FIRST AMENDMENT — COMMERCIAL SPEECH — FOURTH CIRCUIT HOLDS THAT A REGULATION LARGELY PROHIBITING ALCOHOL ADVERTISEMENTS IN COLLEGE NEWSPAPERS IS CONSTITUTIONAL. — *Educational Media Co. at Virginia Tech v. Swecker*, 602 F.3d 583 (4th Cir. 2010).

Government regulation of the advertisement of "vice" products, such as tobacco and alcohol, is subject to the First Amendment commercial speech doctrine. The Supreme Court employs the four-prong analysis set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission*[1] to test whether government regulations on vice advertising are constitutional under this doctrine.[2] Recently, in *Educational Media Co. at Virginia Tech v. Swecker*,[3] the Fourth Circuit held that a regulation largely prohibiting college newspapers from publishing alcohol advertisements met the four prongs of the *Central Hudson* test and thus did not violate the First Amendment.[4] But in taking only a cursory look at other direct means of regulating alcohol consumption, the Fourth Circuit applied *Central Hudson*'s narrow tailoring requirement in a way that differed markedly from the Supreme Court's application of this prong in cases addressing the constitutionality of vice advertising regulations. The Fourth Circuit's application of the *Central Hudson* test pushed back against the Supreme Court's mode of analysis: while ostensibly following the Court's test, in practice this case represents a much more deferential approach to child protection censorship than what the Court has authorized.

The Virginia Alcoholic Beverage Control Board is responsible for regulating alcohol sales and distribution in Virginia.[5] The Board issued section 5-20-40(B)(3),[6] which prohibits "beer, wine and mixed beverage[]" advertisements from being published in "college student publications" unless the advertisement is for a "dining establishment."[7] Even then, the advertisements "shall not contain any reference to particular brands or prices."[8] The regulation defines "college student publication" as a publication that, among other things, "is distributed or

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[1] 447 U.S. 557 (1980).

[2] *See id.* at 566; *see also, e.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 554–56 (2001); Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 183 (1999); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 499–500 (1996) (plurality opinion).

[3] 602 F.3d 583 (4th Cir. 2010).

[4] *Id.* at 591.

[5] Educ. Media Co. at Va. Tech v. Swecker, No. 3:06CV396, 2008 U.S. Dist. LEXIS 45590, at *12–13 (E.D. Va. Mar. 31, 2008).

[6] 3 VA. ADMIN. CODE § 5-20-40(B)(3) (2005) (amended 2010).

[7] *Educ. Media Co.*, 2008 U.S. Dist. LEXIS 45590, at *2 (quoting 3 ADMIN. § 5-20-40(B)(3)).

[8] *Id.* at *3 (quoting 3 ADMIN. § 5-20-40(B)(3)).

intended to be distributed primarily to persons under 21 years of age."[9] Two nonprofit Virginia corporations that publish student-run newspapers[10] filed a complaint alleging that section 5-20-40(B)(3) was an unconstitutional restriction on commercial speech under the First Amendment.[11] Although the majority of the readership of these newspapers is over the age of 21, the corporations had been advised that "they *would* violate § 5-20-40(B)(3) if they published a specific alcohol advertisement."[12] Therefore, as the Fourth Circuit later held, the newspapers could challenge the regulation.[13]

The district court granted summary judgment for the plaintiffs.[14] The court employed the four-prong test set forth in *Central Hudson* to determine whether section 5-20-40(B)(3) was constitutional.[15] The test is satisfied when: 1) "the expression is protected by the First Amendment"; 2) "the asserted governmental interest is substantial"; 3) "the regulation directly advances the governmental interest asserted"; and 4) the regulation "is not more extensive than is necessary."[16] As the speech at issue did not concern unlawful activity and was not misleading, the court found that the first prong was satisfied.[17] The court also found that the second prong was met because "the reduction of underage and over-consumption of alcohol on college campuses . . . constitutes a substantial governmental interest."[18] The court focused its opinion on the third and fourth prongs. Pointing to the lack of evidence that the regulation "advance[d] the substantial interests asserted to a material degree," the court found that "the regulation [did] not meet the third prong of the *Central Hudson* test."[19] The court also held that section 5-20-40(B)(3) did not satisfy the fourth prong because it was "more extensive than necessary to serve the interests of preventing underage and abusive drinking."[20] The court reached this conclusion by finding that the regulation "broadly affect[ed] *all* readers of college newspapers in the Commonwealth of Virginia" and "prohibit[ed] adult readers — who comprise the majority of readers [of the

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[9] *Id.* at *2–3 (quoting 3 ADMIN. § 5-20-40(B)(3)).

