

FOOD LABELING DISCLOSURES AND THE COMMERCIAL SPEECH  
DOCTRINE: COMBATING AMERICA'S GROWING PROBLEM

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I. INTRODUCTION

Currently, forty-two percent of adults in the United States are classified as obese, and it has been suggested that by the year 2048, nearly *all* Americans may be overweight or obese.<sup>1</sup> Studies have found that obesity directly increases annual United States medical expenses by \$210 billion and contributes \$450 billion of indirect costs.<sup>2</sup> Although other influences on obesity include biological, behavioral, environmental, and cultural influences, the lack of adequate nutrition from both the overconsumption of ultra-processed foods and added sugar has consistently been shown to perpetuate this rapidly expanding epidemic.<sup>3</sup> Because of overconsumption of these foods, obesity has become the most prevalent chronic, non-communicable disease affecting the United States as well as the rest of the world, even surpassing communicable diseases as the leading cause of death and disability.<sup>4</sup> Obesity contributes to or causes a host of health issues, such as cardiovascular diseases, dementia, diabetes, high blood pressure, sleep apnea, anxiety, depression, liver cancer, colon cancer, hypertension, and inflammation.<sup>5</sup> Some of these diseases are among the leading causes of death in the United States,<sup>6</sup> with obesity serving as a contributing factor to approximately 678,000 deaths per year.<sup>7</sup>

At the most basic level, people gain weight when they consume more calories than they burn.<sup>8</sup> The best way for Americans to fight obesity is to

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<sup>1</sup> Craig M. Hales et al., *Prevalence of Obesity and Severe Obesity Among Adults: United States, 2017-2018*, NCHS DATA BRIEF, no. 360 (2020), <https://www.cdc.gov/nchs/data/databriefs/db360-h.pdf> [<https://perma.cc/FW5A-TCET>]; see also Ryan T. Williams, *Size Really Does Matter: How Obesity Is Undermining America's National Security*, 48 U. TOL. L. REV. 21, 37 (2016) (noting that "100% of Americans will be overweight or obese by 2048.").

<sup>2</sup> Tyler Rauh, *Regulating Sugar-Sweetened Beverages*, 27 U. MIAMI BUS. L. REV. 269, 272 (2019).

<sup>3</sup> See, e.g., Sarah A. Roache & Lawrence O. Gostin, *The Untapped Power of Soda Taxes: Incentivizing Consumers, Generating Revenue, and Altering Corporate Behavior*, 6 INT. J. HEALTH POL. MGMT. 489, 489 (2017) (explaining that "overconsumption of sugar . . . is a major contributor to the obesity epidemic.").

<sup>4</sup> Katherine Pratt, *A Constructive Critique of Public Health Arguments for Anti-Obesity Soda Taxes and Food Taxes*, 87 TUL. L. REV. 73, 107 (2012).

<sup>5</sup> Rauh, *supra* note 3.

<sup>6</sup> *Vital Signs: Adult Obesity*, CDC (Aug. 2010), <https://www.cdc.gov/vitalsigns/adultobesity/index.html> [<https://perma.cc/LC79-5XJD>].

<sup>7</sup> *Why Good Nutrition is Important*, CTR. FOR SCI. IN THE PUB. INTEREST, <https://cspinet.org/eating-healthy/why-good-nutrition-important> [<https://perma.cc/AY3Y-AWMB>] (last visited Feb. 23, 2022).

<sup>8</sup> Roberta F. Mann, *Controlling the Environmental Costs of Obesity*, 47 ENV'T L. 697, 701 (2017).

consume fewer calories by eating *fewer* unhealthy calorie-dense foods because dietary interventions are more effective than exercise in achieving weight loss.<sup>9</sup> However, this simple caloric equation presents a fundamental problem for the food industry, because any governmental guidance telling Americans to eat less conflicts with food industry interests to sell more and increase profits.<sup>10</sup>

The phrase “Big Food” applies to the global food and beverage industry consisting of agribusiness companies (e.g., Bayer-Monsanto), food sellers (e.g., Kraft Foods), restaurant chains (e.g., McDonald’s), and industry trade organizations (e.g., The Sugar Association).<sup>11</sup> Big Food generates more than \$5.7 trillion in annual revenues from growing and processing food and then selling it to consumers.<sup>12</sup> Using vast corporate resources, the food industry has developed a “blueprint” to confuse consumers about diet and nutrition and to encourage them to eat more of these profitable – but unhealthy and fattening – processed foods.<sup>13</sup> Big Food’s blueprint begins with funding “science” to create doubt about the basic nutritional guidance to avoid fat, cholesterol, sugar, and sodium found in most processed foods.<sup>14</sup> Big Food uses its paid-for science and also overreaches its corporate constitutional rights to lobby the government to further confuse the public about the role the food industry plays in the obesity epidemic.<sup>15</sup> Currently, Big Food generates far more food than the American population can consume, so the industry spends \$30 billion annually on marketing to encourage people to eat more.<sup>16</sup> Not only does “Big Food” want us to eat more food, but also to consume more of the foods with the highest profit margins – highly processed foods with little nutritional value.<sup>17</sup>

Through the maximization of profits and with the sole goal of increasing revenue, the food industry is hiding behind the idea of “corporate personhood.”<sup>18</sup> This enables corporations to constitutionally spend unlimited

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<sup>9</sup> Erin Allday, *Experts: For Losing Weight, Diet Beats Exercise*, SFGATE (Aug. 27, 2009), <https://www.sfgate.com/health/article/Experts-For-losing-weight-diet-beats-exercise-3288732.php> [<https://perma.cc/BEX3-5X34>].

<sup>10</sup> MARION NESTLE, *FOOD POLITICS: HOW THE FOOD INDUSTRY INFLUENCES NUTRITION AND HEALTH* 31–32 (2013).

<sup>11</sup> Kelly D. Brownell & Kenneth E. Warner, *The Perils of Ignoring History: Big Tobacco Played Dirty and Millions Died. How Similar Is Big Food?*, 87 *MILBANK Q.* 259, 263 (2009).

<sup>12</sup> Mallorie McCue, Note, *Follow the Money: Insulating Agribusiness Through Lobbying and Suppression of Individual Free Speech*, 6 *PITT. J. ENV’T PUB. HEALTH L.* 215, 215 (2012).

<sup>13</sup> Brownell & Warner, *supra* note 11, at 259.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Emily J. Schaffer, *Is the Fox Guarding the Henhouse? Who Makes the Rules in American Nutrition Policy?*, 57 *FOOD & DRUG L.J.* 371, 374 (2002).

<sup>17</sup> MARION NESTLE, *FOOD POLITICS: HOW THE FOOD INDUSTRY INFLUENCES NUTRITION AND HEALTH* 31–32 (2007).

<sup>18</sup> David Stuckler & Marion Nestle, *Big Food, Food Systems, and Global Health*, 9 *PLoS MED.* 1–2 (2012)

funds to participate in the American political process by exploiting consumers and lobbying government officials to provide unhealthy foods to the American public.<sup>19</sup> Food manufacturers have an inbuilt incentive to create unhealthy foods, all to the serious detriment of the American consumer.<sup>20</sup> Arguing under the protection of the First Amendment and the Commercial Speech Doctrine, as established in *Central Hudson Gas & Electric v. Public Service Commission of New York*,<sup>21</sup> food manufacturers defend their actions as creative advertising that increases profits.<sup>22</sup> However, in reality, “Big Food” is misguiding consumers into believing that many of the products they are consuming are “healthy” through deceptive advertising<sup>23</sup> and funding of “nutritional science”<sup>24</sup> that affects consumer beliefs.<sup>25</sup>

The Federal Government, through the Food & Drug Administration (FDA) and Federal Trade Commission (FTC), has a duty to protect public health by providing consumers with “accurate, science-based information” about food.<sup>26</sup> Part II of this Note provides a historical analysis of Big Food’s exploitation through consumer deception and misdirection of nutritional science.<sup>27</sup> Further background will be provided as to the creation and authority of the FDA and FTC, presenting the problem that the FDA’s and FTC’s size and authority are too limited to combat the practices of Big Food and its First Amendment defenses under the Commercial Speech Doctrine.<sup>28</sup> Part III of this Note analyzes the development of the Commercial Speech Doctrine, the successes of the FDA under the *Zauderer* standard and *Central*

(noting that the food industry “has a legal mandate to maximize wealth for shareholders”); see also David G. Yosifon, *Legal Theoretic Inadequacy and Obesity Epidemic Analysis*, 15 GEO. MASON L. REV. 681, 685 (2008).

<sup>19</sup> Barbara Bennett Woodhouse & Charles F. Woodhouse, *Children’s Rights and the Politics of Food: Big Food Versus Little People*, 56 FAM. CT. REV. 287, 290 (2018).

<sup>20</sup> See generally MICHAEL MOSS, *SALT SUGAR FAT: HOW THE FOOD GIANTS HOOKED US* (2014) (examining the influence of the food industry on public health); Joseph Mercola, *The Concentration of Power in the Food Industry: What We Eat is Dependent Upon Who’s in Control*, SOTT (July 30, 2017), <https://www.sott.net/article/357990-The-Concentration-of-Power-in-the-Food-Industry-What-We-Eat-is-Dependent-Upon-Whos-in-Control> [<https://perma.cc/327H-KCFF>] (arguing that “most of us have little to no idea how behind-the-scenes forces control the food we buy, and the depth of the corruption involved.”).

<sup>21</sup> *Central Hudson Gas & Electric v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980); see *infra* Part II.

<sup>22</sup> Michele Simon, *Can Food Companies be Trusted to Self-Regulate? An Analysis of Corporate Lobbying and Deception to Undermine Children’s Health*, 39 LOY. L.A. L. REV. 169, 210 (2006).

<sup>23</sup> Christopher Chen, *Food and Drug Administration Food Standards of Identity: Consumer Protection Through the Regulation of Product Information*, 47 FOOD & DRUG L.J. 185, 196 (1992).

<sup>24</sup> Cristin E. Kearns et al., *Sugar Industry and Coronary Heart Disease Research: A Historical Analysis of Internal Industry Documents*, 176 JAMA INT’L MED. 1680, 1680 (2016).

<sup>25</sup> See Chen, *supra* note 23, at 196.

<sup>26</sup> *About FDA: What We Do*, U.S. FOOD AND DRUG ADMINISTRATION, <http://www.fda.gov/aboutfda/whatwedo/default.html> [<https://perma.cc/8AAR-K39G>] (last visited Feb. 23, 2022); The Federal Trade Commission (“FTC”) oversees food advertising and regulates false advertisements that can be misleading to consumers. 15 U.S.C. § 52 (2012).

<sup>27</sup> See *infra* Part II.

<sup>28</sup> *Id.*

*Hudson* test, and the actions of the FTC against manufacturers, thus presenting an avenue for federal agencies to take action against Big Food.<sup>29</sup> Part IV of this Note proposes the resolution that support of the FDA and FTC through increased funding could positively affect their combined ability to help Americans through new proposals for food labeling.<sup>30</sup> Specifically, these proposals would shift control of front-of-package labeling from Big Food's deceptive hands into simple and educational nutrition information provided by the FDA, including a new traffic-light approach.<sup>31</sup> Customers must be provided with knowledge to make healthier choices, thus incentivizing food manufacturers to reformulate their products to either match consumer demand or lose profits.<sup>32</sup> Because the federal government has a substantial interest in combating the obesity crisis, the FDA and FTC need additional financial and political support to confront Big Food and drastically take action to solve a serious public health problem.<sup>33</sup>

## II. BACKGROUND

### A. Consumer Deception

*[It's] utter nonsense ... the first thing any consumer must do with any product is to assume the claims on the front of the label are a pack of lies and scrutinize the fine print on the back to learn what's actually in the product.*

-Stephen Gardner, Chief Litigator, Center for Science in the Public Interest.<sup>34</sup>

When Americans go to the grocery store, they are bombarded with products that claim to be, "Natural," "Non-GMO," "Smart Choice," "Gluten-Free," etc.; however, the average American does not have the education and nutritional knowledge required to effectively assess these claims.<sup>35</sup> Further, Americans erroneously believe they possess reasonable expertise about food

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<sup>29</sup> See *infra* Part III.

<sup>30</sup> See *infra* Part IV.

<sup>31</sup> See *id.*

<sup>32</sup> See *infra* Part IV.C.5.

<sup>33</sup> See *infra* Part IV.A.

<sup>34</sup> Eric Spitznagel, *Drink Deception and the Legal War on Vitaminwater*, BLOOMBERG BUSINESS (July 26, 2013), <http://www.bloomberg.com/bw/articles/2013-07-26/drink-deception-and-the-legal-war-on-vitaminwater> [https://perma.cc/8QLS-JPTN].

