



4-2023

The Junk Food Problem: Why the Law Allows Advertising to Kids and How to Implement Change

MaKenna Hardy

Brigham Young University, makennahardy7@gmail.com

Madison Maloney

Brigham Young University

Follow this and additional works at: <https://scholarsarchive.byu.edu/byuplr>



Part of the [Commercial Law Commons](#), [First Amendment Commons](#), and the [Public Relations and Advertising Commons](#)

BYU ScholarsArchive Citation

Hardy, MaKenna and Maloney, Madison (2023) "The Junk Food Problem: Why the Law Allows Advertising to Kids and How to Implement Change," *Brigham Young University Prelaw Review*. Vol. 37, Article 8. Available at: <https://scholarsarchive.byu.edu/byuplr/vol37/iss1/8>

This Article is brought to you for free and open access by the Journals at BYU ScholarsArchive. It has been accepted for inclusion in Brigham Young University Prelaw Review by an authorized editor of BYU ScholarsArchive. For more information, please contact ellen_amatangelo@byu.edu.

THE JUNK FOOD PROBLEM: WHY THE LAW ALLOWS ADVERTISING TO KIDS AND HOW TO IMPLEMENT CHANGE

*MaKenna Hardy*¹

I. INTRODUCTION

The prevalence of childhood obesity is a statistic that continues to bloat in the United States, surpassing prior records almost annually since the late 1900s.² Scholars and health experts are currently pursuing possible methods to reduce this trend, as obesity will follow 80% of these children into adulthood and add to the staggering 40%

-
- 1 MaKenna Hardy is studying Bioinformatics at Brigham Young University. She plans to attend law school after graduation. She would like to thank her coauthor, Madison Maloney, as well as the editorial staff of the BYU Prelaw Review.
 - 2 Cheryl D. Fryar ET AL., *Prevalence of Overweight, Obesity, and Severe Obesity Among Children and Adolescents Aged 2–19 Years*, Centers For Disease Control and Prevention (December 2020), chrome-extension://efaidnbmninnibpcjpcglclefindmkaj/https://www.cdc.gov/nchs/data/hestat/obesity-child-17-18/o verweight-obesity-child-H.pdf.

of the adult population already classified as obese.³ This scientific and academic pursuit has resulted in scientists and scholars linking societal health degradation with junk food advertising. Researchers have drawn correlations between junk food advertising and higher body mass indexes (BMI)* and the immediate consumption of increased calories,^{4,5} – the accumulation of which has led to high enough obesity rates to be considered an epidemic.⁶ Though many factors impact obesity, government officials from both major parties see junk food advertising as concerning enough to need legislation to combat it. Regulations have been put forth by the government such as restricting all advertising to very young children (under 8) or restricting junk food advertising to older children, but they have failed to make it into the official code of law.⁷

Despite the push for restricting children's exposure to advertisements, completely new, stringent legislation barring advertising to children under technological and even most physical mediums is largely unfeasible due to current Supreme Court precedent regarding

-
- 3 Llewellyn A. ET AL., *Predicting adult obesity from childhood obesity: a systematic review and meta-analysis*, PubMed (Dec. 23, 2015), <https://pubmed.ncbi.nlm.nih.gov/26696565/>. * Although current BMI calculations prove to be an imperfect measurement for individual health and body fat measurement, for representative, population wide studies, the BMI scale remains a useful and accessible way to estimate risk of various health outcomes. Thus, for a United States population wide study on measuring obesity, the BMI is still a productive tool and helpful indicator for excess fat estimation throughout the country. See Mark Green, *Do we need to think beyond BMI for estimating population-level health risks?*, *Journal of Public Health*, Jan. 2015.
 - 4 Frederick J. Zimmerman, Janice F. Bell, *Associations of Television Content Type and Obesity in Children*, *American Journal of Public Health* 100, 334-340 (February 1, 2010).
 - 5 Shin-Yi Chou, *Fast-Food Restaurant Advertising on Television and Its Influence on Childhood Obesity*, 51, *The Journal of Law and Economics* (2008).
 - 6 Nia Mitchell, *Obesity: Overview of an Epidemic*, 34 *National Library of Medicine* (2011).
 - 7 *Children's Advertising, Proposed Trade Regulation, Rulemaking, & Public Hearing*, 43(82) *Fed. Reg.* 17967 (April 27, 1978).

commercial free speech. We will analyze the pertinent case law and advertisement restrictions regarding junk food advertising to children that have defined important commercial speech precedents. Furthermore, we will investigate the current and potential methods of the Federal Trade Commission (FTC) and United States Department of Agriculture (USDA) in regulating children's exposure to commercial speech within the boundaries of existing law.

II. BACKGROUND

The rapid expansion of technology has spurred governmental agencies like the FTC to determine how these advancements target children and what can be done to combat the negative effects. In an October hearing in 2022, the FTC sought to determine what regulations were already in place for the sake of children, the state of advertising to younger audiences, and how to limit the spread of harmful advertising content.⁸ Advertisements targeting children include, but are not limited to, marketing on platforms with a predominantly young audience (such as games like Roblox or self-declared children's channels on YouTube),⁹ using colors and shapes to appeal to children,¹⁰ and using cartoons or other youth to promote products.¹¹ As government and private agencies explore the dangers of increasingly pervasive and personalized advertising towards children, an analysis of landmark commercial speech cases will demonstrate the established First Amendment lines which must be adhered to.

8 *Protecting Kids from Stealth Advertising in Digital Media*, Federal Trade Commission (October 19, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/FTC-Protecting-Kids-from-Stealth-Advertising-in-Digital-Media%E2%80%93October-19-2022.pdf.

9 *Id.* at 17, 54.

10 *Id.* at 5.

11 *Id.* at 16.

