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# Educational Media Co. at Virginia Tech, Inc., v. Swecker

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## *EDUCATIONAL MEDIA CO. AT VIRGINIA TECH, INC. V. SWECKER*

Thomas Jefferson, a viticulturist[1] and founder of the University of Virginia,[2] once wrote, "No nation is drunken where wine is cheap . . . ."[3] Whether Jefferson would have made this statement about a higher learning institution instead of a country is unknown. The Commonwealth of Virginia, however, certainly does not share Jefferson's assertion with respect to college campuses. To combat "illegal and abusive drinking on college campuses,"[4] Virginia's Alcoholic Beverage Control Board in 2009 banned advertisements for the sale of alcohol in student publications at all colleges and universities in the Commonwealth.[5] In *Educational Media Co. at Virginia Tech, Inc. v. Swecker*,[6] the United States Court of Appeals for the Fourth Circuit heard a First Amendment claim brought by student newspapers in Virginia challenging the advertisement ban.[7]

Virginia's Alcohol Beverage Control Board ("the Board") is charged with promulgating regulations governing the possession, transportation, distribution, and sale of alcohol in the Commonwealth.[8] In keeping with its mandate, the Board issued rules restricting alcohol advertisements in any "college student publication."[9] The Board defined such a publication as one "that is prepared, edited or published primarily by students at such institution, is sanctioned as a curricular or extracurricular activity by such institution and which is distributed or intended to be distributed primarily to persons under 21 years of age."[10]

Publications falling under this definition were prohibited from printing advertisements for beer, wine, or mixed beverages unless the advertisements were "in reference to a dining establishment."[11] The advertisements permitted under the dining establishment exemption could not refer to any particular brand or price of alcohol.[12] The exempted ads could, however, include five Board-approved words and phrases, including "'A.B.C. on-premises,' 'beer,' 'wine,' 'mixed beverages,' 'cocktails,' or any combination of [those] words."[13]

The advertisement regulation was not the Board's only means of curbing excessive and illegal drinking at Virginia colleges and universities. The Board

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1. *See* 1 DUMAS MALONE, JEFFERSON AND HIS TIME: JEFFERSON THE VIRGINIAN 164–65 (1948).
2. 6 DUMAS MALONE, JEFFERSON AND HIS TIME: THE SAGE OF MONTICELLO, at xv (2d prtg. 1981).
3. Letter from Thomas Jefferson to Hyde de Neuville (Dec. 13, 1818), *in* A JEFFERSON PROFILE AS REVEALED IN HIS LETTERS 301–02 (1956).
4. Educ. Media Co. at Va. Tech, Inc. v. Swecker, 602 F.3d 583, 587 (4th Cir. 2010).
5. *See* 3 VA. ADMIN. CODE § 5-20-40 (2009).
6. 602 F.3d 583 (4th Cir.), *cert. denied*, 131 S. Ct. 646 (2010).
7. *Id.* at 586.
8. VA. CODE ANN. § 4.1-103(3) (2010).
9. ADMIN. § 5-20-40(B)(3).
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*

also published pamphlets educating college students about the "dangers of underage and binge drinking."[14] The literature was targeted at underage college students and their parents.[15] Furthermore, the Board assigned officers to patrol events that attract large groups of college-aged students to enforce the Commonwealth's liquor laws.[16]

*The Collegiate Times*, a student-run newspaper at Virginia Tech, and *The Cavalier Daily*, a student-run newspaper at the University of Virginia, challenged the Board's advertisement regulation.[17] Both newspapers rely on selling advertisements to generate revenue.[18] Each newspaper estimated a loss of $30,000 each year in advertising revenue due to the Board's prohibition of most alcohol advertisements.[19]

The two newspapers filed suit in the Eastern District of Virginia mounting facial and as-applied challenges to the regulation for violating the First Amendment.[20] The district court granted summary judgment to the plaintiffs, finding that the regulation operated as an invalid prohibition on commercial speech and was thus facially unconstitutional.[21] On appeal, the Fourth Circuit panel reviewed the decision de novo[22] but declined to address the plaintiffs' alternative claims.[23]

