STATS MATTER!

Why The Evidence is Key for Alcohol Regulation to Win the Day over The First Amendment.

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THE GIST

The U.S. Court of Appeals for the Fourth Circuit yesterday issued a legal decision declaring enforcement of Virginia's law against publishing most types of alcohol advertising in college and university newspapers. The decision ends litigation that has been ongoing since the case began in 2006.

The government argued that its restriction on advertising was a necessary part of a comprehensive, multifaceted approach to combat what is acknowledged to be a serious problem, *i.e.*, underage and abusive drinking by college and university students. States have both inherent police power as well as enhanced authority under the 21st Amendment to regulate matters related to alcohol beverages within their borders, and the legitimate public interests justifying enforcement of the prohibition in this case fall right into the heart of the states' responsibilities to reduce alcohol-associated problems of increased fatal and nonfatal motor vehicle crashes, vandalism, suicide attempts, homicide, non-motor vehicle-related injuries, sexual violence, and unprotected sexual encounters.

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Across the courtroom, the college newspapers who instituted the lawsuit countered that their rights to publish lawful and truthful information about alcohol beverages to consumers, **the majority of whom are of lawful age to consume alcohol**, justified protection under the First Amendment. Suppliers of lawful products have commercial speech rights to advertise their products. Moreover, the consumers who read the newspapers in questions have reciprocal rights under the First Amendment to hear that commercial speech.

The Fourth Circuit's September 25, 2013 ruling in the case of *Educational Media Company at Virginia Tech, Inc. et al . v. Insley*, Case. No. 12-2183 (4th Cir. 09/25/2013) came down in favor of the newspapers and the First Amendment. In a decision that did not even reference the 21st Amendment, the appellate court found that Virginia's prohibition on alcohol advertising in college and university newspapers was more restrictive than necessary to achieve the government's legitimate objectives.

THE DETAILS

The Virginia Alcoholic Beverage Control Board prohibits college student newspapers from printing alcohol advertisements. The ABC's authority in this area is codified in an administrative regulation, 3 Va. Admin. Code § 5-20-40(A)(2), which is in turn based on statutory authority that expressly delegates the authority to regulate alcohol advertising to the ABC.[2]

This free-speech legal challenge was brought by Educational Media and The Cavalier Daily, two non-profit college newspapers at Virginia Polytechnic Institute and State University (Virginia Tech) and the University of Virginia, respectively. The college newspapers challenged the ABC ban on alcohol advertisements, arguing that the Commonwealth's prohibition violated their First Amendment rights.

What followed were seven years of legal proceedings, as the case went from the U.S. District Court for the Eastern District of Virginia to the U.S. Court of Appeals for the Fourth Circuit, then back down to the district court, and again up to the appellate court. All of this legal effort resulted in yesterday's decision by the Fourth Circuit in favor of the college newspapers.

The college newspapers made three distinct arguments:

1. Initially, the papers argued that the challenged regulation impermissibly discriminated against a narrow segment of the media -- college student newspapers -- thus subjecting the regulation to the exacting strict scrutiny standard, which, they argued, it cannot withstand.

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[2] *See* §§ 4.1-111 and 4.1-320 of the Code of Virginia.

2. Alternatively, the papers argued that, even if strict scrutiny was inapplicable, the challenged regulation failed, on its face, to satisfy the Supreme Court's *Central Hudson* test,[3] which is uniformly accepted as the judicial standard for measuring the propriety of government restrictions on commercial speech. *Central Hudson* imposes an intermediate level of judicial review (less that strict scrutiny, but more than a simple "rational basis" requirement) to determine if the government's restriction is constitutional.[4]

3. Finally, the college newspapers argued that, even if the challenged regulation could withstand a facial challenge under *Central Hudson*, the way the ABC applied[5] its regulations in this situation effectively failed the component of the *Central Hudson* test that requires the government to implement its restriction in a manner that "*must demonstrate narrow tailoring of the challenged regulation to the asserted interest -- a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served*."[6]

