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Giving New Meaning to ‘Watch What You Eat’: An Argument for FTC Regulation of Television Junk Food Advertising Targeting Children

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GIVING NEW MEANING TO 'WATCH WHAT YOU EAT': AN ARGUMENT FOR FTC
REGULATION OF TELEVISION JUNK FOOD ADVERTISING
TARGETING CHILDREN

by
Sara Spencer Noggle

Submitted in partial fulfillment of the requirements of the
King Scholar Program
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GIVING NEW MEANING TO 'WATCH WHAT YOU EAT': AN ARGUMENT FOR FTC REGULATION OF TELEVISION JUNK
FOOD ADVERTISING TARGETING CHILDREN

SARA SPENCER NOGGLE¹

INTRODUCTION

In recent years, health officials have become increasingly alarmed by the rapid increase in obesity among American children. The American Academy of Pediatrics considers the childhood obesity epidemic to be an “unprecedented burden” on children’s health.² Moreover, because 80% of obese children become obese adults, the epidemic has serious consequences for the future of the American public health system. Numerous studies have documented a correlation between television advertising and childhood obesity rates (one which goes beyond the fact that children who watch television are less likely to have sufficient physical activity to ward off weight gain).³ Indeed, children who are exposed to television advertising are more likely to make unhealthy nutritional choices, and to influence their parents to do the same.⁴ Currently, television advertising to children faces little governmental regulation and is subject almost exclusively to weak industry self-regulation (which is more concerned with self-preservation than self-regulation). Therefore, the time is right for the FTC to step in to regulate television advertising to children, in order to confront this public health plague. Congress should give the FTC the authority and adequate funding to develop and implement, in connection with the Department of Health and Human Services, nutrition standards for foods that can be advertised and marketed to children and limit advertising for foods that do not meet those standards. Such governmental regulation of commercial speech is constitutional and necessary to protect the health of America’s children and economy.⁵

I. THE CHILDHOOD OBESITY EPIDEMIC

In the last thirty years, health officials have become increasingly alarmed by the enormous increase in obesity among American children. According to the Centers for Disease Control and Prevention (CDC), since 1980, the proportion of overweight children aged six to eleven has more than doubled, and the rate for adolescents has tripled.⁶ Today, about one in ten two to five year olds and 15% of six to nineteen year olds are overweight.⁷ Including the large numbers of children who are “at risk” of

becoming overweight, the current percentages double to 20% for children ages two to five, and 30% for kids ages six to nineteen.

Experts fear that this enormous increase in childhood obesity represents an “unprecedented burden” on children’s health.⁸ Almost 60% of overweight children have at least one cardiovascular risk factor such as hypertension.⁹ Moreover, medical complications common in overweight children also include type 2 diabetes, respiratory ailments, orthopedic problems, trouble sleeping, and depression.¹⁰ The Surgeon General has predicted that preventable morbidity and mortality associated with the obesity epidemic may exceed those associated with cigarette smoking.¹¹ And considering the fact that an estimated 80% of overweight adolescents continue to be obese into adulthood,¹² the implications of childhood obesity on the nation’s health—and on health care costs—are huge.¹³

II. THE CORRELATION BETWEEN TELEVISION ADVERTISING AND CHILDHOOD OBESITY

In an effort to pinpoint the causes of this disturbing trend, experts have pointed to a range of potential contributing factors to the rise in childhood obesity that are unrelated to media: a reduction in physical education classes and after-school athletic programs, an increase in the availability of sodas and snacks in public schools, the growth in the number of fast-food outlets across the country, the trend toward “super-sizing” food portions in restaurants, and the increasing number of highly processed high-calorie and high-fat grocery products.¹⁴

It is only recently that experts have begun to explore the connection between media use (television, in particular) and childhood obesity, noting that during the same period in which childhood obesity has increased so dramatically, there has also been an explosion in the amount of media targeted to children, including television shows and videos, specialized cable networks, video games, computer activities, and Internet web sites.¹⁵ Children today spend an average of five-and-a-half hours a day using the media—more time than they spend doing almost anything else.¹⁶ Statistics show that three of these hours are spent directly in front of the television.¹⁷ Much of the media targeted to children is laden with elaborate advertising campaigns, many of which promote foods such as candy, soda, and snacks. Indeed, it is estimated that the typical child sees about 40,000 advertisements a year on television alone,¹⁸ and will see 360,000 television advertisements by the time that she graduates from high school.¹⁹

The first major evidence that children's media consumption may be related to their body weight came in a 1985 article in the journal of *Pediatrics*, and it was dramatic. An analysis of data from a large national study of more than 13,000 children, the National Health Examination Survey found significant associations between the amount of time that children spent watching television and the prevalence of obesity.²⁰ The authors concluded that, among 12 to 17 year olds, the prevalence of obesity increased by 2% for each additional hour of television viewed, even after controlling for other variables such as prior obesity, race, and socio-economic status.²¹ Indeed, according to the authors, "only prior obesity had a larger independent effect than television on the prevalence of obesity." In a commentary published in 1993, the authors went on to note that another interpretation of their findings is that "29% of the cases of obesity could be prevented by reducing television viewing to 0 to 1 hours per week."²²

Since this first pivotal study was published, more studies have found a statistically significant relationship between media use and rates of obesity.²³ For example, analysis of data from a nationally representative survey of more than 700 children ages 10 to 15 years old conducted in the late 1980s concluded that "the odds of being overweight were 4.6 times greater for youth watching more than 5 hours of television per day compared with those watching 0 to 1 hours," even when controlling for prior overweight, maternal overweight, race, and socio-economic status.²⁴ The authors concluded, "[e]stimates of attributable risk indicate that more [than] 60% of overweight incidence in this population can be linked to excess television viewing time."²⁵ Similarly, a study based on the CDC's 1999 Youth Risk Behavior Survey, which sampled more than 12,000 high school students nationwide, found that watching television more than 2 hours a day was related to being overweight; these findings were consistent for the entire student population, controlling for race, ethnicity, and gender.²⁶

Researchers, health professionals, and advocates have theorized many ways that media might contribute to childhood obesity. These claims can be grouped into two broad theories: (1) The time that children spend using the media displaces time spent in more physical activities; and (2) The food ads to which children are exposed (primarily on television) influence them to make unhealthy food choices.

A. TIME SPENT IN FRONT OF THE TELEVISION DISPLACES TIME SPENT DOING PHYSICAL ACTIVITIES

Almost from birth, American children are spending a substantial part of every day of their lives

using the media—primarily television.²⁷ But the time that children spend using media does not necessarily mean a decrease in time spent in physical activities. Surprisingly, the results of the studies that have examined this relationship have been mixed. Some studies have found a weak but statistically significant relationship between hours of television viewing and levels of physical activity,²⁸ while others have found no relationship between the two.²⁹ While logic suggests that extensive television viewing is part of a more sedentary lifestyle, the evidence for this relationship has been surprisingly weak to date. In order for this to be true, as one study noted, children who watch less television would have to be choosing physically vigorous activities instead of television, rather than some other relatively sedentary pastime such as reading books, talking on the phone, or playing board games.³⁰

Another possibility is that the act of watching television itself actually reduces children's metabolic rate, contributing to weight gain. One study of 8 to 12 year olds found that television viewing decreased metabolic rates even more than resting or sleeping, but several other studies found no such effect.³¹

The fact that most studies have failed to find a substantial relationship between the time that children spend watching the television and the time that they spend in physical activity may suggest that the *nature* of television viewing—that is, what children watch on TV—may be as (or more) important than the number of hours that they watch.

B. FOOD ADVERTISING INFLUENCES CHILDREN TO MAKE UNHEALTHY FOOD CHOICES.

There is growing evidence that the food advertising to which children are exposed through the media may contribute to unhealthy food choices and weight gain. Over the same period in which childhood obesity has increased so dramatically, research indicates that the number of advertisements that children view has increased as well. In the late 1970s, researchers estimated that children viewed an average of about 20,000 television commercials a year; in the late 1980s, that estimate grew to more than 30,000 a year.³² As the number of cable channels exploded in the 1990s, opportunities to advertise directly to children expanded as well. The most recent estimates are that children now see an average of more than 40,000 television advertisements each year, and will have seen 360,000 commercials by the time that they graduate from high school.³³

The vast majority of advertisements that are targeted to children are for food: primarily candy (32% of all children's ads), cereal (31%), and fast food (9%).³⁴ One study documented approximately 11

food commercials per hour during children's Saturday morning television programming, estimating that the average child viewer may be exposed to one food commercial every 5 minutes.³⁵ According to another study, even the two minutes of daily advertising targeted to students in their classrooms through Channel One expose them to fast foods, candy, soft drinks, and snack chips in 7 out of 10 commercial breaks.³⁶

Most of the studies about children's consumer behavior have been conducted by marketing research firms and have not been made publicly available.³⁷ However, the fact that marketers spend billions of dollars each year advertising directly to children provides strong evidence that they believe that it works. For example, fast food outlets alone spend \$3 billion every year in television ads targeted to children.³⁸ Moreover, recent years have seen the development of marketing firms, newsletters, and ad agencies specializing in the children's market.³⁹ The New York Times has noted that "the courtship of children is no surprise, since increasingly that is where the money is," and added that marketing executives estimate that children under 12 spent \$35 billion of their own money and influenced \$200 billion in household spending in 2004.⁴⁰

Scientific studies that are available in the public realm indicate that advertising to children is an extremely effective way to sell products—especially food. Studies have demonstrated that from a very young age, children influence their parents' consumer behavior. For example, several studies have found that the amount of time that children had spent watching the television was a significant predictor of how often they requested products at the grocery store, and that as many as three out of four requests were for products seen in television advertisements. These studies have also found that children's supermarket requests have a high rate of success in influencing their parents' purchasing choices.⁴¹

One study found that among children as young as age 3, the amount of weekly television viewing was significantly related to their caloric intake as well as their requests and parent purchases of specific foods that they saw advertised on television.⁴² Another study manipulated advertising shown to 5 to 8 year olds at summer camp, with some viewing ads for fruit and juice, and others viewing advertisements for candy and Kool-Aid. This study found that children's food choices were significantly impacted by which advertisements the children saw.⁴³

Researchers are also beginning to document a link between watching television and children's consumption of fast food and soda, a possible result of exposure to food advertising. A recent study found that students in grades 7 through 12 who frequently ate fast food tended to watch more television than other students.⁴⁴ Another study found that middle-school children who watched more television tended to consume more soft drinks.⁴⁵

Other evidence of television's potential negative impact on children's dietary habits indicates a negative relationship between watching television and consuming fruits and vegetables. The USDA's Dietary Guidelines recommend that children eat three to five daily servings of fruits and vegetables, yet only 1 in 5 children meet the guideline, and one-quarter of the vegetables consumed are reportedly french fries.⁴⁶ In a recent study, more than 500 middle school students from ethnically diverse backgrounds were studied over a 19-month period to determine whether daily television and video viewing predicted fruit and vegetable consumption.⁴⁷ Researchers found that for each additional hour of television viewed per day, daily servings of fruit and vegetables decreased among adolescents.⁴⁸ The researchers who conducted the study conclude that this relationship may be a result of television advertising.⁴⁹

The research also suggests that television advertisements may also contribute to children's misconceptions about the relative health benefits of certain foods. One of the earlier studies found that 70% of 6 to 8 year olds believed that fast foods were more nutritious than home-cooked foods.⁵⁰ Another study showed a group of 4th and 5th graders a series of paired food items and asked them to choose the healthier item from each pair (for example, corn flakes or frosted flakes).⁵¹ Children who watched more television were more likely to indicate that the less healthy food choice was the healthier one.⁵²

III. CURRENT CONTROLS OVER ADVERTISING

Governmental control over advertising in general is vested primarily in the Federal Trade Commission (FTC), which is the agency in charge of determining whether advertising is deceptive, false, or misleading and to which is delegated the responsibility to take action against the sponsors of such material.⁵³ However, children's advertising guidelines are currently regulated by the Federal Communications Commission (FCC), which requires compliance before renewing a station's license. The FCC does not appear to examine the content of advertisements directed at children; rather, its focus is on

restricting the time during which commercials can be aimed at children under the age of 12.⁵⁴ The FCC is charged with carrying out the mandates of the Children's Television Act of 1990.

