

FIRST AMENDMENT FAQs

These FAQs break down in plain language what the First Amendment has to do with government action on food marketing to children.

Q. Food and media companies say the First Amendment doesn't allow the government to regulate junk food advertising to kids. Is that true?

A. No. The First Amendment forbids some kinds of advertising regulation, but the government has leeway to restrict advertising to children, especially younger children. The FAQs below explain why and how the First Amendment applies to advertising. They also describe a number of ways federal, state, and local policymakers can avoid First Amendment problems while improving the food marketing environment surrounding kids.

Q. Why does the First Amendment protect advertising?

A. The First Amendment forbids government from making a law “abridging the freedom of speech.” This means that the government can’t punish someone because she speaks her mind on political matters, or expresses herself artistically, or comments on religion or current events or just about any other idea.

What does all this have to do with advertising? Since the mid-1970s, as a result of a series of Supreme Court decisions, “freedom of speech” has also come to include advertising—in legal terms, “commercial speech.” The Supreme Court decided that the First Amendment applies to advertising because of the importance of commercial information to consumers and the overall marketplace. In fact, the Court has observed that people often care more about the price, features, and availability of products and services than they do about more high-minded topics like politics or art.

For more resources on this topic, see: [The New First Amendment and Its Implications for Combating Obesity Through Regulation of Advertising](#)

Q. What does it mean that the First Amendment “protects” commercial speech?

A. First Amendment protection for commercial speech means that most advertising, like most expression, is a type of speech that the Constitution values—unlike, say, obscenity or criminal conspiracy. The few kinds of speech that the Constitution does not value can be completely outlawed.

When a government restriction on speech is subject to a First Amendment challenge, the court will use one of three types of tests to decide whether to uphold or invalidate the regulation:

- **rational basis** review, which is an easy test that usually results in the regulation being upheld;
- **strict scrutiny**, which is the hardest test and almost always means a regulation will be struck down; or
- **intermediate scrutiny**, which is tougher than rational basis review but more lenient than strict scrutiny.

Most advertising regulations are subject to some form of intermediate scrutiny.

Q. How hard is it for a commercial speech regulation to pass intermediate scrutiny?

A. In 1980, the Supreme Court established the four-part Central Hudson test—named for the case in which the test was first used. Central Hudson started out as a true intermediate scrutiny test. For about twenty years, some advertising restrictions were struck down and some were upheld under this test. For example, the Court did not allow complete bans on lawyer advertising, but it permitted restrictions on particular problem areas, like in-person solicitations of accident victims.

In more recent decisions, however, the Supreme Court has made it harder and harder for commercial speech regulations to survive the Central Hudson test. Since the turn of the century, the Court has rejected a series of government efforts to protect public health and welfare by restricting commercial speech. The Court struck down Massachusetts’ ban on tobacco advertisements within 1,000 feet of schools; federal restrictions on pharmacy advertisements for compounded drugs; and Vermont’s law that “discriminated against” drug companies by limiting their use of doctors’ prescription records for direct marketing purposes—while allowing the records to be used for research and insurance related purposes.

Q. What are the mechanics of the Central Hudson test?

A. The Central Hudson test proceeds in four parts:

1. The first, threshold question is whether the advertisement or other commercial speech at issue is (1) false, (2) actually or inherently misleading, or (3) about illegal activity. If so, the First Amendment doesn’t protect it at all.
2. If the speech is truthful, not misleading, and about legal activity, then the court will ask whether the government has a substantial interest in regulating it. If not, the advertising regulation won’t survive. Usually, though, the government can point to a substantial interest behind the regulation—protecting youth, fighting chronic disease, or another public health rationale.

3. If the government's interest is substantial, the question becomes whether the regulation "directly and materially" advances that interest. Here the government needs to show some evidence that the regulation actually helps to solve the given problem. Empirical studies are not necessary, but they are useful. As courts often explain, "mere speculation" is not enough.

4. If the regulation advances the government's interest, then the final question is whether it is tailored to accomplish the government's purpose without restricting a lot of additional speech. For example, the Supreme Court struck down a state prohibition on tobacco advertisements within 1,000 feet of a school because the law was not narrowly tailored—it banned too much speech directed at adults.

For more on this topic, see our other First Amendment resources

Q. If it is so hard for the government to regulate commercial speech aimed at adults, why aren't there tobacco billboard ads anymore?

A. The ban on tobacco billboard ads was not created by a law. Instead, it is the result of the 1998 "Master Settlement Agreement" that resolved a series of lawsuits filed by states against the major tobacco companies. As part of that agreement, the tobacco companies agreed to eliminate certain marketing practices—including most billboards and other outdoor advertising for cigarettes. If a similar restriction had been created by a law, it would have been challenged in court and would very likely have been struck down.

For more resources on this topic, see: Tobacco Laws Affecting California

Q. Can the government prohibit false and deceptive advertising?

A. Yes. Under the first part of the Central Hudson test, false or inherently misleading commercial speech is not constitutionally protected. For example, the First Amendment does not protect a company's claims that its breakfast cereal "boosts your child's immunity" when the product does no such thing.