<sup>35</sup> OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE 91 (2014); Raksha Goyal & Neeta Deshmukh, *Food Label Reading: Read Before You Eat*, 7 J. EDUC. & HEALTH PROMOTION 1, 1 (2018); Sheena Leek et al., *Consumer Confusion and Front of Pack (FOP) Nutritional Labels*, 14 J. CUSTOMER BEHAV. 49, 55 (2015).

and nutrition, a belief that can be linked to general knowledge illusion.<sup>36</sup> Confirmation bias and motivated reasoning can lead consumers to process information in a self-serving way, causing people to look for, and overvalue, information that supports their beliefs or desires.<sup>37</sup> Consequently, individuals are likely to search for data that confirms their predetermined course of action rather than information that may challenge or contradict it.<sup>38</sup> They are also likely to interpret information and construct subjective narratives in a way that supports their preexisting beliefs or preferences.<sup>39</sup> Because of this, the food industry has a strong incentive to blur reality and portray foods as “healthy” and “natural” to increase profits,<sup>40</sup> with the American public spending over forty billion dollars per year on food products labeled as “natural.”<sup>41</sup> Manufacturers are aware that consumers believe the word “natural” to convey a sense of wholesomeness and an understanding that the food was not produced using pesticides, artificial colorings, synthetic ingredients, or genetically modified organisms (“GMOs”).<sup>42</sup> However, in most situations, manufacturers are using the term “natural” solely as a marketing tool, and their products often contain ingredients that do not align with consumer expectations.<sup>43</sup>

Several examples show that manufacturers are knowingly using the confusion of labeling to mislead consumers as to the actual ingredients of products.<sup>44</sup> In 2009, brands, such as General Mills and Kraft, joined into an industry-wide nutrition claim in order for select products to be labeled with a “Smart Choices” checkmark.<sup>45</sup> The problem with these labeling claims is that the food industry was using them to maximize profits, not to signify

<sup>36</sup> Douglas Buhler & Sheril Kirshenbaum, *Wealthy Americans Are More Likely to Be Influenced by Nutrition Pseudoscience*, REAL CLEAR SCI. (Apr. 18, 2018), [https://www.realclearscience.com/articles/2018/04/18/wealthy\\_americans\\_more\\_likely\\_to\\_be\\_influenced\\_by\\_nutrition\\_misinformation\\_110615.html](https://www.realclearscience.com/articles/2018/04/18/wealthy_americans_more_likely_to_be_influenced_by_nutrition_misinformation_110615.html) [https://perma.cc/UQT7-9L8P].

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Douglas W. Hyman, *The Regulation of Health Claims in Food Advertising: Have the FTC and the FDA Finally Reached a Common Ground?*, 51 FOOD & DRUG L.J. 191, 204 (1996).

<sup>41</sup> See Anahad O’Connor, *Is Your Food “Natural”? F.D.A. to Weigh In*, N.Y. TIMES (May 17, 2016), <https://well.blogs.nytimes.com/2016/05/17/is-your-food-natural-f-d-a-to-weigh-in> [https://perma.cc/856R-VZWR].

<sup>42</sup> Andrea Rock, *Peeling Back the “Natural” Food Label*, CONSUMER REP. (Jan. 29, 2016), <https://www.consumerreports.org/food-safety/peeling-back-the-natural-food-label> [https://perma.cc/97JU-MFS2] (detailing the finding from a consumer study that 87% of people noted they would spend more money on a product labeled as “natural” if it met their expectations for the definition of natural. Over 80% of consumers studied said that “natural” meant no chemicals, meaning synthetic ingredients, were used and that the product does not contain artificial ingredients, colors, toxic pesticides, or genetically modified organisms (“GMOs.”)).

<sup>43</sup> Julie Creswell, *Is It “Natural?” Consumers, and Lawyers, Want to Know*, N.Y. TIMES (Feb. 16, 2018), <https://www.nytimes.com/2018/02/16/business/natural-food-products.html> [https://perma.cc/W3UH-6GWH].

<sup>44</sup> See *infra* notes 46–49 and accompanying text.

<sup>45</sup> Michele Simon, *Can Food Companies Be Trusted to Self-Regulate? An Analysis of Corporate Lobbying and Deception to Undermine Children’s Health*, 39 LOY. L.A. L. REV. 169, 233 (2006).

nutritional quality.<sup>46</sup> General Mills approved Lucky Charms cereal to carry a “Smart Choices” icon, despite its twelve grams (additional forty-eight calories) of added sugar per serving, with approval being grounded in the argument that, “it’s better for you than doughnuts.”<sup>47</sup> Further examples of “Smart Choices” include Cheese Stuffed Crust Pizza, Fruit Loops, and Fudgesicles.<sup>48</sup> Manufacturers have taken these deceptive front-of-package (FOP) labels even further, declaring that sugar-laden Apple Jacks cereal “keeps children focused at school,” highly processed and sodium-saturated Spaghettios include a “full serving of vegetables” and “bone-building calcium,” and Cocoa Krispies cereal “helps support your child’s immunity.”<sup>49</sup> A 2011 study found that, of children’s foods with such front-of-package health claims, eighty-four percent failed to meet basic federal nutrition standards and ninety-five percent contained added sugar.<sup>50</sup> Further, public health organizations like the American Heart Association also allow the food industry to purchase front-of-package certifications, like its heart-healthy (or “heart smart”) seal of approval.<sup>51</sup> For a mere \$7,500 fee per product, companies can add “heart smart” labels to qualifying “healthy foods” like Kellogg’s Pop-Tarts, Frosted Flakes, Cocoa Frosted Flakes, and Fruity Marshmallow Krispies.<sup>52</sup> Through these examples, it is evident that Big Food has used corporate wealth and influence on oversight systems to allow it to confuse and misdirect consumers into purchasing and eating more unhealthy processed foods that fuel the obesity epidemic.<sup>53</sup>

### B. Misdirecting Nutritional Science

The food industry has a long history of funding scientific studies to help promote its products, while, at the same time, concealing their dangers.<sup>54</sup> With the main goal of promoting revenue, food manufacturers have looked to produce their own “science” through the funding of research facilities with

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<sup>46</sup> *Id.*

<sup>47</sup> See Marion Nestle, *Backlash Against “Smart Choices”*, THE ATLANTIC (Sept. 24, 2009), <https://www.theatlantic.com/health/archive/2009/09/backlash-against-smart-choices/27058/> [<https://perma.cc/MEJ4-KW6X>].

<sup>48</sup> Kathryn E. Hayes, Note, *Front-of-Package Nutrition Claims: Trustworthy Facts or Deceptive Marketing? Closing the Loopholes in Labeling*, 19 CARDOZO J.L. & GENDER 545, 559 (2013).

<sup>49</sup> *Id.* at 566.

<sup>50</sup> Juliet Sims et al., *Claiming Health: Front-of-Package Labeling of Children’s Food* 8 (2011), <https://www.preventioninstitute.org/publications/claiming-health-front-of-package-labeling-of-childrens-food> [<https://perma.cc/3A23-RVVD>].

<sup>51</sup> NESTLE, *supra* note 10, at 124–25.

<sup>52</sup> *Id.*

<sup>53</sup> Eugene McCarthy, *Corporate Law, Misdirection, and the Obesity Epidemic*, 60 WASHBURN L. J. 197, 215 (2021).

<sup>54</sup> Kearns et al., *supra* note 24.

employees of their own.<sup>55</sup> Corrupted science and its emphasis on choosing low-fat, high-sugar foods (like the processed foods that inundate today's grocery stores and pantries) likely catalyzed the obesity epidemic in the 1970s.<sup>56</sup> Today, corporate giants have funneled millions of dollars into their own research networks, with Coke founding the Global Energy Balance Network to promote soda consumption,<sup>57</sup> and McDonald's funding the Global Advisory Council on Balanced Lifestyles, which consists of influential doctors and scientists who help explain ways in which the public can integrate fast food into a "healthy" diet and lifestyle.<sup>58</sup> Further, Coke donates millions of dollars to prominent health groups, like the American Heart Association, the American Diabetes Association, and the National Institute of Health, in a "strategy to silence health critics and gain unlikely allies against soda regulations."<sup>59</sup>

A review of sixty studies between 2001 and 2016 looked at whether sugary drinks contribute to obesity or diabetes.<sup>60</sup> Of the twenty-six studies that found no link, almost all were funded by the sugar-sweetened beverage industry or conducted by people with financial ties to the industry.<sup>61</sup> Of the thirty-four studies that found a link, just one was funded by the beverage industry; the rest were independently funded.<sup>62</sup> Although companies in the food industry make public promises feigning corporate responsibility through funding of "health science," research has debunked these statements.<sup>63</sup> Most of these companies misrepresent their actions as they are in reality made for self-serving purposes, causing systematic discrepancy between corporate promises and the true effects on America's health.<sup>64</sup>

Funded nutrition science, past and present, has been undertaken to shift the blame of obesity from ultra-processed foods to an individual's *personal*

<sup>55</sup> Adam Benforado et al., *Broken Scales: Obesity and Justice in America*, 53 EMORY L.J. 1645, 1775 (2004).

<sup>56</sup> Cara Kaplan, Note, *Big Soda: Too Sweet to Fail?*, 44 FORDHAM URB. L.J. 1267, 1281 (2017).

<sup>57</sup> *Id.* at 1281–82.

<sup>58</sup> MICHELE SIMON, APPETITE FOR PROFIT: HOW THE FOOD INDUSTRY UNDERMINES OUR HEALTH AND HOW TO FIGHT BACK 187 (2006).

<sup>59</sup> Anahad O'Connor, *Coke and Pepsi Give Millions to Public Health, Then Lobby Against It*, N.Y. TIMES (Oct. 10, 2016), <https://www.nytimes.com/2016/10/10/well/eat/coke-and-pepsi-give-millions-to-public-health-then-lobby-against-it.html> [<https://perma.cc/D4C8-V34A>].

<sup>60</sup> See Dean Schillinger et al., *Do Sugar-Sweetened Beverages Cause Obesity and Diabetes? Industry and the Manufacture of Scientific Controversy*, 165 ANNALS INTERNAL MED. 895, 895 (2016), <https://annals.org/aim/article-abstract/2578450/do-sugar-sweetened-beverages-cause-obesity-diabetes-industry-manufacture-scientific> [<https://perma.cc/SDV9-YAPC>].

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> David S. Ludwig & Marion Nestle, *Can the Food Industry Play a Constructive Role in the Obesity Epidemic?*, 300 JAMA 1808, 1809 (2008) (analyzing different claims made by the food industry and whether such claims were substantiated by later action).

<sup>64</sup> *Id.*

*responsibility* as to their choices to overeat.<sup>65</sup> Further, the Big Food industry promotes the message that all a person needs to do is “get more exercise and worry less about cutting calories.”<sup>66</sup> Yet, research shows that our society is now “obesogenic,” meaning that if people continue eating according to the industry plan - despite exercising - they will inevitably become overweight or obese.<sup>67</sup> Practicing physicians refute the ability for consumers to have healthy lives when eating under the blueprint of Big Food, stating that: “[i]n the past, social stigmas reinforced the notion that obese people were overindulging, lethargic individuals who should be personally accountable for solving their own health issues. Yet today, we face an industry of harmful additives and overly processed foods in which manufacturers have arguably overcome individual willpower.”<sup>68</sup>

With the goal of maximizing sales and profits, food manufactures look to promote these ideas of personal responsibility and the need for more exercise by lobbying state and national governmental officials.<sup>69</sup> In 2019, Big Food spent \$167 million lobbying elected officials in order to promote food consumption.<sup>70</sup> Despite widespread agreement among nutritionists that Americans desperately need to “eat less,” Big Food works hard to persuade the public into eating *more* processed, calorie-dense, and nutrient-poor foods.<sup>71</sup> The striking reality is that companies must sell less food if the population is to lose weight, and this pits the fundamental purpose of the food industry against public officials who promise to strive for and attain healthy goals for their constituents.<sup>72</sup> Examples of these lobbying tactics can be seen in state legislatures and all the way up to the White House.<sup>73</sup> In 2011,

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<sup>65</sup> Colin Hector, *Nudging Towards Nutrition? Soft Paternalism and Obesity-Related Reform*, 67 FOOD & DRUG L.J. 103, 103 (2012).

<sup>66</sup> Anahad O'Connor, *Coca-Cola Funds Scientists Who Shift Blame for Obesity Away from Bad Diets*, N.Y. TIMES: WELL (Aug. 9, 2015), <https://well.blogs.nytimes.com/2015/08/09/coca-cola-funds-scientists-who-shift-blame-for-obesity-away-from-bad-diets/> [<https://perma.cc/2BLG-EU3V>].

<sup>67</sup> Lindsay F. Wiley, *Shame, Blame, and the Emerging Law of Obesity Control*, 47 U.C. DAVIS L. REV. 121, 145-46 (2013).

<sup>68</sup> See Mark Hyman, *Four Ways Other Countries Are Successfully Tackling Obesity. Take Note, America*, HUFF POST (Sept. 30, 2014), [https://www.huffpost.com/entry/four-ways-countries-obesity\\_b\\_5845336](https://www.huffpost.com/entry/four-ways-countries-obesity_b_5845336) [<https://perma.cc/87XN-U2BH>].

<sup>69</sup> See generally Part II.B.

<sup>70</sup> *Sector Profile: Agribusiness*, CTR. FOR RESPONSIVE POL., <https://www.opensecrets.org/federal-lobbying/sectors/summary?cycle=2019&id=A> [<https://perma.cc/2HME-V9AT>] (last visited Feb. 23, 2022) (“Total for Agribusiness: \$143,344,380”); *Industry Profile: Food & Beverage*, OPEN SECRETS, <https://www.opensecrets.org/federal-lobbying/industries/summary?cycle=2019&id=N01> [<https://perma.cc/2UKE-QXUX>] (last visited Feb. 23, 2022) (“Total for Food & Beverage: \$24,728,080”).

<sup>71</sup> Susan Dentzer, *The Child Abuse We Inflict Through Child Obesity*, 29 HEALTH AFFS. 342, 342 (2010).

<sup>72</sup> Kelly D. Brownell, *Thinking Forward: The Quicksand of Appeasing the Food Industry*, 9 PLOS MED 1, 1-2 (2012).

<sup>73</sup> Duff Wilson & Janet Roberts, *Special Report: How Washington Went Soft on Childhood Obesity*, REUTERS (Apr. 27, 2012), <https://www.reuters.com/article/us-usa-foodlobby/special-report-how-washington-went-soft-on-childhood-obesity-idUSBRE83Q0ED20120427> [<https://perma.cc/K5QA-F22N>].