The FCC primarily relies on the advertising industry to self-regulate its marketing activities to children. In fact, the FCC website specifically mentions CARU, the industry regulatory body, as a source of redress for complaints. However, industry self-regulation is weak, ineffectual, and motivated less by consumer protection than self-protection. Thus, meaningful governmental intervention is required in order to effectively limit advertising aimed at children.

A. CHILDREN'S TELEVISION ACT OF 1990

The Children's Television Act of 1990 (the Act) encompasses almost all of the law dealing with television advertising to children. However, it is full of loopholes and is even routinely violated by advertisers without sanction. The Act mandates that all broadcasters carry children's educational or instructional programming as a condition for license renewal.⁵⁵ However, under the current law, stations can cite public service announcements (PSAs) or short vignettes as evidence of compliance.⁵⁶ These actions may fulfill the letter of the law; however, they do not fulfill its intent. Moreover, networks appear to be flagrantly violating the law by airing cartoons and claiming them as educational programming.⁵⁷

In addition, the Act also limits commercial time during children's programming to 10.5 minutes per hour on weekends and 12 minutes per hour on weekdays (the time is prorated for programs of less than an hour in duration).⁵⁸ The commercial time limits apply exclusively to programming originally produced and aired primarily for an audience of children ages 12 and younger.⁵⁹

Moreover, the Act directs the FCC to consider whether children's programs based on toys constitute program-length commercials, and thus fall under the Act.⁶⁰ However, the FCC concluded that only those shows that include paid advertising for the toy(s) featured in the program can be classified as program-length commercials.⁶¹ Thus, even though it is enforcing this aspect of the Act, it appears that it is too narrow and should address *all* program-length commercials.

B. INDUSTRY SELF-REGULATION OF CHILDREN'S ADVERTISING

Children's advertising is primarily subject to the self-regulatory policies adopted under the Children's Advertising Review Unit (CARU). CARU is a division of the Council of Better Business Bureaus (CBBB), the national organization for the 117 Better Business Bureaus in the United States.⁶²

CARU was created in 1974, and is administered by the CBBB, which funds its operations through direct support from advertisers and CBBB membership dues.⁶³ CARU policy is set by the National Advertising Review Council (NARC), which is a collaboration between the CBBB and the three major advertising associations.⁶⁴ Generally, CARU reviews advertising in all media directed at children under the age of 12; to harmonize with the Child Online Privacy Protection Act of 1998, it reviews online privacy practices involving children under the age of 13.⁶⁵

CARU's guidelines⁶⁶ suggest that advertising should, among other principles, not mislead children about the nutritional benefits of products, depict appropriate amounts of a product for the situation portrayed, depict food products "with a view toward development of good nutritional practices," refrain from portraying snacks as substitute for meals, and show mealtime products in the context of a balanced diet.⁶⁷

Advocates for children's health argue that industry self-regulation is tantamount to the fox guarding the henhouse. They note that industry policies have not reduced the billions of dollars worth of advertising of low-nutrition foods that are directed at children.⁶⁸ Moreover, industry guidelines are, at best, agnostic toward nutrition, when they should have basic nutrition thresholds for foods that are appropriate to advertise to children in the first place.⁶⁹ In addition, CARU does not adequately investigate complaints about child-directed advertising: Often, when complaints are brought, CARU's eventual enforcement actions merely "nibble around the edges of the problem."⁷⁰

IV. THE NEED FOR GOVERNMENTAL RESTRICTIONS ON FOOD ADVERTISING AIMED AT CHILDREN

As discussed supra, studies show a strong correlation between childhood obesity and television advertising of food to children. Moreover, current governmental regulations are almost non-existent; those that exist are uniformly under-enforced and routinely ignored. Therefore, there is an urgent need for meaningful governmental restrictions on food advertising to children.

Most experts in the field of child health and nutrition agree that the causes of childhood obesity are complex and multidimensional. Likewise, most agree that effective prevention and treatment demands a multifaceted approach.⁷¹ But given the fact that children spend so much time with media (especially television), some advocates have pointed to media use as one of the most easily modifiable influences on overweight and obesity among children.⁷²

V. THE CONSTITUTIONALITY OF GOVERNMENT RESTRICTION OF ADVERTISING

Industry opponents of governmental regulation of advertising aimed at children argue that any more meaningful efforts to ban or restrict food advertising than those that presently exist would violate the First Amendment rights of the advertisers to spread their messages to the potential consumers of their products.⁷³ However, while the Court has recognized that commercial speech is deserving of some First Amendment protection, it has left open the possibility that certain restrictions on commercial advertising to protect consumers may be constitutional—especially if those consumers are children.

A. THE CONSTITUTIONALITY OF LIMITING ADVERTISING TO CHILDREN

Laws frequently treat children differently from adults. Children cannot drive, vote, serve in the military, or skip school. Tort, contract, and criminal law all have special rules for children, and assume that children will be subject to their parents' supervision until they reach the age of majority. The law treats children differently from adults because children are not simply miniature versions of adults. Rather, children lack the maturity to make the kinds of sound judgments that adults have the capacity—if not always the will—to make.

In its First Amendment jurisprudence, the Supreme Court has presumed that children are different from adults, and that these differences justify greater speech regulation.⁷⁴ In *Ginsberg v. New York*, for instance, the Court, reasoned that the state had a legitimate interest in protecting minors “from abuses which might prevent their growth into... well-developed men and citizens.”⁷⁵ However, in its subsequent case law, the Court has proven hesitant to approve of restrictions on speech aimed at minors. Such restrictions must meet the Court’s “strict scrutiny” test for restrictions targeted at the content of speech (i.e., such a law must be narrowly tailored to reach a compelling governmental interest).

While the Court uses strict scrutiny to evaluate restrictions on speech that are designed to protect children, it has acknowledged that such restrictions can serve a compelling governmental interest. Indeed, some constitutional law scholars argue that the constitutional law regarding children as currently construed may permit a “two-tiered” First Amendment—one for adults (with full protection for most materials) and one for children (which permits restrictions on material that is harmful to children in an effort to help parents to make choices for their children).⁷⁶ However, in practice, the Court has proven to be more likely to find a compelling governmental interest in protecting children from sexually-oriented

material than from other types of material, such as that which is violent.⁷⁷ And even when the courts have been willing to accept the claim that the physical and psychological well-being of youth is a compelling governmental interest, they have appeared to require conclusive empirical evidence that certain material is harmful to children.⁷⁸ This proof is difficult, if not impossible, to come by.

Although the Court has been reluctant to treat favorably governmental restrictions on many materials to minors, restrictions on advertising are likely to be treated more favorably by the Court. Under *Lorillard Tobacco Co. v. Reilly*,⁷⁹ such advertising restrictions will be scrutinized under the less strict Central Hudson test for commercial speech.

B. THE HISTORY OF COMMERCIAL SPEECH IN THE COURT

For thirty years, *Valentine v. Chrestensen*⁸⁰ provided the controlling rule regarding First Amendment protection for commercial speech: Speech that was commercial in nature was of insufficient public interest to justify protection under the First Amendment. Labeling the double-faced handbill at issue in the case mere commercial speech, the *Chrestensen* Court upheld the application of a city ordinance that barred distribution of commercial leaflets on public streets—an ordinance that would have been unconstitutional if applied to other types of speech.⁸¹

However, even as the Court continued to adhere to the decision, cracks in the Court's *Chrestensen* rationale emerged. For example, in *Breard v. Alexandria*,⁸² the Court rejected the First Amendment argument of a magazine salesman who had been convicted of violating a city ordinance that prohibited door-to-door sales without consent of the relevant property owners.⁸³ The Court classified the magazine salesman's activity as commercial, and thus not protected by the First Amendment.⁸⁴ Nevertheless, the Court conceded that given the public interest content of the magazines being sold, the profit motive associated with the sale of the magazines would not have caused the magazines themselves to lose First Amendment protection.⁸⁵ Even though *Chrestensen* seemed to contemplate a separation between speech of public interest and speech connected with profit-making efforts, it had begun to appear that these supposed categories of speech were not mutually exclusive.

Further chipping away at the *Chrestensen* decision came in *New York Times v. Sullivan*,⁸⁶ the landmark defamation decision issued in 1964. An Alabama police commissioner sued the Times and members of an organization whose advertisement, published in the newspaper, allegedly contained false

statements. In the advertisement, the organization protested police actions during the civil rights movement, and sought monetary contributions to a legal defense fund for Dr. Martin Luther King Jr.⁸⁷ Responding to the defendants' First Amendment arguments, the plaintiff asserted that the defendants' speech should be classified as commercial in nature and hence unprotected under *Chrestensen*. In arguing for this classification, the plaintiff stressed the context in which the defendants' statements appeared—an advertisement—and the fundraising and profit-making motivations associated with the advertisement. The Court refused to classify the defendants' speech as commercial, observing that the defendants' statements were in the context of commentary on major public issues and that the statements' content and underlying economic motivations did not strip the statements of First Amendment protection.⁸⁸

In *Pittsburgh Press v. Human Relations Commission*,⁸⁹ the Court echoed *Sullivan* by observing that speech is not rendered commercial by the mere fact that it appears in an advertisement. The *Pittsburgh Press* Court also appeared to narrow the commercial speech classification by offering a still-used definition of commercial speech: expression that “d[oes] no more than propose a commercial transaction.”⁹⁰ Ultimately, however, the Court upheld a cease-and-desist order against the newspaper, which had published help-wanted advertisements that violated Pittsburgh's human rights ordinance by distinguishing among applicants by gender.⁹¹

Finally, in 1975, the Court foreshadowed the ultimate demise of *Chrestensen*. *Bigelow v. Virginia*⁹² arose from a Virginia newspaper's publication of advertisements that noted the legality of abortions in New York and mentioned an abortion placement service that interested readers could consult. An editor of the newspaper was convicted of violating a Virginia law that prohibited the sale or circulation of any publication that encouraged the obtaining of abortions.⁹³ The Court overturned the conviction, employing a rationale that was largely tied to the First Amendment. Because it stressed that the abortion advertisement at issue had gone beyond a mere proposal of a commercial transaction, the Court appeared to indicate that the case involved either non-commercial expression or expression that should be treated as if it were non-commercial.⁹⁴

One year after the *Bigelow* decision, the Court finally overruled *Chrestensen*. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,⁹⁵ pharmacists challenged a Virginia statute

that prohibited them from advertising drug prices. Adopting the *Pittsburgh Press* definition of commercial speech as speech that does “no more than propose a commercial transaction,” the Court noted the indispensable nature of commercial speech in a free enterprise system.⁹⁶ The Court stressed that in the marketplace of ideas contemplated by the First Amendment, consumers possess a right to receive commercial information that advertisers wish to communicate; this enhances the public interest, the Court observed, by “enlighten[ing] public decision-making in a democracy.”⁹⁷ Commercial speech therefore could no longer be seen as unworthy of First Amendment protection.

