Traffic-Light-Labeling on Restaurant Menus: A Call for the Communication of Nutrition Information Through Color-Coded Text

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Abstract

For years, federal law expressly exempted restaurant-prepared foods from FDA regulations mandating the disclosure of nutrition facts. That changed in 2010 when Congress passed the Patient Protection and Affordable Care Act (PPACA). Section 4205 of the Act requires restaurants with 20 or more locations to display the calorie content of standard menu items on menus, and to provide additional written nutritional information upon request. In April 2011, the FDA issued a proposed final rule specifying the “format and manner” in which restaurants will be required to convey nutrition facts; a final rule is expected by the end of 2012.

This paper responds to the FDA’s proposed labeling scheme in restaurants. It argues that, while the goals underlying Section 4205 — promoting informed consumption and encouraging healthy dietary choices — are well justified, the FDA’s draft disclosure rules poorly advance these goals. First, the agency’s proposed rule permits the omission of crucial nutritional data by not requiring restaurants to prominently display information about the saturated fat, trans fat, sodium, and added sugar — the nutrients most closely associated with diet-related diseases — in the foods they serve. Studies consistently show that information must be visible at the point of sale to significantly factor into consumers’ purchasing decisions and, conversely, information only available upon request tends to be ignored. Second, the written format in which the FDA plans to require restaurants to disclose nutrition facts is not inherently informative. The agency has proposed using a text- and number-filled, black-and-white scheme with uniform typeface, but consumers typically overlook or misinterpret labels that lack a clear and concise interpretive component.

This paper proposes a fix to these problems: traffic-light-colored menu labeling. It argues that the FDA has the authority to mandate a color-coded menu-labeling scheme in which
the color of prices on menus reflects the amount of saturated fat, trans fat, sodium, and added sugar in each menu item. Red prices would correspond with the highest levels of saturated fat, trans fat, sodium, and/or added sugar, green prices would indicate the lowest levels, and orange prices would fall in the middle. By displaying key nutrition facts on menus (in addition to calories), and then conveying that information in a clear, interpretive format, traffic-light-labeling repairs the primary defects in the FDA’s proposed scheme. Moreover, this paper contends, color-coded menu labeling complies with the First Amendment’s compelled commercial speech doctrine — the most significant legal hurdle — because it is based on objective science and negligibly burdens restaurants.

The policy this paper proposes is unique, and its legal analysis contributes to an unsettled area of First Amendment law. Although several European countries, Australia, and New Zealand have experimented with traffic-light-labeling on packaged foods, color-coded menu labeling is a novel concept. Numerous studies evaluating the efficacy of food labeling nonetheless suggest that a readily comprehensible scheme like traffic-light-colored labeling is most likely to achieve its intended policy goals. Furthermore, there is widespread interest — and debate — surrounding the extent of the government’s power to require commercial speakers to disclose potentially adverse information about their products. For example, the Sixth Circuit and D.C. Circuit recently expressed differing views regarding the constitutionality of the FDA’s new tobacco warning labels, which required cigarette companies to cover 50 percent of the front and back of each cigarette pack with graphic images of smoking-related diseases. Traffic-light-labeling may generate similar questions regarding the types of speech that regulators can compel when seeking to inform and influence consumers.
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I. Introduction.

A small provision in the Patient Protection and Affordable Care Act created a big change in the way restaurants do business. Section 4205 of the Patient Protection and Affordable Care Act (PPACA) created a national labeling scheme for restaurant-prepared food.\(^1\) The law requires restaurants with 20 or more locations to display the calorie content of standard menu items on menus.\(^2\) In addition, restaurants must provide additional written nutritional information upon request, and alert consumers to the availability of this information with a “clear and conspicuous statement.”\(^3\)

The disclosure of nutritional information in restaurants is a needed step forward in the fight against diet-related disease and obesity – increasingly widespread problems that restaurant-prepared food disproportionately exacerbates. Obesity inflicts an annual cost of $270 billion dollars as a result of health care expenses and lost productivity.\(^4\) Unhealthy eating and physical inactivity cause one-third of premature deaths in the United States.\(^5\) During the past three decades, obesity rates have doubled among adults and tripled among children.\(^6\) And high-calorie, low-quality food is typical at restaurants – so much so that “for the average consumer, eating one

\(^1\) Patient Protection and Affordable Care Act [hereinafter “PPACA”], Pub.L. 111-148, 124 Stat. 119, Section 4205 [hereinafter “Section 4205”].
\(^2\) Id.
\(^3\) Id.
meal away from home each week translates to roughly two extra pounds a year.”

However, the national labeling scheme (as currently conceived by the FDA) has two significant flaws that limit its reformative potential.

First, the agency’s proposed final rule implementing the law omits crucial nutritional information from menus. Saturated fat, trans fat, sodium, and added sugar are key contributors to diet-related disease, yet the burden will be on consumers to seek out this information. Studies have consistently shown that information must be visible at the point of purchase to influence consumers and, conversely, information available upon request is almost universally ignored. Therefore, most of the nutritional data in restaurants are unlikely to impact consumers’ food choices.

Second, the manner in which restaurants will have to disclose nutritional information in writing is unwieldy. The FDA plans to require restaurants to utilize a text- and number-filled, black and white format with uniform typeface, yet consumers tend to ignore or misinterpret labels that lack a clear, concise, interpretive component.

This paper proposes a fix to these problems. It argues that the FDA has the authority to mandate a color-coded menu-labeling scheme for restaurants in which the color of prices on menus reflects the amount of saturated fat, trans fat, sodium, and added sugar in the associated

10 Id.
menu items. Red prices would generally correspond with the highest levels of saturated fat, trans fat, sodium, and added sugar, green prices would correspond with the lowest levels, and orange prices would fall in the middle. By displaying key nutrition facts on menus (in addition to calories), and then conveying that information in a clear, interpretive format, traffic-light labeling repairs the two main flaws in the federal scheme.

There are two primary benefits to the menu-labeling scheme proposed here. First, it is practical. It adds meaning to existing information on menus rather than creating clutter. As a result, consumers are unlikely to ignore the information traffic light labeling conveys, and it inflicts a negligible burden on restaurants. Second, traffic light labeling is a relatively effective way to disseminate nutritional information. For several years now, packaged food manufacturers in Europe, Australia, and New Zealand have voluntarily used a front-of-package traffic light-labeling system supported by text and numbers,\textsuperscript{11} and studies have found it to be a superior means of both informing and influencing consumers.\textsuperscript{12} Likewise, empirical research from the United States shows that labels are most effective when they can be quickly read and understood\textsuperscript{13} – a criteria color-coded prices fulfill by relying upon familiar traffic light colors that rank foods in a simple, three-tiered system.

Traffic light labeling is also legally viable. As an initial matter, this paper argues that FDA has the power to require traffic-light labeling on menus because the PPACA places few restrictions on the “written form”\textsuperscript{14} in which the FDA can require restaurants to disclose.

\textsuperscript{12} New Studies Favor Traffic Light System for Food Labeling, European Public Health Alliance (May 8, 2009), \texttt{http://www.epha.org/a/3516}
\textsuperscript{13} IOM report, \textit{supra} note 8.
\textsuperscript{14} Section 4205 (ii)(III).
nutritional data, and the “format and manner”\textsuperscript{15} in which that written information can be disclosed. Furthermore, this paper contends that color-coded menu labeling complies with the First Amendment – the most significant legal hurdle – because it meets all four criteria of the rational basis standard that is appropriate for evaluating compelled commercial speech regulations. The scheme is 1) factual and 2) uncontroversial because it is based on objective, well-established nutritional science, Moreover, it is 3) reasonably related to the government’s interest in promoting healthy choices because restaurant food is a major contributor to diet-related disease, and menu labeling can help improve American diets.\textsuperscript{16} Finally, the scheme 4) does not unduly burden restaurants because it occupies a small portion of menus and merely changes the color of existing text.\textsuperscript{17}

In short, this paper seeks to build upon the healthy momentum the PPACA initiated, and make the case for a truly effective food-labeling scheme in restaurants. It does so by 1) illustrating the connection between restaurant food and diet-related disease, 2) explaining why labeling is a reasonable policy tool for addressing the issue, 3) summarizing a variety of empirical research on food labeling, 4) proposing a traffic light scheme that incorporates the key insights of this research and, finally, 5) assessing the political and legal opportunities for, and limits on, traffic-light menu labeling. If the United States is serious about reining in the diet-related disease epidemic, then, the quantity of food people eat in restaurants has to go down and the quality has to go up. A well-crafted menu-labeling scheme is essential to this goal.