[10] *Id.* at *5, *10.

[11] *Educ. Media Co.*, 602 F.3d at 587. A related regulation, 3 VA. ADMIN. CODE § 5-20-40(A) (2005) (amended 2010), was also challenged in the plaintiffs' complaint. However, because the defendants appealed only the district court's decision concerning section 5-20-40(B)(3), only that regulation will be discussed.

[12] *Educ. Media Co.*, 602 F.3d at 587 n.1.

[13] *Id.*

[14] *Educ. Media Co.*, 2008 U.S. Dist. LEXIS 45590, at *57.

[15] *Id.* at *22–23.

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

[17] *Educ. Media Co.*, 2008 U.S. Dist. LEXIS 45590, at *33.

[18] *Id.* at *33–34.

[19] *Id.* at *47.

[20] *Id.* at *48 (citing *Cent. Hudson*, 447 U.S. at 566).

protesting newspapers] — from receiving the communications."[21] Upon holding that section 5-20-40(B)(3) violated the First Amendment, the district court "permanently enjoined [its] enforcement."[22]

The Fourth Circuit reversed and remanded. Writing for the panel, Judge Shedd[23] applied the four-prong *Central Hudson* test and determined that the regulatory burden on commercial speech imposed by section 5-20-40(B)(3) did not violate the First Amendment.[24] Judge Shedd agreed with the district court's assessment of the regulation under the first two prongs of the test. However, the Fourth Circuit reached the opposite conclusion from the district court regarding the third and fourth prongs of the *Central Hudson* test.

The Fourth Circuit found "the link between § 5-20-40(B)(3) and decreasing demand for alcohol by college students to be amply supported by the record."[25] The court based its determination on "judicial decisions recognizing this general link," its view that college student publications "play an inimitable role on campus," and the fact that "alcohol vendors *want* to advertise in college student publications."[26] The court of appeals also concluded that the regulation met the requirements of the fourth prong because it was "narrowly tailored"[27] and had a "reasonable fit with the government's interest."[28] In reaching this conclusion, the court relied on the fact that the regulation "only prohibit[ed] certain types of alcohol advertisements," and "only applie[d] to 'college student publications.'"[29] In addition, the court highlighted the fact that the regulation complemented education and enforcement programs, which would have to be expanded if section 5-20-40(B)(3) were ruled unconstitutional.[30] Because the Fourth Circuit found that section 5-20-40(B)(3) met each of the four prongs of the *Central Hudson* test, it concluded that the regulation was a constitutional limit on commercial speech.[31]

District Judge Moon, sitting by designation, dissented. First, Judge Moon contended that the court should have avoided the constitutional question by determining that the regulation did not apply to the Virginia Tech and University of Virginia newspapers because the regula-

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[21] *Id.* at *50–51 (citations omitted).
[22] *Educ. Media Co.*, 602 F.3d at 586.
[23] Senior Judge Hamilton joined Judge Shedd's opinion.
[24] *Educ. Media Co.*, 602 F.3d at 588, 591.
[25] *Id.* at 590.
[26] *Id.* at 589–90.
[27] *Id.* at 590.
[28] *Id.* (quoting W. Va. Ass'n of Club Owners & Fraternal Servs. v. Musgrave, 553 F.3d 292, 305 (4th Cir. 2009)) (internal quotation mark omitted).
[29] *Id.* at 590–91.
[30] *Id.* at 591.
[31] *Id.*

tion applies only to publications that are "distributed or intended to be distributed primarily to persons under 21 years of age" and the majority of each paper's readership is over twenty-one.[32] Judge Moon then discussed the merits, relying heavily on a Third Circuit opinion, *Pitt News v. Pappert*,[33] which held that a Pennsylvania statute banning paid alcohol advertisements from collegiate publications was unconstitutional.[34] Judge Moon concluded that section 5-20-40(B)(3) did not satisfy the third prong of the *Central Hudson* test. While the Board's evidence may have supported a conclusion that the regulation helped to "reduce general 'demand by college students,'"[35] it did not support the Board's actual asserted justification for the regulation, which was "to reduce '*underage* and *abusive* drinking among college students.'"[36]

In addition, Judge Moon did not believe that the regulation satisfied the narrow tailoring requirement of the test.[37] Judge Moon argued that inconsistencies created by exceptions to the regulation militated against finding that the regulation satisfied the narrow tailoring requirement. He also stated that the "rationale for the regulation applie[d] only to underage and abusive drinking, while the regulation itself applie[d] much more broadly."[38] Accordingly, Judge Moon reasoned that section 5-20-40(B)(3), like the statute in *Pitt News*, was not "a means narrowly tailored to achieve the desired objective."[39]