However, despite recognizing the importance of commercial speech, the *Virginia Board of Pharmacy* Court declined to give it the full First Amendment protection extended to political and other non-commercial speech. Rather, the Court instituted what has come to be seen as an intermediate level of protection for commercial speech.⁹⁸ The *Virginia Board of Pharmacy* Court delineated two major features of the less-than-full protection being extended to commercial speech. First, the Court emphasized that there was no First Amendment obstacle to the government’s attempts to regulate false or misleading commercial speech.⁹⁹ In other words, deceptive commercial speech carried no claim to First Amendment protection. Second, the Court noted that no first Amendment protection would attach to commercial speech designed to promote an unlawful activity.¹⁰⁰

C. THE MODERN FOUR-PART TEST FOR GOVERNMENTAL RESTRICTIONS ON COMMERCIAL SPEECH

For about a decade after its *Virginia Board of Pharmacy* decision, the Court continued to craft the contours of the intermediate level of First Amendment protection for commercial speech. *Central Hudson Gas & Electric Corp. v. Public Service Commission*,¹⁰¹ a 1980 decision dealing with a First Amendment challenge to a New York agency regulation that barred utilities from advertising to promote the use of electricity,¹⁰² became the most important of the early commercial speech decisions during the post-*Virginia Board of Pharmacy* period. Recognizing that the regulation restricted a category of expression that was entitled to less extensive First Amendment protection than non-commercial speech,¹⁰³ the Court added substance to the intermediate level of protection contemplated by the commercial speech decisions of the 1970s. It did so by setting out the four-part test that has served as the controlling analytical framework in commercial speech cases ever since.

1. *Commercial speech must not be deceptive and must not promote illegal activity*

The *Central Hudson* test actually operates as two tests. The first part determines whether the commercial speech affected by a governmental restriction merits First Amendment protection by asking whether the affected commercial speech is non-misleading and concerns a lawful activity.¹⁰⁴ Drawing upon *Virginia Board of Pharmacy*, the Court stressed in *Central Hudson* that the intermediate level of First Amendment protection for commercial speech extends only to speech which is not misleading and which is designed to promote a lawful activity.¹⁰⁵ If the commercial speech either misleads or pertains to illegal activity, it fails part one of the test and receives no First Amendment protection.

If the relevant commercial speech qualifies for First Amendment protection under part one of the test (i.e., if it is not misleading and does not promote an illegal activity), then parts two, three, and four of the *Central Hudson* test become applicable. Parts two through four serve as a test for whether the governmental restriction nevertheless is a valid regulatory action that does not violate the First Amendment.¹⁰⁶ The intermediate level of protection (the highest protection that commercial speech can receive) contemplates that the government may restrict commercial speech in appropriate circumstances and through appropriate regulatory means without running afoul of the First Amendment. Parts two through four of the *Central Hudson* test control the determination of the appropriateness of the circumstances and of the regulatory means chosen by the government. If the government fails to establish the requirements of any of the final three parts of the four-part test, the restriction on commercial speech violates the First Amendment.¹⁰⁷

2. *Government must have a substantial interest in restricting commercial speech*

To satisfy part two of the *Central Hudson* test, the government must demonstrate the existence of a substantial interest to be served by a restriction on commercial speech.¹⁰⁸ In reality, this is not a high hurdle to reach; virtually any regulatory interest connected with furthering the public welfare appears to suffice.¹⁰⁹ For example, the Court has found a substantial governmental interest in reducing the social ills associated with gambling,¹¹⁰ in reducing the public's consumption of alcoholic beverages,¹¹¹ and in helping parents maintain control over when and how to expose their children to sensitive subjects.¹¹²

3. *Restriction on speech must directly advance governmental interest*

The third part of the *Central Hudson* test concerns the relationship between the harm that

underlies the governmental interest, and the means identified by the State to advance that interest. Under the third part of the test, the Court requires the proponents of a restrictive regulation to justify the relationship between the regulation and the public policy that it serves through studies or empirical data. The regulation must have the power to produce the desired effect in meeting its asserted goal.

Although the third part of the test has been difficult for the government to prove, the Court has not hesitated to find that a restriction on advertising directly advances a government's stated interest—especially when that interest is the protection of children.¹¹³ For example, in *Lorillard Tobacco Co. v. Reilly*,¹¹⁴ the Court found ample evidence that a Massachusetts regulation restricting the advertising and sales of tobacco products in specific outdoor locations would alleviate the problems of underage use of the products.¹¹⁵ The Court found the Attorney General's evidence that advertising was causally linked to tobacco use sufficiently compelling to determine that an advertising restriction would directly advance the State's substantial governmental interest in reducing smoking and tobacco use among minors.¹¹⁶

4. *Restriction on speech must be no more extensive than necessary*

The fourth part of the *Central Hudson* test examines whether the restriction on commercial advertising "is not more extensive than necessary to serve the interest that supports it."¹¹⁷ To withstand the fourth part of the test, the government must prove that the regulation is a good fit with the desired objective by demonstrating that less restrictive means are either unavailable, or ineffective to meet legislative goals. The commercial speech restriction is vulnerable under part four if the government could adopt alternative regulatory measures that would restrict considerably less expression than the commercial speech restriction at issue, but would further the underlying substantial interest just as well.¹¹⁸

Over time, the fourth part of the *Central Hudson* test has proven to be the one most often fatal to the governmental restriction on advertising. A restriction on advertising aimed at children is particularly problematic, because the same advertising has a protected interest in informing potential adult customers. However, an advertising restriction that is designed to reach only the media that is accessed primarily by children might survive the Court's scrutiny.

The leading case concerning restrictions on advertising directed to children is *Lorillard Tobacco*.¹¹⁹ *Lorillard* concerned a Massachusetts regulation that, among other things, prohibited the outdoor advertisement of tobacco products within 1000 feet of a school.¹²⁰ Although the Court found the

restrictions unconstitutional, it was because they were too broad of an approach to what the Court recognized to be a substantial governmental interest. The Court agreed that reducing the exposure of youth to tobacco advertising would decrease youth smoking, but the billboard bans went too far, because they constituted a complete ban on tobacco advertising in some metropolitan areas.¹²¹ As for other limitations, the Court said, “[t]o the extent that studies have identified particular advertising and promotion practices that appeal to youth, tailoring would involve targeting those practices, while permitting others.”¹²² Thus, it appears that governmental restrictions on advertising practices that appeal to youth almost exclusively would be justified under the Court’s *Central Hudson* test. Moreover, in his concurrence, Justice Thomas noted that the federal government might have more power to regulate broadcast speech than the state has to regulate print or outdoor advertising because of “special justifications.”¹²³

VI. THE ROLE OF THE FTC

The FTC currently has authority over advertising in general, with the exception of children’s advertising—which is presently controlled by the FCC and by industry self-regulation, as described supra. However, the FTC is the appropriate agency by which government can institute meaningful regulation of commercial advertising to children. Moreover, the agency has attempted to assert such authority in the past (although it’s authority to do so was removed by the Congress before any action could be taken).

A. THE FTC’S DECEPTION AND UNFAIRNESS AUTHORITY

Section 5 of the Federal Trade Commission Act (“FTC Act”) prohibits both unfair and deceptive acts or practices within or affecting commerce.¹²⁴ The FTC’s deception standard is set forth in the Commission’s Deception Policy Statement.¹²⁵ In essence, the standard asks whether the challenged representation or practice is one that would likely deceive a consumer acting reasonably under the circumstances in a material way—that is, in a way that affects the consumer’s conduct or choice regarding a product or service.¹²⁶ In assessing advertising or other marketing practices that affect or are directed primarily to a particular audience, the Commission considers the effect of the ad or practice on that audience.¹²⁷ Thus, the FTC’s examination of children’s advertising takes into account the limited ability of children to detect exaggerated or untrue statements.¹²⁸ The FTC has primarily used its authority

over deceptive marketing to children in cases involving depiction of toys performing acts in commercials that do not occur in real life.¹²⁹

The FTC's current unfairness standard is contained in its "FTC Policy Statement on Unfairness."¹³⁰ The Commission's "unfairness" jurisdiction focuses on one primary inquiry: Whether the practice causes substantial and unjustified injury to consumers.¹³¹ Although the FTC once considered whether the conduct in question violates public policy as established by statute, common law, industry practice, or otherwise, it no longer takes public policy considerations into account.¹³² The independent nature of the consumer inquiry criterion does not mean that every consumer injury is "unfair." Rather, to justify a finding of unfairness, the practice must satisfy three tests. First, the injury must be substantial. Second, the potential unfairness must not be outweighed by any countervailing benefits to consumers or competition that the practice produces. And third, there must be an injury that consumers themselves could not reasonably have avoided.¹³³

First, the injury to consumers must be substantial. The Commission will not consider any theoretical or speculative harms.¹³⁴ In most cases, a substantial injury has involved monetary harm, as when sellers coerce consumers into purchasing unwanted goods or services, or when consumers buy defective goods or services on credit but are unable to assert against the creditor claims or defenses arising from the transaction.¹³⁵ However, the FTC has also found that unwarranted health and safety risks may also support a finding of unfairness. For example, in *Phillip Morris, Inc.*¹³⁶, the company had distributed free razor blades in newspaper advertising in such a way that they could come into the hands of small children. The Commission determined that this posed such a health and safety risk that it was essentially an unfair practice. However, emotional harm or other such subjective types of harm will not ordinarily make a practice unfair. For example, the Commission has refused to ban an advertisement merely because it offended the taste or social beliefs of some viewers.¹³⁷

Second, the injury must not be outweighed by any offsetting consumer or competitive benefits that the sales practice also produces.¹³⁸ For example, most business practices entail a mix of economic and other costs and benefits for purchasers. A seller's failure to present complex technical data on his product may lessen a consumer's ability to choose, but may also reduce the initial price that he or she

must pay for the article. The Commission has indicated that it is aware of these trade-offs, and will not find that a practice unfairly affects consumers unless it is injurious in its net effects.¹³⁹

Finally, the injury must be one which consumers could not have reasonably avoided.¹⁴⁰ The FTC has emphasized that the market is largely self-correcting and dictated by consumer choices, and has largely relied on consumers to weigh the available alternatives, choose those that are the most desirable, and avoid those that are inadequate or unsatisfactory.¹⁴¹ However, the FTC has also recognized that certain sales techniques may prevent consumers from effectively making their own decisions, and that corrective action may then become necessary.¹⁴² Most of the Commission's unfairness matters are brought under these circumstances, "not to second-guess the wisdom of particular consumer decisions, but rather to halt the sort of seller behavior that unreasonably creates or takes advantage of an obstacle to the exercise of consumer decision-making."¹⁴³ Importantly, the FTC has intervened into practices in which sellers exerted undue influence over highly susceptible classes of purchasers, as by promoting fraudulent "cures" to seriously ill cancer patients,¹⁴⁴ noting that this practice unjustifiably hinders the patients' free market decisions.

