

>> Male Speaker: All right, our next panel is "Advertising to Children and the first amendment." This panel will have question and answer from the audience. Staff members will be parading around the audience area with a couple of wireless mics. So if you have questions, please tackle them and they will give you the mic. Actually, raise your hand, that's a better idea. For people who are watching via webcast, you can -- again, you can send questions and comments to childhoodobesity@ftc.gov, and that e-mail address will be up at the question and answer portion of the presentation. And at this time, it is my honor to turn it over to our Director of the Bureau of Consumer Protection, David Vladeck.

>> David Vladeck: Thanks, Steve. [Applause] Thank you. And thank you so much for coming today. I was asked to moderate this panel because I think, in some ways, I am uniquely qualified to do this. I think I'm one of the few lawyers in the country who's taken both sides of the commercial speech debate, arguing early on that commercial speech was entitled to constitutional protection, but also arguing that there are limits to the protection that ought to be afforded to commercial speech. We have a really terrific group of panelists today. I would like just briefly to introduce them. I'd like to start out of order, and do this chronologically, in terms of their participation with the commercial speech doctrine. Marty Redish, an eminent scholar from Northwestern law school. Actually, and this a little-known fact, this is all Marty's fault. Marty wrote an article in 1971, when I think he was still in 6th grade, arguing that the first amendment ought to be read to protect commercial speech. And Marty's article, written at that tender age, provided part of the intellectual foundation for the litigation that then ensued to persuade the Supreme Court that commercial speech was entitled to some measure of constitutional protection. So I'm going to ask Marty to lead off in a minute, maybe give each panelist five minutes to say their piece. Marty, because he started all of this, I think is entitled to the first -- to go first. To Marty's immediate right is Dan Jaffe. Dan is the Executive Vice President of the Association of National Advertisers. I think the title of Dan's position tells us where he will come out on some of these positions. But we are grateful for Dan's participation. Then Tamara Piety is sitting next to Marty. Tamara's an old friend. She is one of the next generation of leading first amendment scholars. She's written extensively on commercial speech. And last, but certainly not least, is David Yosifon. David is a professor at Santa Clara law school. The irony of that should not be lost on anyone who cares about constitutional law. Although Marty is the immediate source of our problem, the real source of our problem is the

Supreme Court's ruling in the Santa Clara Railroad case back in the late 1880s, that corporations were persons under the Civil Right Act, and therefore could assert constitutional protection under the first amendment. So it is only fitting that we have someone from Santa Clara. So I'm going to now get out of the way and ask each of our panelists to speak for five minutes. As the zealous regulator, I will watch the clock carefully and will not permit much transgression. So Marty, the floor is yours.

>> Martin Redish: Thank you, David. I should say that at the outset, that I decided a number of years ago that unless I am reporting statistical studies or need charts, I don't use slides, because I found out when I did that, people were looking at the slides and not looking at me. And I didn't think that made a lot of sense. So I'm just going to try to use a cerebral approach today. And I want to talk about three things. First, what are the values of the first amendment that are implicated by protection of commercial speech? Second, where is the Supreme Court today on the issue of commercial speech? What kind of protection does it give? What kind of regulations would it authorize or would it not authorize? And then finally, take a little time to talk about the unique situation of regulating speech to children, and how that alters the first amendment. First of all, what are the values of the first amendment that are implicated by commercial speech? Why would an ad for Crest toothpaste or for a Toyota be thought to implicate the kind of constitutional protections that would protect the "I Have a Dream" speech, or the "Cross of Gold" speech? And intuitively, it's easy to assume that they have nothing to do with each other. But if you deconstruct a little, you'll see that the two are really connected. Well why do we protect speech in the first place? Why do we have a first amendment? Well, the famous political philosopher of the 1940s, Alexander Meiklejohn once said, "Speech springs from the necessities of self government." We are the governors. The people we call the governors are simply our agents. And because we, in the exercise of our power of self determination, as a collective society, have the final say as to how we will live and govern, we need information and opinion, competing information and opinion that would facilitate our life affecting choices. We may not like all of that speech. We may not like the results that were allowed to achieve as a result of it. But we protect it all because it is of such great value to the Democratic process. Where does commercial speech come into that? Well, commercial speech, as I argued in my article in 1971, really facilitates a kind of private self government. We have total control over basic choices involving our private lives when we are

making our governing decisions that Professor Meiklejohn was talking about, we have 1/1,000,000 of a say. When we make choices about our own private lives, we have 100% of the say. Therefore, at least as great a force of Democratic thought underlies the protection of commercial expression. Now, does that mean that the commercial speaker is not out to make money? Does that mean the commercial speaker is not trying to use certain persuasional techniques that appeal to non-cognitive elements? No. All of that is true, but all of that is true for other kinds of speech, as well. Everything you heard on the last panel would be also true of political consultants. If you're old enough to remember the Willy Horton ad in 1988, by the first George Bush, if you think of what -- the techniques Karl Rove has used or the Democrats themselves have techniques to this effect -- there is always this kind of persuasional element. There are appeals to a motive and a rational or non-rational elements, yet, what's the alternative? As Winston Churchill said, "Democracy is the worst form of government, except for all the others." If we reject the notion that individuals have the basic decision-making power to govern their lives, we have basically conceded the morality of tyranny. And we can't do that, because we can't do it in the political realm. We don't do it in the commercial realm, as well. For example, if I asked all of you, does "Consumer Reports" deserve constitutional protection? I imagine you would say it does. Yet, it's dealing with consumer products. It is not the "Cross of Gold" speech, or the "I Have a Dream" speech. The recognition that "Consumer Reports" deserves constitutional protection is automatically, inherently a recognition that information and opinion about commercial products and services is relevant to our self government. Now, the response, I'm sure most of you are thinking it, "Consumer Reports" is objective. These commercial advertisers aren't. Well, transfer it to the political process. Not all political advertisers are objective. People have agendas. They are allowed to promote it. Advocacy is not fraud. And the mere fact that a speaker is advocating one side of a debate doesn't mean that they are tricking somebody, or that there's necessarily a misleading aspect of their speech. We expect counter speech to deal with the problem. Now where is the Supreme Court today? Well, the Supreme Court has given extensive protection to commercial speech -- much more than I bet you are willing to imagine. In the case that David argued for the free speech side, the Virginia Board of Pharmacy case, in 1976, they gave a significant amount of protection to commercial speech. But in the last 15 years, it has been increased dramatically. The government has not won a commercial speech case in the Supreme Court since before 1996. That rivals the Chicago Cubs for a losing streak. [Laughter] And let me read you some of the things the Supreme