A. Capital Broadcasting Company v. Mitchell (1971)

In an effort to regulate the mass advertisement of tobacco products, Congress passed the Public Health Cigarette Smoking Act of 1969.¹² Six radio station corporations challenged the constitutionality of this act which banned all cigarette advertising across technology platforms under the scope of the Federal Communications Commission (FCC).¹² This scope has remained limited to television and radio, since internet regulation has never been under the FCC's purview.¹³ These six companies argued that the law was in direct violation of their First Amendment right to advertise legally-exchanged goods.¹⁴ The US District Court for the District of Columbia sustained precedent, granting product advertising less protection than other forms of speech. The Court even went so far as to say "Congress has the power to prohibit the advertising of cigarettes in any media," supporting the stance of allowing Congress a "supervisory role over the federal regulatory agencies ... [and] interstate commerce."¹⁵

As a direct result of this case, the room for advertising restrictions on junk food over electronic mediums dilated. The Court outlined that Congress had the right to ban advertising when it considered it beneficial to do so. At this time, stringent legislation regarding what food and beverage companies could advertise over tv and radio would have been feasible, as commercial speech had almost no protection.

B. Virginia State Pharmacy Board v. Virginia Citizens Consumer Council (1976)

A licensed Virginia pharmacist challenged the constitutionality of a Virginia statute asserting the illegality of promoting prescription

12 Public Health Cigarette Smoking Act of 1969 15 U.S.C § (1331-1338).

13 *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582 (1971).

14 *The FCC and Speech*, Federal Communications Commission (May 24, 2011) <https://www.fcc.gov/consumers/guides/fcc-and-speech>.

15 *Capital Broadcasting Co.*, 333 F. Supp.

drug prices “in any manner whatsoever.”¹⁶ The state’s defined interest in enacting this code was to maintain an air of professionalism for its licensed pharmacists.¹⁷ The Court found that the state’s interest in requiring professional standards from its pharmacists was justified, but that they may not do so by “keeping the public in ignorance of the lawful terms that competing pharmacists are offering.”¹⁸ This case revolutionized how the law interpreted the purpose and value of commercial free speech in a society of free-flowing ideas. The Courts lifted the defined level of interest in it to that of other forms of established protected speech (i.e. political, religious) by comparing the curiosity of a consumer for knowledge on subjects of commercialization as equal to, if not greater than, the curiosity to learn of “the day’s most urgent political debate.”¹⁹ Thus, a new shell of protection was granted to speech with no other purpose than to inform the public of commercial goods, directly reversing the decision made in *Capital Broadcasting v. Mitchell*. The possibility for restrictions on junk food, legal goods sold in American markets, declined immensely as the power of Congress to restrict advertising diminished.

C. *FCC v. Pacific Foundation*

A father complained to the Federal Communications Commission after inadvertently overhearing an afternoon radio-broadcasted monologue titled “Filthy Words” which played while his son was in the car. Because of the growing number of protests about indecent broadcasts, the FCC used this particular objection as a catalyst for “clarify[ing] the standards which [would] be utilized in considering” how complaints against indecent radio broadcasts were addressed.²⁰ After the case, the FCC was given power to regulate radio communications that were deemed obscene, indecent, or profane. Because

16 *Id.*

17 Va. Code Ann. § 54-524.35 (1974) (current version at Va. Code Ann. § 54.1-2901).

18 *Id.*

19 *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748 (1976) at 748.

20 *Id.*

“Filthy Words” was played in the afternoon “when children [were] undoubtedly in the audience,” the broadcast was labeled indecent.²¹ This case provided legal validation for arguing that the government’s protection of children is a state interest and that communication over broadcast media does not have unlimited speech protection.

D. KidVid (1978)

Backed with pressure from both the FDA and various health promoting agencies, the FTC attempted to implement regulations in the sphere of advertising to children. The petitions from these agencies included banning televised “candy” advertising directed towards children and banning high sugar snack advertising on television at times where audiences were composed of at least 50% children.²² In brief, the commission proposed blocking all advertisements to children under 8 years old, and heavily restricting junk food advertising geared towards older children.²³ KidVid, a proposal to limit candy ads, was proposed at a time when protection over commercial free speech was starting to bloom. After three years of deliberation, the proposal was shut down. The relationship between advertising and child safety was deemed a substantial concern, but the FTC determined that the proposed restrictions to advertising were not legally feasible at that time.²⁴ The scope of government restriction on advertising and the rights of both advertisers and consumers were clarified by this proposal’s unfortunate but educational failure. If it were possible to restrict potentially dangerous advertising from only the eyes of susceptible children, the law may have passed. However, the audiences of television programs were and remain heterogeneous groups of people of all ages. It was determined that the rights of

21 *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726 (1978) at 726.

22 *Id.* at 726.

23 Children’s Advertising, Proposed Trade Regulation, Rulemaking, & Public Hearing, 43(82) Fed. Reg. 17967 (April 27, 1978).

24 *Id.*

adults would be infringed upon if advertisements were restricted from their eyes in pursuit of protecting their children.

E. Central Hudson Gas & Elec. v. Public Service Commission (1980)

During New York State's fuel supply shortage in the 1970s, the Public Service Commission ordered a ban on all advertising that encouraged electricity usage. Three years after the shortage was averted, the Commission kept the ban, and extended it to include all promotional utility advertising to further the nation's agenda of energy conservation.²⁵ Central Hudson Gas & Electric Corp. challenged the law on First Amendment grounds. The Court's analysis of the constitutionality of the ban resulted in the synthesis of four core criteria with the express purpose of deciding whether advertising restrictions were warranted. The four criteria are as follows: One, whether or not the speech in question was both legal and non-misleading; Two, whether the State's proposed interest in restricting the speech was substantial; Three, determining if the advertising restriction directly advanced the State's interest; Four, whether the restricted speech was no more prohibitive than necessary to accomplish the stated goal.²⁶ The Court found that the Commission's desired restriction on promotional utility advertising passed the first three prongs of this test. The restriction not only addressed legal, non-misleading speech, but also met the State's interest in furthering the nation's goal of energy conservation.²⁷ Nonetheless, the order failed the fourth criterion. The Court found that the ban was overly broad in prohibiting all promotional advertising, unsuccessfully differentiating between products or services that would or would not have a net impact on energy usage in the state.²⁸ The Court did not

25 FTC Final Staff Report and Recommendation ("Final Staff Report"), Mar. 31, 1981.

26 *Central Hudson Gas & Elec. v. Public Svc. Comm'n*, 447 U.S. 557 (1980) at 556-557.

