

No. 10-278

IN THE
Supreme Court of the United States

EDUCATIONAL MEDIA COMPANY AT VIRGINIA TECH,
INCORPORATED; CAVALIER DAILY, INCORPORATED,
PETITIONERS,

v.

SUSAN R. SWECKER, COMMISSIONER, VIRGINIA ALCOHOLIC
BEVERAGE CONTROL COMMISSION; PAMELA O'BERRY
EVANS, COMMISSIONER, VIRGINIA ALCOHOLIC BEVERAGE
CONTROL COMMISSION; W. CURTIS COLEBURN, III, CHIEF
OPERATING OFFICER VIRGINIA DEPARTMENT OF
ALCOHOLIC BEVERAGE CONTROL; FRANK MONAHAN,
DIRECTOR, LAW ENFORCEMENT BUREAU OF THE VIRGINIA
DEPARTMENT OF ALCOHOLIC CONTROL; ESTHER H.
VASSAR, COMMISSIONER, VIRGINIA ALCOHOLIC BEVERAGE
CONTROL COMMISSION,
RESPONDENTS.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICI CURIAE* ASSOCIATION
OF NATIONAL ADVERTISERS, INC.,
AMERICAN ADVERTISING FEDERATION, AND
AMERICAN ASSOCIATION OF ADVERTISING
AGENCIES IN SUPPORT OF PETITIONERS

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Amici Curiae, the Association of National Advertisers, Inc., the American Advertising Federation, and the American Association of Advertising Agencies (the “Advertising Associations”), respectfully request that this Court grant the Petition for a Writ of *Certiorari*.¹

INTERESTS OF *AMICI CURIAE*

The Association of National Advertisers, Inc. (“ANA”) leads the marketing community by providing insights, collaboration and advocacy to its membership, which includes nearly 400 companies with 9,000 brands that collectively spend over \$250 billion in marketing communications and advertising annually in the United States. The ANA strives to communicate marketing best practices, lead industry initiatives, influence industry practices, manage industry affairs, and advance, promote and protect advertisers and marketers. The ANA also serves its members by advocating clear and coherent legal standards governing advertising, including this Court’s commercial speech doctrine.

The American Advertising Federation (“AAF”), headquartered in Washington, D.C., is the trade association that represents 50,000 professionals in the advertising industry. AAF’s 130 corporate members are advertisers, agencies and media

¹ No counsel for a party authored this brief in whole or part and no such counsel or party made a monetary contribution intended to fund preparation or submission of this brief. No person, other than *amici curiae* or their counsel, made a monetary contribution to its preparation or submission. The parties received at least ten days notice of the intention of *amici* to file, and have consented to filing of this brief.

companies that comprise the nation's leading brands and corporations.

The American Association of Advertising Agencies ("AAAA"), founded in 1917, is the national trade association representing the advertising business in the United States. AAAA's nearly 450 members represent virtually all the large multi-national advertising agencies, as well as hundreds of small and mid-sized agencies, which together maintain 13,000 offices throughout the country. Its membership produces approximately 75 percent of total advertising volume placed by agencies nationwide.

STATEMENT

The decision below in *Educational Media Co. at Va. Tech, Inc. v. Swecker*, 602 F.3d 583 (4th Cir. 2010), upheld a Virginia state alcohol regulation that seeks to combat underage consumption and abusive drinking by collegians by all but outlawing the advertisement of alcoholic beverages in any college student publication – even where most readers are of legal drinking age. It held alcohol ads could be banned in publications whose audiences include both underage and of-age readers, even if the ads are truthful and nonmisleading.

The Fourth Circuit found that the asserted "inimitable" on-campus role of college student publications trumps the general rule that correlation between advertising and demand alone cannot justify an advertising ban. *Id.* at 589-90. It also held the challenged regulation is narrowly tailored in part because "[i]t does not, on its face, affect all possible student publications," *id.* at 591, and despite

existence of potentially more effective methods of serving the State's interest. The Fourth Circuit considered an advertising ban to be a more "cost-effective prevention method." *Id.* at 590-91.

SUMMARY OF THE ARGUMENT

The decision below raises fundamental questions regarding First Amendment protection for commercial speech that require clarification by this Court. Among other things, it expanded the concept of "youth" assertedly requiring protection from "harmful" advertising, to include those at the cusp of adulthood – and even a great many non-minors – at the expense of constitutionally protected commercial speech. This directly conflicts with the Third Circuit's decision in *Pitt News v. Pappert*, 379 F.3d 96 (3d Cir. 2004) (Alito, C.J.), which invalidated as unconstitutional a nearly identical ban.