Congress began to overhaul public school lunch menus, planning to make portions smaller and to include more vegetables to help childhood obesity.<sup>74</sup> Minnesota Senator Amy Klobuchar fought successfully to designate pizza as a vegetable for school students - because it includes tomato sauce.<sup>75</sup> Notably, Minnesota is home to Schwan's Food Company, a \$3 billion food corporation with a seventy percent share of the public-school frozen pizza market.<sup>76</sup> Despite the fact that Klobuchar raised \$160 thousand in food industry donations that year (including donations from Schwan's), she insisted there was no link between these campaign contributions and her designation of pizza as a vegetable for America's children.<sup>77</sup>

In that same year, the Obama administration put members of the food industry "on notice," calling for the reformulation of their processed foods and to cease marketing junk food to children.<sup>78</sup> Shortly thereafter, the CEOs of Nestle, Kellogg's, and General Mills, along with lobbyists from the Grocery Manufacturers Association and the Better Business Bureau, paid personal visits to the White House to discuss the administration's position.<sup>79</sup> As discussed in this Note, these food representatives argued that these regulations would constitute an unjustified infringement on the free speech rights of the industry.<sup>80</sup> In response to the pressures of Big Food, the Obama administration, specifically First Lady Michelle Obama, immediately pivoted to a "Let's Move" campaign, which emphasized exercise instead of dietary change - the *precise* message that the food industry seeks to convey to the public.<sup>81</sup> While the efforts of Big Food shifted the priority from "healthy eating" to "more exercise" in the Obama Administration's efforts to combat obesity, the Trump Administration was also impacted by Big Food by repeatedly agreeing to delay the FDA's new nutrition labels that required the disclosure of added sugars.<sup>82</sup> Food industry executives and lobbyists are continuing to behave this way because they are preoccupied with "maximizing shareholder value" and seek to attain "connected capitalism" through corporate political participation; and it is working.<sup>83</sup>

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Solving the Problem of Children Obesity Within a Generation*, WHITE HOUSE TASK FORCE ON CHILDHOOD OBESITY (2010), [https://letsmove.obamawhitehouse.archives.gov/sites/letsmove.gov/files/TaskForce\\_on\\_Childhood\\_Obesity\\_May2010\\_FullReport.pdf](https://letsmove.obamawhitehouse.archives.gov/sites/letsmove.gov/files/TaskForce_on_Childhood_Obesity_May2010_FullReport.pdf) [<https://perma.cc/3RJS-MNMZ>].

<sup>79</sup> Wilson & Roberts, *supra* note 73.

<sup>80</sup> Lyndsey Layton & Dan Eggen, *Food, Ad Industries Lobby Against Nutrition Guidelines*, WASH. POST. (July 9, 2010), [https://www.washingtonpost.com/politics/industries-lobby-against-voluntary-nutrition-guidelines-for-food-marketed-to-kids/2011/07/08/g1QAZSZu5H\\_story.html](https://www.washingtonpost.com/politics/industries-lobby-against-voluntary-nutrition-guidelines-for-food-marketed-to-kids/2011/07/08/g1QAZSZu5H_story.html) [<https://perma.cc/8Q2R-FRHP>].

<sup>81</sup> Wilson & Roberts, *supra* note 73.

<sup>82</sup> Woodhouse & Woodhouse, *supra* note 19, at 299.

<sup>83</sup> Robert J. Foster, *Corporations as Partners: "Connected Capitalism" and the Coca-Cola Company*, 37

In addition to the food industry's influence over health campaigns and labeling, Congress's larger connection with the food industry comes in the form of crop subsidies, which agribusiness and food producers rely on to maximize profits.<sup>84</sup> In 2018, the Agricultural Improvement Act (Farm Act) was passed by Congress, with a projected total cost of \$428 billion over a five-year period between 2019-2023.<sup>85</sup> The main commodity crops included in this bill were corn and soybeans, the prices of which have been artificially and substantially lowered.<sup>86</sup> Because of these subsidies, corn is the least expensive product for producers to cultivate, and most of that corn goes towards producing inexpensive, high-calorie, and highly-processed foods.<sup>87</sup> While these subsidies incentivize the production of calorie-dense, nutrition-poor food, they largely ignore the production of healthy whole grains, raw vegetables, and raw fruits.<sup>88</sup> As a result, the inflation-adjusted grocery store price for snacks and junk food has steadily fallen, while the adjusted price for raw fruits and raw vegetables has substantially increased in recent decades.<sup>89</sup> In a grim reality, Congress is using taxpayer money to subsidize and lower the prices of highly-processed foods that contribute to the death of approximately 678,000 Americans a year.<sup>90</sup>

### C. History and Authority of Food & Drug Administration

The powers of the FDA and its subsequent add-ons have changed immensely over time, with the federal government looking to extend protections for consumers and to create regulatory guidelines to which producers adhere.<sup>91</sup> Originally enacted under the Federal Food and Drug Act of 1906, the FDA was created to detect and deter food containing "added poisonous or other added deleterious ingredients which may render such articles injurious to health."<sup>92</sup> However, the small size and lack of power provided to the FDA never brought about real change, with Supreme Court Justice Louis Brandeis in 1913 describing the marketplace and bartering of

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POL. & LEGAL ANTHROPOLOGY REV. 246, 251 (2014).

<sup>84</sup> Mallorie McCue, Note, *Follow the Money: Insulating Agribusiness Through Lobbying and Suppression of Individual Free Speech*, 6 PITT. J. ENV'T PUB. HEALTH L. 215, 215 (2012).

<sup>85</sup> U.S. Department of Agriculture 2018 Farm Act, ECON. RSCH. SERV. (2018), <https://www.ers.usda.gov/topics/farm-economy/farm-commodity-policy/farm-bill-spending/> [<https://perma.cc/2JSL-KP35>].

<sup>86</sup> McCue, *supra* note 84, at 232.

<sup>87</sup> Benforado et al., *supra* note 55, at 1792-93.

<sup>88</sup> Williams, *supra* note 1, at 47.

<sup>89</sup> *Id.*

<sup>90</sup> *Why Good Nutrition is Important*, *supra* note 7.

<sup>91</sup> See generally Part II.C.

<sup>92</sup> Claudia L. Andre, *What's in that Guacamole? How Bates and the Power of Preemption Will Affect Litigation Against the Food Industry*, 15 GEO. MASON. L. REV. 227, 229 (2007) (providing a history of the FDA's regulation for food labels).

goods as a “contest of wits” and “exchange of two unknown values.”<sup>93</sup> Brandeis further proclaimed that the law at the time gave no sympathy to the ill-informed buyer, espousing the notion of “let the buyer beware.”<sup>94</sup> After efforts continued to fail, Congress enacted legislation in 1930 granting the FDA the teeth to enforce regulations specifically relating to canned goods.<sup>95</sup> Following years of debate and the beginnings of Big Food’s influence that is present today, Congress passed the 1938 Food, Drug, and Cosmetic Act (FDCA).<sup>96</sup> The FDCA authorized the FDA to further regulate the manufacturing process of foods, holding that a food shall be deemed misbranded if the “labeling is false or misleading” or “its advertising is false or misleading in a material respect.”<sup>97</sup> The FDCA also looked to regulate that the prominence of information on a label must be “in such terms as to render it likely to be read and understood by the ordinary individual.”<sup>98</sup>

However, even after the American public became increasingly interested in promoting and demanding access to information regarding the health and safety of consumer products in the 1970s’ “right to know” movement,<sup>99</sup> Big Food only adhered to these requirements as to the essential information, but in a way that was unintelligible from the consumer’s perspective.<sup>100</sup> These same problems persisted, with then Secretary of the U.S. Department of Health and Human Services, Dr. Louis W. Sullivan, stating in 1989 that, “[t]he grocery store has become the Tower of Babel, and consumers need to be linguists, scientists, and mind readers to understand many of the labels they see.”<sup>101</sup>

In its broadest and most expansive action against deceptive labeling practices to date, Congress passed the Nutrition Labeling and Education Act of 1990 (NLEA), which created mandatory food labeling requirements and qualified nutrient claim parameters.<sup>102</sup> The NLEA helped create uniformity and reduce confusion by creating national labeling requirements, giving the Secretary of the Department of Health and Human Services authority to define certain terms, and giving enforcement power to the FDA under the

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<sup>93</sup> Louis D. Brandeis, *Competition that Kills*, HARPER’S WEEKLY, (Nov. 15, 1913) reprinted in Louis D. Brandeis, *Competition that Kills*, Louis D. Brandeis Sch. of L. Libr.: Writings by Louis D. Brandeis, <https://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/business-a-profession-chapter-15> [<https://perma.cc/E99X-XY9D>].

<sup>94</sup> *Id.*

<sup>95</sup> Canned Food Standardization, Pub. L. No. 71-538, Ch. 874, 46 Stat. 1019-20 (1930).

<sup>96</sup> Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301-99 (1938).

<sup>97</sup> 21 U.S.C. § 343(a).

<sup>98</sup> *Id.* § 343(f).

<sup>99</sup> Eula Bingham, *The “Right-to-Know” Movement*, 73 AM. J. PUB. HEALTH 1302, 1302 (1983).

<sup>100</sup> Jennifer L. Pomeranz, *Front-of-Package Food and Beverage Labeling: New Directions for Research and Regulation*, 40 AM. J. PREV. MED. 382, 382 (2011) (discussing nutritional labeling of packaged food due to concerns about obesity).

<sup>101</sup> Jean Lyonsa & Martha Rumoreb, *Food Labeling—Then and Now*, 2 J. PHARMACY & L. 171 (1994).

<sup>102</sup> National Labeling and Education Act (NLEA), Pub. L. No. 101-535, 104 Stat. 2353 (1990).

FDCA.<sup>103</sup> Specifically, the NLEA requires many of the labels that are present today on food products, such as serving size, amount of fats, carbs, sugars, and sodium, with identification of calories from these sources, as well as vitamins and minerals.<sup>104</sup> To address consumer confusion over the use of grams and milligrams, the FDA required that labeling include the percentage of U.S. Recommended Daily Allowance (RDA) of each nutrient, expressed on the label as “% Daily Value.”<sup>105</sup> To prevent consumer deception, certain information was required to be in “larger type, bold type, or contrast color” and all health claims on food packages were to be determined by the FDA.<sup>106</sup> As a probable result, manufacturers began more vividly displaying nutritional information that sheds a good light on the product on FOP labels to entice the consumers’ seemingly “healthier appetite.”<sup>107</sup>

#### D. *The Federal Trade Commission (FTC) and Cooperation with FDA*

The FTC was enacted in 1914 as an independent agency to regulate food advertising that was considered false or misleading.<sup>108</sup> Debates in Congress continued for years as to the division of power between the FTC and the FDA, with arguments as to whether one agency should hold both regulatory powers of labeling and advertising, or whether they should be divided.<sup>109</sup> In 1938, the debate ended, and Congress declined to give the FDA jurisdiction over advertising and instead confirmed FTC authority over false and misleading advertising by passing the Wheeler-Lea Amendments, which amended Section 5 of the Federal Trade Commission Act.<sup>110</sup> The final version of the new food law made no reference at all to advertising, thus implicitly announcing that advertising jurisdiction would remain with the FTC.<sup>111</sup> Under a memorandum of understanding (“MOU”) originally executed in 1954, the FDA and FTC share jurisdiction for enforcement of claims made by manufacturers of health-related products.<sup>112</sup> Under the agreement, the

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<sup>103</sup> Christine Lewis Taylor & Virginia L. Wilkening, *How the Nutrition Food Label Was Developed, Part 1: The Nutrition Facts Panel*, 108 J. AM. DIETETIC ASS’N. 437, 438–39 (2008).

<sup>104</sup> Lyonsa & Rumoreb, *supra* note 101.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> Camille Currey, Note, *Despite What You’ve Been Sold—Unwrapping the Falsities Surrounding Food Labels*, 118 W. VA. L. REV. 1279, 1295 (2016).

<sup>108</sup> Federal Trade Commission Act, ch. 311, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 41 – 64).

<sup>109</sup> 79 CONG. REC. 8356 (1935); 80 CONG. REC. 8356 (1936).

<sup>110</sup> Wheeler-Lea Amendments, ch. 49, § 4, 52 Stat. 111, 114 (1938) (amending § 12 of the FTC Act) (codified at 15 U.S.C. § 45(a)(1)).

<sup>111</sup> *Id.*

<sup>112</sup> Memorandum of Understanding Between the Federal Trade Commission and The Food and Drug Administration, MOU 225-71-8003 (Apr. 21, 1971), <https://www.fda.gov/about-fda/domestic-mous/mou-225-71-8003> [<https://perma.cc/7M57-6AEA>].

FDA has primary responsibility for preventing misbranding of supplements, foods, devices, and cosmetics, and the truth and falsity of prescription drug labeling, while the FTC has primary authority for overseeing advertising of these food and health-products.<sup>113</sup>

Under this agreement and in review of these products, the FTC prohibits the use of “unfair or deceptive acts or practices in or affecting commerce” and false advertisements that “mislead in a material respect.”<sup>114</sup> In a separate policy statement, the FTC has explained that in its enforcement of these provisions, it looks first to whether the claim contains a misrepresentation or omission of fact that is likely to mislead a consumer acting reasonably under the circumstances.<sup>115</sup> Second, the agency considers whether that representation is material to the consumer’s purchasing decision.<sup>116</sup> Thus, false claims, claims made without disclosure of material facts or unsubstantiated claims, may violate the law.<sup>117</sup> Further, when claims are targeted to a specific group, the FTC interprets the claims from the perspective of a reasonable consumer in the target group.<sup>118</sup>

While separate entities, both the FDA and the FTC can enjoin a firm from continuing a practice that violates labeling or advertising statutes and regulations by seeking an injunction or sending a cease and desist order.<sup>119</sup> In addition, the FDA can recommend criminal prosecution of a company engaging in criminal conduct, and the FTC can assess civil monetary penalties, order refunds to consumers, and require corrective advertising, disclosures, or other informational remedies aimed at rectifying the deception.<sup>120</sup>

As consumers continued to criticize the food industry for unfair and inaccurate labeling practices, Congress enacted The Fair Package and Labeling Act (FLPA) in 1966, with the goals of fostering fair competition and preventing deceptive practices.<sup>121</sup> The research and formation of the FLPA was jumpstarted by President John F. Kennedy in 1962, with an address to Congress on behalf of the American consumers.<sup>122</sup> President

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<sup>113</sup> *Id.*

<sup>114</sup> 15 U.S.C. § 45(a)(1).

