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DO STATES PREFER ALCOHOL OVER MARIJUANA? A LOOK AT
LABELING REGULATORY DIFFERENCES BETWEEN THE
ALCOHOL AND EDIBLES INDUSTRIES

McKinley H. Groves

Do States Prefer Alcohol Over Marijuana? A Look at Labeling Regulatory Differences Between the Alcohol and Edibles Industries

McKinley H. Groves*

I. Introduction

In the children's book *Through the Looking Glass and What Alice Found There*, Alice interacts with Humpty Dumpty. During their conversation, Humpty notes that he, alone, can decide the meaning of words.¹ Even Alice, at the young age of seven, casts doubt on this idea.² Definitions of words and phrases play an important role in human interactions and even more so when the words and phrases defined are within a statute. In the United States, Congress and state legislatures play the role of Humpty Dumpty by coming up with meanings of important words and phrases found in the laws they write. This is an important role of the legislatures to ensure the clarity of the law. While sometimes it is necessary to give different meanings to the same word, when the legislature uses unique phrases such as "appealing to children," one would expect the legislature to use the same meaning, given the limited applicability of the phrase. However, this phrase appears to have two different meanings when it comes to states that prohibit labels on marijuana edibles ("edibles") and alcohol that appeal to children. Regulations in the states that regulate such labels on both alcohol and edibles have been shown to have stricter standards for edible labels, even when the language of the regulations is nearly identical.

This note is not advocating for edible manufacturers to target children through advertising. Such advertising would likely lead to more small children accidentally ingesting edibles, which should be avoided. Rather, this note is arguing for state governments to cease violating the constitutional rights of edible manufacturers, given the labeling practices of the alcohol industry.

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¹ LEWIS CARROLL, *THROUGH THE LOOKING-GLASS AND WHAT ALICE FOUND THERE* 81 (1871).

² *Id.*

As of 2021, 18 states and Washington D.C. have legalized marijuana for recreational use.³ In 2022, it is expected that number will increase to 25, assuming there are no setbacks to obtaining petition signatures like there were in 2020.⁴ With this increasing number of states legalizing marijuana likely comes an increasing number of regulations prohibiting edibles from having labels that appeal to children. While the edibles industry is and will continue to be affected by these regulations, the alcohol industry is often not subject to such regulations. It is this lack of uniformity in regulation of mind-altering substances, particularly in regulations that prohibit labels that are appealing to children, that is the subject of this note. By setting one standard for edibles and another standard for alcohol, the states enacting these regulations have violated edible manufacturers' First Amendment rights. This note discusses the "cannot appeal to children" regulations on both marijuana and alcohol and the constitutional implications of such regulations. This note serves as a guide to both states that have already implemented these regulatory schemes, as well as states who will soon be legalizing recreational marijuana and will look for ways to best regulate their new industry.

In analyzing this topic, it is important to first grasp an understanding of the current regulatory schemes, looking at how the edibles industry have been scrutinized and also how the alcohol industry has been given free reign when it comes to labeling design choices. From there, one should understand the First Amendment implications of these regulatory schemes, especially those which prohibit labels from appealing to children.

II. Background

Before looking at the regulations prohibiting labels that appeal to children on both alcohol and edibles, one must compare the two products to understand why they should be regulated similarly. While alcohol and marijuana have different effects, both are mind-

³ Casey Liens et al., *States Where Recreational Marijuana is Legal*, U.S. NEWS & WORLD REP. (Nov. 9, 2022), <https://www.usnews.com/news/best-states/slideshows/where-is-pot-legal> (Alaska, Arizona, California, Colorado, Connecticut, Illinois, Maine, Maryland, Massachusetts, Michigan, Missouri, Montana, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Virginia, Washington, and Washington D.C. have enacted marijuana legalization measures).

⁴ Jon Campbell, *These States Could Legalize Cannabis Next in 2022*, LEAFLY (Oct. 25, 2021), <https://www.leafly.com/news/politics/these-states-could-legalize-cannabis-next> (Arkansas, Florida, Ohio, Oklahoma, and Pennsylvania are all expected to have ballot initiatives to legalize marijuana in 2022).

altering substances that have serious effects on children. Alcohol can slow down the breathing and heart rate of a small child while also lowering their blood pressure to dangerous levels, causing seizures or even death.⁵ However, when a child ingests marijuana they will most likely suffer a state of lethargy, dizziness, increased heart rate, and in rare cases seizures.⁶ Even in children, death from a marijuana overdose is extremely rare.⁷ This article is not asserting marijuana is safer than alcohol, but rather arguing that the two substances are, at the very least, similar and should be regulated accordingly.