27 *Id.* at 566, 568, & 557.

28 *Id.* at 557.

deny that the state's interest in energy conservation was laudable and still left the possibility of advertising bans in the utility sector open for future legislation. The fatal flaw of the Commission's order was failing to tailor the language narrowly enough to pertain only to companies which contributed to the state's overall energy usage.

F. Lorillard Tobacco Company v. Reilly (2001)

After the Massachusetts Attorney General created a series of regulations against tobacco advertising, including outdoor advertising and indoor advertising visible from outdoors,²⁹ tobacco manufacturers claimed these regulations violated the First Amendment.³⁰ After the case circulated through the District Court and the Fifth Circuit Court of Appeals, the case went to the Supreme Court, where it was later decided that, while some of the regulations could remain, other aspects of the regulations violated the tobacco companies' rights to free speech. For example, limiting advertising of tobacco products within 1000 feet of schools was found, under the four-prong test and least restrictive means test, to be unconstitutional.³¹ In the final opinions, Justice Thomas called for increased protection for commercial speech, even more so than had been determined by previous cases. He asserted that there is "no basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech."³² He noted his concern that restrictions on tobacco could potentially be applied to food advertising in the future.

G. United States v. Playboy (2000)

When the Communications Decency Act (CDA) required that television channels transmitting sexually explicit content must either do so between the hours of 10pm and 6am, or fully block those channels, Playboy Entertainment Group filed a lawsuit claiming that

29 *Id.* at 572.

30 *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) at 572.

31 *Id.*

32 *Id.* at 525.

these regulations violated the First Amendment, as they were “too restrictive in nature and therefore unconstitutional.”³³ The Court sided with Playboy, noting that the protection of children was important, but the rule was indeed too restrictive.³⁴ The Court cited the least restrictive means rule, which is a general principle stating that, when limiting civil liberties, those limitations must be enforced in the least restrictive way possible.³⁵ According to the Court, there was a less restrictive way to regulate sexually explicit content than the current standard. Though this case reaffirmed the government’s interest in protecting children, it indicated that protecting children could not take precedence if the law was not narrowly tailored in the least restrictive way possible.

III. PROOF OF CLAIM

To determine if or how advertising towards children can be restricted constitutionally, it is necessary to extract and analyze the variance between accepted commercial speech and full First Amendment protection. With *Va. Pharmacy Bd. v. Va. Consumer Council*, the Court reversed its decision from *Valentine v. Chrestensen*, determining communication expressing a commercial transaction as not “wholly outside the protection of the First Amendment.”³⁶

As commercial speech is considered constitutionally protected, the standard required to restrict the content of advertisements rises considerably. Unprotected speech in advertising consists of that which is false, misleading, or obscene.³⁷ However, attempts at restriction for constitutionally protected speech rises to the standard of strict scrutiny, meaning the government must have a compelling interest and the restriction must be narrowly drawn to serve

33 *Id.* at 575.

34 *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000) at 803.

35 *Id.*

36 *Id.* at 813.

37 *Virginia State Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 776 (1976).

that interest.³⁸ The likelihood of this standard being reached is highlighted in *Playboy*, as the Court remarked “It is rare that a regulation restricting speech because of its content will ever be permissible.”³⁹

However, this verbiage implies there is a realm of commercial speech that is still vulnerable to government regulation. The extent of this realm was explored under *Central Hudson Gas & Electric Corp. v. Public Service Commission* and developed into a four-part test.⁴⁰ Consequently, any hypothetical legislation regarding child-targeted advertising that might limit the rights of commercial speech must pass the scrutiny of this test.

A. Part One

Firstly, the type of content being advertised must be legal and showcased in a non-misleading manner.⁴¹ If not, this means the content has no First Amendment protection and additional legislation would be unnecessary and redundant.⁴² As junk food is currently a legally sold product for all ages, hypothetical legislation in this arena would pass the first part of this criteria. However, the scope of what defines misleading content creates ambiguity in regard to which regulations could pass. It should be noted that the Supreme Court has clarified that commercial speech is generally deserving of First Amendment protection as far as the advertising is informational. Consequently, bans may be granted for advertising that is “more likely to deceive the public than to inform it.”⁴³ Even then, the Court holds that it would much rather prescribe mandated warnings

38 *Ginsberg v. New York*, 390 U.S. 629 (1968).

39 *Brown v. Entertainment Merchants Assn.*, 564 U.S. 786 (2011).

40 *United States et al. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000).

41 *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980).

42 *Id.* at 564.

43 *Virginia State Pharmacy Board*, 425 U.S. at 748.

or additional informative speech to counteract deceitful marketing than take away a person's right to speech altogether.^{44,45}

Scholars, health experts, and government agencies have argued that any advertisement could be argued as deceitful if it is directed towards a child, as children have less understanding of the purpose of advertisements. Additionally, researchers argue that the misleading nature of these advertisements is partially to blame for the obesity epidemic of modern society.^{46,47,48,49} The government has addressed this interpretation of misleading within advertising, but only to a certain extent. The FTC, the government's prime advertising regulatory agency, judges deceitful advertising based on a commercial's intended audience. Thus, the agency has restricted marketing that promotes toys with seemingly non-misleading exaggerations from an adult perspective, but which may be more confusing and deceitful to the target child audience.⁵⁰

However, this is a more in depth interpretation of the word misleading than has been laid out by the Court. It has defined the term as using false names in professional practice with the intention to deceive⁵¹ or being unclear on the full cost of a service,⁵² both in regard to the impact on paying customers (generally adult/

44 *Central Hudson Gas & Electric Corp.*, 447 U.S. at 557.