<sup>115</sup> Fed. Trade Comm’n, *FTC Policy of Deception* (Oct. 14, 1983), [https://www.ftc.gov/system/files/documents/public\\_statements/410531/831014deceptionstmt.pdf](https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf) [<https://perma.cc/94MU-T7YL>].

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Advertising FAQs: A Guide for Small Business*, FTC (last updated Jan. 2022), <https://www.ftc.gov/tips-advice/business-center/guidance/advertising-faqs-guide-small-business> [<https://perma.cc/D2MB-FUNP>].

<sup>120</sup> *Id.*

<sup>121</sup> Fair Packaging and Labeling Act, 15 U.S.C. §§ 1451–61 (1966).

<sup>122</sup> President John F. Kennedy, *Special Message to Congress on Protecting Consumer Interest*, Presidential Papers. President’s Office Files (Mar. 15, 1962), <https://www.jfklibrary.org/asset-viewer/archives/JFKPOF/037/JFKPOF-037-028> [<https://perma.cc/U7ZK-TJNK>].

Kennedy laid out four rights belonging to all consumers that he believed the federal government had an affirmative duty to protect: the right to safety, the right to be informed, the right to choose, and the right to be heard.<sup>123</sup> The FPLA grants the FTC and the FDA the regulatory authority to require specific labels on products, including disclosure of contents, identification of the commodity, and information on the manufacturer, packer, or distributor of the product.<sup>124</sup> Under the law, the FDA and the FTC retain authority to create additional regulations in order to facilitate a fair market and to prevent deceptive practices.<sup>125</sup> To promote honesty in labeling, the FDA and the FTC can promulgate restrictions on ingredient descriptions, package fill, price labeling, and package size labeling as necessary.<sup>126</sup> The bilateral approach undertaken by the FPLA, with the FTC and the FDA acting in concert to enforce provisions of the FPLA, established revolutionary protection for consumers; yet despite the obvious successes, this approach still fails to adequately protect consumers today.<sup>127</sup>

### E. *The Growing Problem*

#### 1. Size & Limitations of the FDA against Big Food's Power

With all their added powers through legislation and the promise of support by politicians, the question must be asked as to why the FDA and FTC continue to fall behind regarding food labeling and advertising. To start simply, the FDA and FTC have too much to regulate.<sup>128</sup> Due to the lack of resources for enforcement, the difficulty of policing advertising across different media outlets, and the lure of profit by food and dietary supplements, manufacturers make it virtually impossible for the FDA and the FTC to keep pace with the marketing strategies for these products.<sup>129</sup> The FDA alone must regulate over 500,000 food products, “tens of thousands” of companies, and scores of new products that are introduced each year in the

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<sup>123</sup> *Id.*

<sup>124</sup> Fed. Trade Comm'n, *Fair Packaging and Labeling Act: Rule Summary*, FTC, <https://www.ftc.gov/enforcement/rules/rulemaking-regulatory-reform-proceedings/fair-packaging-labeling-act> [<https://perma.cc/GE6H-B2LY>], (last visited Feb. 20, 2022).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Coalition for Accurate Product Labels*, ACCURATE LABELS, <https://www accuratelabels.com> [<https://perma.cc/SUU6-NWKM>] (explaining that while the FPLA successfully requires some types of labels, holes exist where states and cities have implemented their own labeling requirements), (last visited Feb. 23, 2022).

<sup>128</sup> Patrick Meyer, *The Crazy Maze of Food Labeling and Food Claim Laws*, 92 ST. JOHN'S L. REV. 233, 243 (2018).

<sup>129</sup> See Natasha Singer, *Foods with Benefits, or So They Say*, N.Y. TIMES (May 14, 2011), <https://www.nytimes.com/2011/05/15/business/15food.html> [<https://perma.cc/C47V-DN8C>].

U.S. market.<sup>130</sup> In addition, there are reportedly over 1,000 food additives on the FDA substance inventory list that have not been investigated.<sup>131</sup> Further, the Center for Food Safety and Applied Nutrition within the FDA, which is in charge of nutrition, labeling, and dietary supplements, has just over 1,200 employees as of 2020.<sup>132</sup> With this level of staffing, the FDA struggles to compete with the incredible ability of Big Food to get around regulations and requirements with its \$30 billion annual marketing budget.<sup>133</sup>

Further, the FDA's regulatory power over these manufacturers has actually declined over the last few decades due to limitations placed on the agency by Congress, such as the Dietary Supplement Health and Education Act of 1994 (DSHEA).<sup>134</sup> In enacting and researching for DSHEA, Congress recognized that one of the most important functions of the federal government is improving the health of its citizens, and that nutritional supplementation plays an important role in achieving that function.<sup>135</sup> However, as expected, DSHEA was met with strong pushback from food manufacturers and calls for limiting its ability to regulate.<sup>136</sup> In response to this influence, Congress made a change in the Act, shifting the burden from having to prove adulteration and false or misleading information, and establishing an "imminent hazard" standard of proof in order to remove a product from sale.<sup>137</sup> For these reasons, experts believe that the DSHEA is lax, which attracts manufactures who are intent on maximizing profits with little regulatory oversight and lobbyists to put millions of dollars into keeping DSHEA the same.<sup>138</sup>

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<sup>130</sup> Lisa Heinzerling, *The Varieties and Limits of Transparency in U.S. Food Law*, 70 *FOOD & DRUG L.J.* 11, 15 (2015).

<sup>131</sup> Brett M. Paben, *Lack of Interest in Consumer Interests: FDA's Narrow Perspective on Food Labeling and Label Statements Undermines a Century of Agency Leadership*, 13 *RUTGERS J.L. & PUB. POL'Y* 174, 186 (2015).

<sup>132</sup> FDA, *Food and Drug Administration Distribution of Full-Time Equivalent (FTE) Employment Program Level*, FDA, <https://www.fda.gov/media/132813/download> [<https://perma.cc/2JMN-49VQ>] (last visited Feb. 23, 2022).

<sup>133</sup> Schaffer, *supra* note 16.

<sup>134</sup> David Vinjamuri, *POM Wonderful's Deception is the Tip of the Iceberg*, *FORBES* (May 23, 2012), <http://www.forbes.com/sites/davidvinjamuri/2012/05/23/judge-finds-pom-wonderful-advertising-deceptive-but-thats-just-the-tip-of-the-iceberg> [<https://perma.cc/TGJ6-UYLJ>].

<sup>135</sup> Dietary Supplement Health and Education Act, Pub. L. 103-417, 108 Stat. 4325, 4325 (1994).

<sup>136</sup> Natalie R. Bilbrough, Comment, *The FDA, Congress, and Mobile Health Apps: Lessons from DSHEA and the Regulation of Dietary Supplements*, 74 *MD. L. REV.* 921, 942-46 (2015).

<sup>137</sup> Dietary Supplement Health and Education Act, Pub. L. 103-417, 109 Stat. 4325, 4328-29 (1994).

<sup>138</sup> Melanie Zanona, *How the Dietary Supplement Industry Masters the Hill*, *CQ WEEKLY* (June 1, 2015), <http://melaniezanona.com/dietarysupplements/> [<https://perma.cc/YW74-98Q7>].

## 2. Introduction of Commercial Speech Doctrine

As revealed, proposed actions by the FDA in order to protect American citizens are met with staunch opposition by Big Food, whether by lobbying efforts or the misdirection of science through biased studies.<sup>139</sup> However, when Big Food is not on the offensive, it falls back on the legal argument of its First Amendment protections as a right to label and market their products to American consumers.<sup>140</sup> To argue these positions, food manufacturers use their vast amounts of revenue to hire PR firms, legal counsel, and publicists to refute the regulations under Constitutional protections.<sup>141</sup> These arguments are based on the Commercial Speech Doctrine, a category of protected speech recognized by the Supreme Court in 1976.<sup>142</sup> As the FDA first began mandating nutrition labeling on food products, the Supreme Court recognized that commercial speech receives less protection under the First Amendment, holding that commercial speech is “more easily verifiable” than other forms of speech “in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else.”<sup>143</sup>

In 2015, the City of San Francisco passed an ordinance to require mandatory disclosures on Sugar-Sweetened Beverages (SSBs) that stated: “WARNING: Drinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay.”<sup>144</sup> In bringing civil action against the City, the American Beverage Association (ABA) found success in arguing their First Amendment defenses.<sup>145</sup> While the City of San Francisco provided evidence of the harms from the products, the ABA succeeded on the grounds that the ordinance was an “unjustified or unduly burdensome disclosure requirement, [that] might offend the First Amendment by chilling protected commercial speech.”<sup>146</sup> While a drastic measure by San Francisco, this action portrays the application of the Commercial Speech Doctrine in relation to mandatory labeling disclosures.<sup>147</sup>

However, the Commercial Speech Doctrine also provides an avenue for the FDA to bring about new requirements for food labeling and marketing,

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<sup>139</sup> Glenn G. Lammi, *FDA's “Added Sugar” Labeling Proposal: More Information Isn't Always Better (Or Legal)*, FORBES (Sept. 8, 2014), <http://www.forbes.com/sites/wlf/2014/09/08/fdas-added-sugar-labeling-proposal-more-information-isnt-always-better-or-legal/> [https://perma.cc/8EFT-HNKF].

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976).

<sup>143</sup> *Id.* at 722.

<sup>144</sup> *Am. Beverage Ass'n v. City & Cnty. of S.F.*, 916 F.3d 749, 753 (9th Cir. 2019).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 753.

<sup>147</sup> *Id.* at 749.

focusing on the substantial government interest in protecting Americans' health through the prevention of deception and misguidance.<sup>148</sup> As added sugars gained attention as a public health risk, the FDA passed new regulations in 2016 to require food manufacturers to disclose added sugar content on the labeling of food products.<sup>149</sup> The new rule mandated a specific line for the amount of added sugars in a food product and a recommended percentage Daily Value (“%DV”) derived from U.S. Dietary Guidelines.<sup>150</sup> In support of the guidelines, the FDA funded research that determined the new labeling would, in fact, help people distinguish added sugars and had the potential to improve dietary intake and to reduce diet-related chronic disease.<sup>151</sup>

While the research was conducted to show the health benefits, the FDA also worked at length to defend the rule against First Amendment claims during the notice and comment period.<sup>152</sup> Both the Grocery Manufacturers Association and the Sugar Association opposed the regulation, challenging the mandatory disclosures as compelled commercial speech.<sup>153</sup> However, the FDA was prepared to respond in the offensive, contending that the required disclosure of factual information in commercial speech is allowed “as long as the disclosures provides accurate, factual information, is not unjustified or unduly burdensome, and ‘reasonably relate[s]’ to a government interest.”<sup>154</sup> These standards were established by the Court in *Zauderer v. Office of Disciplinary Counsel*, a paramount case in the long line of commercial speech case law.<sup>155</sup> In its successful defense of the 2016 “Added Sugars” Act, the door was opened for the FDA and FTC to combat deceptive labeling and advertising in a way that is supported by the courts in meeting the standards established in *Zauderer*.<sup>156</sup> Through an analysis of how the Courts have ruled on these commercial speech cases and the success of the “Added Sugars” Act, the American public now has a fighting chance to bring about support

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<sup>148</sup> 21 C.F.R. § 101 *et seq.* (2016).

<sup>149</sup> *Food Labeling: Revision of the Nutrition and Supplement Facts Labels*, 81 Fed. Reg. 33,742 (May 27, 2016).

<sup>150</sup> *Id.* at 33,744.

<sup>151</sup> Ellen A. Wartella et al., *Front-of-Package Nutrition Rating Systems and Symbols: Phase I Report*, NAT'L ACADEMIES PRESS (2010).

<sup>152</sup> *Food Labeling*, *supra* note 149 at 33,758–67.

<sup>153</sup> See Dan Charles, *An ‘Added Sugar’ Label Is on the Way for Packaged Food*, NPR: THE SALT (May 20, 2016), <https://www.npr.org/sections/thesalt/2016/05/20/478837157/the-added-sugar-label-is-coming-to-a-packaged-food-near-you> [<https://perma.cc/M2NR-5T7F>]; see also *The Sugar Association Statement on FDA’s ‘Added Sugars’ Declaration*, CISION PR NEWSWIRE (May 20, 2016), <https://www.prnewswire.com/news-releases/the-sugar-association-statement-on-fdas-added-sugars-declaration-300272636.html> [<https://perma.cc/BYB7-DF5H>].

<sup>154</sup> *Food Labeling*, *supra* note 149 at 33,758.

<sup>155</sup> *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985).

