No. 12-2183

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

EDUCATIONAL MEDIA COMPANY
AT VIRGINIA TECH, INC., et al.,

Plaintiffs-Appellants,

v.

J. NEAL INSLEY, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF OF *AMICI CURIAE* STUDENT PRESS LAW CENTER AND COLLEGE NEWSPAPER BUSINESS AND ADVERTISING MANAGERS IN SUPPORT OF PLAINTIFFS-APPELLANTS AND URGING REVERSAL

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INTEREST OF *AMICI CURIAE*[1]

The Student Press Law Center ("SPLC") is a national, non-profit, non-partisan organization established in 1974 to perform legal research and provide information and advocacy for the purpose of promoting and preserving the free expression rights of student journalists. As the only national organization in the country devoted exclusively to defending the legal rights of the student press, the SPLC has collected information on student press cases nationwide and has submitted various *amicus* briefs, including to the United States Supreme Court and many federal courts of appeal. The SPLC represents the interests of student journalists and newspapers who regularly disseminate both commercial and editorial information to readers – both student and non-student alike – throughout the country, including the Commonwealth of Virginia.

College Newspaper Business and Advertising Managers ("CNBAM") is a national organization of college newspaper business staffs. Founded in 1972, CNBAM represents more than 150 student newspapers with a circulation of over 1.4 million and more than $50 million in annual sales. Their annual convention

[1] Pursuant to Federal Rule of Appellate Procedure 29(a), *amici* represent that all parties have consented to the filing of this brief *amici curiae.* Pursuant to Rule 29(e), the undersigned counsel further represents that no party or party's counsel authored this brief in whole or in part; that no party or party's counsel contributed money that was intended to fund preparation or submission of this brief; and that no person other than the *amici curiae* and counsel identified herein contributed money that was intended to fund preparation or submission of this brief.

brings together students, professional staff members and industry experts to discuss advertising trends and exchange ideas. The organization also provides education opportunities and recognition to student sales staffs through their annual advertising contest.

The SPLC and CNBAM submit this brief *amici curiae* to emphasize to this Court the critical role that student media plays, and to highlight the serious ramifications that restrictions on advertising revenue have on the student press's ability to serve as an important source of information and ideas for the campus community. *Amici* are gravely concerned about the chilling effect that would result should this Court conclude that Virginia may discriminatorily suppress and otherwise burden the speakers in this case. Neither result is tenable. The Virginia regulation unconstitutionally imposes a content-based restriction of speech upon a particular subset of media, and in so doing threatens to limit the ability of college student media to provide a meaningful voice for their community.

SUMMARY OF ARGUMENT

The Virginia restriction on alcohol advertising in college newspapers unconstitutionally censors the content of speech of a particular speaker – newspapers published by students and intended for a university audience – and will have a serious effect on those newspapers' ability to fund their publications, which are a vital part of our nation's academic and expressive tradition. Although a panel of this Court, by a 2-1 vote, previously upheld the Virginia regulation as facially constitutional under the *Central Hudson* test for commercial speech,[2] the majority explicitly left undecided whether the law impermissibly discriminates against a segment of the media and thus must be subjected to a higher level of First Amendment scrutiny. *See Educ. Media Co. at Va. Tech, Inc. v. Swecker*, 602 F.3d 583, 587 n.2 (4th Cir. 2010) ("[W]e decline to address [the strict scrutiny arguments] in the first instance"). On remand the District Court answered that question in the negative,[3] but *amici* respectfully urge that the District Court's

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

[3] The magistrate judge appeared to believe incorrectly that she was bound by the panel's opinion to reject any scrutiny more exacting than that of *Central Hudson*. *See* JA 00580 (Memorandum Opinion, *Educ. Media Co. at Va. Tech., Inc. v. Insley*, Civil A. No. 3:06-cv-396) ("[T]he Court cannot accept Plaintiffs' invitation to ignore binding . . . precedent, including that which constitutes the law of the case.").

conclusion is wrong, particularly in light of recent Supreme Court precedent and basic First Amendment principles.