45 *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002).

46 *Zauderer v. Office of Disc. Counsel*, 471 U.S. 626 (1985).

47 Matthew A Lapierre ET AL., *The Effect of Advertising on Children and Adolescents*, 140 American Academy of Pediatrics (2017).

48 *Food Marketing to Children and Adolescents*, Federal Trade Commission (Apr. 7, 2014), <https://www.ftc.gov/food-marketing-to-children-and-adolescents>.

49 Rita-Marie Cain Reid, *Embedded Advertising to Children: A Tactic That Requires a New Regulatory Approach*, 51 Wiley Online Library (2014).

50 Mary Story, *Food Advertising and Marketing Directed at Children and Adolescents in the US*, 1 International Journal of Behavioral Nutrition and Physical Activity (2004).

51 *Hasbro, Inc.*, 116 F.T.C. 657 (1993) (consent order). See also *Mattel, Inc.*, 79 F.T.C. 667 (1971) (consent order)

52 *Friedman v. Rogers*, 440 U.S. 1 (1979).

teenage audiences). Specific applications to misleading advertising in regards to a younger audience or those with undeveloped skepticism and discernment has not been explored by the Court.

As KidVid earlier exemplified, the FTC toes a careful line between its definition of misleading in regards to advertisements for children and what the Court has explicitly stated is constitutional. Even with the FTC's more progressive rulings, it still does not have the capability to restrict advertisements that have no dishonest claims. The Court has not established if an advertisement that does not technically lie about the ingredients or capabilities of a product, but alludes to fit, healthy children (falsely) being the prime consumers of junk food, is considered misleading.

B. Part Two

The second Central Hudson qualification is whether the stated government interest in restricting the advertising is significant.⁵³ Let's Move,⁵⁴ Safe Routes to School,⁵⁵ and Head Start⁵⁶ are all government initiatives that have been implemented with the goal to improve childhood health and prevent obesity from a young age. Clearly, there is a substantial government interest in improving the health of children. However, the question at hand is not necessarily whether the government has an interest in preventing obesity, but if the government has an interest in preventing content from reaching children that may increase obesity.

When considering the goal of protecting children from harmful media in general, governmental interest is splintered. In terms of child protection from public broadcast media over television and radio, the government has defined its interest as present. In the majority opinion of *FCC v Pacifica*, the Court highlighted that certain speech can

53 *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985).

54 *Central Hudson Gas & Electric Corp.* 447 U.S. at 568.

55 Let's Move, <https://letsmove.obamawhitehouse.archives.gov/> (last visited Mar. 3 2023).

56 Safe Routes To School, <https://www.saferoutesinfo.org/> (last visited Mar. 3 2023).

trigger a more negative impact in a child than an adult.⁵⁷ Even the dissent emphasizes that “the government unquestionably has a special interest in the wellbeing of children.”⁵⁸ However, in other forms of media, the government holds fast in allowing virtually all speech outside of the obscene to be accessed by children. Even intense violence and depictions of sexual assault in video games are protected.⁵⁹

This is a stark contrast from its position on broadcast media, which gives the FCC power to restrict what is deemed obscene, indecent, or profane. In terms of the law, obscenity is defined as content that appeals “to an average person’s prurient interest”, “depict[s] or describe[s] sexual conduct in a ‘patently offensive’ way”, and “as a whole, lack[s] serious literary, artistic, political scientific value.”⁶⁰ Indecency is defined as content that “portrays sexual” subjects “in a way that is patently offensive” but does not fulfill the requirements to be obscene.⁶¹ Profanity consists of “grossly offensive language that is considered a public nuisance.”⁶² With these definitions taken into account, it is clear that in order to restrict speech in broadcast media, there is a much lower bar to reach than restricting speech in other kinds of media such as cable or satellite tv and radio. The FTC gives broad guidelines prohibiting misleading or unsubstantiated claims over the internet, but as elaborated upon earlier, what is defined as misleading has not been made clear by the Supreme Court. More in depth regulation is controlled by the private sector such as social media companies, but the constitutionality of these regulations is often a contentious topic. This is why concrete case law around advertising in more modern technologies would be necessary to predict which advertising regulations are truly constitutional.

57 Office of Head Start, <https://www.acf.hhs.gov/ohs/about/head-start> (last visited Mar. 3 2023).⁵⁷ *Pacifica Foundation*, 438 U.S. at 758.

58 *Id.* at 726.

59 *Brown, et al. v. Entertainment Merchants Assn. et al.*, 564 U.S. 786 (2011).

60 Federal Communications Commission, *Obscene, Indecent, and Profane Broadcasts* (2019).

61 *Id.*

62 *Id.*

Broadcast media skirts around full First Amendment regulations for multiple reasons, two of which are outlined by the Pacifica Court. The Court first explains that “the broadcast media [has] established a uniquely pervasive presence in the lives of all Americans,” and second, that it is “uniquely accessible to children,” even those who are too young to read.⁶³ The Court further explains this pervasiveness when discussing how broadcasts are randomly tuned in and out of, which prevents adequate warnings, causing indecent content to be unleashed without a user even knowing what they will be tuning into before it is too late.⁶⁴ The reasons given to restrain broadcast media more heavily are the very same reasons that could be applied to the internet and ads on social media. There is no way to guarantee what a user may see without warning when opening a social media app. Additionally, media outlets are easily accessible, and with the omnipresence of handheld devices, children are frequently tuning into these outlets and webpages with little supervision. In this instance it is important to note that the Pacifica decision, in which this differentiation of protection relies on, was supported by only five out of the nine justices. Again, in 2012, the Court determined that the FCC’s regulatory rights were indeed constitutional but in another 5-4 split.⁶⁵ Clearly, the Court has a difficult time determining the constitutionally supported extent of speech regulation and defining which speech repeals are unbiasedly beneficial for children and/or the general public.