B. REMEDIES AVAILABLE TO THE FTC

The Commission has a variety of tools available to it to attempt to address current harm to consumers and to prevent future harm from occurring, including law enforcement action in federal court or before an administrative law judge, issuing rules or guidelines, and consumer education. Court or administrative orders sought by the Commission prohibit deceptive or unfair claims and almost always impose "fencing-in" relief that covers claims or products beyond those that were the subject of the complaint.¹⁴⁵ In some cases, the FTC has ordered disclosures to correct or prevent the deception. In rare cases in which the challenged ads substantially contributed to the development and maintenance of a false belief that lingers in the minds of a substantial portion of consumers, the FTC has required corrective advertising to address the practice.¹⁴⁶

The Commission may also seek redress for consumers or disgorgement in cases involving dishonest and fraudulent conduct. For example, in 1996, a Commission consent order required a toy manufacturer to refund to consumers the purchase price of toy vehicles deceptively shown in television ads performing such feats as driving and flying under their own power.¹⁴⁷ In fact, the toys did not have

these capabilities and were manipulated with off-screen wires and other hidden devices to make them appear to be moving. As fencing-in relief, the FTC also required the company to send a letter to every television station that aired the commercials, advising them of the settlement and of the availability of self-regulatory guidelines used by many industry members to screen advertising directed to children.¹⁴⁸

Once a Commission order is in effect, violations of the order may result in the imposition of civil penalties. For example, a major toy manufacturer was assessed \$280,000 in civil penalties to settle charges that it violated an FTC order by misrepresenting that children could use a “Colorblaster” paint sprayer toy with little or no effort.¹⁴⁹

C. HISTORY OF THE FTC’S REGULATION OF CHILDREN’S ADVERTISING

Almost since the emergence of advertising to children on television, advocacy groups have been lobbying the FTC to step in to set limits. In 1968, a new children’s advocacy group, Action for Children’s Television (ACT), began to lobby for improvements in both the quality of programming and the amount and type of advertising allowed on children’s programs. In the early 1970’s, ACT filed numerous complaints with the FTC protesting specific child-directed advertisements, as well as a 1972 petition asking the Commission to prohibit all advertisements for food on children’s television programs.¹⁵⁰ This petition, which the FTC promptly denied, was followed by a spate of new petitions seeking restrictions to curb children’s advertising.

In 1977, ACT and the Center for Science in the Public Interest (CSPI) each petitioned the FTC for a ban on all television advertising to children under eight, as well as advertising for candy and sugared food directed to children of all ages. Those petitions argued that sugar consumption, especially between meals, is the primary cause of tooth decay, that tooth decay affects virtually every American, that there were an estimated one million unfilled cavities in the United States, and that excessive sugar consumption may contribute to more serious health problems, including obesity and heart disease.¹⁵¹ In 1978, Consumers Union of the United States, Inc. (CU) and Committee on Children’s Television, Inc. (CCT) filed a third, more sweeping, petition seeking to ban all television advertising oriented to young children, not merely advertising related to sugary foods.¹⁵²

The FTC responded to these petitions by conducting an investigation, and, in February 1978, the Staff submitted its report to the Commission, urging it to proceed with rulemaking based on the FTC

staff's conclusion that there was sufficient evidence to suggest that the youngest children could not understand the persuasive intent of commercials and that advertising of sugared foods to children of all ages may be unfair and deceptive under the FTC Act.¹⁵³ Significantly, in explaining the Commission's decision to initiate an inquiry, the staff report cited the same concerns about the "vulnerability of children" that had led it to promulgate a rule requiring health warnings on cigarette packages.¹⁵⁴ The inquiry, according to the report, was "a direct outgrowth" of the recognition that "minors constitute an especially vulnerable and susceptible class requiring special protection from business practices that would not be unlawful if they only involved adults."¹⁵⁵

The FTC's foray into aggressive consumer health protection and its children's advertising restriction (also known as its "Kid Vid" ruling) had not been cut from whole cloth. Rather, it had its origins in the FTC's Cigarette Rule of 1964, which required the tobacco industry to put health warnings on its packages.¹⁵⁶ Subsequent U.S. presidents, especially Richard Nixon, had worked actively to revitalize the once docile FTC and to turn it toward "initiat[ing] a new era of vigorous action" to protect the consumer.¹⁵⁷ As a result, the FTC had adopted a rather sweeping unfairness standard, beginning with the cigarette rule, which had since been cited approvingly by the U.S. Supreme Court.¹⁵⁸

Following the staff's recommendation to pursue rule-making aimed at limiting advertising to children, the FTC issued a Notice of Proposed Rulemaking requesting comment on three aspects of a potential rule: (1) A ban on all televised advertising for any product when the audience for that advertising is composed of a significant proportion of children who are too young to understand the selling purpose of advertising (those under the age of 8); (2) a ban on televised advertising for sugared products when the audience for that advertising is made up of a significant proportion of older children (ages 8-12) given the serious dental risks associated with the consumption of sugared foods; and (3) mandatory health disclosures and nutritional messages in advertising for sugared food when the audience is composed of a significant proportion of older children.¹⁵⁹

The Commission also requested comment on numerous factual issues, including whether there was any evidence that advertising for sugared foods caused children to consume such products and to develop tooth decay.¹⁶⁰ Resolution of this factual issue was critical to the FTC's ability to meet the legal standard for finding that conduct was "unfair" under the FTC Act.¹⁶¹ To take any kind of action based on

unfairness, the Commission recognized that it would have to prove that advertising to children misleads them, causes them to purchase unwanted products, or creates an actual or unreasonable risk of injury to them (ie, tooth decay). Whether such “injury” could be avoided, e.g., by parental intervention, would also need to be addressed.¹⁶²

In the months that followed the FTC’s proposal, hundreds of written statements were placed on the record. In January and March 1979, several hearings were held. In July 1979, the FTC concluded that adjudicative-type hearings were necessary to resolve specific factual issues regarding the ability of children to understand commercials, as well as the health effects of (i) a lack of understanding and (ii) an inability to defend against persuasive techniques.¹⁶³

The FTC’s proposed rule stirred considerable controversy among food manufacturers, broadcasters, and the press, some of which was highly critical of the FTC—dubbing it the “National Nanny,” for its regulatory zeal.¹⁶⁴ Responding to industry pressures, before the Commission could adopt the proposed rule, Congress stepped in and withdrew its authority to act. In order to curb the potential reach of Section 5 of the FTC Act, Congress enacted the FTC Improvements Act of 1980.¹⁶⁵ The Improvements Act removed the Commission’s authority to pursue any rulemaking effort based on unfairness, which had been the principal legal basis for the proposed rule. The Act also suspended the rulemaking process with respect to children’s advertising and placed a moratorium on the initiation of any new rules seeking to regulate commercial advertising as an unfair practice until congressional oversight hearings were held on the subject.¹⁶⁶ After passage of the Act, the FTC was relegated to using only its existing authority over deceptive and unfair marketing practices.¹⁶⁷ And because at that time there lacked scientific support for the proposition that advertising to children is deceptive and unfair, the FTC was forced officially to abandon its proposed rule. Soon thereafter, the FTC issued its current self-imposed guidelines on the use of its unfairness jurisdiction.

D. THE TIME IS RIGHT FOR THE FTC TO ACT

At the time of FTC’s proposed rule to limit advertising to children, few people truly understood the seriousness of the impending obesity epidemic—consumer advocates pushed for the FTC rule based on junk food’s propensity to cause dental cavities, while American public opinion polls demonstrated that the public viewed obesity as an almost non-existent issue. Moreover, extreme pressure from industry groups

and a lack of understanding about the effect of television advertising on children's choices also contributed to the demise of the FTC's only effort to restrict advertising to children.

During the last two decades, however, the United States has experienced an unprecedented rise in its citizens' body weights. At the time that the FTC originally proposed its rule, fewer than 47 percent of Americans were considered overweight, and under 15 percent were obese.¹⁶⁸ Today, it is estimated that over 60 percent of Americans are overweight and over 27 percent are obese.¹⁶⁹ While adult obesity has increased by 80 percent in the last twenty years,¹⁷⁰ there has been an equally large growth rate in childhood obesity, as discussed *supra*.

As the American obesity epidemic has surged, so have the calls from policymakers, child advocates, pediatricians, and many others, to institute policy measures to counter the obesity epidemic. Junk food has become a concern to public health experts not only because of its propensity to cause dental cavities, but also because of its strong link to childhood obesity. In light of the rapid increase in childhood obesity described *supra*, food advertisements aimed at children have come under increasing scrutiny; more and more, policy experts are advocating for public policy designed to protect children from advertising—especially advertisements for unhealthy food.¹⁷¹ For example, in 2003, a coalition of obesity experts, health professionals, and child advocates asked Sesame Workshop not to air sponsorship messages for McDonald's before or after its "Sesame Street" program.¹⁷²

Policymakers are listening and responding to the growing calls for action. Recognizing the connection between junk food advertising and childhood obesity, in 2003, while on the campaign trail, Senator Joseph Lieberman called for a FTC investigation into the marketing practices of companies that target unhealthy foods to children.¹⁷³ Moreover, the California legislature, in 2004, passed a resolution calling on the FTC to act to develop and implement nutrition standards for foods and beverages advertised to children, and to ensure that equal time is given during television programs that have a significant youth audience to encourage fruit and vegetable consumption and physical activity.¹⁷⁴ Similarly, in 2005, Senator Harkin introduced a bill into the United States Senate to restore to the FTC the authority to regulate marketing directed at children.¹⁷⁵ The legislation, which would have given the FTC the power to restrict the advertising of junk food to children under the age of 18, died in the Finance committee.¹⁷⁶ On November 22, 2005, President Bush signed a bill appropriating funds for the FTC to

submit a report to Congress by July 1, 2006, on marketing activities and expenditures of the food industry targeted toward children and adolescents.¹⁷⁷ It was requested by Congress that the report include an analysis of commercial advertising time on television, radio, and in print media, in addition to in-store marketing and other forms of advertising to children.¹⁷⁸

Several industrialized democracies have adopted policies designed to protect children from excessive marketing practices. Sweden, Norway, and Finland, for example, do not permit commercial sponsorship of children's programs.¹⁷⁹ Sweden also does not permit any television advertising directed to children under the age of 12.¹⁸⁰ Belgium imposes restrictions on commercials five minutes before and after as well as during children's programming.¹⁸¹ The British Broadcasting Company (BBC) decided to prohibit the use of its cartoon characters in fast food ads, and England is pushing for stricter guidelines for advertising aimed at children.¹⁸²

Despite the concerns of public health advocates and experts across the globe, the American public has been slow to fully grasp the obesity epidemic in this country. However, public opinion polls demonstrate that American public awareness of the problem is quickly rising. With this awareness is a desire to see policymakers offer solutions to the problem.

Despite considerable media attention to the obesity epidemic when it first reached the public's radar screen as a public health issue in the early 1990s, no more than about 5 percent of Americans during that decade viewed obesity as the country's most important health problem.¹⁸³ This left obesity behind cancer, heart disease, and HIV/AIDS as the most worrisome threat to health.¹⁸⁴ But in the spring of 2002, public concern with obesity increased dramatically.¹⁸⁵ By 2003, it had become Americans' second most salient health concern, trailing only cancer as a perceived health problem.¹⁸⁶ Depending on the poll, anywhere from 79 percent to 92 percent of Americans presently consider obesity a serious problem.¹⁸⁷ Childhood obesity is even more salient a problem to the American public: 92 percent of Americans in one poll, and 95 percent in another poll rated childhood obesity a serious problem.¹⁸⁸

Public concern about the obesity epidemic is fueling positive reactions to public policy proposals to confront the problem. Polls show that the American public is solidly in favor of limiting or banning outright food advertising directed at children. Depending on the poll, the percentage of Americans in favor of such governmental action range from 57 percent in a 2001 poll to 73 percent in a 2004 poll.¹⁸⁹

While polls indicating support for governmental intervention into the obesity problem seem to be antithetical to the common belief (backed by survey data) that Americans believe that obesity is a matter of personal choice,¹⁹⁰ experts reason that the two competing values of personal autonomy and governmental action do not conflict.¹⁹¹ Rather, whether an individual chooses to eat or to be active at any particular moment is a personal decision; however, the overall eating and activity of the population are a function of an environment that undermines personal control.¹⁹² Such public health measures make perfect sense under these circumstances.