This brief addresses two issues of particular concern to *amici*. First, if allowed to stand, the regulation will have a significant deleterious effect on the ability of college newspapers in Virginia to continue to provide excellent, independent journalism to their audiences. Like the two plaintiff newspapers involved in this case, college newspapers generally rely heavily on advertising income to fund their publications. The Virginia regulation will deprive student-run newspapers – but not their local competitors – of a significant source of revenue, at a time where college newspapers, like print newspapers generally, are struggling to stay afloat. The Virginia regulation will thus impose unfair and undue burdens on college newspapers, despite their important role in furthering the principles underlying democracy and the First Amendment.

Second, if allowed to stand, the Virginia regulation will run counter to recent Supreme Court precedent. Since this Court ruled in the first appeal in this case, the United States Supreme Court, in *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011), ruled that laws discriminating against a particular class of speakers raise serious First Amendment concerns – even where the laws target only commercial speech. The principles set forth in *Sorrell* and other recent Supreme Court cases apply with full force to this case. Indeed, these are the same reasons relied on by

then-Third-Circuit-Judge Alito in a well-reasoned decision striking down a nearly-identical ban on alcohol advertising in college newspapers in Pennsylvania. *See Pitt News v. Pappert*, 397 F.3d 96, 109 (3d Cir. 2004).

Here, because the Virginia regulation singles out a small segment of newspapers for discriminatory treatment based on the content of those newspapers' advertisements, the law must be subject to searching judicial inquiry. Under any form of heightened scrutiny, the Virginia regulation fails. As the Commonwealth's own evidence shows, the regulation is neither necessary to achieving Virginia's desired end, nor a particularly effective means at so doing. The only direct and material result of the law will be to impose financial burdens on student-run college publications while allowing their competitor newspapers to freely collect revenue from alcohol advertising. This is the kind of pernicious discrimination that the First Amendment forbids.

ARGUMENT

I. The Virginia Regulation Threatens The Financial Viability Of College Newspapers, Which Are Critical To Our Tradition Of A Free Press.

American democracy depends upon a free press. "A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves." *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936). This maxim applies in equal if not greater force at institutions of higher

learning. As the Supreme Court has recognized, "education . . . is the very foundation of good citizenship." *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003) (quotation marks omitted; ellipses in original). Schools of higher education, in particular, "represent the training ground for a large number of our Nation's leaders." *Id.* at 332; *see also Rosenberg v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 836 (1995) (noting "danger . . . to speech from the chilling of individual thought and expression" on college campuses "where the State acts against a backdrop and tradition of thought and experiment that is at the center of our intellectual and philosophical tradition"); *Keyishian v. Board of Regents*, 385 U.S. 589, 602-03 (1967); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

Student publications are the engine of free expression at institutions of higher learning. "As counterparts to the Fourth Estate in the society at large, college journalists act as watchdogs on student government[;] . . . serve[] all the public by monitoring the administration of higher education[;] . . . [and] serve college communities by commenting on and documenting campus politics and campus life, by provoking thought and discussion, and by simply entertaining." Richard J. Peltz, *Censorship Tsunami Spares College Media: To Protect Free Expression on Public Campuses, Lessons From The "College Hazelwood" Case*, 68 Tenn. L. Rev. 481, 481-82 (2001). Equally important, student "[p]ublications stimulate critical thinking, offer a mode for critical inquiry and response, and

provide an arena where these skills can be practiced, cultivated, and transferred into the classroom." Lauren E. Tanner, Note, *Rights and Regulations: Academic Freedom And A University's Right to Regulate the Student Press*, 86 Tex. L. Rev. 421, 439 (2007). Thus, as this Court has observed, "[c]ensorship of constitutionally protected expression cannot be imposed [at a college or university] by suspending the editors [of student newspapers], suppressing circulation, requiring imprimatur of controversial articles, excising repugnant material, withdrawing financial support, or asserting any other form of censorship oversight based on an institution's power of the purse." *Joyner v. Whiting*, 477 F.2d 456, 460 (4th Cir. 1973) (footnotes omitted). Student publications, in other words, are an important means through which students of higher education develop and achieve the "foundation of good citizenship" championed by the Supreme Court.