Court has said in the recent years. First, in that Virginia Board of Pharmacy case, the Supreme Court said this -- "There is of course an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests, if only they are well enough informed. And the best means to that end is to open the channels of communication, rather than to close them. But the choice among these alternative approaches is not ours to make. It is precisely this kind of choice, between the dangers of suppressing information and the dangers of misuse, if it is freely available that the first amendment makes for us." In a later case, the 44 Liquor Market case, the Court spoke of "the offensive assumption that the public will respond irrationally to the truth. The first amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be for their own good." Think about the relevance of those statements to the kinds of issues we're talking about today. Now, does that mean there are no alternatives? How about regulating the content of the food? It seems -- it would seem to me that that would be an obvious choice. What you are not allowed to do is regular behavior, to manipulate behavior through the selective suppression of information. You can require disclaimers. You can require warnings. And you can restrict speech aimed at a certain level of child. Where the first amendment is on the first amendment rights of children is not entirely clear. But the one thing that is clear, and I'll end with this, is you cannot reduce an adult population to the level of the sandbox. Thank you. [Applause].

>> Male Speaker: Marty, that was terrific. Thank you. I'm going to ask Tamara to go next, so we could liven this up a little. Tamara?

>> Tamara Piety: I couldn't tell whether you were asking me to go next or last. Okay -- I had prepared a much longer piece not taking -- not taking the invocation seriously, that it was five minutes. So I'm going to try to do this very quickly. And a lot of things are probably going to be left out, but I want to -- I want to make two points that are really -- or perhaps three points really, really clearly. And that I hope will be the thing that you take away from this. I want to commend first the FTC for convening this conference, and thank David for inviting me to do it, because this is a very serious problem. But Marty's talk just illustrated where we are. I have a quote from yesterday's "Advertising Age," about how they view the sort of -- the problem. And I want to -- I

assume that the purpose of this panel is to investigate whether or not the first amendment represents an obstacle to the regulation of advertising directed at children, in light of the very grave health -- and not say life chances that we are talking about, and this is the life of our country. I will comment, no surprise to those familiar with my work, when I say that no, the first amendment should not represent any obstacle. Now there are a number of things that Marty said, there are a number of things that go into this sort of conception, of commercial speech this way that I don't have time to talk about. But here, the points I want to say. First of all, marketing speech is about making a profit, not about making a point. Now, that does not mean that I have anything against making profits. I think commerce is great, I think making profits is great. But for markets to function well, they need information -- information, good information. In particular, to regulate commerce, we need to be able to regulate marketing. If we can't regulate marketing, we can't regulate commerce. And this is particularly important with respect to fraud. We have to be able to regulate fraud. Secondly, a second category mistake is to treat corporate speakers the way that you treat human beings and to treat them as having expressive needs the same way that human beings do. Corporations are legal fictions. They don't have expressive needs intrinsically. I think Professor Redish even alluded to this, in his conception of governments. Likewise, corporations have the sort of speech rights I would maintain that are representative of the type of organization that it is. Corporate law, which I teach, distinguishes between types of corporations and gives to those corporations powers that they are given by law. So it's a sort of a circular -- they have what powers we give them under law. If we don't stop this trend that Professor Redish so eloquently expressed there about the last -- since the last 15 years, what we will see is the attempt to use even the existing commercial speech doctrine against fraud claims, and to treat the commercial speech like "New York Times vs. Sullivan," sort of liable -- which would be effectively, even though we retain the sort of a genuflect in the direction of how we -- you know, the first amendment doesn't protect fraud. The practical import will be that it will protect fraud. Now let me just give you an example of this. I'm going to go very quickly through all of these slides so that you can see. And none of these things I can actually say. These are some things from the tobacco case in Washington that was recently affirmed in the second circuit. But one of the reasons that I -- and some of the reasons offered for protecting commercial speech, which I'm not going to go into all of these. [Laughter] Yeah, it's because David warned me, you know, it's going to be very quick.

So I'm going to just go to the "Casket" case, which most of you are possibly familiar with, the Nike v. Caskie case. And in Nike v. Caskie, it's exhibit "A" for the claim I just made about fraud. Here is what Nike v. Caskie's case was about. I'm sure most of you are familiar with it, but we are probably not familiar with because it got misreported, widely misreported and then repeated, even in some of the justices' opinions is that this was a case in which the plaintiff plead fraud. Nike's response, a demur, you failed to say the cause of action. You don't have a cause of action for fraud. If we take this away, that's what the import of that was. That's California Supreme Court eventually said no, this case can go forward. But the trial court and the court of appeals in California agreed the first amendment would bar this claim notwithstanding that Caskie alleged that there was fraud and deceit involved in that case. Let me go back for a moment to the corporate person. This is I think a mistake that arises from Santa Clara, but I think that there's also -- Part of what happened in the commercial speech doctrine is something that we saw a blending from the election speech area. That is, the strong statement of corporate personhood in Beloti got moved into the commercial speech case, and we began to see these sort of statements about the commercial speaker reiterated in the commercial speech case. The Virginia pharmacy case that Marty refers to is one in which the Court focused on the listener and that sort of not being paternalistic about the listener, and having the listener be able to make choices for himself about truthful information. But didn't talk about the speaker's right to speak the commercial speech, and indeed, retained the right to regulate, and that's where we are now, right in the central Hudson world. Beloti was a really strong statement about the corporation's right to speak as a corporation, although albeit, stated in terms of, this is the type of speech that must be protected. And so I predict to you that with citizens united, that is being decided right now, that what is valuable about that, even though it's theoretically political speech, is that it will be imported into the commercial speech context as a justification, or a rationale for why we can't regulate at all. This problem is far too important. This is life or death -- life or death for me. One more minute. And so the moral to the story is extension of stronger speech rights to corporate entities will lead to the argument of fraud and irresponsible marketing or communication practices should be, must be, unavoidably have to be shielded. We see this beyond food and Standard and Poor's response on the fraud claims and their bond ratings and drug marketing. If not now, when? I would note, also, the may does not entail the shall. Just because we can doesn't mean we should, or we will, but we shouldn't take it off the table. But, I will leave you with the words of Justice Jackson, given the nature of this crisis in interpretation of the first amendment to disable us

from responding to this in terms of marketing would turn the first amendment into a suicide note.
Thank you. [Applause]

>> Male Speaker: Dan, you are up next.