The issue of inherently misleading advertising is particularly important when it comes to kids. A substantial body of scientific research shows that developmentally, most children cannot effectively understand and process advertising until they are at least 11-12 years old. This means that there is no plausible way to advertise to most children under 12 without being misleading. Therefore, although courts have not addressed this issue directly, the First Amendment should not stand in the way of government restrictions on child-targeted advertising. The limitation of this approach, of course, is a lot of advertising targets multiple age groups, and the government has a lot less leeway to regulate advertising to older kids and adults.

As for adolescents, a growing number of scientific studies are finding that teens are highly vulnerable to certain digital marketing techniques heavily used to market junk

food. Adolescents are significantly more vulnerable than adults to advertising messages because the part of the brain that directs impulse control, risk-taking, and maturity of judgment does not fully develop until adulthood. Furthermore, interactive and immersive marketing to teens is specifically designed to trigger subconscious, emotional reactions. These tactics are particularly problematic when used to elicit positive associations with fatty, sugary, and salty food that already is hard to resist as it is. To the extent these tactics can be shown to be actually or inherently misleading, the government should be free to regulate them under the first prong of the *Central Hudson* test.

For more resources on this topic, see:

- *Identifying and Reporting Unfair, Misleading, and Deceptive Ads and Marketing*
- *State Attorneys General: Allies in Obesity Prevention*
- *Government Can Regulate Food Advertising To Children Because Cognitive Research Shows That It Is Inherently Misleading*
- *Protecting Young People From Junk Food Advertising: Implications of Psychological Research for First Amendment Law*

Q. What about advertising for illegal products?

A. Advertising about illegal activity is not protected by the First Amendment. This means that if the government has outlawed the underlying commercial activity—like the sale of narcotics—then it may also restrict or ban advertising about those products. With respect to products that are illegal only for minors, like alcohol or tobacco, the government can prohibit advertising that specifically targets minors—but in so doing, it cannot restrict too much advertising aimed at adult consumers.

Q. What counts as commercial speech?

A. Protected commercial speech has traditionally been defined as "speech that proposes a commercial transaction." This definition clearly includes common types of advertising, including billboard ads, TV ads, magazine ads, in-store signs, internet banner ads, and the like. It is less clear, however, what additional marketing practices qualify for First Amendment protection.

When faced with government regulation, businesses generally try to characterize as many commercial activities as possible as commercial speech—especially since the Central Hudson test now offers strong protection from government intervention. So, for instance, industry advocates have argued that commercial speech includes free tobacco samples and the toy in a fast food children's meal. In a recent case, the Supreme Court seemed open to an expanded definition of commercial speech, observing that there is "a strong argument" to be made that a database of doctors' prescription records is protected commercial speech. But as of yet, the Supreme Court has not articulated what, in addition to traditional advertising, meets the definition of protected commercial speech.

Q. What if a run-of-the-mill business regulation ends up having an unintended impact on commercial speech?

A. Courts apply a more lenient intermediate scrutiny test than Central Hudson to regulations that aren't meant to restrict commercial speech but that may impact communication to consumers in some way. For example, the Supreme Court reviewed a Massachusetts ban on self-service displays of tobacco products. The goal of the regulation was to prevent minors from shoplifting by making customers access tobacco products through a salesperson. The Supreme Court assumed for the sake of argument that merchants might have a protected speech interest in displaying their products a particular way. But the Court still upheld the regulation because it was intended to prevent youth access to tobacco products, not to suppress communication.

Q. What types of restrictions on advertising and other marketing don't violate the First Amendment?

A. There are quite a few ways that local, state and federal governments may restrict junk food advertising and other commercial activity without running into First Amendment problems.

For more information on this topic, see: Protecting Children From Harmful Food Marketing: Options for Local Government to Make a Difference

1. Governments can regulate business practices that are not related to speech.

The First Amendment doesn't apply to restrictions on business activities that have nothing to do with speech. For example, no free speech concerns are raised by zoning laws that limit the number of fast food restaurants, or by laws that ban trans fat, or even by measures that limit portion sizes or set minimum price requirements designed to make unhealthy foods more expensive and therefore harder for kids to purchase. This is why Santa Clara and San Francisco were able to enact ordinances setting minimum nutritional standards for meals that come with toys.

For more resources on this topic, see:

- *Fact Sheet: Creating a Healthy Food Zone Around Schools*
- *Sugar-Sweetened Beverage Taxes: Model Legislation*

2. Governments can impose restrictions on advertising in schools and other publicly owned places that aren't open to all speakers.

Governments may restrict advertising on government property—like public schools—that is not generally open to all speakers.

Of course, some public property is a traditional place for speakers of all kinds to share their ideas—and hawk their wares. Think about people on a corner in a business district passing out leaflets about global warming, distributing flyers about an art opening, or handing out coupons for a sale. Public streets are “public forums” for ideas, debate, and advertising. It is very hard to restrict what people can say in public forums.