The Fourth Circuit's application of *Central Hudson*'s narrow tailoring requirement was a significant departure from the Supreme Court's approach in recent vice advertising cases. Specifically, the Fourth Circuit did not fully consider the availability of alternative, direct means of regulation, which have been the focus of the Supreme Court's application of the narrow tailoring requirement. The court may have been more deferential to commercial speech regulation than the Supreme Court has been in vice advertising cases over the last few decades due to concerns about the impact of advertising and a desire for child protection censorship.[40]

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[32] *Id.* (Moon, J., dissenting) (quoting 3 VA. ADMIN. CODE § 5-20-40(B)(3) (2005) (amended 2010)) (internal quotation marks omitted).

[33] 379 F.3d 96 (3d Cir. 2004) (Alito, J.).

[34] *Id.* at 108–09. The *Educational Media Co.* majority distinguished *Pitt News* by saying that *Pitt News* was an as-applied challenge, whereas *Educational Media Co.* was a facial challenge. *Educ. Media Co.*, 602 F.3d at 588 n.4.

[35] *Educ. Media Co.*, 602 F.3d at 594 (Moon, J., dissenting).

[36] *Id.* (quoting Brief of Appellants at 2, *Educ. Media Co.*, 602 F.3d 583 (No. 08-1798)).

[37] *See id.* at 595–96.

[38] *Id.* at 596.

[39] *Id.* at 595 (quoting Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 556 (2001)) (internal quotation marks omitted).

[40] Judge Moon's dissent suggests that the Fourth Circuit similarly took a more deferential approach than the Supreme Court in its application of the *Central Hudson* test's third prong. *See id.* at 592–94.

The narrow tailoring requirement of the *Central Hudson* test states that the regulation must not be "more extensive than is necessary to serve [the asserted government] interest."[41] This requirement does not mean that the government must employ the method that impinges on speech the least,[42] but does mean that the regulation must not limit speech substantially more than necessary.[43]

Over the past few decades, the Supreme Court has strictly applied this test's narrow tailoring requirement by critically considering the availability of direct means of regulation.[44] The Supreme Court's decisions in *Rubin v. Coors Brewing Co.*[45] and *44 Liquormart, Inc. v. Rhode Island*[46] tightened the narrow tailoring requirement by employing a direct-means analysis.[47] The direct-means analysis "requir[es] the government to seek out more direct means of accomplishing regulatory goals than restricting protected commercial speech."[48] For example, in *Coors Brewing Co.*, the Court determined that restrictions on the advertising of alcohol content did not meet the narrow tailoring requirement because of the availability of alternative means of promoting the government's asserted interest, such as limiting the alcohol content in drinks, which would be less restrictive of speech.[49] Similarly, in *44 Liquormart*, a plurality of the Court determined that a prohibition on the advertisement of liquor prices did not satisfy the narrow tailoring requirement because there were alternative types of regulation that would not impinge on First Amendment rights while still

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

[42] Michael Hoefges, *Protecting Tobacco Advertising Under the Commercial Speech Doctrine: The Constitutional Impact of* Lorillard Tobacco Co., 8 COMM. L. & POL'Y 267, 280 (2003) (citing Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 477–78, 480 (1989)).

[43] M. Neil Browne et al., *Advertising to Children and the Commercial Speech Doctrine: Political and Constitutional Limitations*, 58 DRAKE L. REV. 67, 108 (2009).

[44] *See* Fara Blecker, Comment, *Beating the Odds:* Greater New Orleans Broadcasting Association v. United States *Strikes Congressional Ban on Commercial Speech Advertisements of Private Casino Gambling*, 20 LOY. L.A. ENT. L. REV. 605, 625–27 (2000) (discussing how, at one time, the *Central Hudson* test was applied broadly to defer to legislatures' decisions, but in later cases, such as *Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173, 192–93 (1999); and *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) (opinion of Stevens, J.), the Court applied the fourth prong strictly).

[45] 514 U.S. 476 (1995).

[46] 517 U.S. 484.

[47] *See* Michael Hoefges & Milagros Rivera-Sanchez, *"Vice" Advertising Under the Supreme Court's Commercial Speech Doctrine: The Shifting* Central Hudson *Analysis*, 22 HASTINGS COMM. & ENT. L.J. 345, 372 (2000). The crafting of a direct-means analysis under the narrow tailoring requirement of the test was "a strong point of agreement for the justices in *44 Liquormart*," who were otherwise sharply divided. *Id.* The direct-means analysis was further supported by the Court in *Lorillard Tobacco* and *Greater New Orleans Broadcasting*. Hoefges, *supra* note 42, at 308.