\section*{II. Food labeling in restaurants is economically justified and politically appropriate.}

There are compelling economic and political reasons to mandate food labeling in

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{15} Section 4205 (x)(II)(bb).
\item \textsuperscript{16} \textit{Id.} at 651.
\item \textsuperscript{17} \textit{Id.}
\end{itemize}
\end{footnotesize}
Labeling is economically warranted because it provides important information to consumers that they would otherwise lack, and it aims to decrease the costly spillover effects associated with unhealthy consumption decisions in restaurants. Labeling is politically warranted because individual dietary needs differ, and the two main regulatory alternatives to labeling, which could target unhealthful restaurant food – taxation and prohibition – are not nationally viable.

A. The market for restaurant prepared food is plagued by information asymmetry and negative externalities.

Labeling is often justified by reference to economic theory, and abundant data show that the market for restaurant-prepared food suffers from two significant infirmities: information asymmetry and negative externalities. Taken together, these data demonstrate that food labeling is necessary to promote a properly functioning market.

First, the market suffers from “information asymmetry,” i.e., an imbalance of information between sellers and buyers, because many customers are either unaware of or grossly underestimate the number of calories in restaurant foods. In one study of 193 adults, 73% of the participants underestimated the calorie content in “healthy” foods prepared outside of the home by nearly half, and 90% underestimated the calorie content in less-healthful entrees by an average of 642 calories. In another study, even trained nutritionists had “great difficulty” estimating the calories in restaurant meals. Moreover, most consumers want nutritional

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information to be on menus. The FDA conducted eight focus groups in four geographically diverse cities to explore the reaction of consumers to having nutrition information on menu boards and found that all groups favored 1) the disclosure of calorie information next to food items on menus, and 2) a uniform, commonly defined symbol to help them make healthier food choices.

Second, ample evidence shows that the rising consumption of restaurant-prepared food over time has increased the prevalence of diet-related diseases. Therefore, the market is rife with negative “externalities,” i.e., unwanted spillover affects associated with the consumption of restaurant food. Studies of adults, adolescents, and children demonstrate that eating out frequently is related to higher intakes of fat, sodium, and soft drinks and lower intakes of nutrient-dense foods. Furthermore, the more frequently people eat restaurant food, the more likely they become to gain weight. A typical meal at an ordinary restaurant has 1,000 calories without the dessert or appetizer – roughly half the government’s recommended daily allowance of calories. Americans now spend almost half their annual food dollars on food prepared outside the home, and consume an estimated one-third of their total calories from these sources.

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21 Id.
Moreover, national obesity rates continue to rise.\textsuperscript{28} CDC data indicate that 68\% of the adult United States population is currently overweight or obese, which elevates the risk of chronic diseases such as coronary heart disease, type 2 diabetes, stroke, hypertension, and certain cancers. In addition, 32\% of individuals aged 2 to 19 are overweight or obese. That raises the likelihood of obesity in adulthood and can lead to immediate health problems such as elevated lipid concentrations and blood pressure.\textsuperscript{29} In 2008, obese Americans cost the country $147 billion in direct medical expenses alone – double what it was a decade earlier. Obesity now accounts for roughly 9.1\% of medical spending.\textsuperscript{30}

Unless there is a shift in consumer preferences and restaurant behavior– changes menu labeling could encourage – restaurant food is likely to keep exacerbating the nation’s diet-related disease epidemic. That is because a key factor that currently drives the market is the perception that bigger is better, which tends to limit the availability of healthy options. As Barbara Rolls, a nutrition researcher and professor of biobehavioral health at Penn State, explains, a food’s size, not its quality, is its primary source of value in America. “By comparison, European eaters tend to seek out smaller portions and focus on quality over quantity.”\textsuperscript{31} Not surprisingly, restaurant portions have grown substantially over time. For instance, the original McDonald’s hamburgers were 1.6 oz, but the Big Mac and Quarter Pounder are 4 ounces. Furthermore, growing portion sizes have reinforced the tendency of restaurants to fill plates with relatively cheap, low-quality


\textsuperscript{29} See 76 Fed. Reg. 191912, \textit{supra} note 9.


\textsuperscript{31} Jon Bonne, \textit{Bigger Portions, Bigger Appetite: We eat however much we’re served, research shows}, MSNBC.com (March 26, 2004), http://www.msnbc.msn.com/id/4603600/ns/health-fitness/t/bigger-portions-bigger-appetite/#.TrhmY3Fjzmo.
ingredients, which has amplified the health risks associated with oversized meals.  

**B. Food labeling has the proven potential to be economically beneficial.**

Although there are currently no reliable estimates of the cost savings associated with federally mandated restaurant food-labeling, menu labeling *could* be economically beneficial because analyses involving the Nutrition Labeling and Education Act of 1990 (NLEA) and the 2006 NLEA amendments (two of the most significant federal food labeling laws) both found that “relatively small changes in nutrient intakes may generate substantial public health benefits.” Specifically, the FDA’s analysis of its regulations implementing the 1990 NLEA concluded that the value of “life years” saved by mandatory nutrition labeling ranged from more than $106 billion (not a typo) to $3.6 billion over a 20-year period (starting in 1990). And an estimate connected with the FDA’s 2006 NLEA amendments requiring manufacturers to disclose the number of grams of trans fatty acids per serving found that, in three years, this change would result in total benefits ranging from $4.1 billion to $8.3 billion per year. Thus, food labeling has the demonstrated capacity to decrease the costly spillover effects associated with unhealthy food choices.

**III. The impact of menu labeling laws on consumer and producer behavior – mixed results so far.**

Notwithstanding the *potential* for menu labeling to change consumer and producer, empirical data examining consumer and producer responses to menu labeling is mixed – so

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32 Id.
33 The FDA explained that it was unaware of data that would support a reliable prediction *See* 76 Fed. Reg. at 19223, *supra* note 9.
35 Id.
36 Id.
mixed that the PPACA is perhaps best described as an experiment in and of itself.

For starters, data from some of the cities that enacted menu-labeling laws before the PPACA went into effect is inconclusive. A study, which compared the pre- and post-calorie labeling of Starbucks menu items in New York, concluded that the labeling led to a 6% reduction in calories per sales transaction and projected a decrease in long-term body weight of less than 1%.\textsuperscript{37} Another study assessed the choices made by adolescents at three restaurants that posted calorie and fat content information on their menus and found that the information did not affect behavior.\textsuperscript{38} More encouragingly, an impact assessment in Los Angeles County estimated that restaurant menu labeling could decrease the annual weight gain of residents by as much as 41%. This assessment relied on a prior study, which estimated that 10% of patrons would select lower calorie meals in response to menu labeling with an average reduction per meal of 100 calories.\textsuperscript{39}

Data from controlled experiments provide slightly stronger evidence that menu labeling could affect consumers’ behavior. A 2006 study using survey methodology showed that “consumers significantly underestimated levels of calories, fat, and saturated fat in less healthy restaurant items.”\textsuperscript{40} And, in a “subsequent experiment on items for which levels of calories, fat, and saturated fat substantially exceeded consumers’ expectations, the provision of nutritional information had a \textit{significant influence} on product attitude, purchase intention, and choice.”\textsuperscript{41}

In addition, evidence from the field suggests that responses to menu labeling could vary

\textsuperscript{37} Id.
\textsuperscript{39} See Healthy Eating Research, \textit{Menu Labeling: Does Providing Nutrition Information at the Point of Purchase Affect Consumer Behavior?} (June 2009), \url{www.rwjf.org/files/research/20090630hermenulabeling.pdf}.
\textsuperscript{40} See Kiesel, \textit{supra} note 25.
\textsuperscript{41} Id.
widely among demographic groups. These data highlight the potential for unintended consequences, and show that “many factors drive label usage and food consumption behavior, including heterogeneous values of time, health concerns, tastes, incomes, and culture.” For example, a few studies indicate that menu labeling may lead to higher energy intake among some population subgroups, such as college-age men. Surveys also have found that women are much more likely than men to use nutrition information to help them lose weight.

Empirical data involving restaurants’ responses to menu labeling are more limited. One study evaluated the effect of New York City’s menu-labeling law on Starbucks, and concluded that the 6% reduction in calories per sales transaction was “almost entirely related to changes in consumers’ food choices.” However, research from other food-labeling contexts suggests that some producers will voluntarily decide to reformulate products to make them more attractive nutritionally. Yet, these studies also have shown that “producers behave strategically in such situations – for example, by reducing the price of less healthful foods.” Furthermore, because “away-from-home food providers have different types of offerings, economies of scale, and levels of recipe standardization,” a “labeling policy will affect each provider differently.”