Although policymakers and the public in general are both demonstrating willingness for government to act to confront the childhood obesity epidemic, as expected, the advertising industry still remains steadfastly opposed to governmental restrictions on advertising food to children.¹⁹³

VII. CREATING A CONSTITUTIONAL RESTRICTION ON ADVERTISING JUNK FOOD TO CHILDREN

Now is the time for the government to act to restrict advertising junk food to children, and the agency best equipped to deal with instituting limitations on television advertising to children and monitoring compliance therewith is the FTC. Therefore, the Congress should re-authorize the FTC to create rules to limit the advertising of junk food to children. However, absent Congressional authorization, the FTC should use its existing authority over deceptive and unfair advertising to control the widespread advertising of unhealthy food to children.

A. CONGRESS SHOULD RE-AUTHORIZE THE FTC TO CREATE RULES LIMITING FOOD ADVERTISING TO CHILDREN.

As noted supra, there appears to be growing support among policymakers and the general public for federal intervention to restrict the marketing of unhealthy foods to children.¹⁹⁴ Indeed, as discussed supra, legislation has recently been introduced to re-authorize the FTC to create rules limiting such advertising. Now is the time for the Congress to pass legislation that reinstates the FTC's rulemaking authority over the marketing of food to children.

B. THE FTC CAN USE ITS EXISTING AUTHORITY TO LIMIT THE MARKETING OF UNHEALTHY FOOD TO CHILDREN.

Absent a Congressional reauthorization of its rule-making authority, the FTC already has the authority to regulate advertising that is deceptive and unfair, as those features of its authority were not stripped away by Congress during its first attempt at rulemaking in this area. Moreover, the First Amendment does not apply at all to advertising that is deceptive. Thus, the optimal means by which

government can regulate television advertising to children is by the FTC asserting its current authority over deceptive and unfair advertising to commercials aimed at children. Because experts such as the American Academy of Pediatrics argue that all advertising aimed at children under the age of 8 years old is inherently deceptive, the FTC can rationally utilize its authority over such advertising and greatly restrict it—if not ban it all together.

In the alternative, or for advertising aimed at children over the age of 8, the FTC can assert authority over television advertising to children under its “unfairness” jurisdiction. Advertising to children as “unfair” is not a new proposition—experts on children’s health and policy have been making this argument for decades. In order for a governmental restriction on commercial advertising to children based on the FTC’s unfairness jurisdiction to be constitutional, it must meet the requirements of the *Central Hudson* four-part test as discussed *supra*.

1. *Advertising to children as “deceptive” advertising*

As discussed *supra*, the FTC’s deception standard asks whether the challenged representation or practice is one that would likely deceive a consumer acting reasonably under the circumstances in a material way—that is, in a way that affects the consumer’s conduct or choice regarding a product or service.¹⁹⁵ In assessing advertising or other marketing practices that affect or are directed primarily to a particular audience, the Commission considers the effect of the ad or practice on that audience.¹⁹⁶ Thus, the FTC’s examination of children’s advertising takes into account the limited ability of children to detect exaggerated or untrue statements.¹⁹⁷

Advertising to children—especially children under the age of 8 years old—is inherently deceptive. In fact, the three major marketing associations recognize that material that might be truthful and non-deceptive to adults might still mislead children.¹⁹⁸ There have been numerous studies documenting that young children under 8 years of age developmentally are unable to understand the intent of advertisements and, in fact, accept advertising claims as true. Indeed, experts reason that the youngest viewers, up to age 8, cannot distinguish advertising from regular television programming.¹⁹⁹

In order to persuade children to consume their company’s products, marketers link feelings and perceptions to products—especially linkages to feelings of comfort, love, and family.²⁰⁰ The combination of children’s innocence and inability to distinguish advertising from reality leads to extreme manipulation

of their behaviors and desires by commercial television. Studies indicate that the more that children watch television, the more they specifically request brand name products at the grocery store.²⁰¹ In fact, children can recognize images of corporate logos and mascots from as young as six months old.²⁰²

Marketing to children thus deprives them of their autonomy as individuals—robbing them of the ability to make choices (or to learn to make choices) based on their individual preferences, and not the desires of corporations seeking to incorporate them into the consumer culture as mindless purchasers of their products. Therefore, advertising to children under the age of 8 meets the FTC’s standard for deceptive advertising; the agency is therefore empowered to greatly restrict it, or even ban it altogether, without prior Congressional approval or First Amendment consequences.

2. Advertising to children as “unfair” trade practice

As discussed supra, the FTC’s “unfairness” jurisdiction focuses on one primary inquiry: Whether the practice causes substantial and unjustified injury to consumers.²⁰³ To justify a finding of unfairness, the practice must satisfy three tests. First, the injury must be substantial. Second, the potential unfairness must not be outweighed by any countervailing benefits to consumers or competition that the practice produces. And third, there must be an injury that consumers themselves could not reasonably have avoided.²⁰⁴ Because advertising to children meets the FTC’s standard for unfair marketing practices, and is also constitutional under the Court’s *Central Hudson* standard, the FTC should take action to regulate commercial advertising aimed at children.

i. Advertising junk food to children causes substantial injury

Many researchers strongly suspect that the food advertising to which children are exposed through the media may contribute to unhealthy food choices and weight gain. As discussed supra, over the same period in which childhood obesity has increased so dramatically, research indicates that the number of advertisements that children view has increased as well. The most recent estimates are that children now see an average of more than 40,000 television advertisements each year, and will have seen 360,000 commercials by the time that they graduate from high school.²⁰⁵

Studies show that advertising to children shapes their nutritional choices, and because most of the advertising that is aimed at children is for unhealthy foods, children naturally choose those foods over other, more healthy, alternatives. Moreover, advertising aimed at children negatively influences their

perceptions about the relative health benefits of foods. Children who are exposed to advertising on television are more likely to believe that certain foods (especially fast foods) are nutritious, when in fact they clearly are not. In addition, children who view commercial advertisements are more likely to request that their parents purchase the advertised product at the grocery store—thereby influencing the nutritional choices of their entire families.

The injury caused by childhood obesity is undeniably substantial. As discussed supra, the increase in childhood obesity represents an “unprecedented burden” on children’s health.²⁰⁶ The Surgeon General has predicted that preventable morbidity and mortality associated with obesity may exceed those associated with cigarette smoking.²⁰⁷ Considering the fact that an estimated 80% of overweight adolescents continue to be obese in adulthood,²⁰⁸ the implications of childhood obesity on the nation’s health—and on health care costs—are huge.²⁰⁹ This trend seriously compromises the future health and productivity of the U.S. population. Moreover, obesity-related health care costs threaten the prospect of a recovery for the American economy; the American Academy of Pediatrics has called the potential costs associated with childhood obesity “staggering.”²¹⁰

ii. Unfairness not outweighed by benefits to consumers

While advertising to adults has the potential benefit of educating them about choices among products in quality and price, advertising to children has no such benefit. This informational failure occurs because, as discussed supra, children are unable to distinguish between advertising and programming, and are also unable to differentiate between products in terms of nutritional value. Moreover, children’s limited world view forces them to misinterpret the information that they receive.

Advertising pushes children to make what economists call “inefficient” purchasing choices.²¹¹ Even if children fully understood advertising for what it is (which they do not), they still have a limited knowledge base and mental construct of the world, compared to adults. An advertisement promotes only a limited piece of the whole picture—that which is most favorable to the advertiser.²¹² This bias leaves children with only a small amount of information. Adults, who have more experience and knowledge, would be able to fit the information from the advertisement into their mental construct of the world, treating it as just another bit of information. But for children, the advertisement is a much larger percentage of their total knowledge.²¹³ Thus, the small amount of information that the commercial

imparts, because of children's limited knowledge and experience in the world, has the potential to create a bigger impact on children's choices than on those of adults. Therefore, the informational benefit of advertising to children is far outweighed by the misperception about the world that the advertising conveys.

iii. Injury is not one that consumers could reasonably have avoided

As discussed supra, television advertising has a significant impact on children's nutritional choices. Commercials make children want foods that, in the long run, will do more harm to them than good. However, while children have a good deal of disposable income (cite), statistics show that parents and guardians purchase most of the food that children consume (cite). Therefore, in theory, the injury to children (childhood obesity) could reasonably be avoided by parental intervention in the form of not purchasing the children's desired products. In reality, though, parents act more as "amplifiers" of the advertising problem than as "buffers" from it.

There are two views of the family dynamic in the economic literature.²¹⁴ The first view sees the family serving as a buffer to prevent the ill-informed member (the child who receives information on nutrition through television advertising) from causing damage to the family by acting on the misinformation.²¹⁵ Upon learning of the misinformation, the family could provide the child with better information or deny the child access to family resources (by not purchasing the product at the grocery store).²¹⁶ Either choice could serve to limit the number or importance of the decisions made by the misinformed member (the child influenced by television advertising). This scenario, according to economists, is more likely to play out in a setting where the misinformation is expected and family members have the time to discover and adjust to it accordingly.²¹⁷

The second view sees the family serving as an amplifier, allowing greater misinformation effects than if the child had not been present.²¹⁸ This scenario is more likely to exist when the purchasing power of the family as a whole is much greater than that of the child, when the other family members are unable to properly educate the child with good information, or where the family members choose to act upon the misinformation either through a lack of knowledge or a sense of appeasement of the child.²¹⁹ The willingness to appease children has been termed the "nag factor" by advertisers.²²⁰ In fact, the purpose of most advertising to children is to push families to become amplifiers by creating naggers out of the

children.²²¹ The effect is to undermine the ability of parents to control their children and to teach a preference for foods that provide better nutritional value.²²² Therefore, rather than helping their children to avoid the injury brought on by television advertising, parents tend to amplify the problem by appeasing their children and purchasing the unhealthy products. Regardless of who is to blame, the responsibility does not fall upon the children most affected by the problem and who could not reasonably have avoided the injury.

C. FTC ACTION MUST MEET THE CENTRAL HUDSON FOUR-PART TEST

FTC action to restrict the marketing of food to children using its “unfairness” jurisdiction must still meet the requirements of the Court’s Central Hudson test for regulations that restrict commercial speech. If the advertising is not misleading, the government must prove that it has a substantial interest in restricting the speech. Moreover, the restriction must directly advance the governmental interest at issue. Lastly, the restriction must be a good fit with the government’s interest. As will be discussed *infra*, an FTC rule that restricts the advertising of junk food to children likely meets the requirements of this test.

1. *Advertising is not misleading and government has substantial interest*

Although experts reason that advertising aimed at children under the age of 8 is inherently deceptive, as discussed *supra*, there is not a widespread agreement that advertising to older children is similarly misleading. Therefore, in order for FTC action that restricts food advertising to children to be constitutional under the Central Hudson test, the government must demonstrate the existence of a substantial interest to be served by such a restriction on commercial speech.²²³ Under the current case law, this is not a high hurdle to reach; virtually any regulatory interest connected with furthering the public welfare appears to suffice.²²⁴ For example, the Court has found a substantial governmental interest in reducing the social ills associated with gambling,²²⁵ in reducing the public’s consumption of alcoholic beverages,²²⁶ and in helping parents maintain control over when and how to expose their children to sensitive subjects.²²⁷ Given the numerous studies that have demonstrated a correlation between childhood obesity and the advertising of junk food to children, an FTC rule controlling the matter should easily meet this test.

2. *Restriction directly advances governmental interest*

The next part of the *Central Hudson* test concerns the relationship between the harm that

underlies the governmental interest, and the means identified by the State to advance that interest. Under the third prong of the test, the Court requires the proponents of a restrictive regulation to justify the relationship between the regulation and the public policy that it serves through studies or empirical data. The regulation must have the power to produce the desired effect in meeting its asserted goal.