A. States Prohibit Edible Labels that Appeal to Children

First, to get a sense of the problem, it is important to look at the marijuana industry. While edibles have been around for centuries, in 2012 Colorado and Washington legalized marijuana for recreational use, which marked the beginning of the measurable U.S. edibles market, worth billions.⁸ In recent years, these edibles have gone from simple “special” brownies to complex candies that resemble their non-marijuana infused counterparts.⁹ Although this is quickly becoming a national issue, marijuana remains illegal under federal law as a Schedule I drug and the Food and Drug Administration (FDA) has refused to regulate recreational marijuana as a result.¹⁰ This deferral leaves regulation to the states. In recent years, state legislatures justifiably began enacting regulations prohibiting labels that appeal to children.¹¹ Overall, these regulations have not led to the intended result of protecting children from

⁵ Rose Ann Gould Soloway, *Alcohol: A Dangerous Poison for Children*, POISON CONTROL NAT’L CAP. POISON CTR., <https://www.poison.org/articles/alcohol-a-dangerous-poison-for-children> (last visited Nov. 15, 2022).

⁶ Linda Carroll, *Doctors Debate Whether Baby Died from Marijuana Overdose*, NBC NEWS (Nov. 17, 2017) <https://www.nbcnews.com/health/kids-health/doctors-debate-whether-baby-died-marijuana-overdose-n821801>.

⁷ *Id.*

⁸ See Colleen Fisher Tully, *A Global History of Cannabis Edibles*, LEAFLY (Dec. 4, 2019), <https://www.leafly.com/news/canada/canada-world-history-cannabis-edibles>; see also *Cannabis Edibles Expected to be a \$4.1 Billion Business by 2022*, FOODABLE NETWORK INC., (Oct. 16, 2018), <https://www.foodabletv.com/blog/cannabis-edibles-expected-to-be-a-41-billion-industry-in-the-us-and-canada-by-2022>.

⁹ Tori B. Powell, *State Attorneys General Warn of Cannabis Edibles that Look Like Snacks and Candy Ahead of Halloween*, CBS NEWS (Oct. 28, 2021), <https://www.cbsnews.com/news/halloween-candy-snacks-cannabis-edibles-warning/>.

¹⁰ See 21 C.F.R. § 1308.11 (2022); Sheryl C. Cates & Jenny L. Wiley, *Marijuana Edibles and Labeling*, RTI INT’L, <https://www.rti.org/impact/marijuana-edibles-and-labeling> (Last visited Nov. 15, 2022).

¹¹ See 1 COLO. CODE REGS. § 212-3:3-1010; MICH. ADMIN. CODE r. 420.403; OR. ADMIN. R. 845-025-7000 (2018).

accidental ingestion and some have even cost manufacturers hundreds of thousands of dollars.

In 2016, Colorado enacted a regulation prohibiting the word “candy” or “candies” from appearing on edible labels.¹² Colorado later prohibited labels appealing to children in 2020.¹³ This regulation prohibited manufacturers from “plac[ing] any content on a Container or the Marketing Layer in a manner that reasonably appears to target individuals under the age of 21, including but not limited to, cartoon characters or similar images.”¹⁴ Although these measures were taken to protect children from unintentionally ingesting marijuana, the numbers prove the opposite is true. Since the first regulation passed in 2016, accidental marijuana ingestion in children age 0-5 years old has more than tripled, jumping from 33 cases in 2016 to 127 in 2020.¹⁵ While the observed increase in accidental ingestions may be indicative of the increase in marijuana availability in the state, it is important to note the regulations prohibiting labels that appeal to children have had little if any effect on curbing the increase in accidental marijuana ingestion among small children. Not only are these regulations ineffective, but they also have cost manufacturers hundreds of thousands of dollars in modifying their products to comply with the law.¹⁶ This is in addition to the \$100,000 fine and suspended license manufacturers suffer if they fail to comply with the regulations.¹⁷