At first glance, these data may, in the aggregate, seem to cast doubt on the ability of menu labeling to meaningfully improve public health. But it would be premature to draw any definitive conclusions because eating habits and business practices can be slow to change. Moreover,

\(^{42}\) Id.
\(^{43}\) Id.
\(^{44}\) Id.
\(^{45}\) Id.
\(^{47}\) See Kiesel, *supra* note 25.
\(^{48}\) Id.
\(^{49}\) Id.
labeling is not necessarily suitable for study in isolation because it often is seen as one part of a broader campaign to change social norms surrounding food production and consumption. Human behavior is exceptionally complex – perhaps too complex to allow for the study of the causal relationship between specific food labels and particular decisions by sellers and buyers.

IV. The nationwide experiment: an overview of the federal menu labeling law.

The PPACA dramatically altered the federal food-labeling scheme. Originally, the NLEA (which mandated nutrition labeling on most food products regulated by the FDA) exempted food sold in restaurants and prepared in grocery stores. But then, in 2010, Section 4205 of the PPACA amended the NLEA to require restaurants with 20 or more locations to “clearly and conspicuously disclose” calorie information next to standard menu items. In addition, restaurants must make additional written nutrition information available to consumers upon request; provide a statement on menus and menu boards about the availability of the additional written nutrition information; and, on a sign adjacent to each food item, provide calorie information (per serving or per food item) for most self-service items and food on display. Notably, the NLEA now expressly preempts state and local menu-labeling laws that “directly or indirectly establish … any requirement for the labeling of food of the type … that is not identical to the [federal] requirement.” However, the statute explicitly forbids implied preemption of state and local law menu labeling laws, and the NLEA’s preemption provision

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51 The Act also requires vending machine operators who own or operate 20 or more vending machines to disclose calorie content for certain items. See Section 4205 (ii)((I)(aa).
52 Section 4205.
54 See Section 4205 (x)(d)(1). Implied preemption occurs when a higher-level law invalidates state or local law without explicitly saying so. Courts infer a basis for federal preemption if 1) the state or local law poses an obstacle to the goals of federal law or 2) Congress intended to
does not apply to food “safety” warnings. In addition, states and municipalities can in theory petition the FDA for an exemption from the NLEA preemption’s provision.

In April 2011, the FDA released guidance documents related to Section 4205 that outline how the agency plans to enforce the law by specifying (among other things) which businesses are covered, what foods are covered, and what qualifies as a menu. Additionally, the FDA proposed specific menu labeling requirements. Taking a “flexible” approach to the disclosure of written nutritional information, the FDA chose not to require a specific medium for conveying that information. And the FDA proposed the following written format:

Cheeseburger:
• Total calories 470 calories
• Calories from fat 190 calories
• Total fat 21 g
• Saturated fat 8 g
• Trans fat 1 g
• Cholesterol 75 mg
• Sodium 880 mg
• Total carbohydrate 43 g
• Sugars 10 g
• Dietary fiber 2 g
• Protein 26 g

The FDA expects to issue a final rule by the end of 2011.

V. An analysis of the federal menu labeling law, and a proposed alternative.


Section 4205 (x)(d)(2).


that posting key nutritional information (in addition to calories) on menus, and conveying that information in a concise, interpretive manner is the most effective way to inform and influence consumers. Because the proposed federal labeling scheme currently lacks both these attributes, this paper proposes an alternative “traffic light” labeling scheme in which the color of prices on menus corresponds with the nutritional content of menu items.

A. Labels are best at informing and influencing consumers when they are clear, concise, and interpretive.

Studies consistently show that labeling is most likely to achieve its intended goals when the information is clear, concise, and interpretive. That is because consumers must be able to quickly read and comprehend labels in order for them to be useful. In October 2011, the Institute of Medicine (IOM) released a comprehensive study, which analyzed the current federal packaged-food-labeling scheme and suggested ways it could be improved – suggestions that are pertinent to menu labeling. The IOM concluded that, to be effective, labeling must be:

- Simple: not requiring specific or sophisticated nutritional knowledge to understand the meaning
- Interpretive: nutrition information provided as guidance rather than as specific facts
- Ordinal: offering nutritional guidance by using a scaled or ranking system
- Supported by communication: with readily remembered names or identifiable symbols

Accordingly, the IOM recommended that the FDA and USDA implement a single, standard front-of-package labeling scheme that includes “calories in common household measure serving sizes” and “one simple, standard symbol translating information from the Nutrition Facts panel (NFP) on each product into a quickly and easily grasped health meaning.” The “symbol”

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61 IOM Report, supra note 8.
the IOM proposed using is a “point system” based on saturated and trans fats, sodium – nutrients “strongly associated with the most pressing diet-related health concerns,” and added sugars, which the “2010 Dietary Guidelines for Americans recommends that consumers reduce or avoid.” The IOM further explained:\textsuperscript{62}:

1. “Eligible or not? If a food or beverage contains any one of the critical nutrients in amounts above a threshold limit, the product is not eligible for earning FOP “points” — an indicator of whether a critical nutrient met defined criteria.

2. If eligible, for how many points? A product that is eligible is evaluated for FOP points for saturated and trans fats, sodium, and added sugars based on qualifying criteria that assess amounts of the nutrient. If one, two, or all three nutrients are present in a small enough quantity to meet the qualifying criteria, the product earns one, two, or three FOP points, respectively. For example, 100-percent whole-wheat bread could earn all three points, graham crackers could earn two points for fats and sodium, and an oat- and peanut-butter bar could earn one point for sodium. The more points earned, the more a product helps consumers avoid harmful amounts of these nutrients, which have been linked to obesity, diabetes, and high blood pressure among other illnesses.”

Thus, leading food-labeling research shows that labels are most effective at disseminating information and influencing buyers’ behavior when they use interpretive symbols that help readers quickly read and understand them. Moreover, it is particularly important for labels to highlight the amount of saturated fat, trans fat, sodium, and added sugars in foods because these are “strongly associated with the most pressing diet-related health concerns.”\textsuperscript{63}

\textbf{B. A proposed alternative to the current federal menu labeling scheme: color-coded text on menus that utilizes traffic light colors.}

What would a clear, concise, interpretive menu labeling format that includes key nutrition facts look like? This paper proposes the following “traffic light” labeling scheme for standard menu items in restaurants:

\textsuperscript{62} \textit{Id.}
\textsuperscript{63} \textit{Id.}
1) The prices on menus that refer to foods exceeding a “critical threshold” (based on the IOM’s criteria) of added sugar, sodium, trans fat or saturated fat must appear in red.

2) The prices on menus that refer to foods exceeding the IOM’s “qualifying criteria,” but not exceeding the IOM’s “critical threshold” criteria, for at least two of the four nutrients referenced in (1) must be in yellow.

3) The prices on menus that refer to foods that exceed no more than one of the IOM’s “qualifying criteria” for the nutrients referenced in (1) must be in green.

4) In addition, and subject to the requirements in (1) – (3), restaurants must clearly and conspicuously disclose the calorie content of all foods.

In order to put the colors in context, restaurants also must:

1. Include the following statement on menus and menu boards, which explains the criteria for classifying menu items as red, yellow, or green:

   “Menu prices are color-coded to reflect the nutritional content of menu items. Meals and sides associated with red prices contain relatively high levels of saturated fat, trans fat, sodium, and/or added sugar, green items contain the lowest levels, and yellow items fall in the middle.”

2. Display the following statement on menu boards OR in a format that is clear and conspicuous from any location wherever consumers can order menu items:

   “The government’s 2010 Dietary Guidelines advise Americans that diets low in fats, salt and added sugar can reduce the risk of chronic diseases such as cancer and heart disease.”

Finally, in order to minimize restaurants’ reformulation costs, the aforementioned rules do not apply to black-and-white “take-away” menus.

Unlike the FDA’s proposed labeling system, color-coded labeling makes it easy for consumers to quickly compare menu items and home in on the healthiest option. In so doing, traffic-light labeling incorporates all of the IOM’s recommendations for effective labeling: it is simple, provides guidance rather than specific facts, offers nutritional advice using a scaled system, and is supported by easily identifiable symbols.65

Traffic light labeling has other significant benefits as well.

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65 IOM Report, supra note 8.
First, color-coded text and numbers is a practical way to convey nutritional information because it does not add much clutter to menus. Instead, it integrates key nutritional information into existing typeface. Although the explanation that must accompany traffic light colors on menus takes up some space, it is the only additional information restaurants have to place on menus, and it is brief. Therefore, traffic light labeling takes “into account” space on menus, as the PACA requires, while significantly advancing the PPACA’s overarching goal of “Creating Healthier Communities.”