In defense of its actions, the Virginia ABC argued that the purpose of the challenged regulation is to combat underage and abusive college drinking. While the college newspapers' expert testified at trial that the ABC's prohibition was ineffective because a prohibition on alcohol advertising in one forum simply pushes alcohol advertising to other forums, the ABC's expert testified that this assumption only holds true where a reasonable substitute for the regulated forum exists. The ABC's testifying expert, Dr. Henry Saffer (an Economics professor at Kean University in New Jersey) testified that such assumptions do not hold true in the context of college student newspapers, because "[a] college newspaper is a very targeted, specific kind of media," and there is "nothing else that can replace that kind of targeted media that's specifically oriented towards and reaches college students."[7] According to Dr. Saffer's reasoning, in the unique instance of college newspapers, alcohol advertising bans actually do have a significant

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[3] *Central. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

[4] Under the *Central Hudson* test, a regulation of commercial speech will be upheld if: (1) the regulated speech concerns lawful activity and is not misleading; (2) the regulation is supported by a substantial government interest; (3) the regulation directly advances that interest; and (4) the regulation is not more extensive than necessary to serve the government's interest. *Central Hudson*, 447 U.S. at 566.

[5] The difference between a **facial challenge** versus an **as-applied challenge** lies in the scope of the constitutional inquiry. Under a facial challenge, a plaintiff may sustain its burden in one of two ways. First, a plaintiff asserting a facial challenge "may demonstrate 'that no set of circumstances exists under which the law would be valid, or that the law lacks any plainly legitimate sweep.'" *Greater Baltimore. Ctr. for Pregnancy Concerns, Inc. v. Mayor and City Council of Baltimore*., ---F.3d ---, 2013 WL 3336884, at *11 (4th Cir. July 3, 2013) (en banc) (alterations omitted), quoting *United States v. Stevens*, 559 U.S. 460, 130 S. Ct. 1577, 1587 (2010). Second, a plaintiff asserting a facial challenge may also prevail if he or she "show[s] that the law is 'overbroad because a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *Id.* (alterations omitted), quoting *Stevens*, 130 S.Ct. at 1587. Under either of these scenarios, a court considering a facial challenge assesses the constitutionality of the challenged law "without regard to its impact on the plaintiff asserting the facial challenge." *Educational Media Co. at Virginia Tech, Inc., et. Al. v. Swecker*, 602 F.3d 583, 588 (4th Cir. 2010). In contrast, an as-applied challenge is "based on a developed factual record and the application of a statute to a specific person[.]" *Richmond Med. Ctr. for Women v. Herring*, 570 F.3d 165, 172 (4th Cir. 2009) (en banc).

[6] *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 188 (1999) (construing the fourth prong of *the Central Hudson* test for government restrictions on commercial speech).

[7] *Educational Media Co. at Virginia Tech, Inc. et al . v. Insley*, Case. No. 12-2183 (4th Cir. 09/25/2013) at p. 6.

effect on market demand despite the vast majority of studies that show otherwise outside of this particular context.[8]

WHO WON, AND WHY

Everybody knows that colleges and universities have significant and continuing problems with underage alcohol consumption. Likewise, binge drinking and its debilitating consequences are constantly making headlines.

The subject of alcohol on campus was recently reviewed with competence and eloquence by Christopher Shepard, the newest industry reporter for leading trade publication Beer Marketer's INSIGHTS. Wring on September 25th – ironically, the day the Fourth Circuit released its decision in the *Educational Media Co*. case -- Mr. Sheppard had this to say about the ongoing problems posed by alcohol on campus:

> Every September, just as new college students are entering dorms for the first time and older students return to campus, we see an uptick in the number of media outlets looking to cover college drinking culture. Our publication *Alcohol Issues Insights* has covered these stories as well as studies of that culture and its effects on student life, not to mention the various policies institutions have implemented in attempts to keep their students safe. When I joined BMI in 2010 just 3 years out of college, my dad, Eric, long-time *All* editor, gleefully started piling anything he gathered about college drinking on my desk, commenting that I was "closer" to the culture than he was. Now I'm 6 years out of college and still eagerly flipping thru these pieces, analyzing the studies and listening out for policy changes.
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> This year, the Washington Post printed a long article on "The College Drinking Problem" in its magazine. Anyone working in the beer industry (or not) who is at least as far out of college as I am might want to take a peek. Or maybe a long stare. As I say, it's a deep dive, but it drops readers off at a commencement ceremony pre-game at U-Va, a registered party in Boston College and other bastions of collegiate shenanigans. Keeping in touch with these students and how and why they're choosing to drink the way they drink is an important early step in identifying policy possibilities. And the college policy-makers that the Post talks to, while hopeful that they may be making progress, are clear that this "problem" likely won't go away anytime soon. I used the piece, and the administrator's lack of certainty, to open an article we printed in *Alcohol Issues Insights* this week, before diving into various updates from schools around the country. Of particular interest: lots of focus on education, including bringing parents into the mix.
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> I didn't have room in that article for one particularly frank University of Nebraska-Lincoln junior though. Early this month, he took the unpopular position in his school's newspaper in support of UNL's dry campus policy. His reasoning? While not perfect, he deems staying "dry" to be "the policy that best supports" what he calls the "two major overreaching [sic? overarching? maybe not...] goals" of colleges/college students:
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> "1. Get a degree.

[8] *Id.*

2. Don't die."

> Fair enough. Of course, dangerous drinking "is still a problem" at UNL, he cops, and one "that no one really has a solution to."[9]

Despite these sentiments, the Virginia ABC lost its case. The winners were the college newspapers, as well as the alcohol advertisers who sought to access their pages, and the consumers who read those pages.

Why did this happen?

While the federal appellate court's decision reviews numerous judicial predicates to sustain its decision, one key factor stands out – the evidence presented in the record of this case demonstrated that the majority of the newspapers' readers were 21 years of age or older, and thus were lawfully able to purchase and consume alcohol beverages. This may not be the case in many or even most colleges and universities throughout the United States, but it apparently is true at Virginia Tech and UVA.

According to the appellate court's decision, the college newspapers presented during trial the testimony of their expert, Dr. Jon Nelson, an economics professor at Pennsylvania State University. Dr. Nelson testified that "[a]dvertising bans, partial or comprehensive, do not reduce the demand for alcohol, . . . [i]n a 'mature market,' such as alcohol beverages, the primary effect of advertising is to create and maintain brand loyalty[,]" as opposed to expanding overall market demand. He also noted that college students are continually exposed to alcohol advertisements in a variety of forums -- including television, radio, and the internet -- which "will totally offset any possible temperance effect of the ABC regulation."[10]

Dr. Nelson's testimony in this regard directly contradicted the testimony of the Virginia ABC's expert, Dr. Saffer. What ultimately distinguished the two experts and delivered the appellate panel to the college newspapers was the evidence regarding the newspapers' readership. The college newspapers presented evidence, without any counter-argument from the Virginia ABC, that a majority of their readers are over the age of 21. Specifically, the *Collegiate Times* -- the Virginia Tech student newspaper owned by Appellant Educational Media -- has a daily readership of roughly 14,000 readers; according to a 2004 survey entered by the plaintiffs into evidence, persons age 21 or over constituted roughly 60% of the *Collegiate Times'* total readership and about 59% of the *Collegiate Times*' total student readership.

Likewise, the plaintiffs presented evidence that UVA's *Cavalier Daily* has a daily readership of approximately 10,000 readers. As of January 1, 2007, persons age 21 or over comprised approximately 64% of UVA's total student population.

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[9] Shepard, Christopher, "Back to School for College Drinking," *Beer Insights Extras* (September 25, 2013). The full text is available online at: http://www.beerinsights.com/index.php?option=com_easyblog&view=blogger&layout=listings&id=731&Itemid=59.

