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FEDERAL APPEALS COURT RULES

ALCOHOL AD BAN UNCONSTITUTIONAL

by

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After five years of litigation that resulted in two trips to the court of appeals, the United States Court of Appeals for the Third Circuit recently held that a Pennsylvania law barring college newspapers from accepting paid alcoholic beverage advertising was an unconstitutional content-based restriction that violated the First Amendment. *The Pitt News v. Pappert*, 379 F.3d 96 (3d Cir. 2004). While the decision does not break new constitutional ground, it is nonetheless important because it provides a strong degree of First Amendment protection for advertising lawful adult products, and affirms the First Amendment rights of the adult college population.

The case arose from a 1996 amendment to the Pennsylvania state liquor code, Pa. Stat. Ann. tit. 47, § 4-498 (Section 4-498), that prohibited alcoholic beverage advertising in, among other things, college newspapers. Violations were misdemeanors punishable by a fine or imprisonment. *The Pitt News*, a free student newspaper at the University of Pittsburgh, commenced a Section 1983 action in federal court in 1999 after a restaurant that had placed alcoholic beverage ads in the paper responded to threatened enforcement of Section 4-498 by canceling its advertising. The cancellation prompted the paper to stop accepting all such ads in order to avoid legal problems. This led to genuine economic hardship, as advertising was the paper's sole source of revenue and it received substantial income from alcoholic beverage ads.

In its complaint, *The Pitt News* alleged that Section 4-498 violated its free speech and free press rights under the First Amendment, as well as its Equal Protection rights under the Fourteenth Amendment. The district court denied the paper's preliminary injunction motion on the grounds that *The Pitt News* had no standing to assert the First Amendment claims of its readers or advertisers and that the paper had not suffered any actual injury because it remained free to publish as it wished — so long as it was not paid. On the first appeal, a panel of the Third Circuit affirmed the denial of the preliminary injunction. The court agreed with the paper that it had standing to assert its own First Amendment claims, but concluded that *The Pitt News* had failed to demonstrate that it would prevail on the merits. *The Pitt News v. Fisher*, 215 F.3d 354 (3d Cir. 2000), *cert. denied*, 531 U.S. 1113 (2001).

After remand, the district court granted the defendants' motion for summary judgment, which resulted in the paper's second appeal to the Third Circuit. This time, however, the paper received good news. After first determining that it was not bound by the prior panel decision, the current panel reversed the district court's decision and held that Section 4-498 constituted a content-based restriction that violated the First Amendment. The court of appeals then remanded the case for entry of a permanent injunction barring enforcement of Section 4-498 against *The Pitt News*.

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As an initial matter, the court of appeals roundly rejected the state's argument that there was no constitutional harm to *The Pitt News* because it could publish alcoholic beverage ads as long as the paper did not receive any payment. Noting that the purpose of the statute was to restrict speech viewed by the state as harmful, the court held that "[i]mposing a financial burden on a speaker based on the content of the speaker's expression is a content-based restriction of expression and must be analyzed as such." 379 F.3d at 106. In this regard, the decision is consistent with the case law holding that the protections of the First Amendment are not dependent on whether or not someone has paid for the speech in question. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). In the words of the court of appeals, "[i]f government were free to suppress disfavored speech by preventing potential speakers from being paid, there would not be much left of the First Amendment." 379 F.3d at 106.

Having thus concluded that the restriction was content-based, the court proceeded to apply the Supreme Court's *Central Hudson* test for commercial speech, which turns on the following four factors: (1) whether the expression is protected by the First Amendment; (2) whether the governmental interest asserted is substantial; (3) whether the restriction directly advances the asserted interest; and (4) whether the restriction is not more extensive than necessary to serve the asserted interest. The first two factors were readily satisfied: the court held that the ads concerned lawful conduct and were not misleading, thus entitling them to protection under *Central Hudson*, and also held that the asserted government interests in preventing underage drinking and alcohol abuse were substantial. However, Section 4-498 did not survive the court's application of the third and fourth prongs of *Central Hudson*.

With respect to the third prong, the court viewed the state's contention that Section 4-498 would cause underage and abusive drinking to fall as relying solely on speculation and conjecture; the state had not made any showing that the elimination of the ads at issue would do any good. Turning to the fourth prong, the court held that the statute was not adequately tailored to achieve the state's goals. Applying a core holding of the Supreme Court's decision in *Lorillard v. Reilly*, 533 U.S. 525 (2001), which struck down tobacco advertising restrictions, the court held that Section 4-498 "prevented the communication to adults of truthful information about products that adults could lawfully purchase and use." 379 F.3d at 108. As noted in the panel's decision, at least two-thirds of the University's 25,000 students were old enough to consume alcoholic beverages under Pennsylvania law, and three quarters of the students, faculty, and staff were over the age of twenty-one. In the court's view, the state could serve its interests more directly and without violating the First Amendment.

The court concluded its opinion with an additional reason why Section 4-498 was unconstitutional: it failed to meet the strict scrutiny applicable to laws that place special financial burdens on particular media segments. It is not clear why the court reached this additional level of constitutional analysis; indeed, in applying strict scrutiny, the court essentially relied on its application of *Central Hudson* in concluding that the statute was neither necessary nor the least restrictive means of serving the state's interests. While not stated as such, perhaps the court was interested in establishing some precedent for protecting free speech rights on college campuses.

This decision is important for several reasons. First, it applied the *Central Hudson* test in a meaningful way, especially with respect to the third prong. This aspect of the decision should help provide some additional vitality for the test. Second, the decision should send a strong message to those neo-prohibitionists who view censorship as a simple and efficient tool for silencing speech about lawful products they dislike. Indeed, this decision demonstrates precisely why courts need to apply the third prong of *Central Hudson* rigorously and demand a genuine showing of direct advancement, as opposed to the typical offering of mere speculation or conjecture. Finally, the decision protects First Amendment rights in the college setting. In this regard, the court's ruling may well have broader implications in the current free speech debates taking place on college campuses around the country.