Second, traffic light labeling is intuitive. Almost everyone, regardless of their age, education, language skills, or socioeconomic status understands the significance of red, yellow, and green lights. Traffic-light-colored typeface requires virtually no explanation to make sense and does not lend itself to misinterpretation. Although menus tend to be colorful, which could create confusion about the meaning of different hues in different places, traffic light labeling avoids this potential pitfall by confining itself to a small, clearly defined space on menus. Because red, yellow, or green anywhere besides the prices on menus does not convey nutritional information, the meaningful nature of these colors is amplified in the discrete location where they do convey nutritional information.

Third, traffic light labeling is not a purely “academic” proposal. Conversely, it is a well-established idea in Europe, Australia, and New Zealand that has garnered the support of consumers, food advocacy organizations and some participants in the food industry. For example, grocery stores and food manufacturers in Great Britain have started voluntarily using front-of-

\[66\] See Section 4205 (x)(II)(aa). Section VI more fully explains the legal bases for traffic light labeling.
package traffic-light labeling – typically some variant of the following image:

Furthermore, the British Medical Association, European Public Health Alliance, and Public Health Association of Australia (which represents more than 40 public health organizations) support mandatory traffic light labeling for packaged foods that utilizes front-of-package symbols similar to the image above. Australia is currently considering mandatory traffic light labeling for packaged foods, and a recent survey showed that 87% of consumers support the system.

Fourth, two recent, comprehensive, government-funded studies show that traffic light

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72 *Id.*
labeling (in the above-referenced format) is a particularly effective way to inform consumers and affect their decision-making.\footnote{New Studies Favor Traffic Light System for Food Labeling, European Public Health Alliance (May 8, 2009), http://www.epha.org/a/3516; but see Arya Sharma, Effectiveness of “Traffic Light” Food Labeling and “Junk Food Taxes, drsharma.ca (November 18, 2010), http://www.drsharma.ca/obesity-effectiveness-of-traffic-light-food-labeling-and-junk-food-taxes.html (study found “virtually no effect of traffic-light-labeling on driving UK consumers to make healthier choices”).} Though the applicability of these studies to menu labeling is somewhat limited by the fact that the labeling schemes they studied included numbers and/or low” “med” “high” to reinforce the colors, they still support the broader point that traffic light colored symbols (of any sort) are useful because they also compared consumers responses to black-and-white and color-coded labels that were otherwise similar, and found that the colorful scheme was more informative and influential.\footnote{Sarah Hills, Further Evidence Backs Traffic Light Food Label Scheme, Food Navigator.com (April 6, 2009), http://www.foodnavigator.com/Legislation/Further-evidence-backs-traffic-light-food-label-scheme.}

The first study, commissioned by the UK Food Standards Agency, examined how labeling schemes enable consumers to interpret levels of key nutrients, and also looked at how consumers use front of pack labels in real-world contexts. “The results showed that the label combining text [and] traffic light colors … had the highest levels of comprehension and preference amongst British consumers.”\footnote{Id.}

The second study – conducted by Australian researchers – found that “consumers are five times more likely to identify healthy food products when they are presented with a color-coded traffic light nutrition label than if the information is only presented numerically. The study further showed that consumers understood the scheme equally regardless of socio-economic status, gender or ethnicity.”\footnote{Id.}
Of course, traffic-light menu labeling is ultimately an untested proposition. Nonetheless, both the IOM’s study and experiences from abroad strongly suggest that color coded labeling is an especially practical and informative way of conveying nutrition facts because it is simple and intuitive. Therefore, traffic light labeling on menus maximizes the potential of nutritional disclosure in restaurants to affect consumer and producer behavior.

C. Flaws in the FDA’s proposed rule for menu labeling – no nutrition facts on menus besides calories, and no clear, concise interpretation of nutritional information.

The FDA’s proposed menu labeling rule\textsuperscript{77} has two substantial flaws that traffic-light labeling repairs: It does not require restaurants to disclose any information about sodium, added sugar, saturated fat, and trans fat on menus even though these nutrients are key contributors to diet-related disease, and it lacks a clear, concise interpretive component that helps consumers make sense of the information they are given.

1. The FDA’s failure to help consumers make sense of written nutritional information.

The manner in which the FDA plans to require restaurants to disclose nutritional information in writing is flawed because it lacks an interpretive component (such as a standardized set of symbols or colors) that allows consumers to easily compare foods (Section IV contains an example of the FDA’s proposed format). Empirical studies consistently show that consumers often make hasty choices and do not scrutinize food labels. If labels have too much information, consumers may disregard them completely. And even if consumers do consider each piece of information on a label, they may find it difficult to rank the information according

\textsuperscript{77} For simplicity’s sake, this paper assumes that the FDA’s Final Rule will be the same as its Proposed Rule unless otherwise stated.
What consumers need, therefore, is a simple, intelligible guidepost that allows them to make snap judgments about foods’ nutritional value at the point of purchase. Traffic light labeling answers this call in a way the FDA’s requirements do not. Indeed, as the IOM states: “[I]t is time for a fundamental shift in strategy, a move away from systems that mostly provide nutrition information without clear guidance about its healthfulness, and toward one that encourages healthier food choices through simplicity, visual clarity, and the ability to convey meaning without written information.”

2. The omission of crucial nutritional information on menus.

The FDA has also erred by not requiring restaurants to convey information on menus about the amount of saturated fat, trans fats, sodium, and added sugars in menu items. These are the nutrition facts the IOM identified as most important to “promoting healthier choices,” and the facts traffic light labeling highlights. There are two key reasons why the FDA’s omission is problematic.

First, providing key nutrition facts at the point of purchase is essential to promoting informed consumption. Yet, the FDA will only require restaurants to make nutrition information (besides calories) available upon request. Few consumers are likely to access – much less respond to – this information.

Notably, putting the onus on consumers to request nutritional information conflicts with

79 IOM report, supra note 8.
80 City of Philadelphia Petition Requesting Exemption from Preemption for State Requirement, Document ID: FDA-2011-P-0646-0001 (August 25, 2011), http://www.regulations.gov/#!documentDetail;D=FDA-2011-P-0646-0001 [hereinafter “Philadelphia Petition”] (citing study showing that 0.1% of consumers request nutrition information that is available on the premises but not visible at the point of sale).
prior congressional and FDA statements on labeling, which recognize the integral link between prominently conveying nutritional information and promoting healthier choices. For instance, the House report accompanying the 1990 NLEA (which created the Nutrition Facts Panel on the outside of packages) stated:

“The Surgeon General has advised Americans that diets low in fats, low in salt and high in fiber can reduce the risk of chronic diseases such as cancer and heart disease. . . . [S]tatements regarding the level of these nutrients in foods will assist Americans in following the Surgeon General’s guidelines.”81

Moreover, in its preamble to the 1993 final rule on nutrition labeling for packaged food, the FDA explained that nutrition information, including total fat and sodium, is “essential to aid consumers in learning about the relative nutritional qualities of all foods, and it allows them to judge the consequences of the food selections they make.”82 The FDA again recognized the importance of nutritional disclosure at the point of purchase in its 2006 trans-fat labeling rules, stating, “[T]he current scientific evidence consistently showed that trans fats are associated with increased low density lipoprotein (LDL)-cholesterol levels and, therefore, that lower intakes of both saturated and trans fats are important dietary factors in reducing the risk of coronary heart disease (CHD) in the general population.”83

Experience corroborates the notion that not providing nutrition information at the point of purchase is “tantamount to not providing the other nutrition information at all.”84 A study conducted in 2009 found that just 0.1% of patrons at fast food restaurants accessed on-premises nutrition information that was only available upon request before purchasing food.85

84 Philadelphia Petition, supra note 85.
study found that up to 70% of patrons notice multiple types of nutrition information that is printed on menus.\footnote{Elizabeth Pulos & Kirsten Leng, \textit{Evaluation of a Voluntary Menu-Labeling Program in Full-Service Restaurants}, 100 Am. J. Pub. Health 1035, 1037-39 (2010).}

There are further reasons why nutrition information, which is not visible at the point of purchase, is unlikely to appreciably impact consumer or producer behavior.