The Fourth Circuit's decision contradicts the clear trend of this Court's cases that have recognized increasing protection for commercial speech. This Court's recent precedents caution against regulating speech available to general audiences based on asserted interests in protecting children. The Fourth Circuit's conclusions also are inconsistent with the "direct and material advancement" and "narrow tailoring" requirements that all commercial speech regulations must satisfy, as established by *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), and applied in its progeny.

ARGUMENT

The Advertising Associations support the arguments for review raised in the Petition. At minimum, *certiorari* should be granted to address

the direct conflict between the Third Circuit decision in *Pitt News* and the instant Fourth Circuit decision as to the proper application of *Central Hudson* in cases like this. Pet. at 8-9. The divergent results regarding two nearly identical state regulations make such review essential. Further, review by this Court is needed to clarify the scope of First Amendment protection for commercial speech for the additional reasons set forth below.

**I. THE TREND OF THE CASES IS TO
EXPAND PROTECTION FOR
COMMERCIAL SPEECH**

For more than three decades, this Court has recognized that a “particular consumer’s interest in the free flow of commercial information ... may be as keen, if not keener by far, than his interest in the day’s most urgent political debate.” *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976). *See also Bigelow v. Virginia*, 421 U.S. 809, 818-20 (1975). In addition to the needs of particular individuals, “society also may have a strong interest in the free flow of commercial information,” and any given advertisement, “though entirely ‘commercial,’ may be of general public interest.” *Virginia State Bd. of Pharmacy*, 425 U.S. at 764.

These observations – and the jurisprudence to which they gave rise – did not limit First Amendment protection to only advertising related in some way to “public” issues. This Court has explained that the constitutional interest in commercial speech lies in “dissemination of information as to who is producing and selling what product, for

what reason, and at what price,” to foster “private economic decisions.” *Id.* at 765. “To this end, the free flow of commercial information is indispensable.” *Id.*

More recent decisions have significantly increased the level of protection for commercial speech. In the past two decades the Court has invalidated: (1) an ordinance regulating the placement of commercial newsracks, *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 430-31 (1993); (2) a state ban on in-person solicitation by CPAs, *Edenfield v. Fane*, 507 U.S. 761, 777 (1993); (3) a state ban on using “CPA” and “CFP” on law firm stationery, *Ibanez v. Florida Dep’t of Bus. & Prof’l Regulation*, 512 U.S. 136 (1994); (4) a restriction on listing alcohol content on beer labels, *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 491 (1995); (5) a state ban on advertising alcohol prices, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996); (6) a federal ban on broadcasting casino advertising, *Greater New Orleans Broad. Ass’n v. United States*, 527 U.S. 173 (1999); (7) state regulation of tobacco ads, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001); and (8) FDA restrictions on advertising the practice of drug compounding. *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 377 (2002).

Of these more recent decisions, *Rubin*, *44 Liquormart* and *Lorillard* are particularly significant here. In *Rubin*, the Court refused to adopt any kind of more deferential rule for commercial speech restrictions concerning alcohol consumption (or other “socially harmful activities”), 514 U.S. at 482 n.2, and *44 Liquormart* established definitively that

there is no exception or special treatment for commercial speech regulations that target so-called “vice” activity. 517 U.S. at 513-14. As the Court further observed in *44 Liquormart*, such a “vice characterization” is “anomalous when applied to products such as alcoholic beverages ... that may be lawfully purchased.” *Id.* at 514.

The Court in *Rubin* also pointed out the serious failing in cases where, as here, a commercial speech restriction is erected for some communication channels while the audience sought to be protected receives the same or similar messages from other quarters. *See* 514 U.S. at 488. *Compare also Pitt News*, 379 F.3d at 107 (“Even if Pitt students do not see alcoholic beverage ads in The Pitt News, they will still be exposed to [them] on television and [] radio, and ... will [] see [such] ads in other publications[.]”), *with Educational Media*, 602 F.3d at 590-91 (citing favorably the extent to which other student publications on campus do not face alcohol advertising restrictions).