Although this part of the test has been difficult for the government to meet, the Court has not hesitated to find that a restriction on advertising directly advances a government's stated interest—especially when that interest is the protection of children.²²⁸ For example, in *Lorillard Tobacco Co. v. Reilly*,²²⁹ the Court found ample evidence that a Massachusetts regulation restricting the advertising and sales of tobacco products in specific outdoor locations would alleviate the problems of underage use of the products.²³⁰ The Court found the Attorney General's evidence that advertising was causally linked to tobacco use sufficiently compelling to determine that an advertising restriction would directly advance the State's substantial governmental interest in reducing smoking and tobacco use among minors.²³¹ Evidence that advertising is strongly correlated to childhood obesity is similarly available and persuasive, as discussed supra.

3. *Restriction no more extensive than necessary to meet the interest*

The final part of the *Central Hudson* test examines whether the restriction on commercial advertising "is not more extensive than necessary to serve the interest that supports it."²³² To withstand the fourth part of the test, the government must prove that the regulation is a good fit with the desired objective by demonstrating that less restrictive means are either unavailable, or ineffective to meet legislative goals. The commercial speech restriction is vulnerable under this part of the test if the government could adopt alternative regulatory measures that would restrict considerably less expression than the commercial speech restriction at issue, but would further the underlying substantial interest just as well.²³³

Currently, advertising to children is largely industry self-regulated. Defenders of the current self-regulatory scheme argue that governmental action is not needed because the industry has its own regulating body, CARU, which monitors commercial advertising directed at children. However, experts have long noted that CARU has an extreme conflict of interest due to the nature of its funding, and is wholly incapable of doing the job for which it was instituted. Therefore, the less restrictive means of

industry self-regulation is ineffective to meet the government's substantial interest in reducing childhood obesity, and more governmental restriction is needed.

As discussed *supra*, CARU is industry funded. Companies that fund its work and subscribe to its guidelines include some of the largest manufacturers and marketers of fast foods to children, as well as trade associations representing these companies.²³⁴ Given the dominant roles played by the CARU supporting companies and associations, it is unsurprising that CARU is essentially powerless to impose its guidelines, and demonstrates a conflict of interest in some cases. For example, in the summer of 2005, General Mills announced the launch of a national advertising campaign targeted at children that would tout the health benefits of eating breakfast cereal, including Trix, Cocoa Puffs, and the other sugary cereals that it sells.²³⁵ General Mill's "Choose Breakfast" campaign was designed to include characters such as the Lucky Charms leprechaun and the Trix bunny, which would appear on the back of sugary cereal boxes as part of a new "fitness squad" that would tell children that breakfast can help them stay focused in the morning and build muscles.²³⁶ CARU endorsed the General Mills campaign, calling it "responsible advertising," which "encourage[es] a behavior that is healthful," as opposed to not eating breakfast at all.²³⁷ The commercials, which aired on Nickelodeon and Cartoon Network, as well as child-oriented programs on other channels, were part of a year-long marketing campaign aimed to get children to eat sugary breakfast cereals.²³⁸ Thus, while General Mills was conflating the health benefits of sugar-laden cereals with the benefits of eating more nutritious breakfast cereals, and doing "a fabulous marketing job of making people think that these [sugary breakfast cereals] are health food when [they] are cookies,"²³⁹ CARU failed to attempt to stop the marketing campaign—in fact, it actually endorsed the advertising as responsible.

CARU's process is also weakened by its invisibility. CARU is ridiculously understaffed. It has only five full-time employees to monitor a multi-billion dollar industry.²⁴⁰ It does not appear that CARU and its supporters advertise or otherwise promote awareness of its activities among consumers and other stakeholders, nor do they use public-service announcements or similar outlets to encourage parents and others to file complaints against advertisers that violate their standards.²⁴¹ More than 95% of its cases arise from its own monitoring of print and television advertising, rather than from consumer-initiated investigations. The system is therefore extremely likely to be underinclusive of violators. Indeed,

numerous egregious cases of advertising that violates CARU's principles exist that have gone unnoticed by the review unit.²⁴² Moreover, CARU has no enforcement powers. In fact, CARU's director has said, "[s]ome of our guidelines have no backup in law, so somebody can actually blow us off and all we do is publish the results and give them bad publicity...."²⁴³ Therefore, it is obvious that self-regulation of commercial advertising of food to children is not working. Therefore, there is no less extensive means by which the government could take action to limit the advertising of junk food to children, and this part of the *Central Hudson* test is met.

However, governmental restrictions on television advertising to children may inevitably lead to what scholars call "spill-over:" a regulation that limits children's access to harmful materials will inevitably limit the access of adults to the material. This is a violation of the fourth prong of the Court's *Central Hudson* test. In its plurality opinion in *44 Liquormart v. Rhode Island*,²⁴⁴ the Court, drawing from *Virginia Pharmacy*, as well as a footnote that appeared in *Central Hudson*, demanded that "special care" be exercised in reviewing state laws that "entirely suppress commercial speech in order to pursue a nonspeech-related policy,"²⁴⁵ especially when the state wraps a complete "blanket ban" over the "dissemination of truthful, nonmisleading commercial messages." As Justice Stevens explained, *Virginia Pharmacy* "reflected the conclusion that the same interest that supports regulation of potentially misleading advertising, namely the public's interest in receiving accurate commercial information, also supports an interpretation of the First Amendment that provides constitutional protection for the dissemination of accurate and nonmisleading commercial messages."²⁴⁶ Thus, the Stevens plurality mapped out an area of special constitutional concern: blanket bans on accurate commercial information must be reviewed with "special care," meaning that they must be subjected to a "more stringent constitutional review."²⁴⁷

Relevant spillover violations have been found in the attempts to limit youth access to sexually indecent material on the Internet: Both the Communications Decency Act (CDA) and the Child Online Protection Act (COPA) were aimed at legitimate goals, but unconstitutionally limited adult access.²⁴⁸ Similarly, the most recent attempt to limit the exposure of children to tobacco advertising on billboards, at issue in *Lorillard Tobacco Co.*, discussed supra, was found unconstitutional due to its spillover effect.²⁴⁹

Because adults would be cut off from information about products that they may legally consume, the regulations were held to be violative of the First Amendment.

Spillover problems are addressed by more closely tailoring the restrictions to the legitimate targets.²⁵⁰ In *Lorillard Tobacco Co.*, for example, the Court noted that a constitutionally-permissible statute banning tobacco advertisements in sight of children would have been tailored to target practices that appeal primarily to youth.²⁵¹ Therefore, in order to avoid the unconstitutional spillover effect, regulations of television advertising to children should be specifically targeted to the programs directed at children and the hours during which children tend to watch television. Moreover, regulations of television advertising could take advantage of the relevant research literature on marketing practices using visual imagery, by targeting the color and pictorial imagery utilized by the ads.²⁵² For example, because the research literature shows that color advertisements increase attention and recall beyond black and white formats, and that pictures increase an ad's ability to communicate quickly and memorably,²⁵³ government regulation of television advertisements of junk food could require that such commercials use only black and white and certain bland imagery. By tailoring the regulations in this manner, the government could meet the requirements of the fourth prong of the *Central Hudson* test.

In the absence of Congressional re-authorization to create a rule restricting the marketing of junk food to children, the FTC can utilize its existing authority over deceptive and unfair advertising to restrict such marketing to children. Such an action is well within the FTC's existing authority, and is consistent with the Court's *Central Hudson* First Amendment test for restrictions on advertising.

CONCLUSION

In recent years, health officials have become increasingly alarmed by the rapid increase in obesity among American children. The American Academy of Pediatrics considers the childhood obesity epidemic to be an "unprecedented burden" on children's health. Moreover, because 80% of obese children become obese adults, the epidemic has serious consequences for the future of the American public health system. Numerous studies have documented a correlation between television advertising and childhood obesity rates (one which goes beyond the fact that children who watch television are less likely to have sufficient physical activity to ward off weight gain). Indeed, children who are exposed to television advertising are more likely to make unhealthy nutritional choices, and to

influence their parents to do the same. Currently, television advertising to children faces little governmental regulation and is subject almost exclusively to weak industry self-regulation (which is more concerned with self-preservation than self-regulation). Therefore, the time is right for the FTC to step in to regulate television advertising to children, in order to confront this public health plague. Congress should give the FTC the authority and adequate funding to develop and implement rules restricting the advertising of food to children. However, in the absence of such rule-making authority, the FTC can utilize its existing authority over deceptive and unfair marketing to restrict the advertising of food to children. Such governmental regulation of commercial speech is constitutional and necessary to protect the health of America's children and economy.

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² See *infra* note 6.

³ See *infra* note 15.

⁴ See *infra* note 41 and accompanying text.

⁵ What such a rule should entail is beyond the scope of this paper. However, a proper FTC rule that restricts food advertising to children should include standards for the nutrition and portion sizes of the foods advertised. Guidance for the content of the rule can be found in existing industry standards for advertising to children, such as those utilized by Kraft and Coca-Cola, and in recommendations made by the Department of Health and Human Services, as well as by the many public health policy interest groups (such Center for Science in the Public Interest).

⁶ See Henry J. Kaiser Foundation, *Issue Brief: The Role of Media in Childhood Obesity*, available at: www.kff.org (citing Centers for Disease Control and Prevention, *Overweight Among U.S. Children and Adolescents, National Health and Nutrition Examination Survey*, available at: <http://www.cdc.gov/nchs/data/nhanes/databriefs/overwght.pdf>).

⁷ See, *id.* (citing US Department of Health and Human Services, *The Surgeon General's Call to Action to Prevent and Decrease Overweight and obesity*, 2001).

⁸ See *id.* (citing American Academy of Pediatrics, *Policy Statement: Prevention of Overweight and Obesity*, 112 PEDIATRICS 424-430 (2003)).

⁹ See *id.* (citing D.S. Friedman, et. al., *The Relation of Overweight to Cardiovascular Risk Factors among Children and Adolescents: the Bogalusa Heart Study*, 103 PEDIATRICS 175-1182 (1999)).

¹⁰ See *id.* (citing D. Styne, *Childhood and Adolescent Obesity: Prevalence and Significance*, 48 PEDIA. CLINICS OF N. AMER. 4 (2001)).

¹¹ See Surgeon General, *supra* n. ii.

¹² See Styne, *supra* n. iv.

¹³ See, e.g., Int'l Assoc. for the Study of Obesity, Int'l Obesity Task Force, *Obesity: The Disease of the Millennium*, available at: <http://www.iof.org/media/release3.htm>.

¹⁴ See, e.g., Kaiser Foundation, *supra* n. 6.

¹⁵ See *infra* note 17 and accompanying text.

¹⁶ See Kaiser Foundation, *supra* n. 6 (citing D. ROBERTS AND U. FOEHR, *KIDS AND MEDIA IN AMERICA* (2004)).

¹⁷ See FCC Consumer Facts: Children's Educational Television, available at: <http://www.fcc.gov>.

¹⁸ American Academy of Pediatrics, *supra* n. iii.

¹⁹ Mary Story and Simone French, *Food Advertising and Marketing Directed at Children and Adolescents in the US*, 1 INT'L J. NUTR. PHYS. ACT 3 (2004), available at:

<http://www.pubmedcentral.nih.gov/articlerender.fcgi?artid=416565&tools=bot#B22>.

²⁰ See Kaiser Foundation (citing W. Dietz and S. Gortmaker, *Do We Fatten Our Children at the TV Set? Obesity and Television Viewing in Children and Adolescents*, 75 PEDIATRICS 807-812 (1985)).

