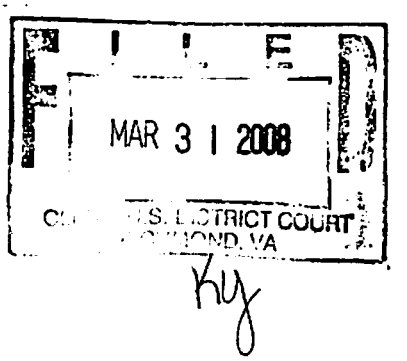

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

EDUCATIONAL MEDIA COMPANY AT VIRGINIA TECH, INC., and THE CAVALIER DAILY, INC.,

Plaintiffs,

v. Civil Action No. 3:06CV396

SUSAN R. SWECKER, *et al.*,

Defendants.

MEMORANDUM OPINION

This case presents the question of whether two regulations of the Virginia Administrative Code, which prohibit certain words in advertisements for alcoholic beverages and advertisements within college student publications, violate the First Amendment to the United States Constitution.[1] 3 VAC 5-20-40(A), the first challenged regulation, pertains to all advertisements and reads as follows:

> A. Beer, wine and mixed beverage advertising in the print or electronic media is permitted with the following exceptions:
>
> 1. All references to mixed beverages are prohibited except the following: "Mixed Drinks," "Mixed Beverages," "Exotic Drinks," "Polynesian Drinks," "Cocktails," "Cocktail Lounges," "Liquor" and "Spirits";
>
> 2. The following terms or depictions thereof are prohibited unless they are used in combination with other words that connote a restaurant and they are part of the licensee's trade name: "Bar," "Bar Room," "Saloon," "Speakeasy," or references or depictions of similar import; and
>
> 3. Any references to "Happy Hour" or similar terms are prohibited.

[1] "Congress shall make no law . . . abridging the freedom of speech. . . ." U.S. Const. amend. I.

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The second challenged regulation, 3 VAC 5-20-40(B)(3), pertains to advertisements in college publications and provides the following:

> 3. Advertisements of beer, wine and mixed beverages are not allowed in college student publications unless in reference to a dining establishment, except as provided below. A "college student publication" is defined as any college or university publication that is prepared, edited or published primarily 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.
>
> Advertising of beer, wine and mixed beverages by a dining establishment in college student publications shall not contain any reference to particular brands or prices and shall be limited only to the use of the following words: "A.B.C. on-premises," "beer," "wine," "mixed beverages," "cocktails," or any combination of these words . . . .

Plaintiffs seek a declaratory judgment and an injunction against the continued enforcement of these two regulations.[2] (Compl. ¶ 1.) The parties consented to this Court's jurisdiction pursuant to 28 U.S.C. §§ 636 and filed cross-motions for summary judgment. (Docket Nos. 16, 18.) Jurisdiction is premised on 28 U.S.C. § 1331 and 42 U.S.C. § 1983. The Court held oral argument and the Motions are ripe for adjudication.

I. Standard of Review

Summary judgment under Rule 56 is appropriate only when the Court, viewing the record as a whole and in the light most favorable to the nonmoving party, determines that there exists no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986), *Anderson v. Liberty*

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[2] The parties have agreed that consideration of a third regulation, 3 VAC 5-20-50(A)(3), which limits advertising of "spirits" in college student or other publications "primarily relating to intercollegiate athletic events," is not necessary for resolution of Plaintiff's claims. (Stipulation ¶ 4.) It does not overlap with the regulations challenged at bar. *Id.* Because Regulation 5-20-50-(A)(3) is not challenged in the complaint, the Court will not address it.

Lobby, Inc., 477 U.S. 242, 248-50 (1986). Once a party has properly filed evidence supporting the motion for summary judgment, the nonmoving party may not rest upon mere allegations in the pleadings, but must instead set forth specific facts illustrating genuine issues for trial. *Celotex*, 477 U.S. at 322-24. These facts must be presented in the form of exhibits and sworn affidavits. Fed. R. Civ. P. 56(c).

A court views the evidence and reasonable inferences drawn therefrom in the light most favorable to the nonmoving party. *Anderson*, 477 U.S. at 255. Whether an inference is reasonable must be considered in conjunction with competing inferences to the contrary. *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 818 (4th Cir. 1995). Nonetheless, the nonmoving party is entitled to have "'the credibility of his evidence as forecast assumed.'" *Miller v. Leathers*, 913 F.2d 1085, 1087 (4th Cir. 1990)(en banc)(*quoting Charbonnages de France v. Smith*, 597 F.2d 406, 414 (4th Cir. 1979)). Ultimately, the court must adhere to the affirmative obligation to bar factually unsupportable claims from proceeding to trial. *Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir. 1987)(*citing Celotex*, 477 U.S. at 323-24).

II. Findings of Facts

Plaintiff Educational Media

1. Plaintiff Educational Media at Virginia Tech, Inc., is a non-profit, 501(c)(3) Virginia corporation that owns several print and broadcast media outlets, including the *Collegiate Times*, a student-run newspaper at Virginia Polytechnic Institute and State University ("Virginia Tech"). (Compl. ¶ 3; Pls.' Mem. Supp. Mot. Summ. J., Ex. 1, Wolff Decl. ¶ 2.) Virginia Tech is located in Blacksburg, Virginia.

2. Approximately 98.7% of the *Collegiate Times'* annual budget came from advertising in the year 2005. (Pls.' Mem. Supp. Mot. Summ. J., Ex. 1, Wolff Decl. ¶ 7.)

3. Four issues of the *Collegiate Times* are published each week (Tuesday through Friday) during the fall and spring semesters, during which it has a daily circulation of approximately 14,000. One issue is published each week (Thursdays) during the summer semester, during which it has a daily circulation of approximately 5,000. (Compl. ¶ 15; Pls.' Mem. Supp. Mot. Summ. J., Ex. 1, Wolff Decl. ¶ 4.)

4. Copies of the *Collegiate Times* are distributed free of charge at approximately 73 rack locations throughout the Virginia Tech campus, as well as around Blacksburg and the neighboring town of Christiansburg. (Pls.' Mem. Supp. Mot. Summ. J., Ex. 1, Wolff Decl. ¶ 6.) In 2006, 775 copies per issue were distributed off-campus, out of a total circulation of 14,000. (Defs.' Mem. Supp. Mot. Summ. J., Encl. XI, ¶ 3.) Approximately 40% of the total readership of the *Collegiate Times* is under the age of 21. (Defs.' Mem. Supp. Mot. Summ. J., Encl. VI, Wolff. Dep. 22.) Approximately 41%[3] of the student readership of the *Collegiate Times* is under the age of 21. (Pls.' Mem. Supp. Mot. Summ. J., Ex. 1, Wolff Decl. ¶ 5, Attach. A; Defs.' Mem. Supp. Mot. Summ. J., Encl. XI, ¶ 1.)

5. The *Collegiate Times* is a "college student publication" subject to the regulation in 3 VAC 5-20-40(B).

6. The *Collegiate Times* has been approached by businesses who expressed an interest in placing advertisements for alcoholic beverages in the newspaper: Chateau Morrissette, a winery, which sought to place advertisements for Hokie Wine; the Blacksburg Brewing Company, which sought to place advertisements for keg delivery; and Boudreaux Restaurant, which sought to place advertisements regarding drink specials. (Compl. ¶ 20; Defs.' Mem. Supp. Mot. Summ. J., Encl. XI, ¶ 6.) Plaintiff has no other information regarding the size, quantity, frequency, or price of such desired advertisements. (Defs.' Mem. Supp. Mot. Summ. J., Encl. VI, Wolff Dep. 17-21, 24-25, 30.) The *Collegiate Times* also was approached by the Knights of Columbus seeking to advertise for a Blacksburg Wine Festival. (Pls.' Reply Supp. Mot. Summ. J., Ex. 10, Wolff Supp. Decl. ¶ 2.) An Alcoholic Beverage Control ("ABC") compliance officer advised that the ad would run afoul of 3 VAC 5-20-40, so the paper did not run the ad. (*Id.* at ¶ 3.) A loss of $361.69 in advertising revenue ensued. (*Id.* at ¶ 4.)