In buttressing sellers’ interests in conveying truthful information about products to adults and adults’ corresponding interests in receiving it, *Lorillard* reaffirmed the principle that “governmental interest in protecting children ... does not justify unnecessarily broad suppression of speech addressed to adults.” 533 U.S. at 564 (*quoting Reno v. ACLU*, 521 U.S. 844, 875 (1997)). This is consistent with the Court’s cases that have repeatedly prohibited “reduc[ing] the adult population ... to ... only what is fit for children.” *Butler v. Michigan*, 352 U.S. 380, 383 (1957); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74 (1983);

Denver Area Educ. Telecomms. Consortium v. FCC, 518 U.S. 727, 759 (1996) (quoting *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 128 (1988)).

II. THE FOURTH CIRCUIT'S INCONSISTENT RULING RAISES SIGNIFICANT QUESTIONS ABOUT COMMERCIAL SPEECH DOCTRINE

Notwithstanding this doctrinal background, there is a growing trend of government actions in which it bypasses direct regulation of age-restricted products, and instead regulates commercial speech about them. Restrictions on alcohol ads in college student publications are not the only example. For example, many marketing provisions in the Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31 (2009), were recently upheld against constitutional challenge, even though, while purportedly targeting underage smoking, they drastically restrict speech intended for adults.² The holding in *Commonwealth Brands* is in serious tension with this Court's decision in *Lorillard* that invalidated state restrictions on tobacco marketing to the general public, which the state claimed were necessary to combat underage smoking. *See* 533 U.S. at 555, 562, 564.

This trend of the government targeting commercial speech about lawful products flaunts this Court's decisions stressing that "speech regulation cannot unduly impinge on the speaker's ability to propose a

² *Commonwealth Brands, Inc. v. United States*, 678 F. Supp. 2d 512 (W.D. Ky. 2010), *appeal docketed sub nom., Discount Tobacco City & Lottery, Inc. v. United States*, Nos. 10-5234 & 10-5235 (6th Cir. Mar. 9, 2010).

commercial transaction and the adult listener's opportunity to obtain information about products." *Lorillard*, 533 U.S. at 565. This applies with no lesser force when the object of regulation involves tobacco, alcohol, and/or protecting minors. There is no First Amendment "vice exception," and "so long as [] sale and use ... is lawful for adults" as to a given product, *id.* at 571, the government may not target its marketing on grounds it "pertains to [] 'vice' activity." *44 Liquormart*, 517 U.S. at 513. *See Rubin*, 514 U.S. at 482 n.2.

The decision below epitomizes this trend toward targeting commercial speech rather than directly regulating conduct. Worse, by sustaining restrictions on commercial speech in "college student publications," it invites expansion of the upper age-limit bounds of "children" the government may try to claim it wishes to protect. Here, Virginia asserts interests in combating underage drinking and abusive drinking by college students. *Educational Media*, 602 F.3d at 589. But most college students have reached legal adulthood, and virtually all do so within a short time after enrolling. So, as a threshold matter, audiences for the speech restricted here consist almost entirely of adults whom advertisers have a First Amendment right to reach with truthful, nonmisleading information. *Lorillard*, 533 U.S. at 565; *44 Liquormart*, 517 U.S. at 497, 503. *See also Greater New Orleans Broad.*, 527 U.S. at 195; *Western States Med. Ctr.*, 535 U.S. at 374.

Even considering the legal drinking age is 21 rather than 18, the majority of Petitioners' readership has reached at least that age. *Educational Media*, 602 F.3d at 587 n.1; *Pet.* at 3.

Cf. Pitt News, 379 F.3d at 101, 108 (“more than 67% of Pitt students and more than 75% of the total University population is over the legal drinking age”). Thus, review by this Court is essential in this case not only to address the vital issues raised by the Petition for *Certiorari*, but also those it implicates relating to restrictions on the ability of advertisers to reach young-adult consumers.

This case also offers an important opportunity to clarify the role “common sense” may play in *Central Hudson* direct-and-material-advancement analyses. The Third Circuit demanded evidence of direct and material advancement in *Pitt News*, *see*, 379 F.3d at 107, but *Educational Media* allows resort to nothing more than “history, consensus and common sense” to support restrictions on speech. Pet. at 10-15. This divergence by the circuit courts also should be remedied by granting review here.

CONCLUSION

For the foregoing reasons, *amici* Advertising Associations respectfully request that the Court grant the Petition for *Certiorari*.

Respectfully submitted,

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