²¹ *Id.*

²² *Id.*

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- ²³ See, e.g., M. Proctor, et. al, *Television Viewing and Change in Body Fat from Preschool to Early Adolescence: The Framingham Children's Study*, 27 INT'L JOURNAL OF OBESITY 827-833 (2003). But see T. Robinson, et. al., *does Television Viewing Increase Obesity and reduce Physical Activity: Cross-Sectional and Longitudinal Analyses among Adolescent Girls*, 81 PEDIATRICS 273-280 (1993).
- ²⁴ See Kaiser Foundation, supra n. 6 (citing W. Dietz and S. Gortmaker, *TV or Not TV: Fat is the Question*, 91 PEDIATRICS 499-500 (1993)).
- ²⁵ *Id.*
- ²⁶ See Kaiser Foundation, supra n. 6 (citing R. Lowry, et. al, *Television Viewing and its Association with Overweight, Sedentary Lifestyle, and Insufficient Consumption of Fruits and Vegetables among US High School Students: Differences in Race, Ethnicity, and Gender*, 72 JOURNAL OF SCHOOL HEALTH 413-421 (2002)).
- ²⁷ See, e.g., Kaiser Foundation, supra n.6.
- ²⁸ See id (citing T. Robinson, et. al., *Does Television Viewing Increase Obesity and Reduce Physical Activity: Cross-Sectional and Longitudinal analyses among Adolescent Girls*, 81 PEDIATRICS 273-280 (1993)).
- ²⁹ See id (citing R. Anderson, et. al., *Relationship of Physical Activity and Television Watching with Body Weight and Level of Fatness among Children*, 279 JAMA 938-942 (1998)).
- ³⁰ See id (citing E. Vandewater, et. al., *Linking Obesity and Activity Level with Children's Television and Video Game Use*).
- ³¹ See, id (citing R. Klesges, et. al., *Effects of Television on Metabolic Rate: Potential Implications for Childhood Obesity*, 91 PEDIATRICS 281-286 (1993)).
- ³² See id (citing D. Kunkel and W. Gantz, *Children's Television Advertising in the Multichannel Environment*, 42 J. COMM. 134-152 (1994)).
- ³³ *Id.*
- ³⁴ *Id.*
- ³⁵ See id. (citing K. Kotz and M. Story, *Food Advertisements during Children's Saturday Morning Television Programming: Are They Consistent with Dietary Recommendations?* 94 J. AMER. DIETETIC ASSOC. 1296-1300 (1994)).
- ³⁶ See id (citing J. Brand and B. Greenberg, *Commercials in the Classroom: The Impact of Channel One Advertising*, 34 J. ADVERTISING RESEARCH 18-23 (1994)). A recent study indicated that students watching Channel One recall more of the advertisements than the "news" programming that air on the station. See CNN.com, *Students Recall More Ads than News on Channel One*, available at: <http://www.cnn.com/2006/EDUCATION/03/06/classroom.ads.ap/index.html>.
- ³⁷ See id (citing P. Valkenberg, *Media and Youth Consumerism*, 27 J. ADOLESCENT HEALTH 52-56 (2000)).
- ³⁸ Eric Schosser, *Fast Food Nation*.
- ³⁹ Kaiser Foundation, supra n. 6.
- ⁴⁰ C. Kane, *TV and Movie Characters Sell Children Snacks*, NY TIMES (Dec. 8, 2003).
- ⁴¹ See Kaiser Foundation, supra n. 6 (citing J. Galst and M. White, *The Unhealthy Persuader: The Reinforcing Value of Television and Children's Purchase Influence Attempts at the Supermarket*, 47 CHILD DEVELOPMENT 1089-1096 (1976)).
- ⁴² See id. (citing H. Taras, et. al., *Television's Influence on Children's Diet and Physical Activity*, 10 J. DVLP. BEHAV. PED. 176-180 (1989)).
- ⁴³ See id. (citing G. Gorn and M. Goldberg, *Behavioral Evidence of the Effects of Televised Food Messages on Children*, 9 J. CONSUMER RESEARCH 200-205 (1982)).
- ⁴⁴ See id. (citing S. French, et. al., *Fast Food Restaurant Use among Adolescents: Associations with Nutrient Intake, Food Choices, and Behavioral and Psychosocial Variables*, 25 INT'L J. OBESITY 1823-1833 (2001)).
- ⁴⁵ See id. (citing J. Giammattei, et. al., *Television Watching and Soft Drink consumption: Associations with Obesity in 11-13 year-old Schoolchildren*, 157 ARCHIVES OF PEDIATRICS AND ADOLESCENT MED 843 (2003)).
- ⁴⁶ See id (citing S. Krebs-Smith, et. al., *Fruit and Vegetable Intakes of Children and Adolescents in the United States*, 150 ARCHIVES OF PEDIATRIC AND ADOLESCENT MED 81-86 (1996)).
- ⁴⁷ See id (citing R. Boyton-Jarrett, et. al., *Impact of Television Viewing Patterns on Fruit and Vegetable Consumption among Adolescents*, 112 PEDIATRICS 1321-1326 (2003)).
- ⁴⁸ *Id.*
- ⁴⁹ *Id.*
- ⁵⁰ See id. (citing T. Donahue, et. al., *Black and White Children: Perceptions of Television Commercials*, 42 JOURNAL OF MARKETING 34-40 (1978)).
- ⁵¹ See id. (citing N. Signorielli and J. Staples, *Television and Children's Conceptions of Nutrition*, 9 HEALTH COMM. 291-301 (1992)).
- ⁵² *Id.*
- ⁵³ See *infra* for a detailed discussion of the FTC's role in the regulation of advertising aimed at children.
- ⁵⁴ See <http://www.fcc.gov>.
- ⁵⁵ See id.
- ⁵⁶ See American Academy of Pediatrics, *Children, Adolescents, and Advertising*, 95 PEDIATRICS 295 (1995).

⁵⁷ *Id.*

⁵⁸ www.fcc.gov.

⁵⁹ *See id.*

⁶⁰ *See id.*

⁶¹ *See* AAP, *supra* n. lvi.

⁶² *See* <http://www.caru.org>.

⁶³ *See id.*

⁶⁴ *See id.*

⁶⁵ *Id.*

⁶⁶ In February 2006, facing mounting calls for legislation addressing advertising to children on television, CARU announced that had hired a former FTC staffer, and was instituting a review of its advertising guidelines. *See* <http://www.caru.org/news/2006/caru.pdf>.

⁶⁷ <http://www.caru.guidelines.org/guidelines/guidelines.pdf>.

⁶⁸ Center for Science in the Public Interest, *Self-Regulation of Food Marketing is More Like Self-Preservation*, available at: <http://www.cspinet.org/new/200507141.html>.

⁶⁹ *See id.*

⁷⁰ *See id.*

⁷¹ *See, e.g.*, Kaiser Foundation, *supra* n. ix.

⁷² *See, e.g.*, K. BROWNELL AND K. HORGAN, *FOOD FIGHT: THE INSIDE STORY OF THE FOOD INDUSTRY, AMERICA'S OBESITY CRISIS, AND WHAT WE CAN DO ABOUT IT* (2004).

⁷³ *See, e.g.*, Letter from Association of National Advertisers, the American Association of Advertising Agencies, and the American Advertising Federation to Hon. Tom Harkin, April 4, 2005.

⁷⁴ *See, e.g.*, *Ginsburg v. New York*, 321 U.S. 629, 640-41 (1968).

⁷⁵ *See id.* (quoting Prince, 321 U.S. at 165).

⁷⁶ *See, e.g.*, Kevin W. Saunders, *The Need for a Two (or More) Tiered First Amendment to Provide for the Protection of Children*, 79 CHI-KENT L. REV. 257 (2004).

⁷⁷ *See, e.g.*, *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 215 (2003) (stating that “[t]he interest in protecting young library users from material inappropriate to minors is legitimate, and even compelling, as all Members of the Court appear to agree”).

⁷⁸ But *see* Ginsberg, *supra*.

⁷⁹ 533 U.S. 525 (2001).

⁸⁰ 316 US 52 (1942).

⁸¹ *Valentine*, 316 US at 52.

⁸² 341 US 622 (1951).

⁸³ 341 US at 624.

⁸⁴ *Id.* at 624, 641-43.

⁸⁵ *Id.* at 642.

⁸⁶ 376 US 254 (1964).

⁸⁷ *Id.* at 256-57.

⁸⁸ *Id.* at 266.

⁸⁹ 413 US 376 (1973).

⁹⁰ *Id.* at 384.

⁹¹ *Id.*

⁹² 421 US 809 (1975).

⁹³ *Id.*

⁹⁴ *Id.* at 813.

⁹⁵ 425 U.S. 748 (1976).

⁹⁶ *Id.* at 762.

⁹⁷ *Id.* at 765.

⁹⁸ *See, e.g.*, *Central Hudson Gas & Elec. Corp. v. Pub. Svc. Comm'n*, 447 U.S. 557, 573 (Blackmun, J., concurring) (attaching “intermediate scrutiny” label to test used by Court in commercial speech cases).

⁹⁹ *Virginia Bd. Of Pharmacy*, 425 U.S. at 771. The Court also observed that in the course of attempting to prevent deception, the government could require commercial advertisements to contain warnings, disclosures, or disclaimers—again without triggering a First Amendment problem. *Id.* at 772 n. 4.

¹⁰⁰ *Id.* at 772.

¹⁰¹ 447 U.S. 557 (1980).

¹⁰² *Id.* at 558-59.

¹⁰³ *Id.* at 561-63.

¹⁰⁴ *Central Hudson*, 447 U.S. at 566.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 563-64, 566.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 566.

¹⁰⁹ *See, e.g.*, U.S. v. Edge Broadcasting, Co., 509 U.S. 418 (1993) (finding substantial governmental interest in guarding against “strength wars” among producers of alcoholic beverages).

¹¹⁰ Greater New Orleans Broadcasting Ass’n v. United States, 119 S. Ct. 1923 (1999).

¹¹¹ 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996).

¹¹² Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983).

¹¹³ In his opinion in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 448 (1996), Justice Stevens read the Court’s commercial speech precedents as contemplating greater latitude for the government to restrict commercial expression when the objective is consumer protection than when the government has a different objective in mind.

¹¹⁴ 533 U.S. 525 (2001).

¹¹⁵ Lorillard Tobacco, 533 U.S. at 525.

¹¹⁶ *Id.* at 561.

¹¹⁷ *Id.* at 556.

¹¹⁸ *See* Central Hudson, 477 U.S. at 566.

¹¹⁹ 533 U.S. 525 (2001).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³

¹²⁴ 15 U.S.C. Section 45(a).

¹²⁵ Letter from the Federal Trade Commission to Hon. John D. Dingell, Chairman, Committee on Energy and Commerce, U.S. House of Representatives (Oct. 14, 1983), reprinted in *Cliffdale Assoc., Inc.*, 103 F.T.C. 110, 174 (1984).

¹²⁶ *See* Roscoe B. Starek, III, *The ABCs at the FTC: Marketing and Advertising to Children: Summary of Prepared Remarks*, Advertising and Promotion Law 1997, Minnesota Institute of Legal Education, July 25, 1997.

¹²⁷ *See* Deception Statement, *supra* n. ii, at 178-79.

¹²⁸ *See* Starek, *supra* n. iii.

¹²⁹ *See, e.g.* Lewis Galoob Toys, Inc., 114 F.T.C. 187 (1991) (involving a depiction of a toy ballerina standing alone and twirling, which the FTC reasoned might reasonably be understood by children to mean that the ballerina can really dance by herself).