7. The *Collegiate Times* also is unable to participate in national ad buys for alcohol products. (Pls.' Mem. Supp. Mot. Summ. J., Ex. 1, Wolff Decl. ¶ 10.)

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[3] Plaintiffs cite a 2004 study, which found that 40.9% of student readers were under the age of 21. (Pls.' Mem. Supp. Mot. Summ. J. ¶ 4.) Defendants cite the same study, as reported in Interrogatory Answers from the Plaintiff, and calculate a figure of 41.7% of student readers under the age of 21. (Defs.' Mem. Supp. Mot. Summ. J., Encl. XI at 1)(stating that 58.3% of student readers of *Collegiate Times* are *over* the age of 21). The Court does not find that this constitutes a material dispute of fact.

8. Other competing, non-student newspapers, such as *The Roanoke Times*, are not subject to 3 VAC 5-20-40(B)(3) but are widely available in Blacksburg. (Pls.' Mem. Supp. Mot. Summ. J., Ex. 1, Wolff Decl. ¶ 15.)

9. As a result of the advertising restrictions on college newspapers in 3 VAC 5-20-40(B)(3), the *Collegiate Times* estimates losses of approximately $30,000 per year, based on estimated sales of alcohol advertisement of one-quarter page per issue. This estimation is not based on documentation but, rather, the conjecture of the General Manager of Educational Media Company at Virginia Tech, Inc. (Pls.' Mem. Supp. Mot. Summ. J. ¶ 1; Ex. 1, Wolff Decl. ¶ 11.)

10. Virginia Tech believes that misuse and abuse of alcohol is a serious problem and interferes with the goals of the university. Almost 80% of Virginia Tech students consumed alcohol in the last year, though anywhere from 46 to 51%[4] of the student population was under 21 years of age, and the binge drinking rate at Virginia Tech is significantly higher than the national average. (Defs.' Mem. Supp. Mot. Summ. J., Encl. I, Keene Aff. ¶¶ 6-7, 9-10.) Additionally, the total alcoholic beverage violations, liquor law violations, and disciplinary actions related to alcohol have increased during the past few years. (*Id.* at ¶¶ 17, 19-21.) Virginia Tech uses a variety of educational programs to prevent the use of alcoholic beverages by those not of legal age, such as workshops, peer educational programs, and media campaigns. (*Id.* at ¶¶ 15, 22.)

Plaintiff *The Cavalier Daily*

11. Plaintiff The Cavalier Daily, Inc., is a non-profit, 501(c)(3) Virginia Corporation, which publishes *The Cavalier Daily*, a student-run newspaper at the University of Virginia ("UVA"). (Compl. ¶ 4; Pls.' Mem. Supp. Mot. Summ. J., Ex. 2, Slaven Decl. ¶ 3.) UVA is located in Charlottesville, Virginia.

12. The annual budget for *The Cavalier Daily* is comprised almost exclusively of the revenue it generates through advertising. (Pls.' Mem. Supp. Mot. Summ. J., Ex. 2, Slaven Decl. ¶ 9.)

13. Five issues of *The Cavalier Daily* are published each week during the fall and spring semesters and eight issues are published during the summer. Approximately 10,000 copies are distributed free of charge each day. (Pls.' Mem. Supp. Mot. Summ. J., Ex. 2, Slaven Decl. ¶ 5.)

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[4] This number fluctuates between measurements at the beginning of fall and spring semesters (Defs.' Mem. Supp. Mot. Summ. J., Encl. I, Keene Aff. ¶¶ 6-7), presumably as the student population ages and reaches the age of 21.

14. Copies of *The Cavalier Daily* are distributed at approximately 60-65 locations on campus and 5 locations off campus, at local restaurants in the city of Charlottesville. (Defs.' Mem. Supp. Mot. Summ. J., Encl. VII, Slaven Dep. 8.)

15. Approximately 49% of "on-grounds" students at UVA are under the age of 21. (Pls.' Mem. Supp. Mot. Summ. J., Ex. 2, Slaven Decl. ¶ 6.) Between 36-42% of all UVA students, both undergraduate and graduate, are under the age of 21. (Defs.' Mem. Supp. Mot. Summ. J., Encl. IV, Rue Aff. ¶¶ 3-4.) In addition to students, *The Cavalier Daily* readership also includes university faculty and staff, who are generally over the age of 21. (Pls.' Mem. Supp. Mot. Summ. J., Ex. 2, Slaven Decl. ¶ 7.)

16. *The Cavalier Daily* is a "college student publication" subject to the regulation in 3 VAC 5-20-40(B).

17. *The Cavalier Daily* has been approached three times by businesses who expressed an interest in placing advertisements for alcoholic beverages in the newspaper: Sukura; Coupe DeVille's; and the Satellite Ballroom, which sought to advertise "mojito night." (Defs.' Mem. Supp. Mot. Summ. J., Encl. VII, Slaven Dep. 18-21.) Plaintiff has no other information regarding the size, quantity, frequency, or price of such desired advertisements. (*Id.*)

18. Other free, competing, non-student newspapers, such as *C'Ville Weekly* and *The Hook*, are not subject to 3 VAC 5-20-40(B)(3) but are widely distributed on UVA grounds. (Pls.' Mem. Supp. Mot. Summ. J., Ex. 1, Slaven Decl. ¶ 15.)

19. As a result of the advertising restrictions on college newspapers in 3 VAC 5-20-40(B)(3), *The Cavalier Daily* estimates losses of approximately $30,000 per year, based on estimated sales of alcohol advertisement of one-quarter page per issue. This estimation is not based on documentation but, rather, the conjecture of the newspaper's Editor-in-Chief from January 28, 2006, through January 27, 2007. (Pls.' Mem. Supp. Mot. Summ. J., Ex. 2, Slaven Decl. ¶ 13.)

20. UVA takes the problem of high risking drinking seriously. (Defs.' Mem. Supp. Mot. Summ. J., Encl. II, Bruce Aff. ¶ 3.) The university provides a number of programs designed to reduce the incidence of underage drinking and over-consumption of alcohol on campus, such as peer education programs, committees, and intervention and treatment programs. (*Id.* at ¶¶ 5-7.) Nevertheless, a number of alcohol-related offenses, including DUIs and serious physical assaults, are adjudicated by the UVA Judiciary Committee each year. (Defs.' Mem. Supp. Mot. Summ. J., Encl. IV, Rue Aff. ¶¶ 9-10.) Additionally, there are numerous alcohol-related visits to emergency rooms by UVA students. (*Id.* at ¶ 11.)

Defendants Susan Swecker, *et al.*

21. The Virginia ABC Department is the state agency responsible for regulating the sale and distribution of alcoholic beverages in the Commonwealth of Virginia. The ABC Board promulgates regulations relating to the sale and distribution of alcoholic beverages.

22. The defendants are: Susan R. Swecker, Esther H. Vassar (Chair), and Pamela O'Berry Evans, Commissioners of the ABC Board; Curtis Coleburn, III, Chief Operating Officer ("COO") of the ABC Department; and Frank Monahan, Director of the Law Enforcement Bureau of the ABC Department. (Defs.' Mem. Supp. Mot. Summ. J. ¶ 3.)

23. The purpose of the ABC Department is to regulate the sale, distribution, and manufacture of alcoholic beverages in the interest of the public health, safety, and welfare. (Defs.' Mem. Supp. Mot. Summ. J. ¶ 5; Encl. V, Coleburn Dep. at 16-17.)

Expert Testimony, Research, and Other Opinion Testimony.

24. Defendants present a declaration from Henry Saffer, Ph.D. Dr. Saffer is a tenured full professor of economics at Kean University in Union, New Jersey, as well as a Research Associate in Health Economics at the National Bureau of Economic Research. (Defs.' Mem. Supp. Mot. Summ. J., Encl. III, Saffer Decl. ¶ 1.) Dr. Saffer has researched the impact of advertising on alcohol use and related outcomes. (*Id.* at ¶ 2.) He finds that prior research on this subject has suffered methodological problems. Specifically, he notes that previous studies based on time series data aggregate the data in such a way that variance is erroneously reduced. (*Id.* at ¶ 14.) Dr. Saffer, conversely, uses cross-sectional data for his studies, which he claims is more reliable than time series data. (*Id.* at ¶ 15.)