On the other hand, imagine a protest march through a military base, or a sports drink company passing out product information in a post office, or a fast food chain sponsoring an elementary school's report cards. These images are jarring because military bases, post offices, and public schools are “non-public forums.” They are not traditionally open to any and all public speakers.

School authorities have a lot of leeway to decide what speech happens on school grounds. If a school district decides to restrict food advertising on campus and someone challenges that restriction, a court will use a lenient First Amendment test and the district will probably win. The same is true of other government property that is not typically open to the general public or a wide variety of speakers.

For more resources on this topic, see:

- *Fact Sheet: Restricting Food and Beverage Advertising in Schools*
- *First Amendment Implications of Restricting Food and Beverage Marketing in Schools*

3. Government entities can require advertising restrictions in their own contracts.

When it enters into contracts with suppliers or others, a government can require that companies agree not to advertise on government property.

For example, governments may require in contracts for vending machines on their property that unhealthy products not be displayed on any object or product supplied by the contracting company.

The First Amendment doesn't block these kinds of contract provisions. A company may voluntarily give up certain constitutional rights, like the right to advertise, in exchange for some other benefit—like the exclusive right to sell its products in a city's parks or schools. As long as the parties are more or less equal in their bargaining power, there isn't likely to be a First Amendment problem with the arrangement. Even when the government has more bargaining power, the First Amendment should not stand in the way if the advertising restriction is connected to the purpose of the contract and the restriction is not out of proportion to the benefit the company receives.

Governments may achieve their goals through other kinds of contracts too. Perhaps the most prominent recent example of a contract restriction on advertisements that would otherwise be constitutionally protected is the Master Settlement Agreement (MSA) between 46 states and the major tobacco companies. The MSA resolved lawsuits filed by the states to recover health care costs caused by decades of industry deception about the health effects of smoking. In exchange for avoiding trials and potentially even more damaging outcomes, the tobacco companies agreed to restrictions on their advertising practices, including the elimination of most billboards and other outdoor advertising for cigarettes. If a law that contained the same restrictions had been created by a

government, it almost certainly would have been found unconstitutional and overturned. But a restriction on advertising is not unconstitutional if both parties agree to the terms through a contract.

For more resources on this topic, see:

- *Model Healthy Beverage Vending Agreement*
- *Understanding Healthy Procurement: Using Government's Purchasing Power to Increase Access to Healthy Food*

4. Governments can speak for themselves.

To counter the influence of junk food advertising, a government may offer its own opinion through public service announcements, reports, recommendations, and press releases.

When a government is delivering its own message, the speech does not come within the scope of the First Amendment at all. Therefore, a government may run as many public service announcements as it wants to about the health dangers of excessive consumption of certain foods or beverages. As long as these messages clearly come from the government—even if they are funded by, say, a tax on sugary drinks—the messages are considered government speech and outside the bounds of the First Amendment.

For more resources on this topic, see: Proposal on Food Marketing to Kids Doesn't Violate the First Amendment, Legal Scholars Say

5. Governments generally can impose advertising regulations that are content-neutral.

Although it is difficult for government to regulate billboards and signs based on their content (for example, restricting only billboards advertising cigarettes or junk food), the path is much clearer if the restrictions are based on something other than the content of the ads and apply across the board. For example, a ban on all billboards, on the grounds that they are ugly and that they unsafely distract drivers, would very likely pass muster under the First Amendment.

This means that a law that restricts more advertising will sometimes fare better than one that restricts less. But the real key is that the First Amendment favors laws that do not refer to the content of an ad, and that are not aimed at limiting speech. For example, an ordinance that forbids alcohol ads in store windows, but allows signs for other products, may have a hard time under the First Amendment. But the First Amendment would likely allow for an ordinance requiring at least 75% of storefront window areas to be free of signs (of any kind) so that police and the public may observe the inside of the store.

Q. Does the First Amendment also limit the disclosures that government can require companies to make about their products?

- A. Yes. But the government has more leeway to require informational disclosures than it has to restrict commercial speech. The main reason the First Amendment protects commercial speech is to bring more information into

the marketplace—information about prices, sales, new stores, and so on. When government requires disclosures, it is adding information to the marketplace, not taking information away. Therefore, the First Amendment is much less likely to forbid laws requiring factual disclosures.

Many kinds of disclosure laws have been tested under the First Amendment and passed. These include ingredients labeling on packaged foods, health and safety warnings on a wide variety of products, and calorie-posting requirements in restaurant chains. As long as the mandated disclosures are factual, reasonably related to a legitimate government interest, and not unduly burdensome, they are constitutional. (It is important to note that the federal Nutrition Labeling and Education Act limits what states and localities can require regarding nutrition-related disclosures.)

Government generally can't require merchants to post or disclose messages that are opinion rather than fact. So the government would be hard pressed to defend a measure requiring soft-drink retailers to post signs saying "Don't drink soda." It is unknown (and the subject of a number of ongoing court cases) whether the government can require that its own speech, including its own opinion, be posted in a business when it is clear that the speech is that of the government rather than the business.

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