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Open Letter on the First Amendment and  
the Interagency Working Group Principles

The undersigned professors of law write to convey our conclusion that the draft nutrition principles issued this spring by the federal Interagency Working Group on Food Marketed to Children (IWG) embody a constitutionally permissible set of government recommendations. Despite a number of comments submitted to the IWG claiming the contrary, the nutrition principles, in their current form, do not violate the First Amendment.

Simply put, voluntary principles that food and beverage businesses are free to ignore do not “abridg[e] the freedom of speech.”<sup>1</sup> The draft nutrition principles pose no threat to any rights guaranteed by the First Amendment.

The Free Speech Clause applies only to government mandates restricting or compelling private speech.<sup>2</sup> The draft nutrition principles, which are designed “to guide industry self-regulatory efforts,”<sup>3</sup> do not restrain or compel anyone’s speech. They are not, in fact, government regulation at all. Instead, they are the speech of the government itself.

The Supreme Court has made clear that “the Government’s own speech . . . is exempt from First Amendment scrutiny.”<sup>4</sup> The principles were issued in response to a congressional request for a “report” containing “findings and recommendations.”<sup>5</sup> The agencies have now issued their draft report, and the principles constitute their draft recommendations.

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<sup>1</sup> U.S. Const. amend. I.

<sup>2</sup> *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557 (1980); *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324 (2010).

<sup>3</sup> Interagency Working Group, *Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts*, Request for Comments, <http://www.ftc.gov/os/2011/04/110428foodmarketproposedguide.pdf>.

<sup>4</sup> See *Johanns v. Livestock Marketing Ass’n*, 544 U.S. 550, 553 (2005); *Donaggio v. Arlington Cty., Va.*, 880 F.Supp. 446, 453-54 (E.D.Va. 1995).

<sup>5</sup> Omnibus Appropriations Act, 2009 (H.R. 1105), Financial Services and General Government, Explanatory Statement, Title V, Independent Agencies, 983-84.

The report and recommended nutrition principles contain no mandates. None of the four agencies will seek to “enforce” the principles, which lack any legally binding effect under agency statutes or the Administrative Procedure Act. Accordingly, no federal agency can impose legal repercussions on a company for following the IWG principles in only a piecemeal fashion, for ignoring them entirely, or—for that matter—mounting a wide-ranging public relations campaign disparaging them, as the food and beverage industry has done.

Nonetheless, attorneys retained by industry have invoked a variety of First Amendment arguments, a tactic with the potential effect of diverting policymakers’ attention from the substance of the draft nutrition principles. Nothing in the cases cited by these commenters bears on the IWG principles. The doctrines of “informal censorship,” “unconstitutional conditions,” and “de facto coercion” are completely inapt. The government is neither explicitly nor implicitly forcing industry to espouse any messages or to silence its expression. The IWG is not requiring loyalty oaths,<sup>6</sup> threatening criminal prosecution,<sup>7</sup> or confiscating real estate.<sup>8</sup> It is not establishing or invoking a legal regime. It is simply following a congressional mandate to issue a report with recommendations based on the agencies’ expert analysis of the relevant facts.

The IWG is better characterized as a routine governmental advisory body than an oppressive censorship panel. The situation here is akin to the Environmental Protection Agency promoting the Energy Star guidelines for energy efficiency<sup>9</sup> or the Department of Agriculture announcing the new MyPlate recommendations.<sup>10</sup> The IWG is making suggestions regarding the content of food marketed to children in the same way the National Institutes of Health has called for a reduction in youth exposure to smoking in movies;<sup>11</sup> the Surgeon General has attempted to promote breastfeeding by encouraging hospitals to refuse infant formula advertisements;<sup>12</sup> and Congress has called on the entertainment industry to reduce the exposure of underage audiences to “programs with unsuitable alcohol content.”<sup>13</sup>

The conclusion is straightforward. The principles proposed by the IWG do not violate the First Amendment.

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<sup>6</sup> *Speiser v. Randall*, 357 U.S. 513 (1958); *but see Rust v. Sullivan*, 500 U.S. 173 (1991).

<sup>7</sup> *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); *but see Meese v. Keene*, 481 U.S. 465 (1987).

<sup>8</sup> *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987), *but see City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Pleasant Grove City, Utah v. Sumnum*, 555 U.S. 460 (2009).

<sup>9</sup> <http://www.energystar.gov>.

<sup>10</sup> <http://www.choosemyplate.gov>.

<sup>11</sup> National Institutes of Health, Healthy People 2020 objectives, <http://healthypeople.gov/2020/topicsobjectives2020/pdfs/tobaccouse.pdf>, TU-18.

<sup>12</sup> The Surgeon General’s Call to Action to Promote Breastfeeding (2011) at 43, <http://www.surgeongeneral.gov/topics/breastfeeding/calltoactiontosupportbreastfeeding.pdf>.

<sup>13</sup> The Sober Truth on Preventing Underage Drinking (STOP) Act, 42 USC § 290bb-25b, 120 Stat. 2890, Public Law 109-422 (2006).

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