While Colorado was one of the first states to adopt regulations prohibiting edibles with labels that appeal to children, in recent years more states have been following this approach. In Michigan, “cartoons, caricatures, toys, designs, shapes, labels, or packaging that would appeal to minors,” are prohibited from edible labels.¹⁸ Moreover, Michigan also prohibited edible manufacturers from using images of animals, humans, or fruit on their labels.¹⁹ Like

¹² Press Release, Colo. Dept. of Rev. & Colo. Dept. of Pub. Health & Env’t, New Colorado Rules Make Marijuana Packaging Safer for Adults, Less Appealing to Children (Sept. 2016).

¹³1 COLO. CODE REGS. § 212-3-3-1010.

¹⁴ *Id.*

¹⁵ Rocky Mountain Poison & Drug, *Reported Marijuana Exposures in Colorado*, COLORADO DEP’T OF PUB. HEALTH & ENV’T, <https://marijuanahealthinfo.colorado.gov/health-data/poison-center-data> (last visited Nov. 21, 2022).

¹⁶John Schroyer, *New Colorado Edibles Rules: Major Cost for Producers, ‘Blip on the Radar’ for Others*, MJBizDaily (Sept. 26, 2016), <https://mjbizdaily.com/new-co-edibles-rules-major-cost-producers-blip-radar-others/>.

¹⁷ 1 COLO. CODE REGS § 212-3-8-235 (2020).

¹⁸ MICH. ADMIN. CODE r. 420.403.

¹⁹ *Id.*

Colorado, Michigan also prohibits the use of the word “candy” or “candies” on edible labels, but Michigan takes this a step further by prohibiting “words that are commonly used in commercial candy such as milk chocolate, peanut butter, gummies, or chews without using the words THC, marijuana, or cannabis as modifiers.”²⁰

In Oregon, edible labels may not show:

cartoons, a design, brand, or name that resembles a non-cannabis consumer product of the type that is typically marketed to minors, symbols or celebrities that are commonly used to market products to minors, images of minors, words that refer to products that are commonly associated with minors or marketed by minors.²¹

While these requirements appear similar to the ones in effect in Colorado, in actuality, manufacturers selling in both states must use different labels on the same product. One example of this is Wana’s Watermelon-flavored Sour Gummy edibles, which in Colorado bear a label with the words “Sour Gummies” and pictures of watermelon wedges, but in Oregon, the same product bears the words “Cannabis Infused Sour Gummies” with a very prominent warning label.²² Were the product to be sold in Michigan, the company would have to remove the images of fruit and the word “gummies” from its label to comply with that state’s regulations.²³ Do children in different regions have such different preferences that the regulations intended to prevent them from ingesting harmful substances should be different? Or are the labels the result of a lack of uniformity in regulation that harms both edible manufacturer and consumers? Table 1 shows the similarities and differences in the language of the state regulations prohibiting edible manufacturers from using labels that are appealing to children.

²⁰ *Marijuana Infused Edibles: Enforcement Guide*, MICH. MARIJUANA REGUL. AGENCY (Aug. 2, 2021), https://www.michigan.gov/documents/mra/Marijuana-Infused_Edibles_Bulletin_-_080221_731636_7.pdf.

²¹ OR. ADMIN. R. 845-025-7000 (2018).

²² Valeriya Safronova, *Big Candy is Angry*, N.Y. TIMES (May 22, 2021), <https://www.nytimes.com/2021/05/22/style/edibles-marijuana.html>.

²³ MICH. ADMIN. CODE r. 420.403.

Table 1

State	Regulation	Regulation Language
California	4 CA ADC § 15040	(a)(3) – (a) Any advertising or marketing, as defined in Business and Professions Code section 26150, that is placed in broadcast, cable, radio, print, and digital communications: (3) Shall not use any images that are attractive to children, including, but not limited to: (A) Cartoons; (B) Any likeness to images, characters, or phrases that are popularly used to advertise to children; (C) Any imitation of candy packaging or labeling; or (D) The terms “candy” or “candies” or variants in spelling such as “kandy” or “kandeez.”
	4 CA ADC § 17408	(a)(2) – (a) Cannabis goods labeling shall not contain any of the following: (2) Content that is, or is designed to be, attractive to individuals under the age of 21, as specified in section 15040(a)(2) and (3).