25. Dr. Saffer has authored two empirical studies using cross-sectional data. (*Id.* at ¶¶ 16-17.) The first, "Alcohol Advertising and Highway Fatality Rates," ultimately found that for subjects between the ages of 18-20 years, alcohol advertising increased highway fatalities in two of four models. (*Id.* at ¶ 16.) The second, "Alcohol Advertising and Alcohol Consumption by Adolescents," examined subjects between the ages of 12 and 19. (*Id.* at ¶ 17.) The results found that a 28% reduction in total alcohol advertising would reduce monthly alcohol participation from about 25% to 21-24%. Additionally, a 28% reduction in total alcohol advertising would reduce binge drinking participation from 12% to 8-11%. (*Id.*) In sum, Dr. Saffer believes that an aggregate of advertising increases overall alcohol consumption. (Defs.' Mem. Supp. Mot. Summ. J., Encl. X, Saffer Dep. 11.)

26. Defendants present a declaration from Frances Keene, Director of Judicial Affairs at Virginia Tech since 2004. (Defs.' Mem. Supp. Mot. Summ. J., Encl. I, Keene Aff.) The declaration discusses data primarily from 2003-onward, but encloses a study including data from as early as 1998. (*Id.* and Attach. A.) Keene states that, "[b]ased upon my

knowledge and experience, I believe that regulation 3 VAC 5-20-40(B) will effectively assist in Virginia Tech's efforts to prevent the consumption of alcoholic beverages by those students under the age of 21 and the over consumption of alcoholic beverages by our students." (Keene Aff. ¶ 23.)

27. Defendants present a declaration from Susan Bruce, Director of the Center for Alcohol and Substance Abuse Education (CASE) at UVA since 2000. (Defs.' Mem. Supp. Mot. Summ. J., Encl. II, Bruce Aff.) The declaration discusses UVA's current implementation of the prevention model of the National Academy of Science's Institute of Medicine to affect "three prevention populations"of college students who could be exposed to alcohol. *(Id.* at ¶¶ 4-7.) Bruce states that, "[b]ased upon my knowledge and experience, I believe that regulation 3 VAC 5-20-40(B) will effectively assist in UVA's efforts to prevent the consumption of alcoholic beverages by those students under the age of 21 and the over consumption of alcoholic beverages by our students." (*Id.* at ¶ 8.)

28. Defendants present a declaration from Penny Rue, Dean of Students at UVA since 1999. (Defs.' Mot. Supp. Mot. Summ. J., Encl. IV, Rue Aff.) The declaration discusses UVA's multifaceted efforts to "maintain an educational environment that promotes a healthy lifestyle and is free from underage and abusive alcohol use." *(Id.* at ¶6.) The declaration discusses data primarily from 2005-onward, but encloses a study including data from as early as 2000. *(Id.* at ¶¶ 9-12 and Attachs. A-B.) Rue states that, "[b]ased upon my knowledge and experience, I believe that regulation 3 VAC 5-20-40(B) will effectively assist in UVA's efforts to prevent the consumption of alcoholic beverages by those students under the age of 21 and the over consumption of alcoholic beverages by our students." (*Id.* at ¶ 13.)

29. Defendants present a declaration from W. Curtis Coleburn, COO of the ABC Department since 1999. (Defs.' Resp. to Pls.' Mot. Summ. J., Encl. I, Coleburn Aff.) The declaration touts a comprehensive approach toward combating underage and abusive alcohol consumption on college campuses. *(Id.* at ¶ 4.) Coleburn states that, "[b]ased upon my knowledge and experience, I believe that regulation 3 VAC 5-20-40(B) will effectively assist in ABC's comprehensive efforts to prevent or reduce the consumption of alcoholic beverages by those students under the age of 21 and the over consumption of alcoholic beverages by college students." (*Id.* at ¶ 9.)

30. Plaintiffs present a declaration from Jon P. Nelson, Ph.D. Dr. Nelson is an Economics Professor Emeritus at Pennsylvania State University. (Pls.' Mem. Supp. Mot. Summ. J., Ex. 3, Nelson Decl. ¶ 1.) During the past 20 years, the major focus of his research has been the economics of advertising, especially the advertising and marketing of alcoholic beverages, and he has published 18 articles and chapters on these topics. (*Id.* at ¶ 3.) Dr. Nelson was not paid or compensated to prepare his declaration. *(Id.* at ¶ 23.)

31. Dr. Nelson is of the opinion that advertising bans, partial or comprehensive, do not reduce the demand for alcohol. (*Id.* at ¶ 9.) Specifically, he believes that 3 VAC 5-20-40A, permitting only certain words in all media, would not have any affect on alcohol consumption. (*Id.* at ¶¶ 19-20.) Also, Dr. Nelson opines that 3 VAC 5-20-40B cannot possibly have the effect of substantially or materially reducing underage drinking or binge drinking on college campuses in Virginia. (*Id.* at ¶ 9.)

32. Dr. Nelson also offers a rebuttal declaration to the Defendants' expert, Dr. Saffer. He identifies methodological inconsistencies with Dr. Saffer's research. (Pls.' Mem. Supp. Mot. Summ. J., Ex. 4, Nelson Rebuttal Decl. ¶ 3.) Dr. Nelson asserts that Dr. Saffer has ignored five adverse cross-sectional studies in his literature review. (*Id.* at ¶ 4.) Dr. Nelson contends that some studies lack data on college students or alcohol ads placed in college newspapers. (*Id.* at ¶¶ 15-16.) Dr. Nelson also opines that Dr. Saffer's research fails to draw a causal link between advertising in college newspapers and underage alcohol consumption. (*Id.* at ¶ 19.)

III. Analysis

A. Standing

Before addressing the underlying merits of this action, the Court must first consider whether Plaintiffs have standing to bring this suit. The United States Constitution permits courts to adjudicate only "Cases" or "Controversies." U.S. Const. art. III, § 2. A court must inquire into standing to ensure that the parties have enough of a stake in the case to litigate the issues properly. *See Pye v. United States*, 269 F.3d 459, 466 (4th Cir. 2001). This requires a plaintiff to demonstrate standing by showing that he or she has suffered a judicially cognizable and redressible injury. In order to demonstrate a cognizable injury, a plaintiff must show that: (1) he or she has personally suffered an actual or threatened injury that is concrete and particularized, not conjectural or hypothetical; (2) the injury fairly can be traced to the challenged action; and, (3) the injury is likely to be redressed by a favorable decision from the Court. *Burke v. City of Charleston,* 139 F.3d 401, 405 (4th Cir. 1998)(*citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-61 (1992).

Defendants contend that Plaintiffs' alleged damages of $30,000 are too speculative to constitute injury and that any actual losses suffered by the newspapers stem from unrelated business matters. (Defs.' Resp. to Pls.' Mot. Summ. J. 6.) This allegation, however, too strictly defines the notion of actual injury. The *Collegiate Times* and *The Cavalier Daily* attest to at least six occasions on which they turned away prospective advertisers because of 3 VAC 5-20-40(B)(3). (Defs.' Mem. Supp. Mot. Summ. J., Encl. VII, Slaven Dep. 18-21; Encl. XI, ¶ 6.) Plaintiffs concede that they cannot provide specific information regarding the size, quantity, frequency, or price of such desired advertisements. (Defs.' Mem. Supp. Mot. Summ. J., Encl. VI, Wolff Dep. 17-21, 24-25, 30; Encl. VII, Slaven Dep. 18-21.) Plaintiffs, however, earn the bulk of their revenue from advertising. (Pls.' Mem. Supp. Mot. Summ. J., Ex. 1, Wolff Decl. ¶ 7; Ex. 2, Slaven Decl. ¶ 9.) The *Collegiate Times* articulates a specific amount of monetary loss with respect to one advertisement. (Pls.' Reply Supp. Mot. Summ. J., Ex. 10, Wolff Supp. Decl. ¶ 4.) As a result, any lost advertisements constitute some lost revenue and, more importantly, lost opportunity. *See The Pitt News v. Fisher*, 215 F.3d 354, 360 (3d Cir. 2000) (holding that newspaper had "personal stake" to confer standing because it had lost advertising revenue as a result of challenged regulation).