Ultimately, the Court is firm in holding that the rights of children shall not be put above those of the adult. The Pacifica Court refers to the following reasoning in *Butler v Michigan* for repealing speech restriction geared to protect children: it unconstitutionally diminishes adult media exposure to a level that is only “fit for children.”⁶⁶ A predominant, if not the prime, reason for the failure of the FTC’s proposed *KidVid* legislation abides by similar logic. By reducing

63 *Pacifica Foundation*, 438 U.S. at 749.

64 *Id.*

65 *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009).

66 *Butler v. Michigan*, 352 U.S. 380 (1957) at 380.

television commercials (to audiences with broad age ranges) to avoid junk food promotion for the sake of impressionable children, adults would be subjected to the same standards deemed permissible for children. The commercial speech doctrine, first established by *Virginia State Pharmacy Board v Virginia Citizens CC*, provides advertisers the right to advertise to consumers and gives consumers the right to hear from advertisers.⁶⁷ Ultimately, although the government has an interest in lowering obesity rates and protecting children, it will not do so at the expense of First Amendment values.

C. Part Three

Third, the asserted restriction must markedly and directly advance the government's interest.⁶⁸ In this scenario, the government's interest is to reduce childhood obesity. While there is reputable research correlating junk food advertising to increased rates of obesity, the data and information is limited. A direct, causal link between the two is not widely accepted as there are many other factors to consider, such as socioeconomic status, genetics, family life, etc. Additionally, research exploring the impact of specifically online advertisements is sparse and difficult to execute. With an increase of tailored advertisements (curated for individual users based on third party data collection) and blurred advertisements (promotion of products disguised as normal entertainment or educational content),⁶⁹ there are even more confounding variables to account for in any scientific study. Trying to assess ad content or frequency and the resulting impact on children's obesity rates is overly variable as each child is being served curated content. Thus, the standard of scientific research that hypothetical advertisement restrictions must have to prove capable of "markedly and directly"⁷⁰ carrying

67 *Virginia State Board of Pharmacy et al. v.* 425 U.S. at 748.

68 *Central Hudson Gas & Electric Corp.* 447 U.S. at 557.

69 *Blurred Lines: Advertising or Content?*, Federal Trade Commission (December 4, 2013), <https://www.ftc.gov/news-events/events/2013/12/blurred-lines-advertising-or-content-ftc-workshop-native-advertising>.

70 *Central Hudson Gas & Electric Corp.* 447 U.S. at 568.

out the government's interest is crucial to define. *Brown v Entertainment Merchants Assn.* gives insight into how this standard has been applied. In this case, the Court concluded that California had failed to "draw a direct causal link between violent video games and harm to minors."⁷¹ As the Court examined the research to prove such a link, it concluded that only a correlation between violent video games and aggressive behavior could be drawn. One of these dismissed studies is surprisingly similar to an oft-cited research paper tying junk food advertising to obesity. This junk food advertising analysis draws from multiple experiments and concludes that, on average, children eat 30 more calories minutes after viewing a junk food advertisement than children who do not. This study also demonstrates that usually these dietary choices are of lower nutritional value, but admits that the evidence is low to moderate at best.⁷² In *Brown*, a study involved children acting slightly more aggressive or loud in the few minutes after playing a violent video game compared to a nonviolent one.⁷³ If this sort of study has been dismissed by the Supreme Court before, it will likely be dismissed again.

Without adequate research to prove a causal relationship, a proposed law will not pass this third requirement. While previously ads were curated to display similar content to everyone, recent advertisement techniques have focused on individual users, making studies in this realm increasingly difficult to execute. This, combined with the plethora of other factors that contribute to obesity, suggests the Court would interpret restrictions on this area of advertising as excessively broad.

71 *Brown, et al. v. Entertainment Merchants Assn. et al.*, 564 U.S. 786 (2011) at 799.

72 B. Sadeghirad, T. Duhaney, et. al, *Influence of unhealthy food and beverage marketing on children's dietary intake and preference*, 17 *Obesity Reviews*, 945-959, (October 2016).

73 *Brown*, 564 U.S. at 800.

D. Part Four

The fourth Central Hudson test, and the most consistently failed prong, is whether or not the advertising restriction is sufficiently tailored to bring about the asserted interest.⁷⁴ The Supreme Court has perpetually strengthened its position on First Amendment protection, asserting that adults have a right to information even at the expense of children having improper exposure. In *US v Playboy*, the decision was made that if “a plausible, less restrictive alternative” is available for “a content-based speech restriction,” it must be proved that the more restrictive option is necessary to achieve the asserted interest. Advertising today is so pervasive in all forms of media that to prevent children’s exposure to junk food ads, marketing would have to be restricted on every medium.

The debate over what defines a sufficient tailoring has been unclear, with split opinions on the issue. No matter how noble the cause the government chooses to carry forth, if the legislation is more restrictive than deemed necessary, the regulation will fail. As in *Playboy*, the interest at hand of protecting children is overshadowed by the declared, overbearing means of achieving this goal. The case dealt with the Telecommunications Act of 1996 and was analyzed for its section 505—requiring a ban of sexually oriented programming from outside the hours of 10pm to 6am. This section was deemed unconstitutional, as its section 504 requiring a scrambling of this programming for non-subscribers was seen as just as effective and less restrictive.

A ban restricting all advertising geared towards children is undoubtedly more restrictive than the Court has deemed necessary, as it would inevitably restrict the amount of content-based speech that would reach adult consumers. Thus, neither a narrowly tailored law nor an all encompassing law would be able to both substantially and directly carry out the government’s interest in slowing the childhood obesity rate through advertising law.