This is especially true in the Commonwealth of Virginia, where an estimated 37 college student publications serve both students and non-students alike. *See* Editor & Publisher International Yearbook 2012, at III-76-III-78. These publications have been recognized for their journalistic excellence, and their alumni routinely go on to careers in professional journalism. *E.g.*, About, CavalierDaily.com, http://www.cavalierdaily.com/page/about (last visited Nov. 28, 2012); *VPA First Amendment Award | Virginia Press Association*, Virginia Press Association, http://www.vpa.net/index.php/membership/article/nomination_form_

vpa_first_amendment_award/ (last visited Nov. 28, 2012); *ACP – Contest Winners*, Associated Collegiate Press, http://www.studentpress.org/acp/winners/npm99.html (last visited Nov. 28, 2012).

College newspapers, which often are provided for free to the student population, the staff and faculty, and the surrounding communities, are particularly dependent upon revenue from advertising. *See, e.g.*, JA 00581, 00583 (Memorandum Opinion, *Educ. Media Co. at Va. Tech., Inc. v. Insley*, Civil A. No. 3:06-cv-396) (finding that in 2005, *Collegiate Times* received 98.7% of its annual budget from advertising revenue, and that "[t]he annual budget for *The Cavalier Daily* is comprised almost exclusively of the revenue it generates through advertising."); Lillian L. Kopenhaver, *Research Spotlight: Still in Growth Mode*, College Media Review, Sept. 6, 2012, *available at* http://cmreview.org/research-spotlight-still-in-growth-mode/ (last visited Nov. 28, 2012) ("Most newspapers (86 percent) receive funding from advertising . . . . More than half (53.7 percent) receive 50 percent or more from this source.") (last visited Nov. 28, 2012). As a result, even small disruptions in a student publication's revenue stream can have significant consequence. *E.g.*, Melissa Loewinger, *Economy Hits College Newspapers*, Daily Princetonian, Nov. 21, 2008.

Virginia's restriction on alcohol advertising thus threatens to deprive college newspapers throughout the Commonwealth of an extremely important source of

revenue. As the record amply demonstrates, college newspapers like the *Collegiate Times* and *The Cavalier Daily* are almost entirely dependent on advertising revenue to finance their operations. JA 00581, 00583. Absent the Virginia regulation, revenue from alcohol advertising would be a significant source of funding for college publications in Virginia, as it is for student publications around the country. *See* College Newspaper Business and Advertising Managers (CNBAM), Survey of College Newspapers' Alcohol Advertising Policies, April 28 2009, *available at* http://www.splc.org/pdf/CNBAMsurveysummary_04282009 .pdf (last visited Nov. 28, 2012). But as a consequence of the Virginia regulation, these newspapers each stand to lose upwards of $30,000 in revenue each year. JA 00581, 00583.[4] Given the limited budgets of college newspapers generally, this

[4] The District Court fundamentally erred in discounting the newspapers' calculation of lost advertising revenue attributable to the regulation as mere "conjecture." *See* JA 00594. When the government prohibits any type of economic activity, the amount of activity that would take place in the absence of the prohibition will always involve an element of conjecture. Once it becomes known that placing ads for bars in college newspapers is illegal, merchants will largely stop trying, and so the only factually certain measurement – the dollar value of ads actually turned away – will significantly understate the true economic impact. To require a crystal-ball level of certainty about a matter that cannot be discerned with certainty places too heavy a burden on the regulated business. If such a hurdle becomes the law of the Fourth Circuit, it will become nearly impossible for any business to successfully challenge a regulation based on how much economic activity it deters. This point is crucial because the District Court's only stated basis for distinguishing the otherwise indistinguishable Third Circuit ruling in *Pitt News* (and therefore declining to apply strict scrutiny) was the perceived lack of "substantial evidence of the regulation's impact[.]" JA 00595, n.9. This Court already has established as the law of the case that merchants

kind of lost revenue opportunity will impose a significant hardship on college newspapers if the regulation is allowed to stand. *See* Kopenhaver, *Still in Growth Mode* ("One-third of four-year public college papers have annual budgets of $100,001-$500,000, an increase from 28.9 percent in 2007, while 43.2 percent have less than $100,000, comparable to 2007.").

Indeed, depriving college newspapers of this significant source of revenue threatens their very financial solvency. Across the nation, college newspapers are facing overwhelming financial hardship. Keith Matheny, *College newspapers feel financial pinch*, USA Today, Apr. 29, 2012. Moreover, "the conditions causing hard times for newspapers in the private sector – declining print advertising revenue and difficulties making the Web a moneymaker – are also affecting student newspapers at colleges and universities throughout the country." *Id.* As a result, even college newspapers that are not subjected to the Virginia regulation "have entered adapt-or-die mode." *Id.* The Virginia regulation thus imposes a significant hardship on college newspapers in Virginia by depriving them of an important and substantial source of income at a financially precarious time for college newspapers generally.