The absence of specific calculation of loss does not diminish the injuries Plaintiffs suffered. Plaintiffs' failure to offer a precise monetary loss does not alleviate the proffered injury. *See Virginia v. Hicks*, 539 U.S. 113, 121 (2003)(finding that the Commonwealth had suffered an actual injury simply by being unable to prosecute a criminal defendant). Their injuries actually occurred and are not contemplative of future events. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983)(finding no standing where plaintiff feared that, in a future

encounter with police, the officers might administer a chokehold). In addition, the Plaintiffs unambiguously plead constitutional injury by asserting infringement upon their freedoms of speech. *See Miller v. Brown*, 462 F.3d 312, 316-17 (4th Cir. 2006)(noting that stating a claim of violation of the right to freely associate constituted sufficient constitutional injury to confer standing).[5]

Plaintiffs' injuries can be fairly traced to the regulations at issue and are likely to be redressed by a favorable decision from this Court. In sum, the lost advertisements constitute an allegation of sufficient actual injury to confer standing upon the *Collegiate Times* and *The Cavalier Daily*.

B. Merits

It is well settled that speech that does "no more than propose a commercial transaction" is protected by the First Amendment. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 762 (1976)(internal citation omitted). "The commercial market place . . . provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented." *Edenfield v. Fane*, 507 U.S. 761, 767 (1993). This so-called "commercial speech," however, enjoys protection only proportionate to its "subordinate position in the scale of First Amendment values." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978). Accordingly, commercial speech is regulated in a manner that might be impermissible for noncommercial speech. *Id.*

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[5] In the context of a preliminary injunction, the Supreme Court of the United States has explained that "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

In this case, the parties agree that the Supreme Court's *Central Hudson* framework governs this dispute. (Pls.' Mem. Supp. Mot. Summ. J. 9; Defs.' Mem. Supp. Mot. Summ. J. 17.) In *Central Hudson*, the Court set forth a four-part test for evaluating restrictions on commercial speech. *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980).

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id.

In this analysis, the Government bears the burden of identifying a substantial interest and justifying the challenged restriction. *Edenfield,* 507 U.S. at 770. The Court shall apply this test to each of the regulations at issue.

1. <u>Generally Applicable Regulation: 3 VAC 5-20-40(A)</u>

The first regulation, 3 VAC 5-20-40(A), does not restrict its applicability to any particular audience. Instead, it applies generally to all "print or electronic media." 3 VAC 5-20-40(A). This regulation allows advertisements to reference beer or wine. *Id.* The regulation allows reference to mixed beverages only if the following words are used: "Mixed Drinks," "Exotic Drinks," "Polynesian Drinks," "Cocktails," "Cocktail Lounges," "Liquor," or "Spirits." 3 VAC 5-20-40(A)(1). In terminology reflecting that it has "been in effect since the repeal of Prohibition in 1933," (Defs.' Mem. Supp. Mot. Summ. J. at 5), the words "Bar," "Bar Room," "Saloon," "Speakeasy," or similar references may not be used unless they are combined with words that

connote a restaurant and they are part of the trade name. 3 VAC 5-20-40(A)(2). Finally, 3 VAC 5-20-40 prohibits use of the term "Happy Hour" or similar terms in advertisements. 3 VAC 5-20-40(A)(3).

a. Mootness

Instead of addressing constitutionality on the merits, Defendants simply state that the regulation "is no longer at issue." (Defs.' Resp. to Pls.' Mot. Summ. J. 12.) Defendant W. Curtis Coleburn, III, testified that the ABC Department has not enforced 3 VAC 5-20-40 since the filing of the instant suit. (Pls.' Mem. Supp. Mot. Summ. J., Ex. 6, Coleburn Dep. 14; Defs.' Resp. to Pls.' Mot Summ. J. 12.) He also testified that the ABC Department intends to implement a committee to examine the advertising regulations, but the committee has not yet been named nor has a timeline been selected. (*Id.* at 14-15.) The regulation, however, remains promulgated in the Virginia Administrative Code.

This Court does not agree that the voluntary cessation of enforcement, even with intent to reconsider the merits of the regulation, renders 3 VAC 5-20-40(A) moot. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189 (2000)(noting the stringency of the mootness standard and placing a heavy burden to demonstrate that challenged conduct cannot reasonably be expected to reoccur). Defendants could elect to enforce 3 VAC 5-20-40 at any time. Moreover, any intention to repeal the regulation is, at best, speculative. Because the ABC Department could be reasonably expected to enforce the regulation in the future, 3 VAC 5-20-40 remains a viable issue.

b. *Central Hudson* Test for Constitutionality

Applying the *Central Hudson* test to this regulation, this Court finds it to violate the First Amendment. First, alcohol advertising is "protected by the First Amendment," as it is lawful and no evidence exists that the text is misleading. *Cent. Hudson*, 447 U.S. at 566. While it is illegal for a segment of the population to consume alcohol, the product itself is not unlawful or contraband for the purposes of First Amendment protection. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 504 (1996) ("[T]here is no question that Rhode Island's price advertising ban [on alcohol] constitutes a blanket prohibition against truthful, nonmisleading speech about a lawful product").

Scant evidence exists that this regulation serves a substantial governmental interest, the second *Central Hudson* prong. *Cent. Hudson*, 447 U.S. at 566. The first subsection, 3 VAC 5-20-40(A)(1), permitting only certain terms pertinent to mixed beverages, seeks to "discourage the consumption of distilled spirits." (Pls.' Mem. Supp. Mot. Summ. J., Ex. 6, Coleburn Dep. 11.) The second subsection, 3 VAC 5-20-40-(A)(2), seeks to avoid the promotion of bars or "watering holes." (*Id.*) The third subsection, 3 VAC 5-20-40(A)(3), prohibits the term "Happy Hour" in order to "encourage temperance," to avoid enticing otherwise abstemious individuals into consuming inexpensive alcohol. (*Id.* at 12.)

Assuming, without deciding, that temperance is a substantial governmental interest,[6] the Court simply cannot find that the regulation meets the third prong. Specifically, the regulation

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[6] "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." *44 Liquormart*, 517 U.S. at 503. In *44 Liquormart*, however, the parties conceded that the second prong of *Central Hudson* was met, so the Court did not pass judgment on whether temperance constituted such an interest. *Id.* at 529 (O'Connor, J., concurring).

does not directly advance the governmental interest asserted. *Cent. Hudson*, 447 U.S. at 566. The litany of permitted words in 3 VAC 5-20-40(A)(1) does not directly advance the goal of temperance or diminished consumption of distilled spirits. Defendants present little evidence about this regulation at all, much less evidence to explain why generic phrases such as "Mixed Drinks," "Exotic Drinks," or even "Polynesian Drinks" are more temperate than drink- or brand-specific phrases. As for 3 VAC 5-20-40(A)(2), the ABC Department cannot seek to discourage bars when, in fact, the ABC Department concedes that "we don't have bars in Virginia." (Pls.' Mem. Supp. Mot. Summ. J., Ex. 6, Coleburn Dep. 11.) Although the parties do not comment directly on the point, the Court notes that "speakeasies" likely don't exist in Virginia anymore, either. Direct regulation mandates that only restaurants may obtain "on premises" liquor licenses. (*Id.*) Defendants also fail to present proper evidence that prohibition of the term "Happy Hour" in print or electronic advertisements, forbidden by 3 VAC 5-20-40(A)(3), advances the goal of encouraging temperance. These events may be advertised by radio, television, or even by signage at an establishment. In the absence of evidence to meet the third prong, this Court shall not consider the fourth prong of the *Central Hudson* test.