First, many customers at full service restaurants do not have the time or patience to wait for their servers to retrieve written nutritional information before ordering food. Additionally, pamphlets tend to be unwieldy and difficult to use, particularly when the prices and descriptions of menu items are in another location. The FDA recognized this problem when it concluded that separate tables were an ineffective way to convey calorie information on menu boards, stating, “[S]tanchions inadequately convey calorie information. A situation in which customers need to look to one board (the menu board) for important food selection information, such as price, and another (the stanchion) for calories, is likely to be more difficult for customers attempting to use the declared calorie information at the point of selection.”\footnote{76 Fed. Reg. at 19206, \textit{supra} note 9.} Furthermore, because consumers tend to underestimate the amount of sodium and saturated fat in restaurant foods, many buyers likely do not recognize the need to assess the nutritional content of menu items before making a purchase in order to avoid excess calories.

More generally, only placing calorie information in plain view is problematic because diet-related disease is largely a consequence of the \textit{quality} – not the quantity – of food that people eat. For example, individuals whose diets are high in high-glycemic index carbohydrates (like added sugar) are at an increased risk of developing type 2 diabetes regardless of whether they are
overweight. Excessive sodium consumption elevates the risk of heart disease and stroke irrespective of individuals’ calories intake. And, as the FDA explained at length in 2006, foods that contain trans fatty acids increase the risk of chronic heart disease and sudden heart attacks independent of their calorie content.

There also may be a causal link between certain nutrients and obesity. A recent study published in *Diabetes, Obesity, and Metabolism* (2011) used brain imaging to show that the consumption of refined sugar elicits a neurological response that can promote weight gain. In another study reported in the *Journal of Clinical Investigation* (2009), participants who consumed refined sugar had a greater increase in abdominal fat and triglyceride levels than those who consumed other forms of carbohydrate. Additionally, at least three studies have demonstrated a link between trans fat consumption and obesity. Finally, research has shown that sodium acts like a mild opiate in the brain, and that individuals who consume large quantities of sodium later experience more pronounced “withdrawal” symptoms that include a strong hunger response.

Taken together, these data provide a compelling reason to include nutritional information.

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88 Walter Willet et al., *Glycemic Index, Glycemic Load, and Risk of Type 2*, the American Journal of Clinical Nutrition (July 2002), [http://www.ajcn.org/content/76/1/274S.full](http://www.ajcn.org/content/76/1/274S.full).
92 Id.
in addition to calories on menus. Traffic light labeling incorporates the insights of this research, whereas the FDA’s rule does not. Because the overriding purpose of menu labeling is to “Prevent[] . . . Chronic Disease and Improv[e] Public Health,” in an effort to “Creat[e] Healthier Communities,” the FDA’s proposed scheme is inadequate.  

VI. Legal Analysis of traffic light labeling.

There are two viable ways traffic light labeling could be implemented throughout the United States. First, the FDA could craft a rule (based on existing legal authority) that mimics the requirements discussed in Section V or, second, Congress could explicitly create the scheme. In addition, while the First Amendment can render some types of compelled disclosures invalid, traffic light labeling should pass constitutional muster because it is factual, uncontroversial, and reasonably related to the government’s goal of promoting healthy choices.

A. The FDA has the authority to require color-coded text on menus.

A strong argument can be made that the PPACA grants the FDA the authority to mandate traffic light labeling on menus. Because menus are a “written form” of communication and the PPACA gives the FDA wide latitude to specify the “format and manner” in which restaurants must disclose nutrients in writing, the FDA appears to have the green light to act. And if it does not, then Congress could explicitly grant that authority.

As an initial matter, the FDA has virtually unfettered discretion to decide which nutrients restaurants must disclose. Subclause (ii)(III) of the PPACA expressly gives the FDA power to mandate the disclosure of total calories from fat, total fat, saturated fat, trans fat, cholesterol,
sodium, total carbohydrates, dietary fiber, sugars, and protein in “written form.” Moreover, the PPACA expansively states:

‘(vi) ADDITIONAL INFORMATION—If the Secretary determines that a nutrient, other than a nutrient required under subclause (ii)(III), should be disclosed for the purpose of providing information to assist consumers in maintaining healthy dietary practices, the Secretary may require, by regulation, disclosure of such nutrient in the written form required under subclause (ii)(III).’

The key question then becomes what “written form” Subclause (ii)(III) requires. Subclause (ii)(III) provides little guidance, stating just that restaurants must disclose, in a “clear and conspicuous manner” nutrition information “in a written form, available on the premises of the restaurant . . . and to the consumer upon request.” Likewise, neither the PPACA nor NLEA defines “written form” or provides examples of what forms of disclosure would and would not qualify.

However, despite this ambiguity, menus are properly characterized as a “written form” of disclosure under Subclause (ii)(III) because the PPACA describes “menus” as “writing,” and both the NLEA’s purpose and the ordinary meaning of “written” supports an interpretation of “written form” that encompasses menus. First, Section 4205 defines “menu” as: “the primary writing of the restaurant or other similar retail food establishment from which a consumer makes an order selection.” Thus, according to the PPACA, menus are not just a form of “writing,” but the “primary” form of writing that consumers see in restaurants.

Second, menus are properly characterized as a “written form” under Subclause (ii)(III)

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98 Section 4205 (ii)(III). See also 76 Fed. Reg. at 19213, supra note 9.
99 Section 4205 (vi).
100 Section 4205 (IV).
101 Because Section 4205 of the PPACA and the NLEA currently use identical language, this section refers to the two interchangeably.
102 Section 4205 (xi).
because the NLEA seeks to “assist consumers in maintaining healthy dietary practices,” and interpreting the law in a way that gives FDA authority to require the disclosure of nutrition information on menus significantly advances this goal. Conversely, construing “written form” so as to exclude menus would frustrate Congress’s objective of disseminating nutritional information because menus are, as the PPACA states, the “primary” way restaurants communicate with consumers in writing.\footnote{21 U.S.C. 343(q)(5)(H)(vi).
Section 4205 (xi).
\textit{Id.}}

Third, the plain meaning of “written” supports the view that menus fall under the aegis of Subclause (ii)(III) because the dictionary defines “written” as “expressed in writing,”\footnote{Dictionary.com, “written,” \texttt{http://dictionary.reference.com/browse/written} (last visited November 29, 2011)} and defines “writing” as: “the act of art of forming visible letters or characters.”\footnote{Dictionary.com, “writing,” \texttt{http://dictionary.reference.com/browse/writing} (last visited November 29, 2011)} Similarly, the dictionary defines “written“ (a noun) as: “letters or characters that serve as visible signs of ideas, words, or symbols.”\footnote{Dictionary.com, “written,” \texttt{http://dictionary.reference.com/browse/written} (last visited November 29, 2011)} Menus convey ideas “expressed in writing,” and contain “letters or characters that serve as visible signs of ideas, words, or symbols.”\footnote{\textit{Id.}}

In short, the most natural interpretation of the phrase “written form” in Subclause (ii)(III) is one that encompasses numerous formats, including menus. Therefore, the PPACA is best seen as giving the FDA wide leeway to craft the details of nutrient disclosure requirements in restaurants – leeway that extends to menus.

The FDA’s broad discretion to create effective nutrient disclosure requirements is most apparent in Subclause (x)(II)(bb), which empowers the FDA to “specify the format and manner...
in which” restaurants display all “nutrient content disclosure[s].”\textsuperscript{109} This rather sweeping delegation of authority is inherently significant, but Subclause (x)(II)(bb) is especially noteworthy because it collectively refers to calories (which must appear on menus) and other nutrients (which must appear in “written form”) as “nutrient content disclosure[s].”\textsuperscript{110} Thus, by not distinguishing between the “format and manner” of nutritional disclosures on menus and other written forms, the NLEA indicates that the FDA has comparable authority to dictate the “format” and “manner” in which restaurants disclose data in menus and in other written forms.\textsuperscript{111}

Because the FDA almost certainly has the authority to mandate traffic light labeling in “written form[s]” other than menus, it almost certainly has the authority to require it on menus. In its proposed final rule, the FDA recognized its power to “require nutrients that are particularly important to consumers . . . in order to maintain healthy dietary practices (e.g., total calories, \textit{total fat, sodium, sugar}) . . . to be \textit{bolded} or \textit{placed in a separate table} of nutritional content,” along with its authority to create a “more prescriptive” format and manner of disclosure.\textsuperscript{112} Based on these statements, and because menus are a “written form” of disclosure, it is reasonable to conclude that the FDA also has the power to draw attention to “particularly important” nutrients through color-coded typeface on menus which is “more prescriptive” than traditional labeling.