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serving alcohol "*want* to advertise in college student publications." *Educ. Media Co. v. Swecker*, 602 F.3d 583, 590 (4th Cir. 2010) (emphasis in original). That finding should itself suffice to establish that the regulation deters a substantial amount of advertising.

II. Because It Singles Out Student Newspapers For A Content-Based Speech Restriction, The Virginia Regulation Is Presumptively Unconstitutional.

Even where laws do not restrict the content of speech – and here, the Virginia regulation expressly restricts the content of advertisements concerning alcohol – the Supreme Court has made clear that laws singling out the media (or a particular type of speaker) for disfavored regulatory treatment are presumed to be unconstitutional and are subject to strict scrutiny. *See Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231, 234 (1987); *Minneapolis Star & Trib. Co. v. Minn. Comm'r of Rev.*, 460 U.S. 575, 585 (1983); *Grosjean*, 297 U.S. at 250; *see also Smith v. Daily Mail Publ'g. Co.*, 443 U.S. 97, 105 (1979) (striking down as unconstitutional West Virginia statute prohibiting only newspapers, but not broadcasters or other media, from publishing names of juveniles charged as youthful offenders); *Pitt News*, 397 F.3d at 109. In this case, the Virginia regulation is anathema to fundamental First Amendment principles in two ways: it singles out a particular segment of newspapers for discriminatory regulatory treatment, and it explicitly restricts the kinds of words that college newspapers may use in their advertisements. Both of those aspects of the Virginia regulation require the application of strict scrutiny.[5] *See, e.g.*, *Arkansas Writers Project*, 481 U.S. at 231; *Brown v. EMA*, 131 S. Ct. 2729, 2733 (2011) ("The most basic of

[5] *Amici* agree with appellants that the regulation cannot withstand constitutional scrutiny under *Central Hudson*. *See* App. Br. at 26-29.

[First Amendment] principles is this: '[A]s a general matter, . . . government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'") (quoting *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002) (first bracket added)); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid."); *PSINet, Inc. v. Chapman*, 362 F.3d 227, 233 (4th Cir. 2004) ("[C]ontent-based restriction on expression . . . may only be upheld if it survives strict scrutiny.").

The Commonwealth has argued, and the District Court agreed, that the Virginia regulation does not trigger heightened scrutiny because its discriminatory regulations apply only to college newspapers' commercial advertising. *See* JA 00594-96. But the Supreme Court made clear in *Sorrell* that laws singling out particular speakers for disfavored treatment trigger heightened constitutional scrutiny – even where the laws target commercial speech. The District Court's decision upholding the Virginia regulation, even though the law facially discriminates against college newspapers as compared to non-college newspapers serving the same audience, cannot be squared with the Supreme Court's decision in *Sorrell*.

In *Sorrell*, the Court struck down a Vermont regulation that prohibited pharmacies and other similar entities from disseminating prescriber-specific information to marketers of prescription drugs and from using that information in

marketing speech. *Sorrell*, 131 S. Ct. at 2664. Like the Virginia regulation, the Vermont law applied only to a narrow class of speakers, and targeted only the commercial use of the prohibited speech. *Id.* Vermont thus argued that "heightened judicial scrutiny is unwarranted because its law [was] a mere commercial regulation." *Id.*

Explaining that "[c]ommercial speech is no exception" to the presumed unconstitutionality of a content-based or speaker-based restriction, the Supreme Court unambiguously rejected Vermont's defense of the law. *Id*. Noting that "[a] 'consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue,'" *id.* (quoting *Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1977)), the Court emphasized that the First Amendment prohibits the government from forbidding certain speakers to engage in commercial speech that others are freely allowed to make. *Id.*; *see also id.* at 2677 (Breyer J., dissenting) (noting that prior to *Sorrell*'s majority opinion, "neither of these categories – 'content-based' nor 'speaker-based' – has ever before justified greater scrutiny when regulatory activity affects commercial speech"). The Court thus struck down the Vermont regulation as an impermissible

content- and speaker-based speech restriction that was not justified by or tailored to the government's purported interests.[6]