2. Applicable Regulation to College Student Publications: 3 VAC 5-20-40(B)(3)

The second regulation, 3 VAC 5-20-40(B)(3), applies only to "college student publications." Updated in the 1970's and early 1990's when the drinking age changed, the second regulation prohibits College student publications from advertising for "beer, wine and mixed beverages," unless made in reference to a dining establishment. The advertisements may not contain "any reference to particular brands or prices" and are limited to use of the following words: "A.B.C. on-premises," "beer," "wine," "mixed beverages," "cocktails," or any

combination of these words. 3 VAC 5-20-40(B)(3). The constitutionality of this regulation, or any similar statute, appears to be an issue of first impression in courts of the United States Court of Appeals for the Fourth Circuit. Plaintiffs claim that 3 VAC 5-20-40(B) violates both their freedom of speech under the First Amendment and unjustifiably imposes a financial burden on a particular segment of the media.

a. *Central Hudson* Test for Constitutionality

i. First Amendment Protection

Defendants argue that alcohol advertisements in college student publications do not pertain to lawful activity and, as a result, are not protected by the First Amendment. (Defs.' Mem. Supp. Mot. Summ. J. 17-18.) Their contention focuses on the argument that the publications are directed at a population with an "unusually high *concentration* of underage persons."[7] (*Id.* at 18)(emphasis in original.) The activity is unlawful for the underage people who read the advertisements. Nevertheless, the parties agree that the majority of readers of the *Collegiate Times* and *The Cavalier Daily* are over the age of twenty-one. (Pls.' Mem. Supp. Mot. Summ. J., Ex. 1, Wolff Decl. ¶ 5, Attach. A; Defs.' Mem. Supp. Mot. Summ. J., Encl. IV, Rue Aff. ¶¶ 3-4; Encl. XI, ¶ 1.)

In response, Plaintiffs cite several cases for the proposition that alcohol and similar products, which are illegal for only a segment of the population, are lawful products for the purposes of First Amendment protection. (Defs.' Resp. to Pls.' Mot. Summ. J. 7-8.) Although

[7] The sale of alcoholic beverages to persons under the age of 21 is unlawful Virginia. Va. Code § 4.1-304. The purchase, possession, or consumption of alcoholic beverages by persons under the age of 21 also is unlawful in Virginia. Va. Code § 4.1-305.

this Court finds that the expression at issue meets the first prong of the *Central Hudson* test, it does so on a more narrow reading of precedent than Plaintiffs suggest.

Plaintiff first relies on *Lorillard*, where the Supreme Court considered the constitutionality of a state's ban on outdoor tobacco advertising within the vicinity of schools and playgrounds. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001). However, the majority opinion does not consider the entirety of the *Central Hudson* test, stating that "[o]nly the last two steps . . . are at issue here." *Id.* at 555. Plaintiff cites a portion of Justice Thomas's concurrence, in which he notes that the State raised a similar issue as Defendants raise here. "[The State] argue[s] that the regulations restrict speech that promotes an illegal transaction -- *i.e.*, the sale of tobacco to minors." *Id.* at 577 (Thomas, J., concurring). Justice Thomas explicitly noted that the theory was not properly before the Court, because the parties "did not urge their theor[y] in the lower courts." *Id.* at 577-78. As such, the Supreme Court did not consider whether tobacco advertisements near schools and playgrounds communicated lawful transactions warranting First Amendment protection.

Plaintiffs' next source of support similarly must be circumscribed. The Fourth Circuit considered the first prong of the *Central Hudson* test only in dicta when it evaluated Baltimore's prohibition on the placement of stationary alcohol advertising in publicly visible locations. *Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305, 1313 (4th Cir. 1995), *aff'd in part after remand*, 101 F.3d 325 (4th Cir. 1996). The Fourth Circuit observed that the parties' "principal challenge" to Baltimore's regulation pertained to the third and fourth prongs of *Central Hudson*. *Id.* at 1311. Before progressing to the heart of the discussion, the Court commented that the first prong

of *Central Hudson* was not disputed because "the purchase and consumption of alcoholic beverages are generally lawful." *Id.* at 1313.

Plaintiffs also cite *The Pitt News v. Pappert*, a case from the United States Court of Appeals for the Third Circuit. 379 F.3d 96 (3d Cir. 2004). Then-Circuit Judge Alito authored the opinion striking down a state statute prohibiting *all* paid alcohol advertising in educational institution publications. While the bulk of the Court's analysis pertained to the third and fourth prongs of the *Central Hudson* test, then-Judge Alito offered the following remark about the lawfulness of the regulation: "[T]he law applies to ads that concern lawful activity (the lawful sale of alcoholic beverages) and that are not misleading, and we see no other ground on which it could be argued that the covered ads are outside the protection of the First Amendment." *Id.* at 106.

This Court is persuaded by the observations of the Fourth and Third Circuits. The first prong of the *Central Hudson* is not solely lawfulness, but rather whether the speech is "protected by the First Amendment." *Cent. Hudson*, 447 U.S. at 566. Lawfulness and truthfulness are merely the minimal requirements for this inquiry. *Id.* Here, the proposed commercial transaction is not inherently unlawful, as is the sale of narcotics or other contraband. Moreover, the parties agree that at least 50% of the readers of Plaintiffs' newspapers are of legal age to purchase alcohol. Defendants present no evidence that these advertisements specifically target readers under the age of 21. Nor do the parties present any evidence that the advertisements in question are misleading. This Court finds that the expression suppressed is protected by the First Amendment and the first prong of the *Central Hudson* test is met.

ii. Substantial Government Interest

The second prong of the *Central Hudson* test requires that the asserted governmental interest be substantial. *Cent. Hudson*, 447 U.S. at 566. Defendants claim that the reduction of underage and over-consumption of alcohol on college campuses is the interest this regulation seeks to advance. (Defs.' Mem. Supp. Mot. Summ. J. 19-20.) The Plaintiffs concede, for the purposes of summary judgment, that this interest is substantial. (Pls.' Mem. Supp. Mot. Summ. J. 9.) This Court agrees that this constitutes a substantial governmental interest. Accordingly, the second *Central Hudson* prong is met.

iii. Direct Advancement

To satisfy the third prong of the *Central Hudson* test, the government bears the burden of demonstrating that the regulation directly advances the governmental interest asserted. *Cent. Hudson*, 477 U.S. at 566. Direct advancement requires that the regulation "alleviate" the substantial interest "to a material degree." *Lorillard*, 533 U.S. at 555; Greater New Orleans Broad. Ass'n, Inc. v. United States, 527 U.S. 173, 188 (1999); *Edenfield,* 507 U.S. at 771. Evidence necessary for this showing may range from "'studies and anecdotes . . . [to] simple common sense.'" *Lorillard*, 533 U.S. at 555 (*quoting Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995). "Mere speculation or conjecture" or "remote support," however, will not suffice. *Edenfield*, 507 U.S. at 770.

Defendants appear to advocate a subjective overlay onto this test, urging this Court to evaluate the reasonableness of the belief that the regulation directly advances the governmental interest. (Defs.' Mem. Supp. Mot. Summ. J. 23; Defs.' Resp. to Pls.' Mot. Summ. J. 8.)

Defendants rely on the series of *Anheuser-Busch* cases from this Circuit to support this contention. A discussion of these cases ensues.

The *Anheuser-Busch* Cases

In 1993, the city of Baltimore enacted a ban on the display or advertisement of alcoholic beverages on billboards in publicly visible locations. *Anheuser-Busch, Inc., v. Mayor & City Council of Baltimore City*, 855 F. Supp. 811, 813 (D. Md. 1994). A brewing company and billboard company facially challenged the constitutionality of this ordinance. *Id.* The District Court of Maryland upheld the regulation, finding that it adequately met the *Central Hudson* test. *Id.* at 822. On appeal, the Fourth Circuit affirmed the decision, specifically considering the third and fourth prongs of *Central Hudson*. *Anheuser-Busch, Inc., v. Schmoke*, 63 F.3d 1305, 1318 (4th Cir. 1995)("*Anheuser I*"). The Fourth Court affirmed commenting on the research and studies presented to the City Council before enactment, the majority of which "show[ed] a definite correlation between alcoholic beverage advertising and underage drinking." *Id.* at 1314. The City Council also found that outdoor advertising to be a "unique and distinct medium" that invites the public, especially children, to "involuntary and unavoidable solicitation." *Id.* Relying in part on *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), the Fourth Circuit gave deference to legislative judgment when making its determination. *Id.* at 1314. The court found the regulation valid because of the "reasonableness of the legislature's belief that the means it selected will advance its ends." *Id.* at 1314-15.