<p>Colorado</p>	<p>1 CO ADC 212-3:3-1010</p>	<p>(B)(2) - Labels Shall Not Be Designed to Appeal to Children. A Regulated Marijuana Business shall not place any content on a Container or the Marketing Layer in a manner that reasonably appears to target individuals under the age of 21, including but not limited to, cartoon characters or similar images.</p> <p>(B)(8)(a) - Licensees shall not use the word(s) “candy” and/or “candies” on the label of any Container holding Regulated Marijuana, or of any Marketing Layer.</p>
<p>Illinois</p>	<p>IL ST CH 410 § 705/55-21</p>	<p>(f)(5) – (f) Packaging must not contain information that: (5) includes any image designed or likely to appeal to minors, including cartoons, toys, animals, or children, or any other likeness to images, characters, or phrases that are popularly used to advertise to children, or any packaging or labeling that bears reasonable resemblance to any product available for consumption as a</p>

		commercially available candy, or that promotes consumption of cannabis
Maine	28-B M.R.S.A. § 701	(4)(B) and (D) - Adult use marijuana and adult use marijuana products to be sold or offered for sale by a licensee to a consumer in accordance with this chapter: (B) May not be labeled or packaged in a manner that is specifically designed to appeal particularly to a person under 21 years of age; (D) May not be sold or offered for sale using a label or packaging that depicts a human, animal or fruit;
Massachusetts	935 MA ADC 500.105	(6)(b) – Packaging for Marijuana or Marijuana Products sold or displayed for Consumers, including any label or imprint affixed to any packaging containing Marijuana, Marijuana Products or any exit packages, may not be attractive minors. Packaging is explicitly prohibited from: 1. Using bright colors, defined as colors that are “neon” in appearance; 2.

		<p>Imitating or having a semblance to any existing branded consumer products, including foods and Beverages, that do not contain marijuana; 3. Featuring cartoons; 4. Featuring a design, brand or name that resembles a non-cannabis consumer product of the type that is typically marketed to minors; 5. Featuring symbols or celebrities that are commonly used to market products to minors; 6. Featuring images of minors; and 7. Featuring words that refer to products that are commonly associated with minors or marketed to minors.</p>
<p>Michigan</p>	<p>MI ADC R. 420.403</p>	<p>(9)(a) and (b) - (a) Edible marihuana product packages shall not be in a shape or labeled in a manner that would appeal to minors aged 17 years or younger. Edible marihuana products shall not be associated with or have cartoons, caricatures, toys, designs, shapes, labels, or packaging that would appeal to minors. (b) Edible marihuana products shall not be easily</p>

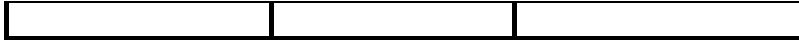
		<p>confused with commercially sold candy. The use of the word candy or candies on the packaging or labeling is prohibited. Edible marihuana products shall not be in the distinct shape of a human, animal, or fruit, or a shape that bears the likeness or contains characteristics of a realistic or fictional human, animal, or fruit, including artistic, caricature, or cartoon renderings. Edible marihuana products that are geometric shapes and simply fruit flavored are permissible.</p>
Montana	MT ADC 42.39.319	(1)(c) – All packaging of marijuana and marijuana products shall: (c) not primarily appeal to children. Packaging that primarily appeals to children includes but is not limited to packaging that: (i) depicts a child; (ii) portrays objects, images, celebrities, or cartoon figures that primarily appeal to children or are commonly used to market products to children; or (iii) otherwise has special

		attractiveness for children beyond the general attractiveness for adults;
Nevada	NV ADC 453D.805	(1)(b) – (d) – Any edible product containing marijuana must: (b) Be packaged in a manner which is not modeled after a brand of products primarily consumed by or marketed to children; (c) Be presented in packaging which does not contain an image of a cartoon character, mascot, action figure, balloon or toy, except that such an item may appear in the logo of the marijuana product manufacturing facility which produced the product; and (d) Not be packaged or marketed as candy.
New Jersey	24 N.J.S.A. § 6I-35	(7)(a)(iv) - Cannabis items and cannabis paraphernalia are not packaged, branded, or marketed using any statement, illustration, or image that: (iv) Includes objects, such as toys, characters, or cartoon characters suggesting the presence of a person under the legal age to purchase cannabis items, or any other depiction