E. Cigarettes

The outlined four-part test above is a theoretical framework for Courts to follow but does not, understandably so, give a concrete or comprehensive list of exact situations that allow for advertising limitations. Understanding which products have received the kinds, or similar kinds, of restrictions proposed towards junk food is important, then. In this commercial speech arena, notably only one type of legal good has actually faced the kinds of restrictions that junk food has been threatened with: tobacco. Analyzing the Court's stance on commercial speech protection at the times of these restrictions and what similarities there may be between the two categories of product is necessary.

After the passage of the Public Health Cigarette Smoking Act in 1972 and the subsequent lawsuit of Capital Broadcasting Company v. Mitchell, Congress was provided an expansive blanket of authority to "prohibit the advertising of cigarettes in any media."⁷⁵ The case was appealed but failed to reach the Supreme Court as it was denied certiorari. The Federal District Court underlined the type of speech protected by the First Amendment at the time, explaining that the radio companies in the case had not lost their right to express their opinions over whether or not cigarette smoking was bad, and thus, the company's "speech [was] not at issue."⁷⁶ Staying consistent with the logic of this ruling, restrictions on junk food advertising, or food advertising in general, would have easily passed. Seven years later, the Supreme Court provided more clarity on the protection of commercial speech in *Virginia State Pharmacy Board v Virginia Citizens Consumer Council*. Commercial speech was finally distinguished as valuable as the perceived consumer's interest in commercial information was seen as "keen, if not keener by far, than his interest in the day's more urgent political debate."⁷⁷

75 *Capital Broadcasting Company v. Mitchell*, 333 F. Supp. 582 (D.D.C. 1971).

76 *Id.*

77 *Va. Pharmacy Bd.* 425 U.S.at 748.

Although the constitutionality of the decision from Capital Broadcasting has not been tried after this standard of protection was established, a decision in 1998 solidified the restrictions that resulted from the case and expanded upon the restrictions that tobacco companies must adhere to. This decision, known as the Master Settlement Agreement (MSA), was not carried forth by law but by a settlement between 46 US states and the largest tobacco companies of the time.⁷⁸ The companies were no longer able to target youth in advertising of tobacco products by product placement in cartoons, concerts, sports games, sport team endorsements, events with large youth audiences, and billboards. They were also unable to receive any payment for promotion in tv, theater, music, and video games.

These companies also give repeated payments to the states to counteract the massive medical cost burden associated with tobacco-related disease. The likelihood of these restrictions and mandates passing constitutional scrutiny is unlikely. For example, banning tobacco billboard advertisements was included in the MSA. However, in *Lorillard*, the Supreme Court explicitly stated billboard restrictions on tobacco were unconstitutional even when considering the stated goal of protecting children.⁷⁹

In 2009, the Obama administration passed the Family Smoking Prevention and Control Act (FSPCA).⁸⁰ This act disallowed tobacco sponsorships, free sampling of tobacco, branding of non-tobacco merchandise, billboard advertising, and the use of colors outside of black and white on packaging. The billboard restriction was almost immediately overturned in a Kentucky District Court case as comparisons were drawn between the new law and what was

78 Master Settlement Agreement, National Association of Attorneys General (Nov. 13, 2018), <https://naagweb.wpenginepowered.com/wp-content/uploads/2020/09/2019-01-MSA-and-Exhibits-Final.pdf>.

79 *Lorillard Tobacco Co.* 533 U.S.

80 Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, Div.A, Title I, 123 Stat. 1776 (2009) (codified at 21 U.S.C. § 387 et seq (2012)).

outlined in *Lorillard*.⁸¹ On appeal, the Sixth Circuit upheld most of the restrictions on tobacco that the Kentucky Court affirmed.⁸² On a separate appeal, the plaintiffs chose to only challenge the FSPCA's mandate of graphic images being displayed outside of tobacco boxes (these images included victims of tobacco addiction and the physical repercussions).⁸³ Thus, the rest of the restrictions weren't subject to further constitutional scrutiny. At face value it might seem that a court would allow certain restrictions on junk food advertising such as banning branding on non-junk food merchandise (i.e. on toys or clothes) if these restrictions have been deemed permissible for tobacco. Upon closer inspection, the two circumstances in which tobacco and junk food advertising restrictions have and would come to pass are very different. The constitutionality of the restrictions was never tried by the Supreme Court (besides the billboard bans) which means the case law is less binding. Secondly, children are legally allowed to eat junk food but smoking cigarettes at that age is not permitted. Thirdly, the MSA has already established many of these restrictions so it is less shocking for tobacco companies to implement many of these regulations. The MSA already outlines similar bans to the FSPCA such as disallowing tobacco product placement in various contexts. The same is not true for junk food. The sudden restriction of junk food advertising would be more shocking for these companies as they have yet to face the same kinds of regulations tobacco has. It is likely, then, that even more vigorous measures would be taken by these companies than have been seen from tobacco companies to assess the constitutionality of this advertising legislation. In the future, junk food advertising might face similar restrictions as tobacco advertising has, but for the stated reasons, compiled with the Supreme Court's opinion in *Lorillard*, it does not seem likely. In *Lorillard*, Justice Thomas

81 *Commonwealth Brands, Inc. et al v. United States of America et al*, No. 1:2009 cv 00117 - Document 65 (W.D. Ky. 2009).

82 *Disc. Tobacco City & Lottery, Inc. v. United States*, No. 10-5235 (6th Cir. 2012).

83 *R.J. Reynolds Tobacco Co., et al. v. FDA, et al.*, No. 11-5332 (D.C. Cir. 2012).

even expressed his concern over this exact scenario, citing how the increase of tobacco advertising restrictions might bleed into other spheres such as junk food advertising.⁸⁴

Overall, many of the restrictions facing tobacco are either outside of the Supreme Court's jurisdiction or have not been subject to Supreme Court review. In order for more secure change in the suppression of junk food advertising, efforts should not be targeted at creating new interpretations for the constitutionality of such regulations, but at evolving what has already been deemed constitutional in existing law and case law.