The Court's decision in *Sorrell* is consistent with a number of other recent First Amendment cases where the Court has viewed laws that discriminate against specific speakers with particular skepticism. Thus, in *Citizens United v. FEC*, which struck down the Bipartisan Campaign Finance Act of 2002, the Court emphasized that "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content." 130 S. Ct. 876, 899 (2010). And in *Brown*, 131 S. Ct. at 2732-33, the Court invalidated a state law restricting the sale of violent video games to minors, holding, *inter alia*, that "California has singled out the purveyors of video games for disfavored treatment – at least when compared to booksellers, cartoonists, and movie producers – and has given no persuasive reason why." *Id.* at 2740. Just as there is no qualitative difference between video game violence and other portrayals of violence, there is no qualitative difference between college publications and non-college publications

[6] Because it found that the Vermont regulation would fail both the "special commercial speech inquiry" and "a stricter form of judicial scrutiny," the Court in *Sorrell* applied the more flexible *Central Hudson* standard instead of strict scrutiny. *Sorrell*, 131 S. Ct. at 2667. But the Court made clear that the presumption against content- and speaker-based restrictions on speech apply with equal force to commercial speech, except for situations where the government is seeking to remediate commercial harms like fraud. *Id.* at 2671. Nothing in the Virginia regulation is concerned with preventing fraud or other kinds of commercial harms contemplated by the Court in *Sorrell*.

aimed at the same demographic audience. Taken together, *Sorrell*, *Citizens United*, and *EMA* make plain that laws discriminating against particular speakers must be subject to searching judicial scrutiny. The Virginia regulation is no exception.

Moreover, the concerns animating these recent decisions are the same as those in the Court's earlier tax discrimination cases. The overarching principle is that the First Amendment forbids the government from picking winners and losers in the marketplace of ideas – either by directly restricting the content of speech, or by undermining the ability of particular speakers to compete in the marketplace by burdening some speakers and not others. *See Arkansas Writers' Project*, 481 U.S. at 230-31, 234; *Minneapolis Star*, 460 U.S. at 582, 590-91 (noting "potential for abuse" of discriminatory regulation of the media); *Grosjean*, 297 U.S. at 250; *see also Leathers v. Medlock*, 499 U.S. 439, 448 (1991) (recognizing that localized or otherwise targeted regulation empowers governments to impermissibly "distort the market of ideas"). Accordingly, the Supreme Court has long subjected laws imposing disparate burdens on discrete segments of the media to the same strict scrutiny that is applied against more transparently content-based prohibitions. *See Minneapolis Star*, 460 U.S. at 582; *Arkansas Writers' Project*, 481 U.S. at 231, 234 (noting the "heavy burden" to establish the constitutionality of a law that singles out particular speakers); *Grosjean*, 297 U.S. at 250 (striking down tax on

advertising revenue for newspapers with circulation of more than 20,000, and holding "in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties").[7]

Drawing on these principles, in an opinion penned by now-Justice Alito, the Third Circuit in *Pitt News* struck down a nearly identical restriction on alcohol advertising in college newspapers. 379 F.3d at 109. While holding that the Pennsylvania statute failed the *Central Hudson* test for restrictions on commercial speech, the Third Circuit also held that the law "violate[d] the First Amendment for an additional, independent reason: it unjustifiably imposes a financial burden on a particular segment of the media, *i.e.*, media associated with universities and colleges." *Id*. As the Third Circuit observed, the Pennsylvania statute singled out college and university publications by its terms and in practice, and was thus presumptively unconstitutional under *Grosjean*, *Minneapolis Star*, and *Arkansas Writers' Project*. *Id.* at 111. Today, speaker-based discrimination is all the more suspect in light of the Supreme Court's subsequent decisions in *Sorrell*, *Citizens United*, and *EMA*.

[7] Moreover, this overlapping concern for censorship also explains why *intent* is not relevant where an ostensibly neutral regulation may effectively censor speech. *Leathers*, 499 U.S. at 445 ("Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment." (quotation marks omitted)).