		designed in any manner to be especially appealing to persons under the legal age to purchase cannabis items;
New Mexico	NM ADC 7.34.4.16	(A) A package containing usable cannabis shall not display any content that reasonably appears to target minors, including but not limited to, cartoon characters or similar images. A product name or package shall not be modeled after a brand of product that is traditionally marketed toward children.
Oregon	OAR 845-025-7000	(3) “Attractive to minors” means packaging, receptacles, inhalant delivery devices, labeling and marketing that features: (a) Cartoons; (b) A design, brand or name that resembles a non-cannabis consumer product of the type that is typically marketed to minors; (c) Symbols or celebrities that are commonly used to market products to minors; (d) Images of minors; and (e) Words that refer to products that are

		<p>commonly associated with minors or marketed by minors.</p> <p>(12) “Cartoon” means any drawing or other depiction of an object, person, animal, creature or any similar caricature that satisfies any of the following criteria:</p> <p>(a) The use of comically exaggerated features;</p> <p>(b) The attribution of human characteristics to animals, plants or other objects, or the similar use of anthropomorphic technique; or (c) The attribution of unnatural or extra-human abilities, such as imperviousness to pain or injury, X-ray vision, tunneling at very high speeds or transformation.</p>
	<p>OAR 333-007-0090</p>	<p>(8)(b) – A label may not be attractive to minors, as that is defined in OAR 845-025-7000.</p>
<p>Washington</p>	<p>WAC 314-55-105</p>	<p>(1)(c) - “Especially appealing to persons under the age of twenty-one” means a product or label that includes, but is not limited to: (i) The use of cartoons;</p>

		<p>(ii) Bubble-type or other cartoon-like font;</p> <p>(iii) A design, brand, or name that resembles a noncannabis consumer product that is marketed to persons under the age of twenty-one; (iv) Symbols or celebrities that are commonly used to market products to persons under the age of twenty-one; (v) Images of persons under the age of twenty-one; or (vi) Similarities to products or words that refer to products that are commonly associated or marketed to persons under the age of twenty-one.</p> <p>(1)(g)(iv) - Labels for marijuana edibles in solid form may not contain any statement, depiction, or illustration that: Depicts a person under the age of twenty-one consuming marijuana, or is especially appealing to persons under twenty-one years of age as defined in subsection (1)(c) of this section.</p>
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While the reasons given by state legislators in prohibiting edible manufacturers from using labels that appeal to children are seemingly valid, when one compares these regulations to similar ones applicable to the alcohol industry, they can see the unfairness and resulting violations of edible manufacturers' First Amendment rights.

B. Labels that Appeal to Children are Prohibited from Alcohol Labels. Or are They?

Before discussing the regulations prohibiting alcohol labels from appealing to children, it is important to understand how the alcohol industry is regulated. At the federal level, alcohol labels are regulated by the Alcohol and Tobacco Tax and Trade Bureau (TTB).²⁴ However, these regulations are concerned with the label's description of the container's contents and any health claims made by the label instead of whether the label makes the product appealing to children.²⁵ So, if the federal government does not prohibit alcohol labels from appealing to children, who does? The states? No. Most states take a similar approach to alcohol labeling as the federal government. In fact, as discussed further, of the 18 states that have legalized marijuana for recreational use, only two prohibit alcohol labels that appeal to children.²⁶ In actuality, the alcohol industry is largely self-regulated when it comes to the advertising content of alcohol labels.²⁷

Three institutes are mostly responsible for regulating the alcohol industry and prohibiting labels that appeal to children, the Beer Institute (BI), Distilled Spirits Council of the United States (DISCUS), and the Wine Institute (WI).²⁸ Each institute has its own set of guidelines for members to follow when participating in advertising activities, which includes the alcohol's labeling.²⁹

²⁴ See 27 C.F.R. § 4.39 (2006); see also 27 C.F.R. § 5.42 (2020); see also 27 C.F.R. § 7.29 (2020); see also 27 C.F.R. § 25.142 (2006).

²⁵ See 27 C.F.R. § 4.39; see also 27 C.F.R. § 5.42; see also 7 C.F.R. § 7.29; see also 27 C.F.R. § 25.142.