¹³⁰ Letter from the Federal Trade Commission to Hon. Wendell H. Ford, Chairman, Consumer Subcommittee, Committee on Commerce, Science, and Transportation, U.S. Senate (December 1980).

¹³¹ *See id.*

¹³² *See id.*

¹³³ *See id.*

¹³⁴ *See id.*

¹³⁵ Statement of Basis and Purpose, Preservation of Consumers’ Claims and Defenses, 40 Fed. Rep. 53522-23 (1975).

¹³⁶ 82 F.T.C. 16 (1973).

¹³⁷ *See* Unfairness Policy Statement, *supra* n. vii.

¹³⁸ *Id.*

¹³⁹ *See id.*

¹⁴⁰ *See id.* The Commission noted that, in a sense, any injury can be avoided—for example, by hiring independent experts to test a product in advance, or by private legal actions for damages—but these courses may be too expensive to be practical for individual consumers to pursue. *Id.* at n. 19.

¹⁴¹ *See id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *See, e.g.* Travel king, Inc., 86 F.T.C. 715, 744 (1975). The practices in this case primarily involved deception, but the Commission noted the special susceptibilities of such patients as one reason for the prohibition of the ads, rather than relying on the remedy of fuller disclosure.

¹⁴⁵ *See* Starek, *supra* n. iii.

¹⁴⁶ *See* Warner Lambert Co. v. F.T.C., 562 F.2d 749 (D.C. Cir. 1977), *cert denied*, 435 U.S. 950 (1978).

¹⁴⁷ *See* Azrak-Hamway International, Inc., Docket No. C-3653 (1996).

¹⁴⁸ *See id.*

¹⁴⁹ *See* U.S. v. Hasbro, Inc., No. 96-451P (D.R.I. Aug. 6, 1996).

¹⁵⁰ William C. MacLeod and Judith L. Oldham, *Kid-Vid Revisited: Important Lessons for the Childhood Obesity Debate*, 18-SUM ANTITRUST 31 (2004).

¹⁵¹ *Id.* at 32.

¹⁵² *Id.*

¹⁵³ Federal Trade Commission, FTC Staff Report on Television Advertising to Children 3 (1978).

¹⁵⁴ See Sidney M. Milkis, *The Federal Trade Commission and Consumer Protection: Regulatory Change and Administrative Pragmatism*, 72 ANTITRUST L.J. 911 (2005).

¹⁵⁵ FTC, Final Staff Report and Recommendation on Children's Advertising, 43 Fed. Reg. 17,967 (Mar. 31, 1981).

¹⁵⁶ Milkis, *supra* n. xxxi, at 917.

¹⁵⁷ Public Papers of the Presidents, 1969, at 887 (quoting Richard M. Nixon).

¹⁵⁸ See *FTC v. Sperry & Hutchinson, Co.*, 405 U.S. 233 (1972). The unfairness doctrine utilized at the time of this rule-making attempt is described *infra* in note xxxviii.

¹⁵⁹ 43 Fed. Reg. 17,967 (Apr. 27, 1978).

¹⁶⁰ *Id.*

¹⁶¹ The FTC's unfairness doctrine, at the time, took into account three factors: (1) Whether the practice injures consumers; (2) Whether it violates established public policy; and (3) Whether it is unethical or unscrupulous. See *Unfairness Policy Statement, supra*, n. vii (describing the FTC's pre-1980 factors for unfairness).

¹⁶² See MacLeod and Oldham, *supra* n. xxvii, at 32.

¹⁶³ *Id.*

¹⁶⁴ See, e.g., Someone Does Need a Nanny, Wash. Post, Mar. 16, 1979, at A18.

¹⁶⁵

¹⁶⁶ See American Financial Services Ass'n v. FTC, 767 F.2d 957 969 (D.C. Cir. 1985).

¹⁶⁷ MacLeod and Oldham, *supra* n. xxvii, at 32.

¹⁶⁸ See, e.g., J. Eric Oliver and Taeku Lee, *Public Opinion and the Politics of Obesity in America*, 30 J. HEALTH POL. POL'Y & LAW 923, 923-24 (2005).

¹⁶⁹ *Id.* at 924.

¹⁷⁰ *Id.*

¹⁷¹ Kaiser Foundation, *supra* n.

¹⁷² Commercial Alert, *Obesity Experts, Child Advocates Ask Sesame Street Not to Advertise for McDonalds*, available at: <http://www.commercialalert.org>.

¹⁷³ Associated Press, *Lieberman Seeks FTC Junk Food Marketing Investigation*, December 4, 2003, available at: <http://msnbc.msn.com/id/3660428>.

¹⁷⁴ CA SJR 29, Resolution Chapter 140 (2004) (enacted).

¹⁷⁵ S. 1074 Section 302 (2005).

¹⁷⁶ *Id.*

¹⁷⁷ Food Advertising to Children: Analysis of Diverse Regulatory Models, Discussion Paper, Stakeholder Forum, Adelaide, 31 March 2006, available at: <http://ehlt.flinders.edu.au/law/forumchild/Forum/%20Discussion%20Paper.pdf>.

¹⁷⁸ *Id.*

¹⁷⁹ See Kaiser Foundation, *supra* n.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ Mark Schlesinger, *Weighting for Godot*, 30 J. HEALTH POL. POL'Y & LAW 785, 785-86 (2005).

¹⁸⁴ *Id.* at 785.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ See Kelly D. Brownell, *The Chronicling of Obesity: Growing Awareness of its Social, Economic, and Political Contexts*, 30 J. HEALTH POL. POL'Y & L. 955, 956 (2005).

¹⁸⁸ See *id.*

¹⁸⁹ *Id.* at 957.

¹⁹⁰ See *id.*

¹⁹¹ See, e.g., *id.*

¹⁹² See *id.*

¹⁹³ Industry opponents to governmental action contend that there is no relationship between advertising and obesity. Moreover, the industry reasons that public health the U.S. Surgeon General's recent report on obesity, which contained a broad range of specific recommendations on how to address the "serious health challenge" of obesity, did not contain any recommendations for restrictions on food marketing. Also, the industry notes that it provides over a billion dollars in

public service advertising each year, and has a self-regulatory system already in place that voluntarily monitors the advertising of food to children. In addition, industry opponents of governmental action argue that the FTC already provides sufficient protection for consumers by its authority to prohibit false, deceptive, or unfair acts or practices in the marketplace, and that in the last two decades, no case based on “unfairness” has been brought regarding children’s marketing. Thus, it argues, there is no need for increased FTC authority. *See* Industry Letter to Sen. Harkin, *supra*.

¹⁹⁴ *See supra* notes 188 to 202 and accompanying text.

¹⁹⁵ *See* Roscoe B. Starek, III, *The ABCs at the FTC: Marketing and Advertising to Children: Summary of Prepared Remarks*, Advertising and Promotion Law 1997, Minnesota Institute of Legal Education, July 25, 1997.

¹⁹⁶ *See* Deception Statement, *supra* n. ii, at 178-79.

¹⁹⁷ *See* Starek, *supra* n. iii.

¹⁹⁸ Industry Letter to Senator Harkin, *supra* n. at 3.

¹⁹⁹ *See, e.g.*, CK Atkin, *Television advertising and socialization to consumer roles*, in D. Pearl, L. Bouthilet, and J. Lazar, eds., *Television and Behavior: Ten Years of Scientific Progress and Implications for the Eighties* (1982).

²⁰⁰ Tamara R. Piety, *Merchants of Discontent: An Exploration of the Psychology of Advertising, Addiction, and the Implications for Commercial Speech*, 25 SEATTLE U. L. REV. 377, 410 (2001).

²⁰¹ Mona L. Hymel, *Consumerism, Advertising, and the Role of Tax Policy*, 20 VA. TAX REV. 347, 406 (2002).

²⁰² *Id.* at 408.

²⁰³ *See id.*

²⁰⁴ *See id.*

²⁰⁵ *Id.*

²⁰⁶ American Academy of Pediatrics, *Policy Statement: Prevention of Overweight and Obesity*, 112 PEDIATRICS 424-430 (2003).

²⁰⁷ *See* Surgeon General, *supra* n. ii.

²⁰⁸ *See* Styne, *supra* n. iv.

²⁰⁹ *See, e.g.*, Int’l Assoc. for the Study of Obesity, Int’l Obesity Task Force, *Obesity: The Disease of the Millennium*, available at: <http://www.iaotf.org/media/release3.htm>.

²¹⁰ *See* American Academy of Pediatrics, *supra* n. iii.

²¹¹ *See, e.g.*, Dennis Crouch, *The Social Welfare of Advertising to Children*, 9 U. CHI. L. SCH. ROUNDTABLE 179, 193 (2002).

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *See id.* at 195.

²¹⁵ *See id.* (citing GARY S. BECKER, A TREATISE ON THE FAMILY ix at 14-37 (1981)).

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.* (citing Becker at 14-37).

²¹⁹ *Id.*

²²⁰ *See id.* (citing FTC Staff Report at 74).

²²¹ *Id.*

²²² *Id.*

²²³ *Id.* at 566.

²²⁴ *See, e.g.*, U.S. v. Edge Broadcasting, Co., 509 U.S. 418 (1993) (finding substantial governmental interest in guarding against “strength wars” among producers of alcoholic beverages).

²²⁵ Greater New Orleans Broadcasting Ass’n v. United States, 119 S. Ct. 1923 (1999).

²²⁶ 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996).

²²⁷ Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983).

²²⁸ In his opinion in 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 448 (1996), Justice Stevens read the Court’s commercial speech precedents as contemplating greater latitude for the government to restrict commercial expression when the objective is consumer protection than when the government has a different objective in mind.

²²⁹ 533 U.S. 525 (2001).

²³⁰ Lorillard Tobacco, 533 U.S. at 525.

²³¹ *Id.* at 561.

²³² *Id.* at 556.

²³³ *See* Central Hudson, 477 U.S. at 566.

²³⁴ Public Health Advocacy Institute, *Industry Controls over Food Marketing to Children: Are They Effective?* Available at: http://www.phaionline.org/downloads/car_u.analysis.pdf.

²³⁵ NY TIMES, *General Mills Touts Sugary Cereal as a Healthy Kids Breakfast*, June 22, 2005.

²³⁶ Id.

²³⁷ Id.

²³⁸ Id.

²³⁹ Id. (quoting Marion Nestle, a New York University professor of nutrition, food studies, and public health).

²⁴⁰ Id.

²⁴¹ Id.

²⁴² Id. For example, a General Mills commercial for its Trix cereal product features an announcement calling the product “the fruity part of a complete breakfast,” and shows an over-sized bowl of the product with an orange and a muffin. In fact, the product contains no fruit. Moreover, it is inaccurate that a sweetened cereal with a muffin and an orange can be considered a “complete breakfast” for a child, let alone a balanced one. The message violates CARU principles or guidelines requiring that representations of mealtime should “clearly and adequately depict the role of the product within the framework of a balanced diet [C9]”; that children should not be misled about such product characteristics as nutritional benefits [C1]; and that sound use of food products should be encouraged “with a view toward healthy development of the child and development of good nutritional practices [C8].” Id.

²⁴³ Id.

²⁴⁴ 116 S. Ct. 1495 (1996).

²⁴⁵ Id. at 1511-14.

²⁴⁶ Id.

²⁴⁷ Id.

²⁴⁸ For a more extensive discussion, see Saunders, *supra* note 69.

²⁴⁹ Id.

²⁵⁰ Id.

²⁵¹ Id.

²⁵² Id.

²⁵³ Id.