IV. SOLUTIONS

Though a Supreme Court ruling might be the most widespread and binding way to pass protective laws regarding children and advertising, current precedent indicates that federal law largely in favor of children at the expense of older audiences will fail to pass. However, there are other methods that may be successful alternatives to a Supreme Court ruling: increased restrictions within constitutionally deemed laws and more emphasis on vending machine regulations. The following outlines include potentially viable solutions moving forward that work in tandem with existent law.

A. COPPA and Existing Law: Increasing Protection

The Courts have made it clear that restricting free speech should be a last resort. Therefore, one of the most compelling reasons not to establish new advertising law standards or precedent is because there are still pursuable alternatives, such as enhancing existing measures within the Children's Online Privacy Protection Act (COPPA) or mandating informational speech to combat deceit.

COPPA, passed by Congress in 1998, gives the FTC responsibility to impose "requirements on operators of websites or online

services”⁸⁵ to prevent the collection of data from children or those who are under thirteen years old. If data is collected, parental consent must be given, and the information must remain completely confidential. However, parental consent can easily be falsified, particularly on social media accounts, where both ads and children are increasingly present.

The rise of social media and platform advertising has skyrocketed from the time COPPA took effect. However, while tech accounts have found themselves in hot water over not taking children’s privacy laws seriously enough (in 2019 TikTok was ordered to pay \$5,700,000⁸⁶ in violations, and Youtube was fined \$170,000,000⁸⁷ on similar accounts), it is still far too simple to bypass platform age verification and privacy measures. Checkboxes affirming parental consent and scroll boxes seeking a birthdate are easily manipulated.

Facing scrutiny and recognizing the flaws with their own systems, companies like Meta announced in 2022 that they’re looking into new ways to verify age.⁸⁸ These solutions include uploading ID, recording a video selfie, and asking 3 mutual adult friends to verify age. However, one of the main drawbacks to these measures is that they are only implemented for *existing* users trying to edit their date of birth on the platform. Upwards of 40% of kids under thirteen use

85 *Children’s Online Privacy Protection Rule (“COPPA”),* Federal Trade Commission (Feb. 11, 2022), <https://www.ftc.gov/legal-library/browse/rules/childrens-online-privacy-protection-rule-coppa>.

86 *Video Social Networking App Musical.ly Agrees to Settle FTC Allegations That it Violated Children’s Privacy Law,* Federal Trade Commission (Feb. 26, 2019), <https://www.ftc.gov/news-events/news/press-releases/2019/02/video-social-networking-app-musically-agrees-settle-ftc-allegations-it-violated-childrens-privacy>.

87 Alex Gaynor, *Google and YouTube Will Pay Record \$170 Million for Alleged Violations of Children’s Privacy Law,* Federal Trade Commission (Sept. 3, 2019), <https://www.ftc.gov/news-events/news/press-releases/2019/09/google-youtube-will-pay-record-170-million-alleged-violations-childrens-privacy-law>.

88 *Introducing New Ways to Verify Age on Instagram,* Meta (June 23, 2022), <https://about.fb.com/news/2022/06/new-ways-to-verify-age-on-instagram/>.

social media,⁸⁹ so a better way to curb any rise in these numbers is to implement these new verification measures *before* users join a platform. Similarly, other social media platforms such as Yubo are taking ID verification a step further by implementing age-identification methods that can fairly accurately determine the age of a user based on facial recognition software.⁹⁰

In order for age verification measures to be standard across all platforms and to give reason for smaller companies (without the same level of public pressure to change compared to larger companies like Meta) to implement these measures, it would be most productive for updated age verification regulations to come from an addendum or alteration to COPPA. Despite the declared intentions of media companies to increase children's data protection, we have seen companies such as YouTube/Google try to ignore their knowledge of illegal collections of children's data to ultimately gain a profit.⁹¹ The wording of COPPA requires that companies have "actual knowledge" of threats to children's privacy to be held liable, which encourages platforms to turn a blind eye to issues within their systems.⁹² If COPPA was updated to address these issues while still retaining the original goal of the legislation (to protect the privacy of children online) and without violating the rights of the platforms, this adjustment would be a major step forward for the rights and protections of children in the online world.

In 2021, a new bill titled the "*Children and Teens' Online Privacy Protection Act*" was introduced to Congress by Senators Edward J. Markey and Bill Cassidy. The purpose of this legislation is to increase the protections outlined by COPPA by banning data collection on online users 16 and under (up from 12) without consent, allowing

89 Katie Canales, *40% of kids under 13 already use Instagram and some are experiencing abuse and sexual solicitation, a report finds, as the tech giant considers building an Instagram app for kids*, (May 13, 2021), <https://www.businessinsider.com/kids-under-13-use-facebook-instagram-2021-5>.

90 Yubo, <https://www.yubo.live/blog/yubos-new-age-verification-feature-helps-keep-you-safe> (last visited Mar. 3, 2023).

91 Gaynor, *supra* note 82.

92 *Children's Online Privacy Protection Rule ("COPPA")*, *supra* note 80.

for an erasure of previous data collected from a child or teen and establishing a new division for “Youth Privacy and Marketing” at the FTC.⁹³ Although these would be steps toward progress, revisions to COPPA expanding the ages of youth whose data rights are protected is futile without additional revisions specifying improved methods for determining how old these users are in the first place.