After this decision, the Supreme Court decided *44 Liquormart, Inc. v. Rhode Island*, in which the Court placed doubt on the validity of *Posadas de Puerto Rico Associates*. 517 U.S. at 509-13. In a fragmented opinion, *44 Liquormart* struck down Rhode Island's broad ban on

advertising of alcohol prices. *Id.* at 516. Less than two months later, the Supreme Court granted a petition for writ of certiorari in *Anheuser I*. *Anheuser-Busch v. Schmoke*, 517 U.S. 1206 (1996). The Court remanded for further consideration in light of *44 Liquormart*. *Id.*

Upon reconsideration, the Fourth Circuit affirmed the district court's judgment and re-adopted its earlier decision. *Anheuser-Busch, Inc. v. Schmoke*, 101 F.3d at 327 ("*Anheuser II*"). The Fourth Circuit disclaimed its previous reliance on *Posadas de Puerto Rico Associates,* finding that its "own independent assessment" determined that Baltimore's ban "directly and materially" advanced the city's interest in "promoting the welfare and temperance of minors." *Id.* at 327. The Fourth Circuit re-evaluated the evidence the City Council considered when enacting the legislation, and found reasonable the Council's decision that a correlation existed between alcohol ads and underage drinking. *Id.* The *Anheuser* court also distinguished Baltimore's ban from that at issue in *44 Liquormart*, highlighting Baltimore's interest in "protect[ing] children" compared to Rhode Island's "desire to enforce adult temperance." *Id.* at 329.

Reasonableness under the Third Prong

This Court cannot adopt the Defendants' refracted version of the third prong test for several reasons. First, it seems clear to the Court that the reasonableness of the legislature's belief no longer drives the examination. The language from *Anheuser I* on which Defendants rely largely pertains to the Court's obligation to assess the reasonableness of the government's enactment of the legislation. (Defs.' Mem. Supp. Mot. Summ. J. 22.) Though the Fourth Circuit declined to specifically disclaim these conclusions in *Anheuser II*, they appear to be grounded in jurisprudence from *Posadas de Puerto Rico Associates*, which was disclaimed. *Anheuser II*, 101

F.3d at 327 n.1. Also, in *Anheuser II*, the Fourth Circuit twice confirmed that it was making its own "independent" assessment regarding the advancement. *Id.* at 327 & n.1.

Second, *Pitt News*, a factually analogous case from the Third Circuit, confirms that other courts read the Supreme Court test more narrowly than Defendants suggest. 379 F.3d 96. In striking down the blanket ban on all paid alcohol advertisements in college publications, then-Judge Alito noted that the state failed to meet its burden of proving "a material degree" of advancement. *Id.* at 107 (quotation omitted). Even if college students did not see the alcohol ads in the college newspaper, "they will still be exposed to a torrent of beer ads on television and the radio, and they will still see alcoholic beverage ads in other publications, including the other free weekly . . . papers that are displayed on campus." *Id.* "*Anheuser II*" itself rested on a finding that the regulation directly and materially advanced the governmental interest. 101 F.3d at 327.

Third, the record before this Court is virtually bereft of evidence as to the precise rationale of Virginia's ABC Board at the time of 3 VAC 5-20-40(B)(3)'s enactment or altering.[8] Unlike *Anheuser II*, the Defendants here present no record that the ABC Board considered the findings of Dr. Saffer or any other researchers. Indeed, the Board could not have, because all the data before the Court post-dates the regulation's enactment. This *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. This Court simply does not see any guiding precedent allowing after-created studies to justify an earlier restriction on protected commercial speech.

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[8]At the Court's request, Defendants submitted documents as to any hearings held. Those documents are scant, and do not illuminate the decision-making process to a significant degree, if at all.

The evidence regarding the efficacy of 3 VAC 5-20-40(B)(3).

However, even presuming the "*Anheuser II*" call for a court to make its own independent judgment controls the procedure to be undertaken here, the regulation founders on the record. In this case, Defendants present the testimony of one expert, three administrators, the COO of the ABC Department, and a mountain of statistics regarding the serious phenomenon of underage and abusive drinking on college campuses. Expert Dr. Saffer's research culminates in the findings that (1) alcohol advertising increased highway fatalities in subjects between the ages of 18-20, and (2) a reduction in alcohol advertising would reduce alcohol participation and binge drinking. (Defs.' Mem. Supp. Mot. Summ. J., Encl. III, Saffer Decl. ¶¶ 16-17.) He agrees that alcohol advertising bans reduce alcohol consumption only when no reasonable substitute for the banned media exists. (Defs.' Mem. Supp. Mot. Summ. J., Encl. X, Saffer Dep. 8.) The cornerstone of Dr. Saffer's opinion is that a college student newspaper is a unique sort of media for which no substitute media exists. (*Id.* at 9.) A ban on alcohol advertising in college newspapers, therefore, would reduce alcohol consumption because advertisers would not be able to reach college students in a similar manner. (*Id.* at 9-10.)

At the outset, the Court does not dispute the general proposition that advertising increases demand, while suppressed advertising may have the opposite effect. *Lorillard*, 533 U.S. at 557; *see also Cent. Hudson*, 447 U.S. at 569 ("There is an immediate connection between advertising and demand for [the advertised product]. [Plaintiff] would not contest the advertising ban unless it believed that promotion would increase its sales.").

Nor does the Court take lightly the severity of the problem. Defendants' three college-based administrators pointedly lay out the scourge presented by misuse of alcohol at UVA and

Virginia Tech. Nationwide, "80 percent of college students drink alcohol, about 40 percent engage in binge drinking, and about 20 percent engage in frequent episodic heavy consumption, which is binging three or more times over the past two weeks." (Defs.' Resp. to Pls.' Mot. Summ. J., Encl. I, Ex. C (*The Surgeon General's Call to Action To Prevent and Reduce Underage Drinking* (HHS 2007)) at 12-13.) "An estimated 1,700 college students between the ages of 18 and 24 die each year from alcohol-related unintentional injuries, including motor vehicle crashes." (*Id.* at 13.) "Approximately 700,000 students are assaulted by other students who have been drinking," and "[a]bout 100,000 students are victims of alcohol-related sexual assault or date rape." (*Id.*) Dean Rue, and Directors Keene and Bruce, explain the multifaceted and environmental strategies undertaken by the universities to educate about abstinence, responsible alcohol use, and the devastation caused by binge drinking. COO Coleburn touts a similar approach in his affidavit.

It is clear to the Court that 3 VAC 5-20-40(B)(3) seeks to mitigate a significant problem throughout the Commonwealth and the nation as a whole. However, all of the findings before the Court, which show an increasing problem with drinking behavior on college campuses, post-date the enactment of the regulation at issue. Even presuming the Court could evaluate a 1970's regulation based solely on its performance in the years after 2000, not a single witness testifies as to how this regulation, which has been in effect for decades, has directly advanced the admittedly substantial governmental interest of preventing underage consumption of alcohol or abusive drinking. Nor have they said how it has alleviated the problem. All administrators and COO Coleburn emphasize that studies support the use of the environmental, multi-pronged strategy they have in place.

While common sense alone confirms the beneficial use of a multi-pronged strategy, Plaintiffs challenge a facet of that strategy that suppresses commercial speech protected under the First Amendment. That aspect of the approach must be evaluated under existing constitutional principles. In this record, each administrator and Coleburn opine only that "3 VAC 5-20-40(B) *will effectively assist*" in their institution's efforts to prevent or reduce "the consumption of alcoholic beverages by those students under the age of 21 and the over consumption of alcoholic beverages" by college students.[9] (Defs.' Mem. Supp. Mot. Summ. J., Encl. I, Keene Aff. ¶ 23; Encl. II, Bruce Aff. ¶ 8; Encl. IV, Rue Aff. ¶ 13; Defs.' Resp. to Pls.' Mot. Summ. J., Encl. I, Coleburn Aff. ¶ 9.) (emphasis supplied.) They do not aver that it already has done so.