[48] Hoefges, *supra* note 42, at 308.

[49] *Id.* at 277; *see also Coors Brewing Co.*, 514 U.S. at 490–91.

helping the state to achieve its goal.[50] This strict interpretation of the narrow tailoring requirement has made it extremely difficult for regulations to pass the *Central Hudson* test because "directly banning a product . . . would virtually always be at least as effective in discouraging consumption as merely restricting advertising."[51]

By taking only a cursory look at the availability of more direct means of regulation, the Fourth Circuit in *Educational Media Co.* applied the narrow tailoring requirement of the *Central Hudson* test much more loosely than the Supreme Court has applied it in vice advertising regulation cases. To satisfy the narrow tailoring requirement under a direct-means analysis, the government must have tried other means of regulation and found those means ineffective for achieving the state interest.[52] There is no evidence that the Board ever tried alternatives such as "increased taxation on alcohol, which has been empirically verified and quantified as a means to combat underage and binge drinking . . . [or] counter-advertising to correct students' perceptions about their peers' drinking habits."[53] As for the options that the Board was employing in conjunction with section 5-20-40(B)(3) — education and enforcement programs — the court did not conclude, or provide any evidence supporting a conclusion, that these means were ineffective.[54] The court simply said that "education or enforcement efforts would have to be increased," which is a more costly alternative.[55] However, "commercial speech restrictions must be 'a necessary as opposed to merely convenient means of achieving [the government's] interests. . . . [R]egulating speech must be a last — not first — resort.'"[56] The Fourth Circuit did not explain how the regulation was a necessary means as opposed to just a convenient cost saver.

The Fourth Circuit's departure from the Supreme Court's recent application of the *Central Hudson* test in vice advertising cases may be a reflection of the court's willingness to take a more deferential approach to government decisions in this area based on an increased desire for child protection censorship. From the mid-1980s through the mid-1990s, the Supreme Court supported "paternalistic governmental

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[50] *44 Liquormart*, 517 U.S. at 507 (plurality opinion).

[51] *Id.* at 507 (Thomas, J., concurring in part and concurring in the judgment); *see also* Blecker, *supra* note 44, at 627 ("As Justice Thomas predicted in *44 Liquormart*, this application of the fourth prong would strike down virtually all regulations on commercial speech . . . .").

[52] Hoefges, *supra* note 42, at 308.

[53] *Educ. Media Co.*, 602 F.3d at 596 n.8 (Moon, J., dissenting).

[54] *Id.* at 591 (majority opinion).

[55] *Id.* In addition, the Court's statement seems to acknowledge that education and enforcement efforts can be effective if employed at the appropriate levels, therefore negating the necessity of a speech-restricting regulation.

[56] W. Va. Ass'n of Club Owners & Fraternal Servs. v. Musgrave, 553 F.3d 292, 305 (4th Cir. 2009) (first and second alterations in original) (quoting Thompson v. W. States Med. Ctr., 535 U.S. 357, 373 (2002)).

regulation of 'vice' advertising."[57] But, starting with *Coors Brewing Co.* in 1995 and *44 Liquormart* in 1996, the Court began applying the *Central Hudson* test more strictly in the context of vice advertising regulations.[58] One possible reason for this shift is that the Court has put a greater emphasis on the impact that vice advertising regulations have on adults' ability to access commercial information so that value judgments about the products are left to the public.[59] The Court has stated, on numerous occasions, that the "recognized . . . governmental interest in protecting children . . . does not justify an unnecessarily broad suppression of speech addressed to adults."[60]

Conversely, it is possible that the Fourth Circuit is consciously retreating to the more deferential *Central Hudson* analysis based on a determination that concerns about vice advertising's impact on youth[61] outweigh concerns about adult access to commercial information. This interpretation is supported by the Fourth Circuit's decision in *Anheuser-Busch, Inc. v. Schmoke*[62] (*Anheuser-Busch II*). After tightening the *Central Hudson* test in *44 Liquormart*, the Court vacated and remanded the Fourth Circuit's decision in *Anheuser-Busch, Inc. v. Schmoke*[63] (*Anheuser-Busch I*), which upheld a regulation prohibiting stationary, outdoor alcohol advertisements in particular areas.[64] In *Anheuser-Busch II*, the Fourth Circuit upheld its previous determination and applied a watered-down version of the narrow tailoring–requirement analysis[65] after recognizing that the government interest

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[57] Hoefges & Rivera-Sanchez, *supra* note 47, at 361 (citing United States v. Edge Broad. Co., 509 U.S. 418 (1993); Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328 (1986)).