Both courts reviewed the regulation by applying the four-part test articulated by the United States Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.[24] Under *Central Hudson*, if the restricted commercial speech is truthful and involves legal commercial activity, the government must demonstrate a substantial governmental interest in regulating the speech.[25] The government must also show that the regulation directly advances the purported state interest involved[26] and is "narrowly

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14. *Id.* at 587.
15. *Id.*
16. *Id.*
17. *Id.* at 586.
18. *Id.* at 587.
19. *Id.*
20. *Id.* Specifically, the plaintiffs alleged that the regulation was unconstitutional on its face "as an invalid ban on commercial speech"; that, "as-applied, it unconstitutionally restrict[ed] commercial speech"; and that "on its face and as-applied, it unconstitutionally discriminate[d] against a particular segment of the media." *Id.* at 587 & n.2. The district court considered only the first claim. *Id.* at 587 n.2.
21. *Id.* at 587.
22. *Id.* at 586 (citing Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277, 283 (4th Cir. 2004)).
23. *Id.* at 587 n.2.
24. *Id.* at 588–91 (citing Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980)).
25. *Cent. Hudson*, 447 U.S. at 564.
26. *Id.* at 566.

drawn."[27] The district court held that the challenged ban failed the test's third and fourth prongs, and the Board appealed.[28]

The Board posited that the regulation was viable under the *Central Hudson* test because it targeted unlawful activity, such as underage alcohol consumption and alcohol sales to minors.[29] The Fourth Circuit declined to accept the Board's position, reasoning that even though alcohol advertisements in collegiate publications might reach minors, the publications were not available exclusively to minors.[30] According to the court, the regulation on its face did not "restrict commercial speech *solely* distributed to underage students; rather, it applie[d] to commercial speech . . . *primarily* intended for underage students."[31]

The court then looked to the second prong.[32] The newspapers did not dispute the Board's contention that there is a substantial governmental interest in combating underage and excessive drinking on college campuses.[33] The court affirmed the district court's ruling that a substantial governmental interest existed, satisfying the second prong of the *Central Hudson* test.[34]

Looking to the third prong, the court concluded that "history, consensus, and simple common sense"[35] supported the link between bans and restrictions of alcohol-related advertisements in college newspapers, and a decrease in college students' demand for alcohol.[36] Thus, the Board's regulation directly advanced the government's interest in curbing abusive alcohol consumption by college students.[37] The majority opined further, "It is counterintuitive for alcohol vendors to spend their money on advertisements in newspapers with relatively limited circulation, directed primarily at college students, if they believed that these ads would not increase demand by college students."[38]

The court rejected the district court's and newspapers' assertion that a link could not be established because there was no evidence correlating alcohol advertising bans in college publications with a decreased demand among college students for alcohol.[39] The court also dismissed the claim that the ban could not advance the government's interest because other unregulated media with alcohol

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27. *Id.* at 565 (quoting *In re* Primus, 436 U.S. 412, 438 (1978)) (internal quotation marks omitted).

28. *Swecker*, 602 F.3d at 590–91.

29. *See id.* at 589 (citing VA. CODE ANN. § 4.1-304 (2010); 3 VA. ADMIN. CODE § 5-20-40(B)(3) (2009)).

30. *See id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* (quoting Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 555 (2001)) (internal quotation marks omitted).

36. *Id.* at 589–90.

37. *Id.* at 590.