>> Dan Jaffe: Good morning, good to see all of you. I want to very much thank the FTC. I want to thank David Vladeck for having me join this distinguished panel. I'd like to just say one comment to the statement that was made a minute ago, that was said that marketing is all about making a profit, not about making a point. And I'd like to make the point that that's a caricature. That, in fact, advertising makes many points and that was the key fact in the Virginia pharmacy case where they said that the public often is more concerned about some of the issues that marketing discusses than the most important political issues of the day. And that is still the case. I'm going to try to keep to David's five-minute rule. So I'm going to move forward. The FTC should be congratulated for over three decades of protecting the first amendment, not only in the children's advertising area, but in the adult area, as well. But it's going to be strongly challenged again in this environment. Today's panel feels, to quote the famous political sage, Yogi Berra, "like deja vu all over again." We are truly experiencing a back-to-the-future moment. Because, as some of you in this room remember, but for those of you who don't, let me remind you that in 1978, the FTC launched a massive rulemaking to determine whether to ban children's food advertising. After 60,000 pages of submissions, and 6,000 pages of testimony, the FTC in 1981 came to the end of this rulemaking road when the FTC staff concluded that there did not appear to be any workable solution that the commission could implement constitutionally, and as Marty Redish has pointed us out, the constitutional protections have increased, rather than decreased, in the intervening time. In 2004, Howard Beales, the former FTC director of the bureau of competition reviewed this whole rulemaking and concluded, "based on the history of children's advertising, experience with the prior kidvid rulemaking and current state of the law, one can only concur that restricting truthful advertising is not the way to address the health concerns regarding obesity." The FTC's own history and experience should be a beacon to guide us in regard to how to respond to these critical issues today. The first amendment discussion today is just not an academic abstract or theoretical issue. The advertising community faces real clear and present threats of censorship and massive censorship. There is unfortunately a growing number of proposals from policymakers to tax, ban,

or severely restrict food marketing. To go down this road would be very unfortunate and counterproductive. Because it would divert attention from real solutions and head us eventually into a policy cul de sac as we discovered in the late 1970s. Here we see the various strong standards that the Supreme Court has promulgated over the last 30 years in regard to the protections that advertising has under the Constitution. The western states case makes clear, and that is the strongest statement of the first amendment protections, that if the first amendment means anything, and this was a commercial speech case, it means that regulating speech must be a last, not first, resort. Western state's case further makes clear that the first amendment should not be perceived as merely a defense against government overreaching in regard to speech. Instead, it sets clear parameters for government policy formation commanding the non speech restrictive options need to be examined and found insufficient or inadequate before you turn to any speech approach. Even where speech restrictive approaches might be permissible, and they certainly can be -- certainly, the FTC can stop any false, deceptive or unfair ads, the burden of proof is on the government to demonstrate that these restrictions will work in a material manner. Here the research data, despite what you heard earlier today, raises many serious questions. The IOM, when it examined this issue, could not find a causal connection between advertising and obesity. For teenagers, paradoxically, advertising was found to be negatively associated with their food choices. We are far from helpless to effectively respond. Here is a list of just some of the options that the Institute of Medicine put forward as possible means for government to combat obesity, and none of them, as you will see up there, require speech restrictions. Unfortunately, what we've discovered, and I hope that what we heard in the beginning of this forum is true, that there seems to be an inverse relationship between the level of complaint about and concern about obesity and government action. The government has been backing away, and I will discuss this in some detail from doing what is necessary. I hope that what Secretary Sebellia said is really a harbinger of a major change. On the other hand, the ad community over the last nine years has launched a multi-billion dollar, multifaceted approach responding to the legitimate concerns about obesity. That far exceeds even what we heard about this morning. We completely revamped our self-regulatory children's advertising review efforts. We launched a whole new food and beverage and restaurant advertising self-regulatory system for kids. We launched major new initiatives in regards to public service advertising. That campaign has already reached over a half billion dollars. We continue to work in these areas to push for new legislation for CDC programs on nutrition and physical education, which are hardly available in

half of our states, and we continue to push for other programs that work in the schools. I'm almost done.

>> Male Speaker: No good, 'cause your time is up.

>> Dan Jaffe: Can I conclude?

>> Male Speaker: Yes.

>> Dan Jaffe: Finally, I would like to end by noting a disturbing new development. There has begun to be efforts to try to expand advertising restrictions beyond those under 12 to teenagers. Never before in this country have we tried to treat 17-year-olds as if they were 7-year-olds in regard to speech restrictions. To try to infantilize teenagers is a very radical step. You can't claim that teenagers don't have the judgment or maturity to handle advertising and then turn around and say that they can drive and shortly thereafter join the military, get married and vote. It's just not possible to place teenagers in impermeable cocoons until they somehow emerge magically mature at the age of 18. Thank you. [Applause]

>> Dan Yosifon: Okay, thank you so much for this invitation to speak on this panel. It's truly an honor to be sitting on a panel with such illustrious academics. The great legal theorist Roberto Unger likes to say that the task of the intellectual is make the obvious explicit. So, that we might be forced to grapple with that which we already in some sense know, but have not yet treated rigorously. So, what I want to do in the 5 minutes -- 4 minutes and 45 seconds that I have remaining is to take -- is to render what a few statements that I think are relatively uncontroversial. To just line them up one after the other so that we might grapple with their implications, which might indeed be quite controversial. Incidentally, because of the present setting, I thought it might be interesting to look for a pithy line with respect to what the task of the bureaucrat is. I thought it would be funny maybe if I could say I looked for such a line, but couldn't find anything. But instead, I did find quite a bit, but none of it is really appropriate for the polite company. So, we'll leave it to the bureaucrats to describe their own task. So, I want to start off -- we've heard a lot today said about the obesity epidemic. We saw some of the facts and figures that were described

