why deprive the college newpapers of money that could slow this torrent of a message? It must be a small number of underage students who want to drink alcohol, but cannot obtain it because the school newspaper does not tell them where to get it. On the other hand, a significant number of students harbor unhealthy perceptions of appropriate alcohol use. Abby Goodnough & Dan Frosch, *F.D.A. Expected to Take a Stand on Safety of Alcoholic Energy Drinks*, N.Y. TIMES, Nov. 16, 2010, at A14 (discussing abuse of the alcoholic and caffeinated beverage Four Loko, including "Edward Four Loko Hands"-themed parties where guests must hold cans in both hands until they have drunk all forty-seven ounces of the fruit-flavored malt liquor). Two twenty-three-and-a-half-ounce cans of Four Loko, before its formula was ordered to be changed by law, equaled the alcohol and caffeine content of eleven beers and several cups of coffee. Gordon Block, *Authorities Issue Warning to Makers of Caffeinated Alcoholic Beverages*, COLLEGIATE TIMES (Nov. 8, 2010), http://www.collegiatetimes.com/cms/resource/frontpagepdfs/20101118.pdf. The market is mature, *see* Nelson *supra* note 155, meaning that brewers, distillers, and vintners are less focused on convincing non-drinkers to drink than they are competing for the loyalty of those who already "take delight in the juice of the barley." *Whiskey in the Jar*, traditional.

174. *Musgrave*, 553 F.3d at 305 (citing Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 188 (1999)).

175. Educ. Media Co. at Va. Tech, Inc. v. Swecker, 602 F.3d 583, 591 (4th Cir. 2010).

176. *Musgrave*, 553 F.3d at 305 (quoting Thompson v. W. States Medical Ctr., 535 U.S. 357, 373 (2002)).

177. 603 F.3d at 596 n.8 (Moon, J., dissenting).

178. Educ. Media Co. at Va. Tech, Inc. v. Swecker, No. 3:06CV396, 2008 U.S. Dist. LEXIS 45590, at *5–*6 (E.D. Va. Mar. 31, 2008).

179. Pitt News v. Pappert, 379 F.3d 96, 101 (3d Cir. 2004) ("*The Pitt News* was created by the University Board of Trustees 'in recognition of the constitutional right of students to freedom of speech.'").

180. *Id.* at 102 ("All of *The Pitt News*' revenue is derived from advertising, and until Act 199 took effect, the paper received substantial income from alcoholic beverage ads.").

for college students to train as journalists, and although this fact in itself does not violate any constitutional right, it underscores the irrationality of a law that has no demonstrable benefit while doing such tangible harm.[181]

Instead of a nearly complete ban, if the Board mandated that to advertise alcohol in college newspapers, advertisers must also purchase a portion of ad space that discourages underage drinking or that promotes safe drinking habits, the alcohol advertisers would in effect pay for the government's message.[182] Alternatively, the Commonwealth could require alcohol advertisers to pay an assessment to the Board, to use to publish its own advertisements, increase other educational initiatives, and enforce the drinking age more stringently.[183] In either case, these alternatives show that the regulation is irrational and not narrowly drawn because of other available means that are less speech-restrictive. The Board's deprivation of the college newspapers' First Amendment rights should warrant, under § 1983, the granting of a permanent injunction against the enforcement of 5–20–40(B)(3) and entitle the college newspapers to monetary damages.

V. CONCLUSION

The United States Court of Appeals for the Fourth Circuit should have upheld the district court's decision to grant summary judgment for the college newspapers.[184] The Fourth Circuit improperly applied the third prong of the *Central Hudson* test for commercial speech restrictions.[185] The Fourth Circuit also impermissibly lowered the standard for the third and fourth prongs, flouting Fourth Circuit and

181. The Board's expert testified that he could find no definite connection between alcohol advertising and consumption, but the parties agree that the college newspapers each lose at least $30,000 per year in advertising revenue. Educ. Media Co. at Va. Tech, Inc. v. Swecker, No. 3:06CV396, 2008 U.S. Dist. LEXIS 45590, at *7, *8 (E.D. Va. Mar. 31, 2008).

182. Such a measure would surely face a challenge as unconstitutionally compelling speech contrary to the speaker's interest. *See, e.g.*, *United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001) (holding that charging a mushroom producer a mandatory assessment to pay for general mushroom advertising violated the First Amendment, even if the ads were commercial speech). However, for a highly regulated product like alcohol, where the government has a substantial interest in promoting responsible drinking, producers can constitutionally be required to promote the government's message. *See Johanns v. Livestock Mktg. Ass'n,* 544 U.S. 550, 561 (2005) (upholding a mandatory assessment on beef producers to pay for advertising "effectively controlled by the Federal Government"). Empirical data show that counter-advertising has a measurable effect on consumption. The Board's expert published findings on counter-advertising's effectiveness in 2002. Henry Saffer, Alcohol Advertising & Youth, 14 J. STUD. ALCOHOL SUPPLEMENT 173 (2002). The Board's expert also testified that an ad ban will only reduce alcohol consumption if there is no ready substitute for the banned medium. Educ. Media Co. at Va. Tech, Inc. v. Swecker, No. 3:06CV396, 2008 U.S. Dist. LEXIS 45590, at *7 (E.D. Va. Mar. 31, 2008). The Board cannot block the alcohol advertisers' message from reaching college students, but with counter-advertising, the Board may be able to make a limited segment of the media a net positive for the interest in combating underage and abusive drinking.

183. *Johanns*, 544 U.S. at 561; Educ. Media Co. at Va. Tech, Inc. v. Swecker, 602 F.3d 583, 596 n.8 (4th Cir. 2010) (Moon, J., dissenting) (reasoning that the Board used other means to combat underage and abusive drinking, but there is no evidence that the Board ever tried increasing revenue through other means).

184. *See supra* Part V.

185. *See supra* Part V.A.

Supreme Court precedent.[186] Courts must maintain the force of the *Central Hudson* test so that commercial speech retains its limited constitutional protection.[187]

186. *See supra* Part V.A–B.

187. *See supra* Part V.