The silence on the record as to any effect of the existing regulation presents this Court with an insurmountable barrier in upholding its constitutionality. Even presuming that the Court's evaluation of the efficacy of the regulation should begin based on current information, the record leaves out the most telling factual evidence that could undergird the assessment: any effect of this very regulation in the past. Defendants present no evidence of any study of the regulation itself. They present no information about how drinking behavior at Virginia Tech and UVA compares to behavior at campuses not subject to any advertising restriction, or subject to greater prohibition. Dr. Saffer testified that he is unaware of any empirical study indicating that campuses with a ban on campus advertising of alcohol have a lower incidence of underage or

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[9] The Court notes that these individuals likely do not qualify to offer expert opinions under Fed. R. Evid. 701. Because their opinions, even if considered, do not support a finding of constitutionality, the Court need not address that issue definitively.

binge drinking.[10] (Pls.' Mem. Supp. Mot. Summ. J., Ex. 7, Saffer Dep. 18-19.) Susan Bruce testified that she is not aware of any scientific research showing that prohibitions on alcohol advertising in college publications are effective at addressing underage or binge drinking. (Defs.' Mem. Supp. Mot. Summ. J., Encl. VIII, Bruce Dep. 24.) Steven Clarke, the Director of the Campus Alcohol Abuse Prevention Center at Virginia Tech, also testified that he was unaware of any scientific evidence specifically relating to the efficacy of a prohibition on alcohol advertising in college publications. (Pls. Mem. Supp. Mot. Summ. J, Ex. 9, Clarke Dep. 20.) Nothing on this record suggests that the vexatious circumstance regarding drinking at UVA or Virginia Tech would be worse, i.e. that the regulation alleviated directly the problem to a material degree, had VA 3-5-20-40(B)(3) not been in place.

Moreover, if 3 VAC 5-20-40(B)(3) prevented Virginia college students from observing *any* alcohol advertisements, this Court might find the third prong of the *Central Hudson* better addressed. However, as then-Judge Alito noted in *Pitt News*, even given restrictions on ads in college publications, college students are bombarded by advertisements from sources other than college newspapers, including other papers available to the same college population. Dr. Saffer agrees that alcohol advertising bans reduce alcohol consumption only when no real substitute for the banned media exists. His testimony, though, that college papers are so unique that no media substitute exists simply does not persuade. Dr. Saffer offers no rationale or evidence, beyond conjecture, to support his claim as to the singularity of a college publication. Even presuming an

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[10] Dr. Nelson's opinions rest in part on this lack of information. Dr. Nelson's opinion that 3 VAC 5-20-40 cannot substantially or materially reduce underage or abusive drinking stems in part from his criticism of the lack of data specific to college students or advertisements in college publications. (Pls.' Mem. Supp. Mot. Summ. J., Ex.4, Nelson Rebuttal Decl.)

unusually high concentration of underage readers, his insight ignores the common sense reality that college students now live in a multimedia environment including television, radio, and other periodicals, all of which display uncensored alcohol advertisements. Presumably, all of those underage drinkers are exposed to the substitute media, as observed by the court in *Pitt News*. Dr. Saffer's opinion ignores the vast world of electronic media and the internet, which common sense suggests might act as a substitute source of far more information to college students than does any newspaper.[11]

It has been noted that a legislature rarely seeks "to restrict speech about an activity it regarded as harmless or inoffensive. Calls for limits on expression are made when the specter of some threatened harm is looming." *Lorillard*, 533 U.S. at 590 (Thomas, J., concurring.) Regardless of the issue addressed, a court or a legislature must adhere to First Amendment principles. Because Defendants do not provide evidence that 3 VAC 5-20-40(B)(3) alleviates or advances the substantial interests asserted to a material degree, the regulation does not meet the third prong of the *Central Hudson* test.

iv. Narrowly Tailored

The fourth prong of the *Central Hudson* test requires a "reasonable fit between the means and ends of the regulatory scheme." *Lorillard*, 533 U.S. at 561 (*citing Cent. Hudson*, 447 U.S. at 569). This fit need not be perfect but rather reasonable, representing "not necessarily the single best disposition but one whose scope is in proportion to the interest served." *Bd. of Trustees of*

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[11] When asked what types of media college students generally are exposed to, Susan Bruce replied, "Internet mostly." (Pls.' Mem. Supp. Mot. Summ. J, Ex. 8, Bruce Dep. 30.) Steve Clarke confirmed that college student exposure to print media is "probably limited" and that the internet and television are likely primary sources of information for students. (Pls.' Mem. Supp. Mot. Summ. J, Ex. 9, Clarke Dep. 21.)

State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989) (quotation omitted). Some "latitude" in fit exists. *Anheuser II*, 101 F.3d at 327. This Court finds that regulation 3 VAC 5-20-40(B)(3) is more extensive than necessary to serve the interests of preventing underage and abusive drinking. *Cent. Hudson*, 447 U.S. at 566.

In arguing that the regulation is not narrowly tailored, Plaintiffs present evidence of the myriad other ways to address these interests. Defendants' own expert, Dr. Saffer, concedes that increased alcohol taxation and counteradvertising also will reduce underage drinking on college campuses. (Pls.' Mem. Supp. Mot. Summ. J., Ex. 7, Saffer Dep. 19-20.) Indeed, Dr. Saffer states that, "[i]creased taxation is more effective than advertising bans" in combating underage and binge drinking.[12] (*Id.*, Saffer Dep. 22.) Defendants' suggest that their comprehensive approach, in which this regulation is merely one component, best combats the problems of underage and over-consumptive drinking. (Defs.' Reply 6; Defs.' Resp. to Pls.' Mot. Summ. J., Encl. I, Ex. C.) Defendants present extensive evidence of the educational and rehabilitative measures already taken at Virginia Tech and UVA. (Defs.' Mem. Supp. Mot. Summ. J., Encl. I, Keene Aff. ¶¶ 13-14, 22; Encl. II, Bruce Aff. ¶¶ 4-7.) The Court applauds this comprehensive approach and acknowledges that the presence of other means of accomplishing these interests does not deem the regulation over extensive.

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[12] In *Pitt News*, when addressing the proper means to pursue the government's interest, the Third Circuit rested its decision in part on the finding that increased law enforcement of alcohol beverage control laws on college campuses would be more effective than an advertising ban. 379 F.3d at 108. Defendants here suggest that increased law enforcement exists on their campuses as part of their comprehensive approach. Without definitively finding, the Court presumes that law enforcement of ABC laws is part of the environmental approach employed by Defendants.

However, any fit must, in fact, be tailored, because the facet Defendants manipulate here invokes First Amendment principles. Although the test of reasonableness presents a closer case, the retrospective gloss offered by Defendants does not fully explain the breadth of 3 VAC 5-20-40(B)(3). Defendants contend that "tailoring is evident on the face of the regulation," because only certain words are prohibited under 3 VAC 5-20-40(B)(3). (Defs.' Mem. Supp. Mot. Summ. J. 26.) This ban on specific words, they argue, distinguishes the case from *Lorillard.* In *Lorillard*, the Supreme Court held that, *inter alia*, regulations prohibiting the outdoor advertising of smokeless tobacco or cigars within 1,000 feet of a school or playground were not narrowly tailored. 533 U.S. at 565-66. The Court reached this decision based, in part, upon the fact that the regulations prohibited advertising in a substantial portion of Massachusetts' major metropolitan areas. *Id.* at 562. In fact, in some areas, the regulations would have constituted "nearly a complete ban on the communication of truthful information about smokeless tobacco and cigars to adult consumers." *Id.*

Though 3 VAC 5-20-40(B)(3) restricts only certain words, it broadly affects *all* readers of college newspapers in the Commonwealth of Virginia. Because the regulation is over inclusive, it prohibits adult readers - who comprise the majority of readers of the *Collegiate Times* and *The Cavalier Daily* - from receiving the communications. (Pls.' Mem. Supp. Mot. Summ. J., Ex. 1, Wolff Decl. ¶ 5, Attach. A; Defs.' Mem. Supp. Mot. Summ. J., Encl. IV, Rue Aff. ¶¶ 3-4; Encl. XI, ¶ 1.); *see Pitt News*, 379 F.3d at 108. Moreover, the basis for the word choice, or the restriction to ads associated with dining establishments, is not adequately explained in the record. While Defendants' contention that brand names offer potential for greater persuasion rings true, other restrictions are not explained. For instance, as written, the regulation prohibits an academic

department from advertising an on-campus wine and cheese reception honoring a visiting or distinguished scholar. A "champagne" brunch also might violate the ban. Defendants' witnesses do not articulate a consistent basis for the limitations, and they cannot link them to considerations the ABC Board weighed when enacting the regulation because the record on that is essentially silent. The Supreme Court has recognized that alcohol manufacturers and distributors "have an interest in conveying truthful information about their products to adults, and adults have a corresponding interest in receiving truthful information" about those products. *Lorillard*, 533 U.S. at 564.