Therefore, Section 4205’s open-ended language – subject to just a few limitations – is best seen as creating a floor, not a ceiling, for the disclosure requirements the FDA can impose in restaurants. Nowhere does the PPACA state that information which \textit{must} be in written form \textit{may not} be on menus, or that requiring restaurants to include a “prominent, clear, and conspicuous

\begin{footnotes}
\footnote{\textsuperscript{109} Section 4205 (x)(II)(bb)}
\footnote{\textsuperscript{110} \textit{Id.}}
\footnote{\textsuperscript{111} \textit{Id.}}
\footnote{\textsuperscript{112} 76 Fed. Reg. at 19214-15, \textit{supra} note 9.}
\end{footnotes}
statement regarding the availability of [additional nutritional]”\textsuperscript{113} precludes disclosing some of that information on menus. This silence is meaningful given the weight of evidence supporting a more expansive reading of Section 4205.”\textsuperscript{114}

Consequently, the fact that the PPACA refers to calories and other nutritional data in separate subsections likely means that restaurants must, at a minimum, display calories on menus and other nutritional facts in another written form.\textsuperscript{115} Nothing in the PPACA indicates that the FDA cannot add more information menus because they only \textit{have to} contain calorie data. Additionally, while the PPACA does place some restrictions on the FDA’s authority – the FDA also must consider restaurants’ interests by, for instance, taking into account “space on menus and menu boards”\textsuperscript{116} – traffic-light labeling inflicts a minimal burden on restaurants because it integrates nutritional information into a small proportion of existing typeface while adding one small statement to menus.

As a result, the “flexible”\textsuperscript{117} approach the FDA is currently taking with regard to the disclosure of nutritional information in restaurants – an approach the food industry embraces\textsuperscript{118} – can and should be replaced with traffic light labeling. The FDA has the authority to require it, and this alternative scheme is much likelier to “creat[e] healthier communities”\textsuperscript{119} – an outcome Congress explicitly sought.

\textbf{B. Traffic-light labeling comports with the First Amendment.}

\textsuperscript{113} Section 4205 (ii)((I)(aa).
\textsuperscript{114} See PPACA Title IV, Subtitle C.
\textsuperscript{115} Compare Section 4205 (ii)(III) with Section 4205 (ii)(I-II).
\textsuperscript{116} Section 4205 (x)(II)(aa).
\textsuperscript{117} 76 Fed. Reg. at 19214, \textit{supra} note 9.
\textsuperscript{119} See Section 4205 (x)(II)(aa). Section VI more fully explains the legal basis for traffic light labeling.
Courts read the Free Speech Clause of the First Amendment as having a negative inference: the freedom to speak implies that one has the freedom not to speak. The underlying rationale is that silence, like speech, can communicate ideas, and being told what to say can interfere with one’s own expressive interests. Thus, the government cannot require school children to recite the pledge every day, or mandate that private citizens carry ideological state-generated messages on their cars (like “Live Free or Die”).

However, for a variety of reasons, commercial speech receives less First Amendment protection than private speech. Compared to other forms of speech, commercial speech is generally seen as less important to debate on political and social issues, and less central to self-expression. Moreover, advertisements often seek to work through sub-mental manipulation rather than rational, cognitive expression, and are therefore more similar to unprotected forms of speech like obscenity than protected, fully formed ideas. Additionally, government regulation is less likely to “chill” commercial speech than private speech because commercial speakers have a financial incentive to keep talking.

As a result, regulations pertaining to speech that proposes a commercial transaction usually are subject to deferential judicial review. In the case of traffic light labeling, two questions are likely to determine whether a court evaluates the scheme under a lenient “rational basis” framework, or under more rigorous “intermediate” or “strict scrutiny” tests. First, is the scheme “purely factual”? Second, is it “uncontroversial”? For the reasons section ____ discusses, traffic light labeling is best seen as factual and uncontroversial, and therefore subject to rational basis review.

Furthermore, as section ____ explains, traffic light labeling should pass rational basis review because it is “reasonably related” to the government’s interest in promoting healthy
dietary practices, and not unduly burdensome to restaurants. Traffic light labeling plainly advances the government’s significant interests in decreasing consumers’ lack of knowledge about restaurant foods’ nutritional content, and enabling healthy food choices. In addition, traffic light labeling negligibly burdens restaurants by occupying a small amount of menu space, conveying the same information packaged food manufacturers have displayed for years – with little protest – on Nutrition Facts panels, and exempting small businesses.

For these reasons, traffic light labeling ultimately should be seen as furthering – not thwarting – First Amendment values because it adds useful and needed information to the “marketplace of ideas” while inconsequentially affecting the free speech rights of restaurants.

1. Zauderer’s deferential “rational basis” standard applies to compelled commercial disclosures that are factual and uncontroversial.

All compelled commercial speech that is “purely factual and uncontroversial” is subject to Zauderer v. Office of Disciplinary Counsel’s deferential standard of review, which requires that the disclosure be “reasonably related” to the State's interest in informing consumers and not unduly burdensome. Consequentally, proponents of traffic-light labeling must demonstrate that it is 1) factual and 2) uncontroversial to qualify for “rational basis” review, and is 3) reasonably related to the government’s interest in promoting healthy choices, and 4) not unduly burdensome to restaurants to pass rational basis review.

120 Zauderer, 471 U.S. at 650-51.
121 Id. at 650-651. An alternative – but misguided — view of the Court’s commercial speech doctrine is that mandatory disclosures, which do not target inherently misleading speech, are subject to intermediate or even scrutiny. This view principally stems from a single line in Milavetz v. United States, where the Court stated that an “essential” aspect of Zauderer was the fact that the disclosure at issue sought “to combat the problem of inherently misleading commercial advertisements.” Milavetz, Gallop & Milavetz, P.A. v. United States, 130 S. Ct. 1324, 1328-29 (2010). Thus, Milavetz could be read to imply that disclosures must target potential deception to be subject to deferential review.

But this line from Milavez likely just reflected the fact that the disclosure at issue there,
2. The argument against traffic light labeling: it is subjective, highly controversial, and heavily burdens restaurants.

Because the government would be a defendant in a lawsuit involving traffic light labeling, I summarize the First Amendment arguments against the scheme before explaining why such claims are unpersuasive. Food industry plaintiffs are likely to contend that traffic light labeling unjustifiably burdens restaurants by requiring them to carry the government’s subjective, contentious, and misleading message. Accordingly, while the scheme should be analyzed under strict scrutiny (the most stringent form of judicial review), it even lacks a “rational” basis because of its reliance on unproven assumptions about the effects of menu labeling and its excessively coercive requirements.

More specifically, industry first likely will argue that the government must survive strict scrutiny because it is “attempt[ing] to convert commercial speakers into its mouthpiece for a ‘subjective and highly controversial’ marketing campaign expressing its disapproval of their lawful products.” Plaintiffs would thus claim that there is a substantive distinction between commonplace textual labels and nearly unprecedented visual labels because text can convey a single, neutral message, whereas visual representations are inherently susceptible to numerous interpretations, and are thereby subjective, i.e., non-factual. The subjectivity of visual labeling is like the disclosure in Zauderer, sought to prevent consumer deception. Id. It is doubtful that the Court in Milavetz – through a single ambiguous sentence — sought to invalidate the unanimous view among lower courts that Zauderer applies to all factually uncontroversial disclosures. See, e.g., Pharm. Care Mgmt. Ass’n v. Rowe, 429 F.3d 294, 310 n.8 (1st Cir. 2005) (finding “no cases limiting Zauderer” to “potentially deceptive advertising”). Surely, the Court would have clearly corrected lower courts’ mistaken views if that was its intention, particularly considering that Zauderer also rejected the argument that the government needed to “establish … the advertisement, absent the required disclosure, would be false or deceptive” to avoid higher scrutiny. Zauderer, 471 U.S. at 650. Therefore, the weight of authority continues to indicate that rational basis review applies to all factually uncontroversial disclosures.

\[122\] Entm't Software Ass'n v. Blagojevich, 469 F.3d 641, 652 (7th Cir. 2006).
especially plain here (the argument would go) because of the evaluative nature of the traffic light scheme. It seeks to evoke a visceral response in consumers that prompts them to “go” eat certain foods, and stop eating others, and thus pursues a blatantly non-neutral objective that cannot properly be viewed as factual or non-controversial.

To underscore the controversial nature of traffic light labeling, industry likely will point to the fact that even nutritionists disagree about what constitutes healthy levels of fats, added sugar, and sodium. In addition, industry may argue that it is not just controversial, but also misleading, for the government to tell men, women, and children of all sizes, whose dietary needs inevitably differ, to consume the same levels of key nutrients. And restaurants may claim that traffic light labeling unjustifiably stigmatizes wholesome and nutrient-rich products that can be part of a healthy diet.