The conclusion by now Justice Alito that these cases apply to alcohol restrictions in college newspapers is unmistakably correct. *Pitt News*, 379 F.3d at 109 ("[T]he Supreme Court recognized long ago[,] [that] . . . laws that impose special financial burdens on the media or a narrow sector of the media present a threat to the First Amendment."). Indeed, if anything, the presumed unconstitutionality of the Virginia regulation is greater than in *Pitt News*. In that case, Pennsylvania argued that the *Grosjean*/*Minneapolis Star*/*Arkansas Writers' Project* line of cases did not apply because the Pennsylvania statute restricted the speech of would-be advertisers and did not directly burden the college publications themselves. *See Pitt News*, 379 F.3d at 112. The Third Circuit rejected that argument, holding that the indirect and discriminatory burden on college publications was sufficient to trigger strict scrutiny. *Id.* Here, by contrast, the Virginia regulation goes far beyond restricting the speech of potential advertisers and imposing a financial burden on the college student press (although it does that as well) – it directly restricts college student publications' speech, and it does so by drawing content-based lines.

The regulation unmistakably is content-based because it targets publications distributed "or *intended* to be distributed" to persons under 21. 3 VAC § 5-20-40(A)(2) (emphasis added). While it might theoretically be possible to ascertain through readership surveys whether a publication is *actually* distributed to a certain

audience segment, the only way to determine that a publication is "intended" to reach an under-21 audience is by its content.[8]

The Virginia regulation also impermissibly discriminates among segments of the same medium. The District Court treated college newspapers as distinct from newspapers more generally, *see* JA 00593 (the Virginia regulation "does not discriminate against segments of the media based on content produced by the college newspapers . . . . The regulation applies equally to all college student publications, no matter what articles they must publish"), but this approach is incorrect as a matter of fact and law. Factually, there has been no showing that the publishing industry itself recognizes "publications distributed or intended to be distributed to persons under 21 years of age" as a distinct medium, as it does certain other more logical classifications (such as daily versus weekly newspapers, or newspapers distributed free of charge versus newspapers for which a fee is

[8] Content is, for instance, the way the Federal Communications Commission decides whether a website fits the statutory definition of a site "directed to children" so as to fall within the regulatory ambit of the Children's Online Privacy Protection Act. *See* 16 C.F.R. § 312.2 ("In determining whether a commercial website or online service, or a portion thereof, is targeted to children, the Commission will consider its subject matter, visual or audio content, age of models, language or other characteristics of the website or online service, as well as whether advertising promoting or appearing on the website or online service is directed to children.").

charged).[9] And legally, the District Court's conclusion that the Virginia regulation permissibly regulates a distinct medium of expression is at odds with Supreme Court precedent. While on rare occasion the First Amendment tolerates disparate burdens amongst entire mediums of speakers, *e.g.*, *Turner Broadcasting Systems, Inc. v. FCC*, 512 U.S. 622, 660 (1994) (generally applicable tax burdening entire cable industry), the Virginia regulation impermissibly burdens a narrow subset of a medium. As a matter of fact and law, student newspapers and local non-student newspapers in an adjacent newsrack operate within the same print medium. Thus a law discriminating between the two is subject to utmost scrutiny. *See e.g. Citizens United*, 130 S. Ct. at 899 ("Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice."); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) ("We have frequently condemned . . . discrimination among different users of the

[9] The District Court found that a regulation applying to a subset of speakers could be "justified by some special characteristic of the particular medium being regulated." JA 00593 (quoting *Turner*, 512 U.S. at 661). But "publications distributed or intended to be distributed to persons under 21 years of age" is not a "medium." It is an arbitrarily-fashioned subcategory of the larger medium of newspapers.

same medium for expression."); *Surita v. Hyde*, 665 F.3d 860, 870 (7th Cir. 2011) ("Government may not discriminate among speakers.") (collecting cases).

In this regard, the Virginia regulation is analytically the same as the discriminatory sales tax at issue in *Arkansas Writers' Project*. And, like that tax, it follows that the Virginia regulation "cannot be characterized as nondiscriminatory, because it is not evenly applied to all [newspapers]." 481 U.S. at 229. In other words, the Virginia regulation is not saved because it treats all *college* newspapers the same; it is presumptively unconstitutional because it does not treat all *newspapers* the same.[10]

Likewise, the fact that college newspapers play an "inimitable" role in a college community does not justify restricting their speech and imposing financial burdens that their competitor newspapers do not face. This rationale was unmistakably repudiated by *Sorrell.* 131 S. Ct. at 2671 ("That the State finds expression too persuasive does not permit it to quiet the speech or to burden its messengers.").

