

PRESENT: All the Justices

EDUCATIONAL MEDIA COMPANY AT  
VIRGINIA TECH, INC., ET AL.

MEMORANDUM OPINION<sup>1</sup>  
November 4, 2011

v. Record No. 110992

SUSAN R. SWECKER, ET AL.

UPON A QUESTION OF LAW CERTIFIED BY THE UNITED STATES DISTRICT  
COURT FOR THE EASTERN DISTRICT OF VIRGINIA, RICHMOND DIVISION

Pursuant to Rule 5:40(c), the United States District Court  
for the Eastern District of Virginia, Richmond Division (the  
district court), by its order entered May 26, 2011, certified a  
question of law to this Court regarding the interpretation of an  
administrative regulation of the Alcoholic Beverage Control  
Board restricting alcohol advertisements in college student  
publications. By order entered June 8, 2011, we accepted the  
certified question. See Rule 5:40(e).

I.

Educational Media Company at Virginia Tech, Inc., is a non-  
profit corporation qualifying as a tax exempt organization under  
26 U.S.C. § 501(c)(3) that owns the Collegiate Times, a student-  
run newspaper at Virginia Polytechnic Institute and State  
University. The Cavalier Daily, Inc., is a similarly qualified  
corporation that owns The Cavalier Daily, a student-run  
newspaper at the University of Virginia. The newspaper owners

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<sup>1</sup> This memorandum opinion will not be published and will  
not be cited as authority or relied upon by counsel in future  
cases.

filed an action in the district court challenging former 3 VAC § 5-20-40(B)(3), now 3 VAC § 5-20-40(A)(2),<sup>2</sup> as violative of their First Amendment rights. Upon a motion for summary judgment filed by the newspaper owners, the district court found the regulation facially unconstitutional. See Educational Media Co. at Va. Tech v. Swecker, 2008 U.S. Dist. LEXIS 45590, at\*57 (E.D. Va. March 31, 2008). On appeal, the United States Court of Appeals for the Fourth Circuit reversed the judgment of the district court and held that the regulation, on its face, passed constitutional muster. See Educational Media Co. at Va. Tech v. Swecker, 602 F.3d 583, 591 (4th Cir. 2010). The issues still pending before the district court are whether the regulation is unconstitutional as applied to these newspaper owners and whether the regulation unconstitutionally discriminates against a narrow segment of the media.

Based on evidence presented by the newspaper owners, the district court determined that at least half of the readers of the Collegiate Times and The Cavalier Daily are age 21 or older.

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<sup>2</sup> Former 3 VAC § 5-20-40(B)(3) was amended effective March 5, 2010, after the underlying action was filed. See Alcoholic Beverage Control Board, Amendment of Regulations Governing Advertising and Tied-House Restrictions, 26 Va. Reg. 1465, 1468-69 (Feb. 1, 2010). That regulation provides, in part: "Advertisements of alcoholic beverages are not allowed in college student publications unless in reference to a dining establishment, except as provided below." 3 VAC § 5-20-40(A)(2).

Stating that a determination of whether the definition of "college student publications" under 3 VAC § 5-20-40 encompasses publications of which at least half of the readers are age 21 or older will help the court resolve the issues pending before it,<sup>3</sup> the district court certified to this Court the following question of law:

Does the definition of "college student publications" under 3 Va. Admin. Code § 5-20-40(B)(3)(2008), now located under 3 Va. Admin. Code § 5-20-40(A)(2)(2010), include publications of which at least half of the readers are age 21 or older?

## II.

The challenged regulation defines "college student publication" 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." 3 VAC § 5-20-40(A)(2). Responding to the certified question, the Court answers that question in the affirmative, holding that the term "college student publication," as defined in 3 VAC 5-20-40(A)(2), may include publications of which at least half of the readers are age 21 or older if the

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<sup>3</sup> Pursuant to Rule 5:40(a), this Court may answer questions of law that are "determinative in any proceeding pending before the certifying court."

publications are "distributed or intended to be distributed primarily to persons under 21 years of age" and otherwise meet the definition set forth in 3 VAC § 5-20-40(A)(2).<sup>4</sup>

Certified question answered as stated above.

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<sup>4</sup> The record reflects that the district court has not made a determination as to whether the Collegiate Times or The Cavalier Daily are "distributed or intended to be distributed primarily to persons under 21 years of age." 3 VAC § 5-20-40(A)(2).