[10] *Educational Media Co.* at p. 6.

The Fourth Circuit jumped on these data and rejected the ABC's arguments because it determined that the agency's regulation prohibiting alcohol advertisements in college and university were impacting negatively the majorities of the newspapers' readership. According to the federal appellate court:

> "[T]he challenged regulation fails under the fourth *Central Hudson* prong because it prohibits large numbers of adults who are 21 years of age or older from receiving truthful information about a product that they are legally allowed to consume. . .
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> Here, a majority of the College Newspapers' readers are age 21 or older. Specifically, roughly 60% of the Collegiate Times's readership is age 21 or older and the Cavalier Daily reaches approximately 10,000 students, nearly 64% of whom are age 21 or older. Thus, the College Newspapers have a protected interest in printing non-misleading alcohol advertisements, just as a majority of the College Newspapers' readers have a protected interest in receiving that information. Accordingly, the challenged regulation is unconstitutionally overbroad."[11]

In explaining why the First Amendment compels a ruling for the college newspapers, the Fourth Circuit also emphasized the importance of scrutinizing regulations that seek to "protect" consumers from lawful and truthful information. Relying on the U.S. Supreme Court's 2011 decision in *Sorrell v. IMS Health, Inc.*,[12] the Fourth Circuit in *Educational Media Co.* emphasized that "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. . . [states may not] seek to remove a popular but disfavored product from the marketplace by prohibiting truthful, non-misleading advertisements."[13]

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[11] *Id.* at p. 20-21. *See also Pitt News v. Pappert*, 379 F. 3rd 96 (3rd Cir 2004) (declaring unconstitutional a regulation of the Pennsylvania Liquor Control Board that prohibited alcohol beverage advertising in college and university newspapers where more than 67% of the affected student populations were over 21 years of age).

[12] 131 S.Ct. 2653, 180 L.Ed. 2d 544 (U.S. 2011). In *Sorrell*, the U.S. Supreme Court invalidated a Vermont law that prevented pharmacies from revealing physicians' prescription preferences to pharmaceutical companies so that the drug companies could target the doctors for product-specific advertising, even though such information could be disclosed lawfully to academics for research purposes. Vermont argued that this law satisfied *Central Hudson* as it was appropriately tailored to the important governmental aims of ensuring medical privacy and reducing the price of prescription drugs. The U.S. Supreme Court invalidated the ban, concluding that by only prohibiting the disclosure of prescriber-identifying information for marketing purposes, while allowing the disclosure of such information for research purposes, Vermont had engaged in both content-based and speaker-based discrimination. Accordingly, the Supreme Court concluded that the Vermont law needed to withstand "heightened scrutiny" in order to survive a First Amendment challenge. *See Sorrell*, 131 S. Ct. at 2664 ("The First Amendment requires heightened scrutiny whenever the government creates a regulation of speech because of disagreement with the message it conveys. . . . Commercial speech is no exception.") (internal quotation marks and citations omitted). However, the Court also concluded that Vermont's ban could not even withstand intermediate scrutiny under *Central Hudson*. Thus, the Court did not actually apply "heightened scrutiny," striking the ban under *Central Hudson's* intermediate scrutiny alone. *Id.* at 2667 ("[T]he outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied.").

[13] *Educational Media Co.* at p. 22, citing *Sorrell*, 131 S. Ct. at 2670, quoting *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996).

Because alcohol beverages are legal products, and the majority of the populations reading the affected papers are of legal drinking age, the Fourth Circuit found the Virginia ABC's regulation as applied was unduly broad and restrictive of the college newspapers' First Amendment rights under the fourth prong of the Central Hudson test.[14] As the appellate court's decision states:

> [T]he portion of the challenged regulation seeking to prevent the dissemination of alcohol advertisements to readers age 21 or older does exactly what Sorrell prohibits: it attempts to keep would-be drinkers in the dark based on what the ABC perceives to be their own good. Therefore, the district court erred in concluding that the challenged regulation is appropriately tailored to achieve its objective of reducing abusive college drinking.