<sup>156</sup> *Id.* at 652.

for the FDA and FTC's requirements, legislation, and legal action against Big Food to combat the obesity epidemic.<sup>157</sup>

### III. ANALYSIS

#### A. *Development of Commercial Speech Doctrine and Levels of Scrutiny*

In the 1970s, the Supreme Court extended First Amendment protections of commercial speech in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, where the Court addressed “whether speech which does no more than propose a commercial transaction is so removed from any exposition of ideas, and from truth, science, morality, and arts ... that it lacks all protection.”<sup>158</sup> The Court reasoned that a strong public interest existed for consumers to make “intelligent and well informed” decisions, and therefore, the “free flow of commercial information [was] indispensable.”<sup>159</sup> Despite the general protections afforded by the First Amendment, the Supreme Court held that the government’s ability to regulate speech was “surely permissible.”<sup>160</sup> However, when determining whether the government’s compulsion or regulation is constitutionally permissible, the mandate must withstand the applicable level of scrutiny.<sup>161</sup> Through evaluation of the strict scrutiny applied in *R.J. Reynolds Tobacco Co. v. FDA*, intermediate scrutiny applied in *Central Hudson Gas & Electric v. Public Service Commission of New York*, and rational basis applied in *Zauderer v. Office of Disciplinary Counsel*, it is apparent that the FDA and FTC must take precautions in combating the obesity crisis so that their regulations pass constitutional muster.<sup>162</sup>

#### 1. Strict Scrutiny

In an avenue that should be avoided by the FDA and FTC, the Court applies strict scrutiny in the evaluation of government compelled speech, which is only permissible if the speech is “narrowly tailored to achieve a

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<sup>157</sup> See generally *id.*

<sup>158</sup> *Va. State Bd. of Pharmacy v. Va. Consumer Council*, 425 U.S. 748, 781 (1976) (holding that commercial speech warrants First Amendment protection due to its contribution to the flow of accurate, reliable information to public).

<sup>159</sup> *Id.* at 765.

<sup>160</sup> *Id.* at 770.

<sup>161</sup> *Id.* at 771.

<sup>162</sup> Melissa Card, *America, You Are Digging Your Grave with Your Spoon—Should the FDA Tell You That on Food Labels?*, 68 *FOOD DRUG L.J.* 309, 320 (2013).

compelling government interest.”<sup>163</sup> The case of *R.J. Reynolds Tobacco Co. v. FDA* in the District Court of the District of Columbia is the seminal case in the application of strict scrutiny.<sup>164</sup> In that case, tobacco companies sued the FDA, challenging the new required displays of graphic images on cigarette boxes.<sup>165</sup> Despite the adverse health risks generated from smoking, the FDA could not meet its burden under strict scrutiny when compelled speech was used to provoke an emotional response by the consumer.<sup>166</sup> The court found that an aim to change consumer behavior was not a compelling interest, and even if the compelling interest had existed, the graphic images were not narrowly tailored due to their size and content.<sup>167</sup> Although the District Court of D.C. applied strict scrutiny in this case, courts rarely apply this level of scrutiny in the commercial speech context, finding that factual disclosures on products do not threaten the autonomy of the speaker in the same way as laws compelling the expression of ideological speech.<sup>168</sup>

## 2. Intermediate Scrutiny

Because commercial speech receives less protection than other forms of protected speech, the courts usually apply more relaxed standards when evaluating the constitutionality of commercial speech regulations.<sup>169</sup> The Supreme Court set forth the intermediate scrutiny test for commercial speech in the 1980 case, *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.<sup>170</sup> In *Central Hudson*, the issue was whether the New York Public Service Commission violated the First Amendment rights of Central Hudson when it completely banned promotional advertising by the utility company.<sup>171</sup> The Court held that the government must satisfy four factors in order to uphold the regulation: (1) whether the expression concerns a lawful activity that is not misleading; (2) whether the government’s asserted interest is substantial; (3) whether the regulation directly advances the government’s asserted interest; and (4) whether to serve that interest, the regulation is not more extensive than necessary.<sup>172</sup> While the State argued

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<sup>163</sup> *R.J. Reynolds Tobacco Co. v. FDA*, 845 F. Supp. 2d 266, 272–74 (D.D.C. 2012) (concluding that the graphic images are not “purely factual and uncontroversial disclosures that are reviewable under this less stringent standard.”). Thus, the images must withstand the strict scrutiny analysis. *Id.*

<sup>164</sup> *See generally id.*

<sup>165</sup> *Id.* at 271.

<sup>166</sup> *Id.* at 274–75.

<sup>167</sup> *Id.* at 275–76.

<sup>168</sup> KATHLEEN M. SULLIVAN & NOAH FEILDMAN, *FIRST AMENDMENT LAW* 4–9 (5th ed. 2013).

<sup>169</sup> Krista Hessler Carver, *A Global View of the First Amendment Constraints on FDA*, 63 *FOOD & DRUG L.J.* 151, 178 (2008).

<sup>170</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557 (1980).

<sup>171</sup> *Id.* at 558.

<sup>172</sup> *Id.* at 566.

that they had a substantial interest in energy conservation that was directly served by the advertising ban, the Court struck down the regulation, finding a lack of connection between the Commission's interest and the ban itself, as well as the failure of the Commission to demonstrate that the interest could not be achieved through less restrictive means.<sup>173</sup> After the establishment of the *Central Hudson* test, cases pertaining to intermediate scrutiny revealed that the government's actions must directly advance the government's interest through consistent application.<sup>174</sup> For example, in *Rubin v. Coors Brewing Company*, brewers filed suit against the Federal Alcohol Administration Act as it prohibited beer labels from displaying alcohol content.<sup>175</sup> While the Court recognized the government's interest in preventing a "strength war" between distributors, they ruled that the regulation did not directly advance its interests due to inconsistent application.<sup>176</sup>

### 3. Rational Basis Standard

When compelled speech is "purely factual and uncontroversial," aiming to prevent "confusion or deception," a court will examine governmental regulations under a rational basis review.<sup>177</sup> Under this standard, compelled speech is constitutionally permissible if the speech is reasonably related to the State's interest to prevent deception among consumers.<sup>178</sup> In *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, the Supreme Court considered the constitutionality of a mandate that compelled speech in the commercial context, and decided to apply an entirely different test.<sup>179</sup> In *Zauderer*, an attorney printed newspaper ads containing non-deceptive illustrations and legal advice.<sup>180</sup> However, the Board of Commissioners on Grievances and Discipline of Ohio wanted to prevent deception amongst consumers by requiring the disclosure of certain information regarding fee arrangements, deeming the ad misleading because it did not inform potential clients that they might be responsible for the costs of litigation, even if they lost.<sup>181</sup> The U.S. Supreme Court held that the disclosures were constitutional, reasoning that constitutional protection is minimal when disclosures provide

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<sup>173</sup> *Id.* at 569–71.

<sup>174</sup> See *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 478 (1995).

<sup>175</sup> *Id.* at 478.

<sup>176</sup> *Id.* (stating that the government should preclude the disclosure of alcohol content in all alcoholic beverages, not just beer).

<sup>177</sup> See *Zauderer v. Off. of Disciplinary Couns. of S. Ct. of Ohio*, 471 U.S. 626, 651 (1985).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 634–35.

factual information to the consumer and that the state could mandate purely factual warnings or disclaimers to dissipate potential confusion or deception among consumers.<sup>182</sup> Under the rational basis standard, some courts have held that compelled speech is constitutionally permissible if the speech is reasonably related to the government's interest in protecting the public or the environment.<sup>183</sup> In application of the *Zauderer* standard, the FDA is granted a defense in protecting American consumers, and through the production of a substantial interest and presentation of attainable success, has a course to combating Big Food.<sup>184</sup>

#### 4. Successes Under the *Zauderer* Standard

##### a. Introduction of “Added Sugars” Label

As referenced above, the 2016 “Added Sugars” Act by the FDA depicted the ability for federal agencies to require specific labeling under the *Zauderer* standard.<sup>185</sup> While challenged greatly by food manufacturers, especially The Sugar Association, the FDA was prepared to meet the rational basis standard, arguing that the disclosure of factual information in commercial speech is allowed “as long as the disclosure provides accurate, factual information, is not unjustified or unduly burdensome; and reasonably relates to a government interest.”<sup>186</sup> To meet these requirements, the FDA took several actions over an extended period to validate their defenses to First Amendment claims.<sup>187</sup>

To prove the factual validity and government interest in the “added sugars” label, the FDA relied on “new data and information” regarding Americans’ consumption of added sugars.<sup>188</sup> First, the FDA cited the *Dietary Guidelines for Americans 2010 (DGA)* issued by the U.S. Department of Agriculture and the U.S. Department of Health and Human Services, which recommended that Americans reduce their intake of added sugars because they “generally provide calories but few essential nutrients.”<sup>189</sup> According to the *DGA*, added sugars “dilute” nutrient-dense food by adding calories

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<sup>182</sup> *Id.* at 651.

<sup>183</sup> Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 115 (2d Cir. 2001) (finding that a legitimate government interest was reducing the amount of mercury pollution to protect the public from exposure).

<sup>184</sup> *Id.*

<sup>185</sup> 21 C.F.R. § 101.9 (2018).

<sup>186</sup> *Zauderer*, 471 U.S. at 651.

<sup>187</sup> See *infra* notes 188–93 and accompanying text.

<sup>188</sup> *Food Labeling*, *supra* note 149, at 903.

<sup>189</sup> U.S. DEP'T OF AG. & U.S. DEP'T OF HEALTH & HUM. SERVS., *Dietary Guidelines for Americans 2010*, at 14 (2010) <https://health.gov/sites/default/files/2020-01/DietaryGuidelines2010.pdf> [<https://perma.cc/KRA5-YNK2>].

without adding “nutrients and other beneficial substances.”<sup>190</sup> Further, the American Heart Association (AHA) released a statement in 2009, based upon years of research, recommending that Americans lower their sugar intake.<sup>191</sup> The Sugar Association contested these studies, arguing that there was no connection between added sugars and obesity, pointing to studies showing that because added sugars and naturally occurring sugars have the same effect on the body, obesity was more closely linked with lifestyle choices than the consumption of sugar.<sup>192</sup> However, The Sugar Association based these arguments on scientific studies that they commissioned, giving the FDA deference in the assumption that these studies were biased.<sup>193</sup>

In meeting the standard that the “added sugars” label would positively influence consumer choice and thus substantiate a justifiable compulsion of speech, the FDA conducted four consumer studies to evaluate consumer responses to added-sugar information.<sup>194</sup> While the studies showed that the label was recognized by a majority of consumers, there was confusion as to how added sugars affected a consumer’s nutritional levels as a whole, thus leading to the establishment of the % Daily Value guideline.<sup>195</sup> Through further clinical trials, the FDA validated the effects of the “added sugar” label and %DV, finding that their requirement was based on a public health end and was necessary to assist consumers to maintain healthy dietary practices.<sup>196</sup> With a factual basis and reasonable relation to a government interest, the FDA defended the rule at length against First Amendment concerns, expressing that a broad reading of *Zauderer* was the appropriate test to apply, but also asserting that it would survive *Central Hudson’s* intermediate scrutiny.<sup>197</sup> While the goal to aid consumers in their awareness of added sugars was successful, a more subtle goal was established by this action that will be discussed further in this Note: “The mandatory declaration of added sugars may also prompt product reformulation of foods high in added sugars like what was seen when trans-fat labeling was mandated.”<sup>198</sup>

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<sup>190</sup> *Id.* at 94.

<sup>191</sup> Rachel K. Johnson et al., *Dietary Sugars Intake and Cardiovascular Health: A Scientific Statement from the American Heart Association*, 120 CIRCULATION 1011, 1016 (2009).

<sup>192</sup> See *Sugar Association Statement*, *supra* note 153.

<sup>193</sup> See Anahad O’Connor, *How the Sugar Industry Shifted Blame to Fat*, N.Y. TIMES (Sept. 12, 2016), <https://www.nytimes.com/2016/09/13/well/eat/how-the-sugar-industry-shifted-blame-to-fat.html> [<https://perma.cc/AB6X-KMJE>]; see also *supra* Part II.B.

<sup>194</sup> *Food Labeling*, *supra* note 149, at 751.

<sup>195</sup> *Food Labeling: Revision of the Nutrition and Supplement Facts Labels: Reopening the Comment Period as to Specific Documents*, 80 Fed. Reg. 44,304, 44,307-09 (July 27, 2015).

<sup>196</sup> *Id.* at 44,308.

<sup>197</sup> *Food Labeling*, *supra* note 149, at 758–67.

<sup>198</sup> *Food Labeling: Revision of the Nutrition and Supplement Facts Labels*, 79 Fed. Reg. 11,880, 11,904 (Mar. 3, 2014) (defining reformulation as “the process of altering a food or beverage product’s recipe or composition to improve the product’s health profile.”); C. Scott et al., *Food and Beverage Product Reformulation as a Corporate Political Strategy*, 172 SOC. SCI. & MED. 37, 37 (2017).

b. *Vermont GMO Labeling and Federal Follow-Up*

While the FDA and USDA had been working a long time to create regulation regarding food products produced with genetic engineering (GMOs),<sup>199</sup> the Vermont Legislature passed a law in 2014 requiring the specific labeling of these products.<sup>200</sup> Recognizing that the FDA did not require such labeling at the time, the Vermont Legislature enacted this law to help the public make “informed decisions.”<sup>201</sup> The law saw immense backlash from food manufacturers, with the Grocery Manufacturers Association, General Mills, and Mars expending large amounts of resources on litigation and making it clear that their compliance was only to avoid paying fines.<sup>202</sup> Suing under First Amendment claims, food manufacturers sought an injunction, arguing that the disclosure requirement compelled “controversial” speech, which needed to be analyzed through the *Central Hudson* standard of intermediate scrutiny.<sup>203</sup> However, the District Court denied injunctive relief, determining that the *Zauderer* standard was more appropriate.<sup>204</sup> Under the rational basis standard, the Court found that the Legislature’s findings presented a “substantial” interest and that although GMOs were controversial, it did not preempt enforcement of a law based on a “real” interest.<sup>205</sup>

Due to Vermont’s successful defense at the state level, the FDA and USDA expedited the process of a federal law regarding GMOs, bringing about the passing of The National Bioengineered Food Disclosure Standard Act in 2016.<sup>206</sup> Once again, the Federal Law was challenged by food manufacturers under First Amendment claims.<sup>207</sup> However, applying the same defense as the Vermont Legislature, the FDA and USDA defended GMO labeling disclosures against Big Food under the *Zauderer* standard,

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<sup>199</sup> Stephen Tan & Brian Epley, *Much Ado About Something: The First Amendment and Mandatory Labeling of Genetically Engineered Foods*, 89 WASH. L. REV. 301, 306–07 (2014).