on the first panel. But I say the -- I start off this slide by asking the obesity epidemic question mark because the very phrase implies that we have a problem, right? A problem that is in need of remedy. But if we think about the way that we typically view competitive markets operating, we typically like to view the consumer as being served by markets, right? That food corporations and retail food corporations certainly are operating in highly competitive markets. And they're stumbling over one another in pursuit of profits and the way that they achieve these profits on behalf of their shareholders is by discerning what it is that the consumer wants. And so the process of market competition serves the consumer interest by discovery ever more subtly what it is that she desires and by providing it to her at an ever cheaper price. So, if you take this conventional conception of how competitive markets operate, you would have to change the obesity epidemic title to something like just the obesity circumstance, right? And the rates of overweight and obesity that we witness in our society are a felicitous result. Not merely the consequence of consumers getting what it is that they desire. It's this view of human behavior that humans have within them a set of privately ordered preferences that market actors in competitive environments discern -- it's this conception of human behavior that really informs Professor Redish's view if I may of the commercial speech doctrine. The beautiful thing about advertising operating in competitive markets is that it allows profit-seeking corporations to inform consumers about their products and to let consumers know that we've discovered what it is that you want. And here's the price that it's being offered at. And so, the -- Professor Redish's view of commercial speech and indeed the Supreme Court's view of commercial speech broadly construed is that it aids consumers, that it aids consumers in discovering what markets have to offer and it aids in the efficient operation of market competition. The problem is, that the social science has revealed to us, that we human beings are in fact far more susceptible, far more vulnerable to situational influence in our cognitions, in our perceptions than we intuitively think about ourselves or that legal scholars or jurists or policy-makers have typically taken us to be. We've seen from the first panel today the myriad of ways in which marketers can manipulate consumer risk perception, exploit behavioral and neural techniques in such a fashion as to induce hunger, rather than respond to a pre-existing consumer preference but rather induce hunger or manipulate the consumer's perception of the risk. I thought it was going to say one, but it says two, so that's -- right. So, the fact -- the truth is, that alongside the beauty of markets, we have the -- what I call the problem of power economics, which is that these very same profit maximizing corporations operating in the context of competitive markets on

behalf of shareholders as a shareholder primacy norm in corporate governing laws requires them to do, firms are going to discover as much if not more about how humans actually think and behave and develop preferences and risk perceptions as the social scientists who sat on our first panel will discover. And they'll do so even without any actual human beings -- um, sitting within the corporation having any conscious understanding or conscious intent to discover and discern the mechanisms of consumer manipulation because the market will reward those corporations that even happen to stumble upon the mechanisms that were made explicit in the panel today. We do, however, know that corporations -- that many corporations are well aware of these cognitive dynamics which I don't have the time to get into. Professor Redish, I misspelled your name on my slide, but I want to make the point -- first of all -- which hasn't really been made I think that explicit yet which is when we talk about the regulation of commercial speech the court has said that false and misleading speech is not entitled to protection, right? And once you've decided that the speech is not false or misleading, then we have this so-called intermediate standard, but as the other panelists have said, no court is ever willing to say that there's a substantial government interest in keeping truthful, nonmisleading information from the public. And so in my view what we really need to do is to develop the first prong of the central Hudson test and develop a more robust conception of what it means to be false and what it means to be misleading such that advertising will not -- false and misleading advertising would not fall within First Amendment protections. Okay, I'll just wrap it up. So, my time is up, but maybe this can serve as a transition into the question and answer -- maybe it serves as a question to Professor Redish if I might. So, some say that imitation is the sincerest form of flattery. I think that's -- that must not be right. I think critique must be the sincerest form of flattery. And as I told Professor Redish when I wrote some of my earlier writing directly engages his scholarship and I never dreamed that I would be so fortunate as to sit on a panel with him to be able to share some of these ideas. So, I'll put the question to Professor Redish and say where Professor Redish has argued in the past that we can't construe the First Amendment to allow the government conclusively to determine how citizens process information or when there's a fear of information overload dictates a need for government intervention. We can never be sure that such a point exists, much less that citizens have in fact reached it. But I ask you, Professor, whether as a consequence of emerging from the muck or having been cast out of the garden, can we not be certain that we have limited cognitive capacity,

can we not be certain that such a point exists and do we not need a conception of the First Amendment that can account for that reality? [Applause]

>> Martin Redish: A rhetorical question, or do you want an answer?

>> Male Speaker: We'll come to that. I have a number of questions that I wanted the panel to answer in turn. And I want to keep the answers very brief. You have a minute and I want a reasoned, thoughtful response. If one were to look at the sum total of the Supreme Court's commercial speech cases, the one thing that comes out crystal clear is that the doctrine is designed to protect the free flow of information to consumers so they can make reasoned choices about the products and services they want to purchase. The emphasis is on information. Each of the cases the court has decided, and Marty is right, it's been over a decade since the court has struck down -- has upheld the restraint on commercial speech. In each of the cases the issue related to information. My question is this, the concern about children's advertising is that the ads are designed not to inform reason, but to overcome reason. These are not informational ads, these are emotional appeals. How should the first amendment deal with those kinds of ads? Let's just go down the panel, so Dan, you are up first.

>> Dan Jaffe: Well, first of all, I guess you have to accept that theory. Which I do not believe you can make that total generalization. But putting that to those ads which somebody might agree are non-informational. The only group that you should be concerned about would be kids, it would seem to me, because they would not be able to possibly deal with that issue, and that's why parents, I guess, were created by God. For the kids who are 8 and 9 years old who can't fully understand the selling purposes of advertising, some people say it's low, or some people say it's a little higher. Parents are there to step in. Kids can't drive themselves to the supermarket or to the quick service restaurant. So once you get past that, once you get to where people do understand the selling purposes of ads, the government should not be the national nanny, and the person who steps into decide for the public how to deal with this information, which they're well able to deal with on their own.

>> Male Speaker: I'm not sure I heard the first amendment theory there. Marty, do you want to add some theory to Dan's response?

>> Martin Redish: The reason that we protect commercial speech is that we don't approve of government engaging in paternalism through manipulation of information and opinion. The very idea that government can draw a distinction between what's informational and persuasive necessarily implies that government has the authority to protect citizens against the expression of opinion that will unduly or improperly influence their lawful choices. If we are going to start making the assumption that we're all something out of B.F. Skinner, or that we are all laboratory rats, the entire basis of the first amendment disappears. In the area of political speech I wouldn't dare think of allowing them to make those choices. And in the area of commercial speech, the same DNA is going on, the same concern about government treating us all as children. So the very idea that that distinction can be drawn by the government is itself an affront to the basic notion of individual choice. The entire first amendment and indeed the democratic system are premised on.