President Joe Biden proclaimed in his 2022 State of the Union address⁹⁴ that targeted advertising to children should be outlawed, and the collection of children’s personal data by tech companies should be banned. With this call to action, the FTC has taken measures to determine what legally can be done to protect children from the onslaught of advertising today. The agency recently held an event titled “Protecting Kids from Stealth Advertisements in Digital Media.”⁹⁵

During the course of this event, various speakers suggested a few novel ways to implement mandated speech that would work within what the Supreme Court has already deemed as constitutional. One of these suggestions was provided by Eva A. Van Reijmersdal, an Associate Professor of Persuasive Communication at the University of Amsterdam. She explains that “sometimes kids don’t understand that sponsoring could be a bad thing.” Many children cannot understand how sponsorships might be misleading or negative because these children say they “also do sponsorship in school where [their] parents sponsor [them] to raise money for [a] charity.”⁹⁶ This note highlights the idea that even if advertisements are clearly labeled and easily identifiable, children may still be misled about the purpose of such advertisements. She suggests a way to combat this is

93 Text - S.1628 - 117th Congress (2021-2022): Children and Teens’ Online Privacy Protection Act, S.1628, 117th Cong. (2022), <https://www.congress.gov/bill/117th-congress/senate-bill/1628/text>.

94 *2022 State of the Union Address*, The White House (Mar. 1, 2022), <https://www.whitehouse.gov/state-of-the-union-2022/>.

95 Alex Gaynor, *Protecting Kids from Stealth Advertising in Digital Media*, Federal Trade Commission (May 11, 2022), <https://www.ftc.gov/news-events/events/2022/10/protecting-kids-stealth-advertising-digital-media>.

96 *Id.* at 12.

by curating “one icon” for all platforms, content types, nationalities, and countries that would function as a flag for both children and adults, indicating content is being advertised. Over time, this icon could help make all ages of users more aware when they are being marketed to in an age where even adults have difficulty discerning between candid reviews and paid sponsorships.

The federal government has already determined that mandated nutritional food labels are constitutional as they require food manufacturers to be honest about the product they are putting forward into the market.⁹⁷ A mandated icon requiring advertisers and influencers to be honest about the product they are promoting to the world falls under this same sort of logic. Although mandated icons would not bring about advertising restrictions, they may increase the ability for children to distinguish between normal and advertising content.

B. Vending Machines: A Closer Look

Vending machines can be an effective form of advertising, and they have a heavy presence within public schools, where they contain energy-dense, high-fat foods. The easy access children have to these machines is arguably a contributor to growing obesity levels in kids.⁹⁸ While vending machines may be disruptive to health, the fact that children’s main access to them comes from schools is actually beneficial for creating legislation. Public schools do not have the same First Amendment freedoms as commercial speech agencies⁹⁹—this means that restrictions for food advertisements within schools would likely not have to undergo the four prong test, and, therefore, the regulations would be easier to pass.

97 H.R.3562 - 101st Congress (1989-1990): Nutrition Labeling and Education Act of 1990, H.R.3562, 101st Cong. (1990), <https://www.congress.gov/bill/101st-congress/house-bill/3562>.

98 ChangeLab Solutions, *Restricting Food and Beverage Marketing in Schools*, (2017), https://www.changelabsolutions.org/sites/default/files/Restricting_Food_and_Beverage_Marketing_in_Schools-FIN AL-201705.pdf.

99 *supra* note 82.

In the case *Hazelwood School District v Kuhlmeier*,¹⁰⁰ precedent was set that ensures speech restrictions in schools are considered reasonable so long as the policy is consistent with the school's purpose – educating students. Furthermore, any regulation must be reasonable and viewpoint neutral. Arguably, “a policy will likely be considered reasonable if it promotes a school environment focused on learning rather than commercial activity and protects and promotes student health and welfare by excluding advertising that is inconsistent with the district's wellness policy,” a position which upholds the idea of increasing vending machine regulations in schools.

One of the first national restrictions regarding public-school vending machines came in 2016, when the USDA established a rule that food and beverages could not be promoted in schools, unless those products met the USDA Smart Snacks in School nutrition standards.¹⁰¹ There have also been many other initiatives passed to promote healthy nutrition in schools, such as the Healthy, Hungry Free Kids Act. However, these programs focus on school breakfasts and lunches and only require that vending machines be turned off during these periods. For the rest of the day, vending machines are left on.

A research study in Florida in 2010 analyzed children's behavior regarding vending machines in middle schools.¹⁰² The study found that even when vending machines offered healthy options, so long as there were unhealthier options, children consistently chose items that had negative health influences. Furthermore, another research study on this topic was conducted in 2020. This study also followed middle-school aged children, but this time, it followed them across 40 states and for 3 years. The results of the research found that

100 *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988).

101 *supra* note 82.

102 Sohyun Park, *The Impact of the Availability of School Vending Machines on Eating Behavior During Lunch: The Youth Physical Activity and Nutrition Survey*, 110 *Journal of the American Dietetic Association* (2010).

stronger vending machine restrictions correlated with a decrease in child obesity.¹⁰³

These studies suggest that increasing vending machine regulations would be beneficial. Vending machines are advertisements that dangle enticing, unhealthy food right in front of children, who are growing ever more susceptible to obesity issues. Vending machine regulations would be particularly helpful, especially because they would help protect older children in schools as well, who are still susceptible to advertising and obesity, but who are left out of other protection measures, such as COPPA.

V. CONCLUSION

The vast swaths of information that are transferred to the public population today are leagues ahead of the capabilities of speech dissemination when the Constitution was originally written. Consequently, the law has been forced to enroll in a race between its own growth and technological advancement. As explored, growth of the advertising industry has been met with backlash from scholars and health experts, due to its negative correlative effect on child development and health, evidenced by ever-increasing obesity rates. However, precedent under the First Amendment regarding consumer and advertiser protection often supersedes the desire for increased child protection in this realm. In order to combat these legal obstacles, regulations preventing junk food advertising from reaching children should be focused less on modifying Supreme Court case law and more on strengthening existing laws and exploring viable protections within what the Court has already deemed constitutional.

103

Grace Chen, *New Study Shows Vending Machine Laws Yield Positive Health Results in Schools*, (Oct. 5, 2020), <https://www.publicschoolreview.com/blog/new-study-shows-vending-machine-laws-yield-positive-health-results-in-schools>.