<sup>200</sup> An Act Relating to the Food Labeling of Food Produced with Genetic Engineering, H. 112, 2013 Leg., Legis. Sess. (Vt. 2014).

<sup>201</sup> *Id.*

<sup>202</sup> See Dan Charles & Allison Aubrey, *How Little Vermont Got Big Food Companies to Label GMOs*, NPR (Mar. 27, 2016), <https://www.npr.org/sections/thesalt/2016/03/27/471759643/how-little-vermont-got-big-food-companies-to-label-gmos> [<https://perma.cc/K9SE-NAQ8>].

<sup>203</sup> *Grocery Mfrs. Ass’n v. Sorrell*, 102 F. Supp. 3d 583 (D. Vt. 2015).

<sup>204</sup> *Id.* at 633–34.

<sup>205</sup> *Id.* at 648.

<sup>206</sup> Mary Clare Jalonick, *Obama Signs Bill Requiring Labeling of GMO Foods*, ASSOCIATED PRESS (July 29, 2016), <https://www.apnews.com/65c61c63e3df4b74bb90a2187122d744> [<https://perma.cc/7SB8-6XTA>]; *National Bioengineered Food Disclosure Standard*, FDA (Feb. 17, 2022), <https://www.fda.gov/food/agricultural-biotechnology/how-gmos-are-regulated-food-and-plant-safety-united-states> [<https://perma.cc/V4V7-LX5B>].

<sup>207</sup> See generally Mary Christine Brady, Comment, *Enforcing an Unenforceable Law: The National Bioengineered Food Disclosure Standard*, 67 EMORY L.J. 771 (2018)

with the mandatory disclosure going into effect January 1, 2022.<sup>208</sup> While the Vermont Legislature was successful and hastened the process for GMO disclosures, arguments have been made that the execution of compelled disclosure legislation should be under the purview of the FDA.<sup>209</sup> However, the Virginia Act and subsequent federal legislation reveal that there is a changing sentiment in the courts, where under *Zauderer*, the Government has the right, in the name of public health, to inform consumers of what is in the food they are eating.<sup>210</sup>

### 5. Successes and Limitations Against Deceptive Food Labeling

While the FDA has found success in the requirement and disclosures of labeling, the agency also cooperates with the FTC to combat deceptive labeling practices undertaken by food manufacturers to deceive consumers about the nutritional value of products.<sup>211</sup> In 2009, the FTC took action against Kellogg's for claiming that its cereal, Frosted Mini-Wheats, was clinically proven to improve children's attentiveness by nearly 20%.<sup>212</sup> The FTC reviewed these clinical studies, and found that they had actually compared children who ate the cereal to children who just had water for breakfast.<sup>213</sup> After this issue was settled, the very same year, Kellogg's advertised that Rice Krispies cereal "now helps your child's immunity."<sup>214</sup> Under the original settlement, Kellogg's was barred from making claims about the benefits to cognitive health, process, or function provided by any cereal unless the claims were true and substantiated, thus a violation had occurred.<sup>215</sup> As seen before, Kellogg's tried to substantiate these claims through misdirected nutritional science, with the FTC taking swift action and broadening the scope of claims of "health benefits" that Kellogg's was barred from making, and establishing a fine per each violation.<sup>216</sup>

From 2011 to 2014, Gerber Products, a subsidiary of Nestle, advertised that its Good Start Gentle baby formula would prevent or reduce

<sup>208</sup> *The National Bioengineered Food Disclosure Law*, Fed. Reg. (Dec. 12, 2018), <https://www.federalregister.gov/documents/2018/12/21/2018-27283/national-bioengineered-food-disclosure-standard> [<https://perma.cc/3X4M-TZfZ>].

<sup>209</sup> Rakelle Shapiro, *Competing Free Speech Rights: Evaluating Compelled Disclosures on Food Packaging in a Way that Reflects Scientific Realities - Or a Lack Thereof*, 41 CARDOZO L. REV. 2681, 2715 (2020).

<sup>210</sup> *Zauderer v. Off. of Disciplinary Couns. of S. Ct. of Ohio*, 471 U.S. 651 (1985) (discussing how the First Amendment protects consumers' right to information).

<sup>211</sup> *Id.*

<sup>212</sup> *Investigation of Ad Claims that Rice Krispies Benefits Children's Immunity Leads to Stronger Order Against Kellogg*, FTC (June 3, 2010), <https://www.ftc.gov/news-events/press-releases/2010/06/ftc-investigation-ad-claims-rice-krispies-benefits-childrens> [<https://perma.cc/F7QC-8PZ9>].

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

the risk for infants to develop allergies.<sup>217</sup> In 2009, Gerber had petitioned the FDA for permission to make a claim that connected the use of partially hydrolyzed whey proteins to the reduced risk of atopic dermatitis, or eczema, in infants.<sup>218</sup> In acceptance of the limited scientific evidence Gerber provided, the FDA consented to the label only if Gerber clearly stated that there is “little scientific evidence” for the causal relationship.<sup>219</sup> Instead, Gerber turned this consent into an approval claim that their product was the “1<sup>st</sup> and Only” formula that “Meets FDA Qualified Heal Claim,” even printing a gold badge with these claims on the products.<sup>220</sup> Stirred by the trust that American parents place on these products, the FTC moved swiftly to take action, stating that, “Parents trusted Gerber to tell the truth about the health benefits of its formula,” and that, “The FDA evaluated the claim and thought there wasn’t very much science to support the claim at all, but Gerber turned that into a golden seal claim.”<sup>221</sup> As usual, Gerber turned to massive amounts of litigation to fight the claims up until 2019, with the U.S. District Court in the District of New Jersey approving a stipulated order to settle the FTC’s charges and prohibit Gerber from similar conduct in the future.<sup>222</sup>

While these issues may seem trivial, the actions of the FTC and their response show the sheer ability of Big Food to draw out legal claims and fight until the very end.<sup>223</sup> With Big Food spending approximately \$30 billion annually on advertising and marketing,<sup>224</sup> the FDA is heavily outmatched by their food regulation departments’ 2021 budget of \$1.1 billion.<sup>225</sup> Food manufacturers are motivated by “Corporate Personhood” to exploit consumers in the name of profits, taking actions that look to control consumer’s ability to make healthy choices.<sup>226</sup> Legal scholars and health psychologists have opined that the food industry deprives consumers of their money, health, and freedom to choose.<sup>227</sup> While studies have shown that

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<sup>217</sup> *FTC Charges Gerber with Falsely Advertising Its Good Start Gentle Formula Protects Infants from Developing Allergies*, FTC (Oct. 30, 2014), <https://www.ftc.gov/news-events/press-releases/2014/10/ftc-charges-gerber-falsely-advertising-its-good-start-gentle> [https://perma.cc/99DP-XVAU].

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* (quoting Jessica Rich, the Director of the FTC’s Bureau of Consumer Protection, & Mary Engle, the FTC’s Associate Director for Advertising Practices).

<sup>222</sup> *FTC Approves Stipulated Order Settling Charges against Gerber Products Company*, FTC (July 15, 2019), <https://www.ftc.gov/news-events/press-releases/2019/07/ftc-approves-stipulated-order-settling-charges-against-gerber> [https://perma.cc/Y69F-6TTQ].

<sup>223</sup> *Id.*

<sup>224</sup> Schaffer, *supra* note 16 and accompanying text.

<sup>225</sup> *Fact Sheet: FDA at a Glance*, FDA (Nov. 2021), <https://www.fda.gov/about-fda/fda-basics/fact-sheet-fda-glance> [https://perma.cc/HD9Q-CVA5].

<sup>226</sup> *See supra* note 20.

<sup>227</sup> GARY E. MARCHANT ET AL., THWARTING CONSUMER CHOICE: THE CASE AGAINST MANDATORY LABELING FOR GENETICALLY MODIFIED FOODS 4–5 (2010).

individuals generally highly value their health, the actions of Big Food accelerate the self-destructive behaviors of consuming unhealthy foods.<sup>228</sup> It has further been studied that by using “craveable” foods loaded with sugars, fats, and salt, Big Food is creating a reward system in the brains of consumers, thus making the foods addictive.<sup>229</sup>

Due to obesity, for the first time in our nation’s history, children are expected to have shorter lifespans than their parents.<sup>230</sup> Further, over 133 million Americans have diabetes or prediabetes, with the Joint Chiefs of Staff having declared obesity a threat to national security, fearing that America will no longer be able to field an army due to the nation’s growing weight problem.<sup>231</sup> The federal government clearly has a substantial interest in providing consumers with the necessary information to make healthier choices, and in response to obesity and the rise in chronic diseases, consumers are pushing for a return to healthy and fresh food.<sup>232</sup> Moreover, studies have shown that consumers regularly read product labels for nutritional information and claims, especially when purchasing it for the first time.<sup>233</sup> However, food manufactures continue to highlight the beneficial components of a food product while hiding its negative components or ignoring them altogether.<sup>234</sup> The Government and legislatures, through the financial support and advancement of the FDA and FTC, must take action against Big Food’s deceptive practices by adopting new labeling policies that adhere to the Commercial Speech doctrine. By educating and informing the American public through labeling requirements, awareness can be brought to the main contributor of the obesity epidemic, with hopes that Big Food will be forced to reformulate products to appease consumers.<sup>235</sup>

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<sup>228</sup> Caoimhin Macmaolan, *Regulating Consumer Information: Use of Food Labelling and Mandatory Disclosures to Encourage Healthier Lifestyles*, in *REGULATING LIFESTYLE RISKS: THE EU, ALCOHOL, TOBACCO & UNHEALTHY DIETS* 46, 59 (Alberto Alemanno & Amandine Guardé eds., 2015).

<sup>229</sup> A.Y. Onalapo & O.J. Onalapo, *Food Additives, Food and the Concept of “Food Addiction”: Is Stimulation of the Brain Reward Circuit by Food Sufficient to Trigger Addiction?*, 25 *PATHOPHYSIOLOGY* 263, 264 (2018).

<sup>230</sup> Woodhouse & Woodhouse, *supra* note 19, at 290.

<sup>231</sup> *National Diabetes Statistics Report*, CDC (Jan. 18, 2022), <https://www.cdc.gov/diabetes/data/statistics-report/index.html> [<https://perma.cc/FU47-MW23>]; see Robert H. Lustig et al., *The Toxic Truth About Sugar*, 482 *NATURE* 27, 27–28 (Feb. 1, 2012), <https://www.nature.com/articles/482027a> [<https://perma.cc/929W-J39P>].

<sup>232</sup> John Kell, *Fresh, Healthy Food Is Not a Trend, It’s a Movement*, *FORTUNE MAG.* (Nov. 30, 2016), <https://fortune.com/2016/11/30/food-healthy-trend-mpw> [<https://perma.cc/4UPP-77VC>] (claiming that consumer desire for healthy products is about food that is not artificial or synthetic).

<sup>233</sup> Marianne Smith Edge et al., *The Impact of Variations in a Fact-Based Front-of-Package Nutrition Labeling System on Consumer Comprehension*, 114 *J. ACAD. NUTRITION & DIETETICS* 843 (2014). See, e.g., Melissa G. Bublitz et al., *Why Did I Eat That? Perspectives on Food Decision Making and Dietary Restraint*, 20 *J. CONSUMER PSYCHOL.* 239, 251 (2010).

<sup>234</sup> Maggie Dickens, Comment, *Safe Until Proven Unsafe: Solving the Growing Debate Around Dietary Supplement Regulation*, 15 *WAKE FOREST J. BUS. & INTELL. PROP. L.* 576, 584 (2015).

<sup>235</sup> STORCKSDIECK GENANNT BONSMANN ET AL., *FRONT-OF-PACK NUTRITION LABELLING SCHEMES: A COMPREHENSIVE REVIEW* (2020).

#### IV. RESOLUTION

##### A. Failure of Market and Need for Increased Federal Intervention

Because the market has failed consumers, with Big Food's revenues and obesity rates both skyrocketing, it is time and legally necessary for the federal government to take drastic action to combat this growing epidemic.<sup>236</sup> The federal government already has a history of intervening in other areas of public health, including tobacco and alcohol, implementing regulations, policies, and taxes that reduce the harm caused by these products.<sup>237</sup> The food industry continues to ineffectively police itself, while consumers are deceived into not holding it accountable.<sup>238</sup> Considering the growing dominance of obesity and the connection between the diseases and their cause – poor diet from ultra-processed foods containing added sugar – it is undoubtedly time for federal action that improves the public's health.<sup>239</sup>

##### 1. Political Accountability

First, the most immediate method of disrupting the food industry's blueprint for misdirection is political accountability.<sup>240</sup> Until the government restrains corporate political participation, the public must hold politicians accountable accepting the food industry's legally sanctioned bribes and selling out to the food industry.<sup>241</sup> Whether it be Amy Klobuchar's classification of pizza as a "vegetable" or the Obama administration changing course on how to combat obesity after personal visits to the White House from Big Food representatives,<sup>242</sup> the American public needs to hear these stories and demand a government response.

Because citizens rarely have the resources to take on food manufacturers in the courts, citizen-groups should shift their focus from courtrooms to the

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<sup>236</sup> Kelly D. Brownell et al., *The Public Health and Economic Benefits of Taking Sugar-Sweetened Beverages*, 361 NEW ENG. J. MED. 1599, 1601 (2009).

<sup>237</sup> Dariush Mozaffarian et al., Opinion, *The Real Cost of Food: Can Taxes and Subsidies Improve Public Health?*, 321 JAMA 889, 889 (2014).

<sup>238</sup> Ludwig & Nestle, *supra* note 63, at 1810.