If a court were to apply strict scrutiny, the government would have to demonstrate that traffic light labeling serves a “compelling interest” and is “narrowly tailored” to further that interest through the “least restrictive means” available. Given the lack of evidence clearly showing that menu labeling effectively educates consumers or significantly changes consumers’ eating habits, it is unlikely that the government could pass such a rigorous test.

Second, industry is likely to argue that, even under rational basis review, traffic light labeling is invalid because it unduly burdens restaurants. Industry would therefore claim that the scale and intrusiveness of the scheme outweighs any legitimate interest in conveying factual information to consumers because the ability of menu labeling to effectively communicative nutritional information is unproven, and most consumers already know that high fat, high sodium,

123 Id.
124 See, e.g., Zauderer, 471 U.S. at 650-51 (describing rational basis test for compelled commercial speech).
and/or high sugar menu items should be consumed in moderation. Conversely, traffic light labeling overshadows and dominates restaurants’ speech by stigmatizing red and yellow colors, which drastically limits the colors that are viable to use on menus, menu boards, and buildings and signs. Moreover, traffic light labeling appropriates a key part of restaurants’ speech to consumers – the price portion of menus – for the government’s subjective message.

In short, industry’s argument against traffic light labeling likely will emphasize the lack of evidence demonstrating that particular amounts of sodium, fats, and added sugar should (or should not be) avoided, along with the unproven ability of traffic light menu labeling to inform and influence consumers. Plaintiffs will juxtapose this “unsupported” and “heavy-handed” scheme with the “serious” free speech harms that restaurants are certain to incur as a result of it, and will contend that this unjustifiable burden violates the First Amendment.

3. Rational basis review is the appropriate framework for evaluating traffic light labeling because the disclosure of scientifically supported nutritional information through color-coded text is factual and uncontroversial.

Despite colorable arguments to the contrary, traffic light menu labeling is best seen as factual and uncontroversial because its subjective component is consistent with the vast majority of nutritional science or, alternatively, because it merely categorizes menu items based on the objective criterion of how much sodium, fat, and added sugar they contain. Thus, for two independent reasons, Zauderer’s deferential framework should guide a court’s First Amendment analysis of the issue.

First, it is nearly uncontestable that the more saturated fat, trans fat, sodium, and added sugar a food contains, the less nutritious it becomes, and that particularly high amounts of even one of these items is especially unwholesome. This well-established principle provides the basis for the % daily value in the Nutrition Facts Panel (with the exception of added sugar), and is
consistent with the USDA’s *Dietary Guidelines for Americans*, which asserts that a well-balanced, high-quality diet (including one low in added sugar) is essential for the health of Americans.\textsuperscript{125} These uncontroversial facts also provide the foundation for traffic light labeling.

Moreover, traffic light labeling shares important similarities with the tobacco-warning labels the 6\textsuperscript{th} Circuit recently upheld in *Discount Tobacco City*.\textsuperscript{126} In that case, the challenged regulation (the FSPTCA) required tobacco manufacturers to reserve the top 50\% of the front and back of cigarette packaging, 30\% of the front and back of smokeless tobacco packaging, and 20\% of tobacco advertising for full color, graphic warnings, which depicted the “negative health consequences of smoking.”\textsuperscript{127} The tobacco industry argued that “the Government must survive strict scrutiny [because it is] attempt[ing] to convert commercial speakers into its mouthpiece for a ‘subjective and highly controversial’ marketing campaign expressing its disapproval of their lawful products.”

However, the court held that strict scrutiny was unwarranted because “like other disclosures governed by the Zauderer standard, [the] tobacco disclosures may appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive.”\textsuperscript{128} Relying upon evidence, which showed that textual warnings were ineffective at capturing consumers’ attention, the court further held that the visual labels

\begin{footnotesize}
\textsuperscript{125} See IOM Report, *supra* note 8. The IOM primarily relied upon the FDA’s and USDA’s nutritional guidelines when formulating its criteria for classifying foods.

\textsuperscript{126} *Discount Tobacco City v. United States*, 674 F.3d 509 (6\textsuperscript{th} Cir. 2012). However, it should be stressed that questions surrounding the constitutionality of the FDA’s new tobacco warning labels under the First Amendment are currently unsettled. See, e.g., *RJ Reynolds Tobacco Co. v. FDA*, No. 11–1482, 2012 WL 653828, at *5 (Feb. 29, 2012) (Invalidating graphic warning images because they were “neither designed to protect the consumer from confusion or deception, nor to increase consumer awareness of smoking risks; rather, they were crafted to evoke a strong emotional response calculated to provoke the viewer to quit or never start smoking”).

\textsuperscript{127} *Id.* at 524; 15 U.S.C. §§ 1333, 4402(2)(A); Pub. L. No. 111-31, § 201(d).

\textsuperscript{128} *Id.* at 527 (internal citation omitted).
\end{footnotesize}
provided valid “disclaimers” to the public regarding the “incontestable” health consequences of using tobacco.\textsuperscript{129} The court reached this conclusion in spite of the fact that the FDA’s choice of images would be “subjective,” and even though the visual medium is “inherently persuasive.”\textsuperscript{130}

Likewise, here, it may be true that the telling consumers to “stop” eating certain menu items is non-neutral, and that the criteria for distinguishing between red, yellow, and green menu items is subjective. But the fact remains that food represented by green is more nutritious than yellow, which is more nutritious than red. Therefore, disagreement at the margins does not rattle the traffic light labeling’s factual core, which is built around the incontestable health consequences of poor (and wise) dietary choices. Moreover, the scheme’s guidelines for classifying foods are far from arbitrary. They mimic the recommendations in the IOM’s government-commissioned, multi-year analysis of food labeling in the United States, which were based upon an exhaustive review of leading nutritional science. Finally, there is ample data demonstrating that textual food labels, which lack an interpretive visual component, do not facilitate fully informed consumption. Like the visual warning labels in \textit{Discount Tobacco City}, traffic light labeling provides a valid – and needed – means of supplying information to consumers regarding both the content of the products they are considering purchasing, and the health consequences of those choices.

Because it is based on objective science, traffic light labeling also is distinguishable from the video-game labeling scheme the 7\textsuperscript{th} Circuit invalidated in \textit{Entm't Software Ass'n v. Blagojevich}.\textsuperscript{131} In \textit{Blagojevich}, the contested law required video game retailers to place a four-

\begin{flushright}
\textsuperscript{129} \textit{Id.}.
\textsuperscript{130} \textit{Id.} at 526.
\textsuperscript{131} \textit{Entm't Software Ass'n v. Blagojevich}, 469 F.3d 641, 652 (7th Cir. 2006).
\end{flushright}
square-inch label with the numerals "18" on any “sexually explicit” video game. The court held that the label was subject to strict scrutiny because it “communicates a subjective and highly controversial message – that the game’s content is sexually explicit.” The court therefore analyzed the state’s labeling requirements as presumptively unconstitutional compelled speech rather than as “purely factual” commercial disclosures subject to rational basis review. But color-coded prices, unlike the “18” sticker in *Blagojevich*, occupy a tiny fraction of menus and primarily add additional information to existing commercial speech rather than limiting the available space for commercial messages. Moreover, unlike the government’s relatively few efforts to address the social ills associated with explicit video games, regulators have long attempted to inform consumers about the dangers of unhealthy food through less restrictive means than labeling, but Americans’ waistlines continue to expand.

Finally, and most importantly, judgments regarding the sexually explicit nature of speech are notoriously controversial, whereas scientific judgments about the health risks posed by products are generally viewed as uncontroversial and well within the government’s power to compel. *Compare Jacobellis v. Ohio*, 378 U.S. 184, 197 (U.S. 1964) (Stewart, J., concurring) (“I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [hardcore pornography]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it.”) with *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 114-16 (2d Cir. 2001) (rejecting First Amendment challenge to state requirement that

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132 *Id.* at 643.
133 *Id.* at 643. The court then held that the sticker was not “narrowly tailored to the State’s goal of ensuring that parents are informed of the sexually explicit content in games” because the state had not demonstrated that it could not accomplish its goal through a less restrictive educational campaign, and because the sticker covered a “substantial portion” of the box. *Id.*
134 The concise explanation that must appear on menus to place the colors in context also occupies a small percentage of menus.
manufacturers include labeling warning consumers of mercury content); see also Blagojevich, 469 F.3d at 651 (“Particularly in the commercial arena, the Constitution permits the State to require speakers to express certain messages without their consent, the most prominent examples being warning and nutritional information labels”). Because traffic light labeling is really just a novel take on the Nutrition Facts Panel – specifically, the percentage daily value requirement – it is factually uncontroversial.