[10] That is not to suggest, however, that the Virginia regulation would be constitutional were it applied uniformly to all newspapers. The *Turner* regulation was, in essence, "industry-specific antitrust legislation," 512 U.S. at 640, and central to the Court's reasoning was the legislation's intent to "guarantee the survival of [the] medium," *id.* at 647. *Turner* is thus the unique case where restricting speech within a medium paradoxically was designed to ensure a diversity of voices within that medium. The Virginia regulation cannot be defended on this ground. Indeed, if the reference to "college student publications" were removed, the impermissible content-based nature of the regulation would be unmistakable.

If anything, that "inimitable" role casts further doubt on the constitutionality of the law. As explained above, college media is the student counterpart to the Fourth Estate. *See supra* at 4. In this role, student media enforces a vital check on the governance of public universities. Moreover, examples abound of the benefit to society at large from a well-functioning and independent college media. *See, e.g.*, Matthew Cameron, *Student Media: A Force For Good Governance*, Virginia Policy Review 26 (2012) ("In the wake of University [of Virginia] President Teresa Sullivan's surprising removal and subsequent reinstatement, . . . not a lot has been said about the future of student media, which played a crucial role in determining the outcome of the Sullivan saga. If any lesson is to be learned . . . , it is that independent student media is crucial to the successful governance of public higher education institutions and the nation in general."); *Documenting Disaster: A Look into the Collegiate Times*, *available at* http://vimeo.com/22522307 (last visited Nov. 28, 2012) (juxtaposing emphasis of *Collegiate Times* in "bring[ing] the community back together" against exploitative coverage by national media following the 2007 tragedy at Virginia Tech). This is why for good reason the Supreme Court has repeatedly held that "the First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech." *Papish v. Bd. of Curators of the Univ. of MO*, 410 U.S. 667, 671 (1973); *see also, e.g.*, *Keyishian*, 385 U.S. at 603; *Christian Legal Soc'y v.*

Martinez, 130 S. Ct. 2971, 2988-89 (2010). The inference that college newspapers' "inimitable" role justifies discriminatory regulations thus gets it precisely backwards. JA 00594. Instead, the Virginia regulation stands as an archetypical regulation of a disfavored idea, the very evil the First Amendment was enacted to prevent.

III. Virginia's Regulation Cannot Withstand Strict Scrutiny.

Amici do not dispute the general proposition that the Commonwealth has an important interest in curbing the dangers and risks associated with "underage and abusive drinking by college students." *See* JA 00598. However, that does not give the Commonwealth a blank check to use any and all means it can imagine to accomplish those ends. Rather, Virginia "faces a heavy burden in attempting to defend its [imposition of discriminatory burdens on college newspapers]. In order to justify such differential [burdens], the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Arkansas Writers' Project*, 481 U.S. at 231. Virginia can do neither.

As the District Court recognized, the law at issue has been on the books since the repeal of Prohibition, altered over time to reflect changes in the legal drinking age. JA 00594. Yet, as the Commonwealth implicitly concedes, underage and abusive drinking by college students has not diminished since the enactment of this regulation; rather, the evidence demonstrates that the problem

has grown. JA 00581, 00583. Therefore, the Commonwealth cannot demonstrate that the regulation is necessary to advance its purported interest in curbing underage or excessive drinking. *See Brown*, 131 S. Ct. at 2739 (holding that evidence purporting to show a correlation between violent video games and some deleterious effects on minors was insufficient to justify State restriction on sale of violent video games to minors because "those effects are both small and indistinguishable from effects produced by other media.").

Moreover, the Commonwealth has not and cannot satisfy its burden of proving that the regulation is narrowly tailored to the Commonwealth's interest in ameliorating the dangers of alcohol consumption at institutions of higher learning. While prohibiting advertising of prices, brands of alcohol, and names of specialty drinks, the regulation permits equivalent advertising if "in reference to a dining establishment." 3 VAC § 5-20-40(A)(2). And it does so for the very same papers it claims are read by some unknown number of individuals under the age of 21. To the extent there is any correlation between limiting alcohol advertising and limiting alcohol consumption, a regulation aiming to curb underage drinking that permits advertisements for "beer night" but forbids the promotion of the beer served at that beer night is plainly not narrowly tailored for that purpose.