>> Male Speaker: Okay, there's some theory. Thank you. Tamara?

>> Tamara Piety: Well, I would say that under the first amendment, it's appropriate to regulate for children's benefit. It is appropriate to be paternalistic towards children. Children don't have the faculties and are not accorded the sort of cognitive development that adults are, and so it's not clear to me why we haven't said that a long time ago. Most of those autonomy arguments don't seem to have very much purchase with respect to children, and particularly, very young children, but even older children. And I think the work that Professor Yosifon and many others, including John Hansen at Harvard and others have done, cast unseen, Richard Thaler, have illustrated for us that in many circumstances, there isn't any neutral stance from which we can choose. There's gonna be somebody doing what they call choice architecture. The question is, do we want, we the people are elected representatives to make that choice architecture, or do we want general foods to make it? I didn't elect general foods. I don't have any say on the board of directors of general foods, and indeed, the shareholders don't have much. So that's what my --

>> Male Speaker: David?

>> David Yosifon: Well, I think that the problem is not between the informational and non-informational speech. I agree with Professor Redish that it's conceptually impossible, or very, very difficult to distinguish between what is informational or non-informational, what is informational, what is persuasive. The issue is whether the speech is false and misleading, or whether it's truthful. And unless you want to eviscerate the false and misleading dimension to the commercial speech doctrine, and say that even false and misleading speech is protected, then I think the question is, are the rhetorical appeals false and misleading? Now we have a doctrine of puffery in consumer protection law, and that it's crept into constitutional law that says that when you have a magic clown or expressions of sexuality associated with a product, that that's puffery, and it's not actionable as misleading speech because no reasonable person, no rational person takes it seriously. The \$2 billion a year spent in advertising gives a lie to that doctrine of puffery, and so my view is that we need to take seriously what the social science is telling us about what effects magical clowns have on our perceptions of the consequences of consuming the product.

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>> Male Speaker: I'm not sure Professor Redish is gonna be any happier with having social scientists make that choice than my colleagues at the FTC. Let me change the question a bit. The Supreme Court has never really decided, though. There's some hints in perhaps in moral art. Decided whether the commercial speech doctrine applies in full force when you are dealing with advertisements directed at children. Now, I want to put aside the *Butler vs. Michigan*, the roasting - - you know, burning down the house to roast the pig problem when you have ads that are directed both at children, and at adults. Where the ad is plainly targeted at children, not at their parents, what are your views about what, if any, first amendment protection should be accorded to those ads? Because I assume and you can take issue with this, I assume you take the position and I think most scholars do, that protecting the health and welfare of children is a governmental interest of the highest order.

>> Male Speaker: Is that to me?

>> Male Speaker: That's to all of you. Dan?

>> Martin Redish: It's an area on the frontier of the first amendment. When you deal with tobacco and alcohol, it is unlawful for underaged individuals to engage in activities. So promotion to them, the idea that they should take advantage of those products would be the promotion of an unlawful activity, and that's automatically outside the first amendment. When you get to the area of cereals or other kinds of food, it is not unlawful for minors to use it. You have to remember that there still has to be an opportunity for the parents to hear about it. And if the ads are framed in certain ways that simultaneously appeal to children and parents, the fact remains the parents are going to be making the final decision. I understand the concept of the nag factor, but if you're a parent that gives into anything your kid nags about, obesity is only one of the problems you are going to have. And the adults are making many of those choices. Now, there are first amendment rights for minors, not necessarily young children. They can wear anti-Vietnam war arm bands. There was a whole spate of recent cases about regulations of video games, which have struck down restrictions aimed at minors. Where the first amendment outer limits are for minors above the very young age has simply not been litigated.

>> Male Speaker: Tamara, you want to go next?

>> Tamara Piety: Sure. Obviously, I think it is a frontier that certainly there isn't any good, I think, theory that supports why we ought to permit that sort of -- particularly to the extent that we have, the evidence of manipulation we have, and I think, we have a fair amount of evidence of manipulation. So what value sets against this idea is not really the right to speak. And I would just object a little to what Mr. Jaffe said. it's not really expression. It's the right to make Cheerios or Fruit Loops. And then if you make it to sell it, you have to market something, a lot of times, to sell it. And you know, it's just like cigarettes are not illegal, alcohol is not illegal, what we saw in the context of a for-profit enterprise is that they will attempt to do whatever they have to do to market that thing, even to children, at the same time they're saying that they are not marketing.

>> David Yosifon: I think it must be frustrating for non-lawyers in the audience to learn that there is so Supreme Court doctrine directly on point. And this often is the case when you turn to an important problem in law, you find that there is no law. So I would say that I think that the only thing I'd add to the conversation is I think the emerging challenge as courts are going to be required

to confront this problem, is again the science that we heard today, suggesting that this radical distinction that we would like conventionally to make between children and adults or young children and adolescents seems to be breaking down. And that what we are learning is that the human mind, you know, that adults are subject to persuasion and manipulation in many of the same ways that children are. So I don't think that it's gonna be easy to come up with a doctrine that distinguishes children radically from adults.

>> Martin Redish: David, I have to ask you, would you feel the same way in the political area? Because the same dynamic is involved. So is it okay to suppress a political speech on the grounds that it might non-cognitively influence people? I just want to see how far you extrapolate your point.

>> David Yosifon: I would rest provisionally on the distinction that the Supreme Court has made between political speech and commercial speech and say that misleading and false political speeches entitled to first amendment protection, but misleading and false commercial speech is not.

>> Martin Redish: It's circular. I mean, I asked you whether that distinction should be maintained. You can't respond by saying there's the distinction.

>> David Yosifon: Well, I then I would retreat to the hierarchy of first amendment values, and say that there is a -- we have a greater interest in the free flow of expressive content with respect to social and political discourse than we do with respect to commercial discourse.

>> Male Speaker: I want to give Dan an opportunity to answer the last question, and then I want to move on.