²⁶ WASH. ADMIN. CODE § 314-20-020 (2018); MONT. ADMIN. R. 42.13.201 (2019).

²⁷ See Fed. Trade Comm'n, Self-Regulation in the Alcohol Industry, 1–2 (Mar. 2014).

²⁸ *Id.* at 1.

²⁹ See Beer Inst., Advertising/Marketing Code and Buying Guidelines (2018); see also *Wine Institute's Code of Advertising Standards*, WINE INST. (June 2011), <https://wineinstitute.org/our-work/responsibility/social/ad-code>; see also

Before considering whether self-regulation is a workable alternative to the status quo of edible labeling regulation, one should examine the impact this scheme has on the alcohol industry. The emergence of microbreweries in recent years has proved that self-regulation does not stop alcohol labels that appeal to children.³⁰ For example, Fossil Cove Brewing Co. in Fayetteville, Arkansas sells cans of beer featuring cartoon images of dinosaurs riding skateboards, T-Rexes eating peaches, and sasquatches wearing boxers while eating a popsicle.³¹ Fossil Cove's approach is not uncommon among local breweries. One can find cartoons appearing on the labels of local brewery beer cans in liquor stores from coast to coast.³² In California, Paperback Brewing Co. sells cans featuring bunnies with chainsaws and other comic book-like art; while in New York penguins in spacesuits decorate the cans of Kings' County Brewers Collective.³³ Not only that, but breweries are discovering that cartoons on beer labels can significantly boost sales.³⁴ One example of this is New Belgium's Voodoo Ranger, a beer that has become the most popular Imperial IPA since its debut in 2017 and was the top beer launch in the United States and increased New Belgium's IPA sales by 45%.³⁵ Voodoo Ranger features a cartoon skeleton on its label which was awarded the second best beer label in 2017 according to USA Today, other beer labels on the list include Three Heads Brewing's Captain Banana Unfiltered Wheat Beer, which depicts a monkey in an Evel Knievel-like jumpsuit; Red Cypress Brewery's Devil's Chair IPA which features a cartoon devil lounging in a chair while drinking a glass of beer; and Laughing Dog Brewing's Dogzilla Black IPA which features a cartoon dog resembling Godzilla.³⁶ Given these labels listed and the similar ones that can be found throughout the country, it can be concluded that

Distilled Spirits Council of the U.S., Code of Responsible Practices for Beverage Alcohol Advertising and Marketing (Mar. 2021).

³⁰ See generally Dan Fox, *Irresponsible Marketing and Craft Beer*, THE DRINKS BUS. (Mar. 11, 2014), <https://www.thedrinksbusiness.com/2014/03/irresponsible-marketing-and-craft-beer/>.

³¹ *Our Beers*, Fossil Cove Brewing Co., <https://www.fossilcovebrewing.com/beers> (last visited Nov. 15, 2022).

³² Joshua M. Bernstein, *Cartoons Are Becoming the Beer Industry's Best New Sales Tool*, SevenFiftyDaily (Aug. 30, 2021), <https://daily.sevenfifty.com/cartoons-are-becoming-the-beer-industrys-best-new-sales-tool/>.

³³ *Id.*

³⁴ *Id.*

³⁵ *Voodoo Ranger*, Frost Motion, <https://frostmotion.com/project/voodoo-ranger/> (last visited Nov. 17, 2022).

³⁶ *10 Best Beer Labels of (2017)*, USA TODAY, <https://www.10best.com/awards/travel/best-beer-label-2017/> (last visited Nov. 17, 2022).

self-regulation in the alcohol industry has not led to a decrease in the number of labels that appeal to children.

The problem is not unique to small craft breweries, but in the liquor industry as well. One example of this is UV's Sugar Crush Vodka, which features a cartoon image of candy on the top of its bright purple bottle.³⁷ In his article "Limp DISCUS—How Alcohol Lacks a Watchdog," Geoff Kleinman discusses his experience in filing a complaint with DISCUS regarding Sugar Crush's label.³⁸ Even after pointing out the issue to DISCUS, DISCUS found that, because the primary target is adults, not children, the label did not violate regulations even though it had images of cartoon candy on the label, which would, presumably, be a violation of DISCUS's self-imposed regulation to not allow images on labels which may appeal to children.³⁹ The alcohol industry's label regulatory system shines a light on the problem of self-regulation in industries intended to target adults only; while also emphasizing the fact that the edibles industry is treated unconstitutionally regarding labeling regulations.