38. *Id.*

39. *Id.*

advertisements are regularly viewed by college students.[40] Additionally, the court emphasized that the newspapers did not produce evidence to contradict the common sense link between advertisements and demand.[41]

Looking to the fourth prong, the Fourth Circuit accepted the Board's position that the ban was narrow enough to pass constitutional muster.[42] The court ruled that because the Board's regulation was not a wholesale ban on all types of alcohol advertisements and because it applied only to publications targeted at underage students, the ban was "sufficiently narrow."[43] In response to the college newspapers' position that more effective means to achieve the government's interest existed,[44] the court stated that a regulation's narrowness is not an assessment of efficiency.[45] Rather, because the ban was a limited, "cost-effective" measure in "a comprehensive scheme to fight underage and abusive drinking," the regulation survived the narrowness prong.[46]

Judge Norman Moon dissented.[47] Judge Moon argued that the court could have dispensed with the case without reaching the constitutional question.[48] Because the parties stipulated that the majority of each newspaper's readership was over twenty-one years old,[49] Judge Moon concluded the regulation did not apply to the two newspapers.[50]

On the constitutional question, Judge Moon relied on a decision that Justice Samuel Alito wrote while serving as a Third Circuit judge.[51] The decision, *Pitt News v. Pappert*,[52] "invalidated a Pennsylvania statute that banned advertisers from paying for the dissemination of alcoholic beverage advertising by communications media affiliated with a university, college, or other educational institution."[53] The decision held that there was no evidence to suggest that banning alcohol advertisements reduced demand for alcohol or that eliminating advertisements in college publications was effective, considering the pervasiveness of alcohol-related advertisements in other media.[54] Thus, the Pennsylvania ban could not pass the third prong of the *Central Hudson* test.[55]

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40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.* at 590–91.
44. *Id.* at 591.
45. *See id.* (quoting WV Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave, 553 F.3d 292, 305 (4th Cir. 2009)).
46. *Id.*
47. *Id.* at 591 (Moon, J., dissenting).
48. *Id.*
49. *Id.* at 587 n.1.
50. *Id.* at 591.
51. *Id.* at 592–93.
52. 379 F.3d 96 (3d Cir. 2004).
53. *Swecker*, 602 F.3d at 593 (quoting *Pitt News*, 379 F.3d at 101) (internal quotation marks omited).
54. *Id.* (quoting *Pitts News*, 379 F.3d at 107).
55. *See Pitt News*, 379 F.3d at 107–08.

Judge Moon posited that the evidence the Board produced was equally speculative and lacking in supporting evidence to demonstrate that the ban furthered the government's interest.[56]

The dissent also reasoned that the exceptions provided by the Board undermined the purported interest the regulation was intended to achieve.[57]

> "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 it forbids advertisements for keg delivery, 'mojito night,' or the 'Blacksburg Wine Festival.'"[58]

Finally, Judge Moon proffered that other measures, such as increased taxation on alcohol, would be more effective to combat underage and abusive drinking without implicating the First Amendment.[59] Because the ban appeared to be a by-product of convenience rather than of necessity, Judge Moon reasoned that the regulation could not square with *Central Hudson*'s narrowness requirement.[60]

The Fourth Circuit's decision in *Swecker* is a strong endorsement of Virginia's power to restrict some types of commercial speech on college campuses.[61] Though it appears that the decision created a split between the Third and Fourth Circuits, the Supreme Court denied hearing the case. Whether the Court declined the case because it agreed with the majority's distinction between the as-applied challenge in *Pitt News* and the facial challenge in *Swecker*, because it desired similar cases to percolate in other circuits, or because it believed that the question was of relative insignificance is not known. Nevertheless, for the foreseeable future, states in the Fourth Circuit can wield significant regulatory power to similarly restrict alcohol advertisements in collegiate environments.

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56. *Swecker*, 602 F.3d at 593. Notably, *Pitts News* was not persuasive for the majority because it concerned an as-applied challenge rather than a facial challenge. *Id.* at 588.

57. *See id.* at 594.

58. *Id.* at 594.

59. *Id.* at 596 n.8.

60. *Id.* at 595–96 (WV Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave, 553 F.3d 292, 305 (4th Cir. 2009)).

61. *See id.* at 591.