>> Dan Jaffe: Okay. One thing that I think is important is that those who claim that this advertising is false or deceptive are talking about the kinds of advertising that is used in all products, categories. Colors, pictures, illustrations, this is how advertising works. It seems to me to say, if we're going to start saying that we can't have these ads to kids who can't buy the products themselves because they are the ones who don't understand it, then you must be saying that these

ads have no significance to adults. I think that's just wrong, I think doctrinally wrong. So you can't get these nice little ideas that there's these kids who are living off in this world all by themselves without parents, without any other people who are making decisions for them and we are going to protect them from themselves because they are going to make the choice, they don't. Or they don't unless the parents allow them to. And therefore, the communication is both to children and to adults, which is a very significant doctrinal protected area by the Supreme Court, and that's why they wouldn't allow, even in the tobacco area, or the alcohol area where these products would be illegal for kids to be used, to not allow that to be suppressed so that adults couldn't see those ads.

>> Male Speaker: Okay, so we're gonna move on to disclosure. You mentioned the tobacco regime. And Dan was critical of efforts to categorically suppress speech. So let's shift gears. Suppose the government were to adopt the same kind of disclosure regime that was adopted for tobacco. So we would simply require foods that were marketed principally to kids that were high in fat, sugar, calories, sodium, to bear a warning that said something like this: Consuming foods of this kind contributes to obesity, type II diabetes, heart disease and all sorts of other things. What does the constitution say about a disclosure regime like that? Let's start with Tamara because we're just going down the line here.

>> Tamara Piety: I guess I'm not so much concerned about what the constitution says about a disclosure regime or like that, because I don't think it forbids it, as I am about how effective it would be. We're looking at solutions, I think.

>> Male Speaker: Yeah, putting aside -- put aside whether you think it's efficacious or not. I just want people's view on the constitutionality of a regime like that.

>> Tamara Piety: Particularly on the types of foods that we're talking about, yes, I think it would be. I'm sure there would be heated dispute.

>> David Yosifon: Well, I certainly think that it would be permissible as well. Maybe that's a circular, as well, to say that the Supreme Court would likely hold that it's permissible. And this is not at all out of the ordinary. You can't market a security in General Mills. You can't say that

General Mills is going to make you sexy and have magical powers if you buy stock in General Mills. The government requires you under the securities laws to give reams and reams of disclosures in connection with that speech, requiring similar speech in an area as important as food consumption, as security investment, I think, isn't constitutionally problematic. I guess I would -- Professor Redish's question back to him and say, would your theory of the first amendment cause us to say that even misleading and false commercial speech is protected?

>> Male Speaker: Let Dan get involved, and we'll give Marty the last word on this one.

>> Dan Jaffe: I think there's two interesting parts to your question. One, this type of disclosure regime, I would assume, is not directed to kids, because the question before that we talked about how we have to protect kids from non-informational.

>> Male Speaker: The question did pose foods marketed to children. I realize that that definition may be problematic.

>> Dan Jaffe: When you put the disclosure in, I think what you're trying to do is reach adults, which is a perfectly legitimate sort of thing, but it will be judged by the constitutional standard. Does it directly advance a material interest? The burden on the government to show that.

>> Male Speaker: Is that your assertion, is that the disclosures are required to meet the same --

>> Dan Jaffe: I believe that any kind of restriction on first amendment speech, and I think the Supreme Court has said, as well -- if there is a problem about the truthfulness of the ad, then you can obviously do, you know, either disclosures or bans to take care of it. If the ad is not false or deceptive, then if you're going to regulate it under the central Hudson test. The test is very clear that you have to show that whatever restrictions you're placing on that ad directly advance your purpose in a narrowly, tailored manner.

>> Male Speaker: All right, Marty?

>> Martin Redish: I suppose you could put a disclosure that was aimed at kids specifically that said, warning, this product will make you fat, and if you're fat, people won't like you.

>> Male Speaker: Or you may die early.

>> Martin Redish: No, they think they are immortal. I don't think there is any doubt, and you mentioned Zouter, that the Supreme Court, and we could debate whether this is right or wrong. But there is not much doubt that they have been much softer on disclosure requirements or warnings than they have been on direct restrictions. And the theory is now we are giving more speech, more communications, so people have even more information to make choices, rather than selective suppression. There are still a couple of issues. One, is the information in the warning considered accurate? And who gets to make that choice is open to question. And two, and this is coming up under the new tobacco law, does the warning take up so much of the packaging that it effectively undermines the ability of the company to communicate. I would like to say to David that referencing the securities law really doesn't get you very far because again, rightly or wrongly, the securities laws have been assumed to be outside the first amendment and anything can be done in terms of government regulation, securities laws, without doing the first amendment. So by that metaphor, we'd end up having no protection at all in any area.

>> Male Speaker: I'm sure the FTC is now relieved to hear that.

>> Tamara Piety: There's certainly been some scholars who say that.

>> Male Speaker: Okay, last question and then we'll open this up to the audience, what one chip from the master settlement agreement that was entered into between the states and the tobacco -- some of the tobacco companies. One of the regulations that has been debated, some would say it's been efficacious, some would not. Suppose there was, and this would be government imposed, as opposed as to voluntarily assumed, but suppose there is a regulation that said a high nutritional standard for foods advertised on TV were more than a certain percentage of the audience, say one-third, were children between the age of, let's say 2 and 11. Sort of roughly modeled on some of the MSA provisions. David, you go first on this one. Constitutional or not?

>> David Yosifon: Well, I think that, as Professor Redish said, the court has said that you can't reduce level of discourse for adults to that level which exists in the sandbox. If a fifth or a third of the audience is children, meaning that the majority of the audience is going to be adults, I think that that would be problematic, which is why I think that we need to be -- my view is that we need to be developing robust conception of the permissibility of regulating commercial speech generally rather than focusing in the area of children. I think that it's not conceptually sound.

>> Male Speaker: Dan?

>> Dan Jaffe: Well, to some extent that was what the Laralard law case was as to how high you raise the percentage. The Laralard case said that you couldn't have advertising within a thousand feet of schools, or the perimeters of playgrounds, just for the same purpose of trying to protect kids, and the Supreme Court clearly thought that was not okay.

>> Male Speaker: I'm not sure clearly is the right adverb to use.