This case also is factually distinguishable from *Anheuser I* and *II*, which predate *Lorillard*. In *Anheuser*, Baltimore received testimony and evidence about advertising and decreased underage drinking before enacting the ordinance. *Anheuser I*, 63 F.3d at 1309. Baltimore had received studies demonstrating a "definite correlation" between alcoholic advertising and underage drinking. *Id.* Here, the record lacks similar evidentiary findings before the enactment of 3 VAC 5-20-40(B)(3), and the expert testimony before this Court conflicts. The Baltimore ordinance also applied uniformly to an entire medium of communication, whereas 3 VAC 5-20-40(B)(3) applies only to the narrow segment of college newspapers. Finally, Baltimore, as well as the Fourth Circuit, observed the unique nature of billboards and their audiences. Children are exposed to billboards "simply by walking to school or playing in their neighborhood." *Id.* at 1314; *see also Packer Corp. v. Utah*, 285 U.S. 105, 110 (1932) (noting that billboards are "seen without the exercise of choice or volition," and viewers have the message "thrust upon them by all the arts and devices that skill can produce"). Ads embedded within a college newspaper, though meant to persuade, are not "thrust upon" college students in a

similar manner, nor does the college age reader necessarily need the level of protection afforded the younger age group contemplated by the *Anheuser* courts, even given concerns about alcohol misuse.

In sum, although the finding is closer given the latitude of the test applied, Defendants have not presented adequate evidence that 3 VAC 5-20-40(B)(3) is narrowly tailored to address the interests asserted and, as a result, the regulation fails the fourth prong of the *Central Hudson* test.

b. Constitutionality of Burden on One Segment of the Media

The parties places less emphasis on Plaintiffs' second argument, that 3 VAC 5-20-40(B)(3) also violates the First Amendment in that it "unjustifiably target[s] a specific segment of the media," that being media associated with colleges and universities. (Pls.' Mem. Supp. Mot. Summ. J. 16.) Defendants oppose this claim only by stating that the strict scrutiny advocated by Plaintiffs should not pertain in commercial speech cases. (Defs.' Resp. to Plfs.' Mot. Summ J. 11-12.)

Plaintiffs principally rely on *Pitt News* when making this argument. The Third Circuit examined several cases from the Supreme Court and discerned that a law is "presumptively invalid" if it singles out "a small group of speakers" for financial burden. *Pitt News*, 379 F.3d at 111 (internal citations omitted). Once this presumption arises, the *Pitt News* court found that it could be overcome only by the government producing a compelling reason for the challenged law. *Id.* In making this finding, the Third Circuit evaluated Supreme Court jurisprudence involving the imposition of taxes on certain segments of the press in a manner that might affect their First Amendment activities. *See Leathers v. Medlock*, 499 U.S. 439 (1991)(taxing cable

television but not newspapers did not violate the First Amendment because did not attempt to interfere with First Amendment activities); *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987)(even absent motive to interfere, taxing general interest magazine but not certain other types of specialty magazines violated First Amendment); *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575 (1983)(even absent motive to affect content, taxing newspapers that used a certain amount of ink and paper violated First Amendment); *Grosjean v. Am. Press Co.*, 297 U.S. 233 (1936)(taxing newspapers with certain circulation violated First Amendment, especially when meant to interfere with positions taken by newspapers).

Because this Court invalidates the regulations at bar under *Central Hudson*, it will not reach this secondary argument. The Court does so in part because even if 3 VAC 5-20-40(B)(3) imposes a cognizable financial burden on Educational Media Company and the Cavalier Daily, it is undecided in this Circuit how this burden pertains to a limit on commercial speech, not the non-commercial speech at issue in the cases *Pitt* evaluated. Our Constitution "accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." *Cent. Hudson*, 447 U.S. at 563. The Third Circuit's finding in *Pitt News*, though persuasive, is not binding on this Court. The Court declines to reach whether 3 VAC 5-20-40(B)(3) is unconstitutional as an unreasonable burden on a segment of the media.

C. Injunctive Relief

Plaintiffs seek an order permanently enjoining Defendants from enforcing 3 VAC 5-20-40(A) and (B)(3). The briefing before this Court leaves this request for relief largely unaddressed.

The standard for issuing a permanent injunction requires a court to examine the following factors: (1) the likelihood of irreparable harm to the plaintiff without the injunction and whether the plaintiff has an adequate remedy at law; (2) the likelihood of harm to the defendant with an injunction; (3) whether the plaintiff has succeeded on the merits; and (4) the public interest. *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 546 n.12 (1987); *Blackwelder Furniture Co. v. Seilig Mfg. Co., Inc.*, 550 F.2d 189, 194 (4th Cir. 1977). An evidentiary hearing is not required before issuing a permanent injunction. *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698, 708 (4th Cir. 1999).

Because the Court has found 3 VAC 5-20-40(A) and (B)(3) to be unconstitutional, the Court finds that the Plaintiffs have succeeded on the merits and that the public interest is not furthered by enforcing unconstitutional regulations. It appears an injunction should issue. However, the Court will afford the parties an opportunity to address any relief requested should they wish to do so. The parties shall contact the Court no later than five (5) days from the date of entry of this memorandum opinion and order to schedule a hearing on the issue of injunctive relief.

IV. Conclusion

In this case, it is clear that the Plaintiffs no more seek to support irresponsible drinking than the Defendants seek to eviscerate the First Amendment. Instead, the parties seek clarity under the laws and Constitution of the United States.

Having considered the pleadings, the exhibits, and the arguments of counsel, the Court concludes that no genuine issue of material fact exists and that, when applying existing precedent as articulated by the Supreme and other courts, Plaintiffs are entitled to judgment as a matter of

law. The Court concludes as a matter of law that 3 VAC 5-20-40(A) and (B)(3) are facially unconstitutional because they violate the First Amendment as applied. The Court will deny Defendants' Motion for Summary Judgment, grant Plaintiffs' Motion for Summary Judgment, and will allow the parties five (5) days to schedule a hearing on the issue of injunctive relief, should they desire one.

An appropriate Order shall issue.

M. Hannah Lauck
United States Magistrate Judge

Richmond, Virginia
Date: 3/31/08

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

EDUCATIONAL MEDIA COMPANY AT VIRGINIA TECH, INC., and THE CAVALIER DAILY, INC.,

Plaintiffs,

v. Civil Action No. 3:06CV396

SUSAN R. SWECKER, *et al.*,

Defendants.

ORDER

This matter is before the Court on the parties' cross motions for summary judgment. Having considered the pleadings, the exhibits, and the arguments of counsel, the Court concludes that no genuine issue of material fact exists and that Plaintiffs are entitled to judgment as a matter of law. The Court further concludes as a matter of law that 3 VAC 5-20-40(A) and (B)(3) are unconstitutional because they violate the First Amendment to the United States Constitution.

Accordingly, Defendants' Motion for Summary Judgment (Docket No. 18) is DENIED. Plaintiffs' Motion for Summary Judgment (Docket No. 16) is GRANTED. Regulations 3 VAC 5-20-40(A) and (B)(3), are declared unconstitutional.

The Court will allow the parties five (5) days to schedule a hearing on the issue of injunctive relief, should they desire one.

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Let the Clerk send copies of this Order and the accompanying Memorandum Opinion to counsel of record.

It is so ORDERED.

M. Hannah Lauck
United States Magistrate Judge

Richmond, Virginia
Date: 3/31/08