<sup>239</sup> Courtney Baltz, Note, *TaxRx: Ultra-Processed Foods, Added Sugar, and the Social Cost of Obesity*, 75 FOOD DRUG L.J. 596, 622 (2020).

<sup>240</sup> McCarthy, *supra* note 53, at 243.

<sup>241</sup> *Supra* Part II.B.

<sup>242</sup> *Id.*

voting booths.<sup>243</sup> Ultimately (and ironically), Americans can find that the most direct tool for fighting Big Food is through the use of its own blueprint: *personal responsibility*.<sup>244</sup> However, unlike the food industry's shift of exhorting citizens to get more exercise and be "disciplined," the personal responsibility of American consumers should be used to hold politicians accountable for the distorted depiction of food products.<sup>245</sup> Politicians need to reject the efforts of Big Food lobbying tactics and increase funding for the FDA and FTC, while supporting these efforts through the creation of federal acts and legislation.<sup>246</sup> Under the Biden administration, both the FTC and FDA have indicated that the regulation of labeling, standards of identity, and advertising are a priority, with the House Appropriations Committee directing the FDA to prioritize increasing clarity for consumers.<sup>247</sup>

However, real legislative support is needed to give these agencies more power to combat Big Food, and that can be accomplished through support of the Food Labeling & Modernization Act of 2021, moving through Congress as of 2022.<sup>248</sup> The 2021 Bill would not only give much needed regulatory power to the FDA, but also require the FDA to define the terms "natural," "healthy," and "artificial."<sup>249</sup> The legislation would also direct the FDA to establish a signaling system to rank foods according to their overall health value, including a stop-light label later proposed in this Note.<sup>250</sup> While the 2015 and 2018 versions of this Bill were unsuccessful, political accountability by the American public could muster the support for politicians to reject the efforts of Big Food and support this direly needed legislation.<sup>251</sup>

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<sup>243</sup> See, e.g., *Pelman v. McDonald's Corp.*, 272 F.R.D. 82, 84–85 (S.D.N.Y. 2010). *Pelman* was the seminal lawsuit of "obesity litigation" where plaintiffs sued McDonald's, in part, for monetary relief for obesity-related health issues from eating their products. Following *Pelman*, obesity-related litigation has continued to increase. *Id.* See generally, Theodore H. Frank, *A Taxonomy of Obesity Litigation*, 28 U. ARK. LITTLE ROCK L. REV. 427 (2006).

<sup>244</sup> McCarthy, *supra* note 53, at 244.

<sup>245</sup> *Id.*

<sup>246</sup> See *infra* notes 247–51 and accompanying text.

<sup>247</sup> Pooja S. Nair & Cate Veeneman, *False Advertising Lawsuits Are Ramping Up in Food and Beverage*, FOOD DIVE (Aug. 23, 2021), <https://www.fooddive.com/news/false-advertising-lawsuits-are-ramping-up-in-food-and-beverage/604615/> [<https://perma.cc/AH2L-3D5F>].

<sup>248</sup> *Food Labeling Modernization Act of 2021*, H.R. 4917 (Aug. 3, 2021).

<sup>249</sup> Kathleen M. Sanzo & Maria Kalousi-Tatum, *Food Labeling Modernization Act Reintroduced in Congress*, WELL DONE (Sept. 14, 2021), <https://www.morganlewis.com/blogs/welldone/2021/09/food-labeling-modernization-act-reintroduced-in-congress> [<https://perma.cc/6VLX-Y4A6>].

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

## 2. Increased Funding of FDA & FTC

To combat the monstrous amount of revenues that Big Food spends on creative labeling, the introduction of new ingredients to place in products, and litigation, the budgets of the FDA's and the FTC's Food Sectors must be increased.<sup>252</sup> Educational initiatives have long been in place; however, there is now a strong body of evidence to suggest that, in the absence of regulatory controls on the availability of unhealthy foods, education alone cannot substantially mitigate rising rates of obesity.<sup>253</sup> While contributing to approximately 678,000 deaths annually and costing the American government \$660 billion per year, the FDA's food sector had a budget of \$1.1 billion in 2021 and the FTC's entire budget of \$331 million shows the disparity in financial might that is affecting society, yet with no support of real change.<sup>254</sup>

As of early 2022, in response to the Covid-19 pandemic and the loss of more than 900,000 American lives, the federal government has spent \$3.6 trillion in combating the virus.<sup>255</sup> In fiscal year 2021, the federal government budgeted \$41 billion for National Drug Control Program agencies.<sup>256</sup> The CDC has found that excessive consumption of alcohol cost the U.S. government \$249 billion annually.<sup>257</sup> With cigarette smoking and tobacco use being responsible for more than 480,000 deaths per year in the United States, the FDA spends \$671 million per year on tobacco regulation, with numerous other government funds going to prevention advertisements.<sup>258</sup> While there is no doubt that the government has a substantial interest in protecting other

<sup>252</sup> Lustig et al., *supra* note 231.

<sup>253</sup> *Id.*

<sup>254</sup> *Why Good Nutrition is Important*, *supra* note 7 (number of annual deaths); Rauh, *supra* note 2 (cost of obesity); *Fact Sheet: FDA at a Glance*, *supra* note 225 (FDA annual Food Sector budget); *FTC: Fiscal Year 2021 Budget*, FTC (Feb. 20, 2020), [https://www.ftc.gov/system/files/documents/reports/fy-2021-congressional-budget-justification/fy\\_2021\\_cbj\\_final.pdf](https://www.ftc.gov/system/files/documents/reports/fy-2021-congressional-budget-justification/fy_2021_cbj_final.pdf) [<https://perma.cc/2KZR-65J5>].

<sup>255</sup> *The Federal Response to Covid-19*, USA SPENDING GOVERNMENT DATABASE, <https://www.usaspending.gov/disaster/covid-19?publicLaw=all> [<https://perma.cc/83VP-RDH8>] (last visited Feb. 24, 2022).

<sup>256</sup> EXEC. OFF. OF THE PRESIDENT, NATIONAL DRUG CONTROL BUDGET: FY 2021 HIGHLIGHTS (May 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/05/National-Drug-Control-Budget-FY-2022-Funding-Highlights.pdf> [<https://perma.cc/5E5U-8KDS>].

<sup>257</sup> *Excessive Alcohol Use*, CDC (Nov. 23, 2021), <https://www.cdc.gov/chronicdisease/resources/publications/factsheets/alcohol.htm> [<https://perma.cc/9P53-SY7E>].

<sup>258</sup> *Fast Facts on Cigarette Smoking*, CDC, [https://www.cdc.gov/tobacco/data\\_statistics/fact\\_sheets/fast\\_facts/index.htm#:~:text=Cigarette%20smoking%20is%20responsible%20for,or%201%2C300%20deaths%20every%20day](https://www.cdc.gov/tobacco/data_statistics/fact_sheets/fast_facts/index.htm#:~:text=Cigarette%20smoking%20is%20responsible%20for,or%201%2C300%20deaths%20every%20day) [<https://perma.cc/GLJ3-69RB>] (last visited Feb. 24, 2022); *FDA At A Glance: Regulated Products and Facilities*, FDA (Nov. 2021), <https://www.fda.gov/media/154548/download#:~:text=About%203%20percent%20of%20tobacco%20product%20sales%20are%20imports.&text=FDA's%20budget%20for%20Fiscal%20Year%202021%20is%20%246.1%20billion.&text=About%2054%20percent%2C%20or%20%243.3,for%20by%20industry%20user%20fees> [<https://perma.cc/Y62C-Z7Z9>].

areas of Americans' health, the difference compared to food and labeling regulation is that all Americans must eat food to survive.<sup>259</sup> Eating is not a choice, and under the blueprint of Big Food, Americans are eating more and more unhealthy, highly-processed foods.<sup>260</sup>

As these other problems gain more media attention and receive more government funding, obesity continues to cripple the American population, with extremely high percentages of Americans struggling with the effects of non-healthy weight: high blood pressure, high cholesterol, type 2 diabetes, sleep apnea and breathing problems, low quality of life, and many other side effects.<sup>261</sup> While Big Food tries to limit its responsibility for creating this problem by pointing to distracting causes such as genetics, lack of exercise, and bad sleep habits, the reality is that in order for Americans to lose weight, food companies must sell less food in order to advance public health goals.<sup>262</sup> Consumers throughout America survey that they value their health, yet they are still deceived about health claims and misled by manufacturers' food labels.<sup>263</sup> The FDA and FTC need immense increases to their funding in order to combat the practices of Big Food and to bring about novel labeling policies that have been proven to help give American consumers a fighting chance against obesity.<sup>264</sup>

### B. New Labeling Proposals

In order to assist consumers, the FDA should use the success of the 2016 "Added Sugars" label and defend against potential commercial speech First Amendment claims under the *Zauderer* standard to research and produce more labeling requirements for food manufacturers.<sup>265</sup> Studies on the effectiveness of accurate nutritional information have shown that the vast majority of consumers scrutinize product labels.<sup>266</sup> The FDA has a valid substantial interest in forcing disclosure statements and labeling requirements in order to reduce obesity rates.<sup>267</sup> While basic nutritional

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<sup>259</sup> See Sanzo & Kalousi-Tatum, *supra* note 249.

<sup>260</sup> Brownell & Warner, *supra* note 11, at 259.

<sup>261</sup> *The Health Effects of Overweight and Obesity*, CDC (Sept. 17, 2020), <https://www.cdc.gov/healthyweight/effects/index.html> [<https://perma.cc/2SRR-3BK5>].

<sup>262</sup> Brownell, *supra* note 72.

<sup>263</sup> Klaus G. Grunert et al., *Sustainability Labels on Food Products: Consumer Motivation, Understanding and Use*, 44 FOOD POL'Y 177, 177 (2014).

<sup>264</sup> John C. Kozup et al., *Making Healthful Food Choices: The Influence of Health Claims and Nutrition Information on Consumers' Evaluations of Packaged Food Products and Restaurant Menu Items*, 67 J. MKTG. 19, 23 (2003).

<sup>265</sup> *Food Labeling*, *supra* note 149; *Zauderer v. Off. of Disciplinary Couns. of S. Ct. of Ohio*, 471 U.S. 651 (1985).

<sup>266</sup> Jason M. Szanyi, *Brain Food: Bringing Psychological Insights to Bear on Modern Nutrition Labeling Efforts*, 65 FOOD & DRUG L.J. 159, 159 (2010).

<sup>267</sup> David Ludwig et al., *Relation Between Consumption of Sugar-Sweetened Drinks and Childhood Obesity*:

labeling is already present on most food products, labeling disclosures need to be more detailed in order to combat the growing problem of obesity.<sup>268</sup> Studies have shown that consumers welcome such labels and that these labels can help all types of consumers make healthier food choices.<sup>269</sup> Further, labels that are informed by rigorous consumer research are more likely to be effective to inform consumers and promote healthy food choices, prompting the need for more FDA research funding and the introduction of new labeling ideas.<sup>270</sup>

### 1. FDA's Control of Front-of-Package Labeling

“Front of Packaging Labels” [FOP] are the most successful avenue for the FDA to convey nutritional values to consumers, with 86% of consumers reporting that they read a product's FOP labels when purchasing a product for the first time.<sup>271</sup> However, consumers are confused by FOP claims by manufacturers that highlight beneficial ingredients but fail to mention ingredients on the back that may be unhealthy.<sup>272</sup> Claims such as “natural” and “just a tad sweet” are creative marketing techniques meant to persuade consumers, while barely adhering to FDA and FTC regulations.<sup>273</sup> Along with First Amendment protection claims, food manufacturers also argue that additional FOP labeling requirements may increase manufacturing costs, and thus increase the cost of goods.<sup>274</sup> While the main goal of food manufacturers is to create confusion and mislead consumers into seeing only the “positive” health attributes of a product,<sup>275</sup> the FDA needs to take control of FOP labeling, limiting the influence of food manufacturers and requiring the disclosure of harmful ingredients and nutritional values.<sup>276</sup> The CDC has recognized that FOP labeling would be most effective if information is limited to the most important health-related nutrients, while the Institute of Medicine has recommended that FOP labels should be used only for unhealthy amounts of certain nutrients.<sup>277</sup> Because FOP labels include only a

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*A Prospective, Observational Analysis*, 357(9225) THE LANCET 505–08 (2001).

<sup>268</sup> On Amir & Orly Lobel, *Liberalism and Lifestyle: Informing Regulatory Governance with Behavioural Research*, 3 EUR. J. RISK REG. 17, 19–20 (2012).

<sup>269</sup> Erica van Herpen & Hans C.M. van Trijp, *Front-of-Pack Nutrition Labels. Their Effect on Attention and Choices When Consumers Have Varying Goals and Time Constraints*, 57 APPETITE 148, 149 (2011).

<sup>270</sup> Pomeranz, *supra* note 100, at 383.

<sup>271</sup> Edge et al., *supra* note 233.

<sup>272</sup> Josh Dhyani, *Science-Based Food Labels: Improving Regulations & Preventing Consumer Deception Through Limited Information Disclosure Requirements*, 26 ALB. L.J. SCI. & TECH. 1, 7 (2016).

<sup>273</sup> Alexia B. Marks, *Taming America's Sugar Rush: A Traffic-Light Label Approach*, 62 ARIZ. L. REV. 683, 699 (2020).

<sup>274</sup> Mem. from the Dep't of Health & Human Servs. to the Div. of Dockets Mgmt. (Apr. 21, 2009).

<sup>275</sup> Dhyani, *supra* note 272.