>> Dan Jaffe: It is certainly the effective law as of now, and we'll find out again because this is going to be tested, very specifically, on the tobacco legislation that was passed by the congress this year. My guesstimate is that you are always going to be running into the problem of starting to restrict too much speech to adults. So if there's a preponderance, a substantial preponderance of adults in the audience, I don't think you can do that.

>> Male Speaker: Marty?

>> Martin Redish: I think it's dangerous to start using the MSAs as an analogy to the first amendment, because there's no doubt, the tobacco companies, in exchange for valuable consideration, were conceding some of their first amendment rights. Their first amendment rights I think go well beyond what they voluntarily agreed to in the MSA. What you are talking about is what I call the dolphins and the tuna problem. How many dolphins are you allowed to get in when you are collecting the tuna? I think the Supreme Court in the Laralard case, and I don't care

whether it's 5-4, or 8-1, Dan was right, the opinion of the majority was very clear, and that clearly is the controlling law. The four dissenters can go off on their own. But basically, what they said is there's an element of proportionality that's involved, that the mere fact that there are some children exposed to the ads doesn't matter as long as the large majority of people being exposed to the ads are adults.

>> Male Speaker: Tamara, you get the last word.

>> Tamara Piety: I would echo what Professor Yosifon said, I mean, I really think that what we need to be doing is looking at commercial speech generally. But I also would say that this is a very, very, very complicated problem. It's a public health problem. You have to start on the ground somewhere with something and children and the products marketed to children seems to me a good place to start. That sort of metric that kind of -- it says, well, if you don't have enough children in the audience, then maybe it shifts over into a different kind of framework, I think highlights the real question that I wanted to propose, which is what is the value here of commercial speech? What is the value that we are giving to those adults that makes it important enough to say okay now we can't impose these kinds of restrictions. I don't have enough time to talk about all of the ways in which I think there are many empirically, theoretically, problematic assumptions, but the principle one, I think is this sort of -- that kind of assumption about the rational person, or the rational chooser.

>> Male Speaker: I promised to leave some time for questions from the audience. We have 10 or 12 minutes.

>> Male Speaker: This is a far-reaching discussion, I really appreciate the commission having this discussion. Dan Jaffe described what I sort of call Advertising 1.0. What I'd like the panel to talk about, reflect on, is what David Britt and others talked about this morning. That you have an entirely new system that is really able to identify individuals, including children and teens, in an invisible, non-transparent way, profile them by collecting lots of data in real time, target them in myriad ways, and in particular, use techniques honed by neuroscience to directly affect them

through their subconscious and unconscious minds, in the words of the advertisers, directly. What are the first amendment issues with this kind of contemporary digital marketing system? Thanks.

>> Male Speaker: Okay, who wants to go first with that? Dan, David?

>> Dan Jaffe: Do you want to go, David? I'll be glad to follow.

>> Tamara Piety: Okay, I'll go first, maybe because it's --

>> Dan Jaffe: No, it's fine, please.

>> Tamara Piety: Maybe because I don't think this is a first amendment issue. But I think the question is really good for illustrating that question about market research. Why -- is it -- it's a permissible activity, right, and is it a speech activity? It's a business activity, but why are we allowing children to be basically human subjects in a research -- I mean, we're doing research on human subjects without any sort of control. It's not clear to me why we would permit that generally, but with respect with children, and I do not see it as a first amendment issue.

>> Male Speaker: Who wants to go next? I want to refine the question when you are done.

>> Dan Jaffe: Why don't you refine the question.

>> Male Speaker: It seems to me that the question that is imbedded there is whether this is advertising as a kind of -- that central Hudson is directed at, or is this the kind of in person solicitation that really falls more closely into Orlic and Primus, because these are tailored comments, at least as I understood the question, directed to an individual. And if that conception is warranted, does it change the first amendment calculus? And Marty looks like he's stricken, so I think we need to let Marty answer first.

>> Martin Redish: The Orlic case was about an ambulance chasing attorney who went into somebody's hospital room and promoted himself for his services, and the individual was in an extremely vulnerable state.

>> Male Speaker: Remember, the case was paired with Primus, as well.

>> Martin Redish: Primus said that the first amendment does apply when it's a communication that isn't quite in-person solicitation under those unique circumstances. First of all, my instinct is to think the language is too sweeping, that just as maybe the rational model is over-simplistic, the idea that we're all a bunch of automatons, I'm willing to bet, is overly simplistic. The fact that they profile us -- assuming they've invaded some privacy rights, I don't find anything wrong with, because they may know what we like. And we are allowed to make choices that way. But most importantly, the danger is you're proving too much. Because the exact same thing goes on in the political process, and if we basically reject the notion that individuals ultimately can make choices about whom they want to govern because we've decided that they're all just sheep, then we've basically thrown out the whole concept of democracy. And if we're not going to throw it out in that realm, I don't see how we can throw it out in this realm. We can't say we're all sheep when it comes to commercial ads, but that we're rational individuals when it comes to political choices.

>> David Yosifon: I just want to respond briefly and say that the idea that we can't draw distinctions even with respect to constitutional protections is in my view foreign to our constitutional tradition. You are not allowed to yell fire in a crowded theater. That doesn't mean that the entire first amendment goes out the window. You are not allowed as a lawyer to solicit business in person. That doesn't mean that therefore, there's no political speech. You are not allowed to lie when giving testimony in a courtroom or to disrupt an ongoing cross examination. That doesn't mean that political parties can therefore be regulated. We draw all kinds of categorical distinctions, many of which no doubt we would universally agree are acceptable. The very pursuit of categorical distinctions, I don't think, is threatening to the constitutional regime. We can argue about the wisdom where we draw those lines, but the pursuit of it is done all the time.

>> Martin Redish: But you're changing you're empirical assumptions about what reality is. Professor Yosifon accused me in one of his articles of being obsessed with consistency, and I guess I have to plead guilty to that. And I can see why you wouldn't prefer a consistent system, because you're being completely inconsistent here. Either we are sheep or we're not. It's totally different from the situations you're distinguishing. These are situations where it's premised on a factual assumption, and -- Whoa. We thought we were being light to the situation

>> Male Speaker: Marty's the prince of darkness.

>> Martin Redish: I have within called worse. And to make that shift I think, is just blatantly inconsistent.

>> Male Speaker: Give one last comment, and then we need to get some of the other questioners involved.