In addition, because the prohibition is directed only to advertising content and not to editorial content, the very same information that cannot lawfully appear

in an ad can appear – word-for-word – in a feature story by a reviewer as long as the newspaper does not receive advertising revenue. The *Collegiate Times* may not accept an advertisement inviting students to partake of "mojito night," but it may publish a column by a reviewer who describes in alluring detail the delicious taste and affordable prices of a nightspot's mojito cocktails and recommends that readers patronize the establishment. If it is true, as this Court's prior ruling in *Swecker* suggests, that "college student publications" are uniquely influential on their readers, then an endorsement by a neutral journalistic reviewer would be doubly influential as opposed to a biased advertisement by a merchant. Yet this more persuasive speech – targeting exactly the same audience as the proscribed advertisements – would remain unregulated.

Further, "[e]ven if . . . students do not see alcoholic beverage ads in [their student 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." *Pitt News*, 379 F.3d at 107-08. Commercials for alcoholic spirits – not to mention beer – are rampant throughout all forms of media. This is particularly true of sports events – which likely have a large underage viewing audience. Indeed, any student watching the NCAA Tournament will be exposed to countless beer advertisements during each and every televised game. "The consequence is that

[the Virginia] regulation is wildly underinclusive when judged against its asserted justification, which . . . is alone enough to defeat it." *Brown*, 131 S. Ct. at 2740.

Finally, there is a lack of "fit" between the regulation and the government's stated objective because the class of regulated publications is limited to those targeting an audience under 21. Once it became apparent that the *Collegiate Times* and the *Cavalier Daily* were *not* primarily distributed to an under-21 audience, the government's emphasis shifted from the prevention of underage drinking to the prevention of abusive binge drinking by people of any age. The rationale of discouraging binge drinking by people over age 21 completely severs any logical connection with newspapers catering to readers under 21.

In addition to being underinclusive, the regulation is overinclusive because it restricts more speech than is necessary and permissible. To the extent that the Commonwealth claims it has an interest in curbing excessive or abusive drinking by college students who are *over the age of 21*, this type of paternalistic interest cannot justify the regulation. *See, e.g.*, *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 374-75 (2002) (rejecting paternalistic justifications for restrictions on advertising); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 769-70 (1976) (same); *see also 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996) ("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."); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 483-84 (1995) (holding restriction on brewers' rights to advertise truthful information about alcohol invalid).[11] And those who are not yet 21 still have a protected interest in receiving truthful non-misleading information about a lawful product that they will soon have a legal right to consume. *See Brown*, 131 S. Ct. at 2741 ("Even where the protection of children is the object, the constitutional limits on governmental action apply."). Finally, even if the Commonwealth has a cognizable interest in curbing underage drinking, the regulation impermissibly infringes upon the constitutional rights of adults to receive ideas and information contained in the prohibited advertisements, with the ultimate result of limiting the adult population to speech that the Commonwealth deems appropriate for the under-21 population. Such broad speech limitations undermine the fundamental principles of the First Amendment, *see, e.g.*, *Reno v. ACLU*, 521 U.S. 844, 875 (1997), and simply cannot withstand strict scrutiny.

[11] According to the most recent United States Census, 7,834,000 of the nation's 20,275,000 college students – or 38.6 percent – are 25 years of age or older. United States Census Bureau, *Type of College and Year Enrolled for College Students 15 Years Old and Over, by Age, Sex, Race, Attendance Status, Control of School, Disability Status, and Enrollment Status: October 2010, available at* http://www.census.gov/hhes/school/data/cps/2010/tables.html (last visited November 28, 2012).

CONCLUSION

For the reasons set forth above, the opinion of the District Court must be reversed.

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(A)(7)

Amici Curiae certify that they complied with the above-referenced rule and that according to the word processor used to prepare this brief, Microsoft Word 2007, this brief, excluding those parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii), contains 5,771 words, and therefore complies with the type-volume limitations in Fed. R. App. P. 32(a)(7).

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of November, 2012, I electronically filed the foregoing document for which conventional service is required with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on this 28th day of November, 2012, I mailed two copies of the foregoing document by U.S. mail to the following:

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