



MEMORANDUM

To: American Heart Association, Voices for Healthy Kids Staff
From: Sabrina Adler, Senior Staff Attorney and Program Director
Re: Regulation of Restaurant Kids' Meals and the First Amendment
Date: July 30, 2018

Generally, the First Amendment to the U.S. Constitution prohibits the government from making laws abridging the freedom of speech. (U.S. Constitution Amendment I). While traditionally this prohibition applied to government regulation of "core" (e.g., political, artistic, etc.) speech, in the 1970s the Supreme Court interpreted it as applying to commercial, or business, speech. The purpose of this application was primarily to protect the right of the listener – the consumer – to receive free-flowing information about the marketplace. In more recent years, the Court has become increasingly protective of commercial speakers, meaning the businesses themselves.

However, not everything that businesses do is considered speech. Much of what they do, including activities in the realm of marketing, falls instead into the category of "business practices" or "business conduct." Such practices are not protected by the First Amendment at all, so government can more easily regulate them. The line between speech and business practices is not always clear, particularly when it comes to marketing, but the regulation of what a business can sell should fall squarely into the category of business practices. Thus, the regulation of food sold as part of a restaurant kids' meal is not a regulation of speech, and so should not have any First Amendment implications.

Sometimes regulations of business practices have an incidental effect on speech. One might argue that there is a speech component of kids' meal policies insofar as they affect what a restaurant can print on a menu or menu board. But regulation of such "expressive conduct" – i.e., behavior that is not speech but that has a communicative component – is subject to a different standard of review than regulation of speech. This standard of review is known as the "*O'Brien* test" because it was first articulated by the Supreme Court in *United States v. O'Brien* (a 1968 case involving an antiwar activist who burned his draft card, violating federal selective service laws).

Under the *O'Brien* test, a court will **uphold** a regulation if:

1. it is within the constitutional power of the government,
2. it furthers a substantial government interest,
3. that interest is unrelated to the suppression of free expression,
4. the effect on First Amendment freedoms is no greater than necessary to further the government interest, and
5. there are ample channels available elsewhere for the regulated expression.

Regulations of kids' meals meets all of these conditions.

1. Regulation of food to protect public health and safety is within the police power of state and local governments.
2. The health and safety of kids is a substantial government interest.

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3. The government's interest in health and safety is not related to the suppression of free expression.
4. By regulating food primarily intended for consumption by children, the government is only limiting expression directly related children's health and safety. The regulation is therefore not broader than necessary to further the government's interest.
5. The same food items can be listed on other parts of the menu, just not as part of a kids' meal, providing ample opportunity for the regulated expression elsewhere.

The *O'Brien* test is a relatively lenient standard of review, especially (in recent years) as compared with the standard for reviewing direct regulations of speech. The Supreme Court has used this test to uphold part of a Massachusetts law banning self-service cigarette displays because the justification for the ban was to prevent access by minors, not to suppress speech. That non-speech justification distinguished the self-service ban from advertising restrictions.

As the regulation of a business practice, a law prohibiting restaurant children's meals from including sugary drinks as the default option should not implicate the First Amendment at all. To the extent a court could find that such a law has an incidental effect on speech, however, it would be reviewed using the *O'Brien* standard. Because it meets all of the requirements of that test, it should be upheld.