>> Tamara Piety: I think that's a straw man, you know, it's sort of like, either we're sheep, or we're rational. I mean, obviously we're somewhere in the middle. And just like we have to draw some lines in the constitution, lines that will create, as Professor Redish has so eloquently described, twilight zones, the fact that we can't think of in advance something, a theory that will decide every case or every circumstance or easily put something in one category or another doesn't mean that in the face of a threat like this, that we shouldn't try to begin to act in certain ways, and there may be places where we get to some point where we say all right now this seems to look like this is too much intervention. But it seems like to throw up our hands and say we can't do anything at all is also not the appropriate response.

>> Male Speaker: This gentleman has had his hand up for a while.

>> Bruce Silver: Thank you. Bruce Silver, legal director for center for science in the public interest. I would like to just make a comment, and then pose a question to Martin. Very quick comment, if you look at this from the level of 30,000 feet, the World Health Organization has made it very clear that restrictions on children's food marketing of high fat, high sugar, high salt foods is a top

priority, along with production reformulation, better labeling, nutrition education, better school foods, better agricultural policies, but restrictions on marketing from the World Health Organization standpoint, after working with dozens and dozens of experts around the world, looking at hundreds and hundreds of studies, have come out with a form of policy calling for these kinds of restrictions. So while we have an impassioned defense of the first amendment by Dan and Martin, it goes wholly against public health policy around the world. Second, the United Kingdom -

>> Male Speaker: Is there a question?

>> Bruce Silver: The question -- Here's the question, the United Kingdom has instituted restrictions to advertising of high salt, sugar, and fast food to children under 16. I haven't -- it's been in effect for two years. I haven't seen them slide into totalitarianism. They're still a democracy, as I know.

>> Male Speaker: The panel is to address the first amendment, and the WHO and the British have not adopted our first amendment, so the question?

>> Bruce Silver: The question, Martin, is there any -- I'm going to play reverse law school and give you a Socratic question, pardon me. Is there any hypothetical situation that a child under 6 watching a television show directed to children under 6 in a daycare center where parents are not present where the advertisement is for a cereal consisting of 15% sugar by weight, is there any situation where you conceive that a restriction on that kind of marketing would pass first amendment protection?

>> Martin Redish: Oh, sure. Advertising that is dominantly or predominantly aimed at underage children, we've decided aren't at a stage where they can make those kinds of rational choices, I would have no doubt about it, that that would be okay.

>> Male Speaker: Does anyone disagree with that answer? We have peace finally. There's one last question at the end.

>> Angela Camel: Hi, this is Angela Camel from Georgetown Law. Professor Redish talked about in the political context how the remedy for sort of over the top advocacy would be more speech or counter speech. But I don't see how that can work in the commercial realm because there really isn't -- In a political system, where you have multiple parties, there isn't really someone who has the counter advertising point of view. The question for all the panelists is, is there a remedy here that would involve more speech rather than suppressing speech, and is the only person who could do that the government? Is there problems that the government does it, or are there other ways to get different points of views, and would that be effective?

>> Dan Jaffe: Well, as I mentioned in my talk, there is about half a billion dollars worth of expenditures by the ad council to talk about all sorts of issues that deal with the question of obesity and how parents and children should respond to that issue. Certainly the government should weigh in, and unfortunately they backed off because it was a verb program where they were spending I believe about \$100 million a year, and they could certainly increase that where we're talking about these issues. So I think that you can certainly get those ideas in. What I find really surprising and distressing is that no one believes that in this marketplace if parents and the public at large becomes concerned about obesity, that they believe that that will not start creating pressures in the marketplace for companies to respond to that. In fact, there has been that type of pressure, and 10,000 products have been reformulated to try to meet these requirements. So it's not as if the marketplace only skews to hurting kids. If you listen to this discussion today, that's what you would come away with. That's not just an accurate picture. The marketplace will respond to the legitimate concerns of people. Corporations may not be people, but they respond to people. That is how they make money. And unless you feel that they're so manipulative that they can just overwhelm the marketplace of ideas, they're gonna try to respond to the legitimate concerns of people as they begin to discover them.

>> Martin Redish: I'd add that government -- it is well-recognized that government has its own right to speak, and that government informational campaigns or disclosure requirements or warnings on packaging are perfectly permissible. As a matter of free and open debate, rather than selective regulation through suppression.

>> Tamara Piety: I want to echo this point about it not being an effective source of counter speech, partly for commercial speech, because there's not an effective place for profit motive to drive some of that. But I would support all sorts of solutions, including more speech and industry solutions, and involvement from lots of different sectors. This is a complicated problem, and I think it probably has multiple solutions. But this idea that corporations respond -- I also want to say that I do not -- I have been caricatured sometimes. I do not have anything against corporations. Corporations are great, but I think -- intrinsically, their structure makes them sort of neutral. They have sort of amoral structure, so I don't think you can depend on them to respond appropriately in every circumstance. And very often, the public has wanted these restrictions. It said, "please don't advertise to our kids, don't put soda machines in the schools. Don't do this kind of advertising, don't call me at home at dinner." The do-not-call registry. And the industry has responded with lobbying efforts to shut that down. So you know, when the public wants a particularly apparently paternalistic intervention that says, "we would like you to do this for us because we cannot do this adequately ourselves, it's systemic," that seems to me not to be paternalistic. It's paternalistic in the extreme to respond to that desire by saying, "Oh, no, no, you really want us to pitch to your kids. You don't know it, but it's good for them. It's good for them to keep saying no, tough love. They'll be better for it. Even though you say you want it, we're not going to take you seriously."

>> Male Speaker: I didn't ask for that pitch for the do-not-call program. David, you have the last word.

>> David Yosifon: I would just say that I agree it's permissible. Whether or not it's efficacious, I guess, remains to be seen. More speech is always desirable, but more listening isn't always possible, and I think that legal scholars in this country, our culture, our constitutional tradition must ultimately grapple with the reality that we have limited cognitive capacity, and we need to develop a conception of the first amendment that is consistent with that biological reality. And the reality is that more speech is not always possible.

>> Male Speaker: I want to ask everyone to join me in thanking our panel. [Applause] Very stimulating discussion. Keith has some housekeeping announcements to make, quickly.

>> Male Speaker: We'll take a one-hour lunch break and reconvene at 1:30. Please take your belongings, and also keep your sticky badges. You will have to go back through security. Thank you.