WHAT DOES THIS MEAN FOR ALCOHOL REGULATORS?

The practical effect of this decision from the Fourth Circuit is straightforward. Stats matter.

Common wisdom may be that college and university students are primarily comprised of kids. But common wisdom generally is not admissible evidence.

Does this mean that state regulatory agencies need to start conducting demographic studies whenever they pass laws intended to protect the public health, safety and welfare? If the laws apply only to specific group or segment of the population (such as college and university students) rather than the population overall, it might be a good idea.

There's no reasonable argument to challenge the notion that alcohol regulators need to press the fight against underage consumption, campus binge drinking, and other forms of unlawful behavior. The costs to society, and the personal tragedies that result from these inimical behaviors, are too great to ignore.

Nevertheless, the Constitution exists for a reason, and so long as we have courts, the prospects of a legal challenge to regulatory restrictions always will exist.

POSTSCRIPT

In the short time since releasing this analysis, several regulators have responded expressing angst and scorn that alcohol industry members would oppose what they (the regulators) believe to be a meritorious and much-needed regulation. Said one angry public servant: "*Given what we know about the problems of alcohol on campus, is it too much to ask that liquor suppliers just focus their attentions on the remaining 99%-plus of the market place*?"

The frustration is understandable, but not really substantiated by the facts. As you read (or re-read) the Fourth Circuit's decision in *Educational Media Co.*, consider the following:

[14] *Educational Media Co.* at p. 23.

1. As noted above, the federal appellate court was as concerned about consumers as it was about the college newspapers and their suppliers. When analyzing how the Virginia ABC applied its regulation against alcohol ads in college and university newspapers, the Fourth Circuit devoted considerable attention to the notion that "the College Newspapers have a protected interest in printing non-misleading alcohol advertisements, ***just as a majority of the College Newspapers' readers have a protected interest in receiving that information***."[15]

2. While it's often all too easy to jump to conclusions about those you regulate, it's often wrong to do so. Any assumptions that this legal challenge to Virginia's prohibition against alcohol advertising in college and university newspapers was brought by members of the alcohol industry, looking to preserve their access to ill-gotten profits, would be false. In fact, this litigation was brought by the newspapers themselves, and supported by a broad coalition of professional organizations and accomplished lawyers focused on protecting the free speech rights of all Americans. Supporters of the plaintiffs in this case included:

- The American Civil Liberties Union (ACLU), who argued the case before the Fourth Circuit on behalf of the college newspapers;
- The Washington Legal Foundation (WLF), one of the nation's most accomplished public interest law and policy centers that includes the protection of individual and public liberties among its primary missions;
- The Student Press Law Center, which happens to be America's only legal assistance agency devoted exclusively to educating high school and college journalists about the rights and responsibilities embodied in the First Amendment and supporting the student news media in their struggle to cover important issues free from censorship;
- The Thomas Jefferson Center For the Protection of Free Expression, a unique organization devoted solely to the defense of free expression in all its forms. Devoted to freedom of speech and expression, the Center "is as concerned with the musician as with the mass media, with the painter as with the publisher, and as much with the sculptor as the editor."

These supporters in turn were represented by some of the best lawyers in America, and that representation was provided willingly on a *pro bono* basis. The various briefs written on behalf of the college and university newspapers and their supporters came from nationally-recognized law firms such as Jenner & Block, and Baker & Hostetler.

Instead of frustration, what the *Educational Media Co*. case calls out for is focus. This debate is not about bad guys vs. good guys. Rather, it's about balancing genuine public safety concerns against legitimate liberties to arrive at a solution that advances the former while respecting the latter. To undertake a balancing that is defensible in court, regulators need to know their facts and have their stats.

[15] *Educational Media Co.* at p. 21 (Emphasis added).