[58] *See id.* at 372 ("[T]he *Rubin* Court refused to relax the *Central Hudson* analysis for regulations of 'vice' advertising.").

[59] *See id.* at 386.

[60] Reno v. ACLU, 521 U.S. 844, 875 (1997); *see also* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 503 (1996) (opinion of Stevens, J.) ("The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good."). Therefore, when the government's asserted purpose for a regulation on vice advertising is to protect children, "[t]he Court typically has upheld censorship regimes that preserved adults' access to the censored material and invalidated those that did not." Alan E. Garfield, *Protecting Children from Speech*, 57 FLA. L. REV. 565, 647 (2005). In addition, the "availability of other means to obtain similar material does not erase the First Amendment concerns." *Id.* (citing *Reno*, 521 U.S. at 880).

[61] *See* Browne et. al, *supra* note 43, at 72–77 (discussing advertising's impact on children); Garfield, *supra* note 60, at 570–71 (discussing increased public pressure for child protection censorship).

[62] 101 F.3d 325 (4th Cir. 1996).

[63] 63 F.3d 1305 (4th Cir. 1995), *vacated by* Anheuser-Busch, Inc. v. Schmoke, 517 U.S. 1206 (1996) (mem.).

[64] *Id.* at 1308.

[65] *See* Clay Calvert et al., *Playing Politics or Protecting Children? Congressional Action & a First Amendment Analysis of the Family Smoking Prevention and Tobacco Control Act*, 36 J. LEGIS. 201, 219 (2010); Kathryn Murphy, Note, *Can the Budweiser Frogs Be Forced to Sing a New*

was "promoting the welfare and temperance of minors," and finding 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."[66] The Fourth Circuit also used deferential language in its decision to uphold a vice advertising regulation in *West Virginia Ass'n of Club Owners & Fraternal Services v. Musgrave*,[67] but the mixed public/private nature of the speech at issue distinguished that case from typical vice advertising cases and played a large role in the court's analysis.[68]

There are arguments both for and against the Fourth Circuit's departure from the Supreme Court's vice advertising precedent. The Fourth Circuit may be right to treat regulations designed to protect children from vice advertising differently in the context of commercial speech.[69] Alternatively, it may be necessary to treat vice advertising regulations like any other advertising regulation in order to protect adults' access to information about a legal product, regardless of any value judgments.[70] Since many of the arguments regarding the legitimacy of paternalism may be applied in this context, there is no clear answer to how these cases should be handled. Regardless, the Fourth Circuit's departure in *Educational Media Co.* does clearly demonstrate that the *Central Hudson* "test" is susceptible to manipulation.[71] Thus, the Court should set forth a more definitive test to guide lower courts when they are faced with the competing policy arguments in future vice advertising cases.[72]

Tune? Compelled Commercial Counter-Speech and the First Amendment, 84 VA. L. REV. 1195, 1202–04 (1998).

[66] *Anheuser-Busch II*, 101 F.3d at 327, 329. This language seems to suggest that the Fourth Circuit supports an exception of sorts to the *Central Hudson* test for vice advertising. However, the Court's decisions in *Coors Brewing Co.*, *44 Liquormart*, *Greater New Orleans Broadcasting*, and *Lorillard Tobacco* have suggested that no such exception exists. *See* Hoefges, *supra* note 42, at 309 ("[The] Court made it clear that even a compelling interest in protecting children's health would not allow government to overly burden the flow of lawful communication to adults . . . .").

[67] 553 F.3d 292 (4th Cir. 2009).

[68] *See id.* at 299–301, 306.

[69] *See* sources cited *supra* note 61.

[70] *Cf.* C. Edwin Baker, *The First Amendment and Commercial Speech*, 84 IND. L.J. 981, 983 (2009) ("[T]he primary criticism of the *Central Hudson* test is that it apparently authorizes what critics identify as paternalism . . . .").

[71] *See, e.g.*, *id.* ("[T]he *Central Hudson* test usually gives courts plenty of room to maneuver."); Charles R. Yates, III, *Trimming the Fat: A Study of Mandatory Nutritional Disclosure Laws and Excessive Judicial Deference*, 67 WASH. & LEE L. REV. 787, 818 (2010) (stating that the narrow tailoring requirement "gives courts room to maneuver").

[72] *Cf. The Supreme Court, 1995 Term—Leading Cases*, 110 HARV. L. REV. 135, 222 (1996) (arguing that the "fact-based and contextual" nature of the *Central Hudson* test may lead some speech to be underprotected).