Another reasonable interpretation of traffic light labeling is that it does not speak to the nutritional value of food, but solely exists to help consumers compare the nutritional content of menu items. As the requirements described in Section ___ show, the color of text just indicates how much sodium, saturated fat, trans fat, and added sugar a particular menu item contains. And the accompanying statement: “The government’s 2010 Dietary Guidelines has advised Americans that diets low in fats, salt and added sugar can reduce the risk of chronic diseases such as cancer and heart disease” is factual. Thus, there is nothing explicitly evaluative about traffic light labeling. Although red, yellow and green, when placed side by side, may connote specific messages, the colors do not compel consumers to conclude that red foods are less desirable than, say, yellow or green foods. Instead, traffic light labeling disavows subjective analysis by including an explanation of the colors on menus that just focuses on the quantity of nutrients and added sugar each color connotes.

Therefore, the extent to which traffic-light labeling may influence consumers’ choices speaks more to its informational value than its factual nature. It would be perverse to penalize the system for efficiently conveying a significant quantity of helpful information through easy-to-use symbols. This quality is appropriately viewed an asset, not a constitutional infirmity, because the
Supreme Court has held that the commercial speech doctrine seeks to promote the “efficient exchange of information.”

Indeed, a key reason why compelled commercial speech is subject to deferential review is because it increases the amount of useful information in the marketplace, and thereby improves market functioning. Because the restaurant food market has significant information gaps and inflicts a variety of negative externalities, subjecting traffic light labeling to heightened scrutiny – as industry likely will urge – would undercut the commercial speech doctrine’s informative purpose. Rational basis review is appropriate.

4. Traffic-light labeling is reasonably related to the government’s interest in promoting healthy food choices.

Traffic-light menu labeling is “reasonably related” to the government’s goal of assisting consumers in making healthy choices. The studies discussed in Sections II (C) and IV (A) show that 1) diet-related disease is pervasive, 2) eating out is associated with diet-related disease, 3) added sugar and sodium can cause weight gain (a major risk factor for diet-related disease), and 4) added sugar, sodium, trans fat, and saturated fat also increase the risk of diet-related diseases independent of their connection with obesity. These data are sufficient to show that traffic-light menu labeling is a valid tool for informing consumers and promoting public health. Moreover, under the deferential Zauderer standard, the government has “no obligation to

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136 Id. at 748 (factual disclosures are “necessary to insure . . . the flow of truthful and legitimate commercial information”).
137 It also would diminish the importance of the values underlying many other areas of First Amendment law, where strict scrutiny is warranted. See, e.g., Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . .”).
138 Zauderer, 471 U.S. at 651.
produce evidence, or empirical data to sustain . . . rationality."\textsuperscript{139} Nor does the government have to employ the best or least restrictive means to combat a problem, just a rational one.\textsuperscript{140}

5. Traffic-light labeling is not unduly burdensome to restaurants because it minimally impacts the content of their own speech.

Traffic light labeling is not unduly burdensome because it primarily adds meaning to existing information on menus. The only limitation it imposes on restaurant’ speech is that they can no longer choose the color of their menu prices. This minimal restriction on restaurants’ expression distinguishes traffic light labeling from the burdensome statute struck down in \textit{Ibanez v. Fla. Dept. of Bus. & Prof’l Regulation}, where the disclosures required to accompany a “specialist” designation for lawyers were so lengthy that they “effectively rule[d] out notation of the ‘specialist’ designation on a business card or letterhead, or in a yellow pages listing.”\textsuperscript{141} Although restaurants will have to reformulate their menus to adhere to the traffic light system, some burden necessarily accompanies all compelled speech. If a court were to invalidate traffic light labeling on this basis, it would have potentially “wide-ranging implications” because “innumerable federal and state regulatory programs require the disclosure of product and commercial information.”\textsuperscript{142} As the Second Circuit wrote in \textit{Sorrell}, “Such a result is neither

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\textsuperscript{139} See \textit{New York State Rest. Ass’n v. New York City Bd. of Health}, 556 F.3d 114, 135 n.20 (2d Cir. 2009) (New York City law that mandates the disclosure of calories on menus is constitutionally valid).

\textsuperscript{140} See \textit{Zauderer}, 471 U.S. at 651 (First Amendment does not bar City from compelling "under-inclusive" factual disclosures so long as the basis for the disclosure requirement is rational).


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wise nor constitutionally required.”

Other objections to traffic light labeling are equally misguided. As discussed above, restaurants may argue that traffic-light labeling is unduly burdensome because it will force them to reconfigure all their promotional materials, and even their signs and interiors, to avoid the negative implication the scheme attaches to red and yellow colors. However, there is no reason to believe that consumers will view red, yellow, and green colors as significant in any space besides the prices on menus, just as consumers who see the front of packages for 3 Musketeers Bars, 100 Grand Bars, and 5th Avenue Bars seldom (if ever) think those numbers relate to their Nutrition Facts Panels.

In addition, restaurants may argue that traffic light labels will unjustifiably hurt their sales because consumers will think “stop” when they see red and yellow prices. That may be true, but numerous constitutionally valid warning labels cause consumers think twice before purchasing a product. This is the nature of informed consumption – an attribute that is part of a properly functioning free market, but is deficient in restaurants without mandatory nutritional disclosures.

Discount Tobacco City reached a similar conclusion. There, the plaintiff’s contended that “the use of graphic warning labels might dissuade certain smokers from buying their product by making it appear unhealthy or otherwise unattractive.” But the court countered, “[T]his is, in some ways the [valid] purpose of the labels—to provide truthful information regarding the health consequences of the product in order to decrease the use of tobacco by young people and dependence on tobacco.” Likewise, here, the government’s significant and demonstrable interests outweigh whatever adverse affect traffic light labeling may have on restaurants’ sales.

143 Id. at 116.
144 Discount Tobacco City, 674 F.3d at 531.
145 Id.
The scheme provides “truthful information” about the health consequences of consuming certain food products, and thereby fills a well-documented informational void in the market it regulates.146

VII. Conclusion.

Food labeling may not be a perfect policy tool. Unlike direct regulation, labeling cannot create quick and dramatic change. As the mixed empirical data on consumer and producer responses to menu labeling shows, it is not guaranteed to create any real change. The principal limitation on labeling is rather obvious: information only sways consumers to the extent that it convinces them to rethink their purchases. And it is not clear that simply telling consumers a given menu item is unhealthier than they may have realized will have much effect.

Nonetheless, there are at least two reasons to be hopeful that the labeling scheme proposed here can – at least in the aggregate — measurably shift consumption and production patterns. First, it likely complies with the First Amendment. That means traffic-light menu labeling is unlikely be invalidated before it has the chance to make a difference. Second, food labeling has shifted consumption and production patterns in the past. While the precise benefits of the Nutrition Facts Panel are contestable, it has saved millions – if not billions – of dollars in health care costs.147 Because traffic light labeling is more user-friendly than the Nutrition Facts Panel, there is reason to believe it can achieve similar if not better results, especially considering that Americans now spend half their annual food dollars on restaurant prepared food.148

146 Id.
Moreover, even if the scheme proposed here is not currently viable in the United States, it could find a receptive audience in Europe, Australia, or New Zealand. Obesity is, after all, a global problem, and traffic light labeling is already familiar to consumers and regulators in those locations. Furthermore, the political will to take on the food industry appears to be stronger in a variety of locations outside the United States. To cite a few examples: Canada requires products containing more than 0.2 grams trans fat per serving to disclose their trans fat content, whereas the FDA requires that food with less than 0.5 gram trans fat per serving be labeled as trans fat free. Denmark and Switzerland have gone further, and effectively prohibit the use of artificial trans in all foods. France, Luxembourg, Germany, Austria, Hungary, Bulgaria, and Greece have all prohibited the importation of genetically modified crops (GMOs), whereas the United States has no restrictions on GMOs in food. In addition, and perhaps most importantly, only American regulators have to confront the First Amendment, which erects nearly unparalleled barriers to government-compelled speech.

Therefore, traffic-light menu labeling is anything but a purely academic idea. It tackles a pressing problem, and does so in a way that is legally and politically viable – somewhere. While restaurant food labeling is one of many steps needed to effectively combat preventable, diet-related diseases, it is a particularly crucial step because food consumption is largely a matter of

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153 *Id.*
individual choice. That choice should be a fully informed one.