<sup>276</sup> *Id.*

<sup>277</sup> *Front-of-Package Nutrition Rating Systems and Symbols: Phase I Report 1*, INST. OF MED. OF THE NAT'L

few ingredients, the FDA should not allow the inclusion of beneficial claims, such as “low in sodium” and should include only negative nutrition claims (or more accurately, negative nutrition disclaimers).<sup>278</sup> This scheme would clearly place consumers on alert for critical negative ingredient information while still providing a means of identifying positive product attributes by viewing the Nutrition Facts panel on the back of the product.<sup>279</sup>

## 2. Traffic Light Approach

In taking more action than just controlling FOP labeling regarding nutritional information, the FDA should look to inform consumers by instituting a traffic-light label on food products dependent on its serving size, calories, amount of sugar, added sugar, fat, and salt.<sup>280</sup> Variations of this type of labeling have been introduced in 2013 in the United Kingdom as a simple way to indicate the healthiness of a product, with color-coded systems using red (for unhealthy), yellow (for questionable), and green (for healthy).<sup>281</sup> While rather simple, behavioral economists have confirmed the principle of loss aversion, which means that people are predisposed to avoid harm rather than to seek gain. Without these labels, people react reflexively and select foods that provide immediate pleasure but cause long-term harm.<sup>282</sup> Further, studies from Canada, Australia, Germany, and the United States have concluded that traffic-light food labels are successful in providing consumers with information to make healthier choices.<sup>283</sup> While consumers may not always be the most educated or rational,<sup>284</sup> traffic-light FOPs have been proven to help consumers who are not as cautious in buying certain food

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ACADEMIES 1–3 (Ellen A. Wartella et al. eds., 2010); *Front-of-Package Nutrition Rating Systems and Symbols: Promoting Healthier Choices*, INST. OF MED. OF THE NAT'L ACADEMIES 4 (Ellen A. Wartella et al. eds., 2012).

<sup>278</sup> Meyer, *supra* note 128, at 278.

<sup>279</sup> *Id.*

<sup>280</sup> Shelley McGuire, *Front-of-Package Nutrition Rating Systems and Symbols: Promoting Healthier Choices*, 3(3) *ADVANCES IN NUTRITION* 332 (2012).

<sup>281</sup> Mark W. Becker et al., *Front of Pack Labels Enhance Attention to Nutrition Information in Novel and Commercial Brands*, 56 *FOOD POL'Y* 76 (2015).

<sup>282</sup> Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 *J. POL. ECON.* 1325, 1326–28 (1990).

<sup>283</sup> Teri Emrich et al., *Traffic-Light Labels Could Reduce Population Intakes of Calories, Total Fat, Saturated Fat, and Sodium*, 12 *PLOS* 1, 2, 6 (2017); see also Samantha Goodman et al., *The Impact of Adding Front-of-Package Sodium Content Labels to Grocery Products: An Experimental Study*, 16 *PUB. HEALTH NUTRITION* 383, 389 (2012); Bridget Kelly et al., *Front-Of-Pack Food Labelling: Traffic Light Labelling Gets The Green Light*, *CANCER COUNCIL* (2008); Komelia Hagen, *Nutritional Information: Traffic Light Labelling is the Best Way to Reach Consumers*, *DEUTSCHES INSTITUT FÜR WIRTSCHAFTSFORSCHUNG WKLY. REP.* 141, 150–51 (2010); Sue McGreevey, *How 'Traffic Light' Labels Promote Healthier Eating*, *HARV. GAZETTE* (Oct. 17, 2013), <https://news.harvard.edu/gazette/story/2013/10/how-traffic-light-labels-promote-healthier-eating/> [<https://perma.cc/NVD4-C8U3>].

<sup>284</sup> Macmaolain, *supra* note 228.

products, including children.<sup>285</sup> The FDA exhibited interest in researching the British traffic-light labeling system in 2009, but the U.S. food industry resisted.<sup>286</sup> Given the research on the success of traffic-light labeling, the FDA should take further action by researching and implementing these types of displays.<sup>287</sup>

While U.S. food manufacturers have opposed even the beginning stages of research into traffic-light labeling displays, the FDA should be prepared to defend zealously against First Amendment claims under the Commercial Speech Doctrine.<sup>288</sup> This defense should take many aspects from the success of the 2016 “Added Sugars” Act by the FDA, but because the traffic-light indicator may take direct advertising space from food brands, it also raises a new set of legal challenges.<sup>289</sup> First, and as noted earlier, the “Added Sugars” label was successfully defended by the FDA, contending that the disclosure of factual information in commercial speech is allowed under the *Zauderer* standard: “as long as the disclosure provides accurate, factual information; is not unjustified or unduly burdensome; and reasonably relates to a government interest.”<sup>290</sup> The FDA also successfully argued that the “Added Sugars” Act would pass the four-prong *Central Hudson* test, which allows broader applications for compelled commercial speech beyond remedying deception as to: (1) whether the expression concerns a lawful activity that is not misleading; (2) whether the government’s asserted interest is substantial; (3) whether the regulation directly advances the government’s asserted interest; and (4) whether to serve that interest, the regulation is not more extensive than necessary.<sup>291</sup> Under both standards, the FDA relied on scientific evidence and consumer studies as rationales for its decisions, as well as maintaining that the government has a substantial interest in promoting the public health.<sup>292</sup>

To implement a traffic-light approach and defense under either standard, the FDA will have to produce studies showing: (1) the success of the labels in informing consumers, (2) the substantial interest in combating obesity, and (3) the justification of the burden placed on manufacturers.<sup>293</sup> First, U.S.

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<sup>285</sup> Peggy J. Liu et al., *Using Behavioral Economics to Design More Effective Food Policies to Address Obesity*, 36 APPLIED ECON. PERSP. & POLICY 6, 6–7 (2013); Jennifer Harris et al., *Nutrition-Related Claims on Children’s Cereals: What Do They Mean to Parents and Do They Influence Willingness to Buy?*, 14 PUB. HEALTH NUTRITION 2207, 2207–09 (2011).

<sup>286</sup> Becker et al., *supra* note 281.

<sup>287</sup> McGuire, *supra* note 280.

<sup>288</sup> Judith Haydel, *Food and Drug Administration*, THE FIRST AMENDMENT ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/813/food-and-drug-administration> (last visited Feb. 19, 2022).

<sup>289</sup> Marks, *supra* note 273, at 720.

<sup>290</sup> *Zauderer v. Off. Of Disciplinary Couns. of S. Ct. of Ohio*, 471 U.S. 651 (1985).

<sup>291</sup> *Central Hudson Gas & Electric v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980).

<sup>292</sup> *Food Labeling*, *supra* note 149, at 33,760 & 33,766.

<sup>293</sup> *Id.*

studies have shown success in increasing consumer attention to and referencing traffic-light labeling when making food purchases.<sup>294</sup> Food manufacturers will heavily contest these studies and the courts will require them, thus adding to the need for more FDA and FTC funding to further conduct this research.<sup>295</sup> Next, and most likely the easiest task, the FDA must prove that there is a substantial government interest in combating obesity.<sup>296</sup> With all the statistics and research showing the contributory nature of highly-processed and unhealthy foods to weight gain, the FDA will be able to meet this burden.<sup>297</sup> However, the FDA should once again expect Big Food to shift the blame onto other causal factors, guided by the misdirection of their own funded science.<sup>298</sup> Lastly, the FDA must contend that the traffic-light label is not unduly burdensome on manufacturers.<sup>299</sup>

A simple and novel approach to this contention would be to turn Big Food's own practices against them, arguing that having spent \$30 billion annually on marketing that misleads consumers, manufacturers have ample amounts of resources to change direction.<sup>300</sup> Manufacturers bolster food products with many harmful additives, yet still advertise these food products as "Fat Free," "All-Natural," and "Just A Tad Sweet."<sup>301</sup> Because of these choices to cleverly use FOP labels to advance the positive qualities of their products, they should be required to disclose the harmful nature of their products through the traffic-light label.<sup>302</sup> In making these arguments, the FDA will be able to successfully defend the implementation of a traffic-light label on food products under both the *Zauderer* standard and the *Central Hudson* test.<sup>303</sup> Not only would a traffic-light label inform consumers of the unhealthy contents of food products, but it could also force the food industry to reformulate foods in order to adhere to the label.<sup>304</sup>

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<sup>294</sup> McGreevey, *supra* note 283.

<sup>295</sup> *Id.*

<sup>296</sup> *Central Hudson*, 477 U.S. at 566.

<sup>297</sup> See generally *supra* Part II.

<sup>298</sup> *Id.*

<sup>299</sup> *Central Hudson*, 477 U.S. at 566.

<sup>300</sup> Schaffer, *supra* note 16.

<sup>301</sup> Marks, *supra* note 241; Currey, *supra* note 107, at 1307.

<sup>302</sup> *Id.*

<sup>303</sup> *Zauderer v. Off. Of Disciplinary Couns. of S. Ct. of Ohio*, 471 U.S. 651, 651 (1985); *Central Hudson*, 477 U.S. at 566.

<sup>304</sup> Deborah A. Cohen, *Fighting Obesity: Why Chile Should Continue Placing 'Stop Signs' on Unhealthy Foods*, RAND BLOG (Mar. 19, 2018), <https://www.rand.org/blog/2018/03/fighting-obesity-why-chile-should-continue-placing-stop.html>.

C. *End Goal: Product Reformulation & Market Competition*

Arguments have been made that the food industry should self-regulate, but that proved to be wishful thinking as the food industry has a financial stake in the production of ultra-processed food.<sup>305</sup> It is unlikely it will put forth much effort to provide healthier alternatives without federal regulation.<sup>306</sup> Further, mandatory reformulation policies are often too intrusive and would likely face considerable blowback from the food industry and its lobbyists, and success is likely unattainable for the FDA in courts.<sup>307</sup> However, studies have shown that labeling requirements like the traffic-light approach would not only inform consumers, but also lead to the reformulation of products.<sup>308</sup> As food manufacturers are required to disclose poor nutritional values on food products and likely to suffer revenue losses, they will be forced to reformulate their products in order to change FOP labeling that consumers reference when making purchasing decisions.<sup>309</sup>

Research has shown that if producers are mandated to inform consumers of the ingredients they use, and consumers are thus well-informed, market forces will drive out those producers who supply food of inefficient, low quality, i.e., unhealthy foods.<sup>310</sup> Further, information about the quality and attributes of food products allows informed buyers to purchase the products they prefer, encouraging sellers to compete to improve their products.<sup>311</sup> Conclusively, when consumers have less accurate information, food producers have less of an incentive to provide healthy products, thus leading to the reduction of consumer welfare.<sup>312</sup> Some legal scholars have identified the free market as a key component to addressing obesity, which is perhaps more effective than governmental regulation.<sup>313</sup> Further, a free-market approach avoids some of the intricacies that arise when the government attempts to address the obesity problem within the context of food, where consumers desire autonomy and rebel against paternalistic measures that may limit consumer choice.<sup>314</sup> However, free market theory does not necessarily

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<sup>305</sup> Kevin A. Robinson, *Has the Government Failed to Protect Us? A Discussion of HFCS & Other Added Sugars*, 14 J. HEALTH & BIOMEDICAL L. 365, 402 (2018).

<sup>306</sup> *Id.*

<sup>307</sup> Peter von Philipsborn et al., *Voluntary Industry Initiatives to Promote Healthy Diets: A Case Study on a Major European Food Retailer*, 21 PUB. HEALTH NUTRITION 3469, 3469 (2018).

<sup>308</sup> Storcksdiek et al., *supra* note 235.

<sup>309</sup> *The Obesity Prevention Source: Food and Diet*, HARV. SCH. OF PUB. HEALTH, <https://www.hsph.harvard.edu/obesity-prevention-source/obesity-causes/diet-and-weight/> [https://perma.cc/AZ8Z-6K97/] (last visited Feb. 24, 2022).

<sup>310</sup> Howard Beales et al., *The Efficient Regulation of Consumer Information*, 24 J.L. ECON. 491, 492 (1981).

<sup>311</sup> *Id.*

<sup>312</sup> *Id.*

<sup>313</sup> David Friedman, *Public Regulation and the Limits of Paternalism*, 46 CONN. L. REV. 1687, 1767–68 (2014).

<sup>314</sup> *Id.* at 1767.

view all governmental intervention as undesirable, as the government is essential to maintaining structure and security for the market-place to operate successfully.<sup>315</sup> In response, legal scholars and anti-obesity advocates openly question the motives of the food industry – which has been shown to have caused this crisis – and prefer to place more responsibility on the government to tackle the issue.<sup>316</sup> Creation of additional labeling requirements by the FDA and FTC will better inform consumers, motivate manufacturers to reformulate their products, limit Americans’ consumption of unhealthy foods, and allow Big Food to pursue profits made by this newly formed consumer demand.<sup>317</sup>

## V. CONCLUSION

In order to combat America’s growing obesity problem, the federal government, through the FDA and FTC, must take action to inform consumers of the unhealthy realities concerning the products they are eating.<sup>318</sup> Americans simply are being deceived by clever marketing and the misdirection of nutritional science into believing that many of the products they eat are “healthy or “healthier” than others, when in reality, they are consuming highly-processed, calorie-dense foods.<sup>319</sup> The FDA and FTC need more financial and political support to combat Big Food’s practices, to take control of FOP labeling, and to introduce new labeling requirements to better inform consumers of the harmful foods they are eating.<sup>320</sup> With America facing a drastic public health problem, sweeping action is necessary to restore hope to the future of America’s health.<sup>321</sup>

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<sup>315</sup> *Id.*

<sup>316</sup> Katherine Pratt, *The Limits of Anti-Obesity Public Health Paternalism: Another View*, 46 CONN. L. REV. 1903, 1915 (2014) (disagreeing with legal scholar David Friedman’s view that “free markets and free choice could, at least in theory, solve the obesity problem by allowing people to satisfy their own preferences.”).

<sup>317</sup> *See generally supra* Part IV.

<sup>318</sup> *Id.*

<sup>319</sup> *See generally supra* Part II.

<sup>320</sup> *Id.*

<sup>321</sup> *See generally supra* Part IV.