Remember that two states, Montana and Washington, prohibit labels that appeal to children on both alcohol and marijuana edibles.⁴⁰ While these states do not allow unbridled self-regulation in the alcohol industry, they seem to do little to reduce the number of alcohol labels that appeal to children. While Montana's regulations are shown below and in Table 1, this note will focus only on Washington's labeling regulations for edibles and beer.

First, looking at Montana's edibles labeling regulation, one can tell that it resembles those regulations in effect in Colorado and Oregon. Montana's labeling regulation reads:

All packaging of marijuana and marijuana products shall: (c) not primarily appeal to children. Packaging that primarily appeals to children includes but is not limited to packaging that: (i) depicts a child; (ii) portrays objects, images, celebrities, or cartoon figures that primarily appeal to children or are commonly used to market products to children; or

³⁷ Geoff Kleinman, *Flavored Vodka Goes Too Far: UV Sugar Crush Vodka*, DRINK SPIRITS (Jul. 21, 2014), <https://www.drinkspirits.com/vodka/flavored-vodka-goes-far-uv-sugar-crush-vodka/>.

³⁸ Geoff Kleinman, *Limp DISCUS—How Alcohol Lacks a Watchdog*, DRINK SPIRITS (Jan. 13, 2015), <https://www.drinkspirits.com/general-spirits/limp-discus-alcohol-lacks-watchdog/>.

³⁹ *See id.*

⁴⁰ WASH. ADMIN. CODE § 314-20-020 (2018); *See* Mont. Admin. R. 42.13.201 (2019).

(iii) otherwise has special attractiveness for children beyond the general attractiveness for adults.⁴¹

The only noticeable difference in this regulation compared to other regulations is the prohibition on labels that have “special attractiveness for children beyond the general attractiveness for adults.”⁴² This inclusion allows a little more breathing room for edible manufacturers to argue that their designs, which do not fall into the other prohibited categories are attractive to both children and adults.

Montana’s alcohol labeling regulation is not near as detailed as its edibles labeling regulation. The alcohol labeling regulation reads:

The department [of revenue], in its discretion and on a case-by-case basis, will not approve a beer, wine, or hard cider label or primary package that . . . (c) contains graphics or elements that: (i) are designed to target or particularly appeal to underage persons.⁴³

This regulation, like the edibles labeling regulation, allows for manufacturers to use labels that are appealing to both adults and children, so long as the label is not “designed to target or particularly appeal to underage persons.”⁴⁴ However, there are two main differences between the alcohol labeling regulation and the edibles labeling regulation. The first is that the department of revenue uses its discretion in deciding whether to approve the alcohol labels that conflict with the regulation, whereas edible labels are strictly prohibited from using labels that contradict the regulation. The other difference is that, unlike the edibles labeling regulation, this regulation does not go further to prohibit certain images that would be appealing to children like cartoons, children, etc. As this note will discuss in detail below, this is a content preference for alcohol labels and should be subject to strict scrutiny.

Washington’s edibles labeling regulation is similar to that of other states discussed above. Washington’s regulation prohibits labels that are “Especially appealing to persons under the age of twenty-one,” which includes:

⁴¹ MONT. ADMIN. R. 42.39.319(1)(c) (2022).

⁴² *Id.*

⁴³ MONT. ADMIN. R. 42.13.201(c)(i).

⁴⁴ *Id.*

(i) The use of cartoons; (ii) Bubble-type or other cartoon-like font; (iii) A design, brand, or name that resembles a noncannabis consumer product that is marketed to persons under the age of twenty-one; (iv) Symbols or celebrities that are commonly used to market products to persons under the age of twenty-one; (v) Images of persons under the age of twenty-one; or (vi) Similarities to products or words that refer to products that are commonly associated or marketed to persons under the age of twenty-one.⁴⁵

The statute also defines cartoon as:

any drawing or other depiction of an object, person, animal, creature, or any similar caricature that meets any of the following criteria: (i) The use of comically exaggerated features; (ii) The attribution of human characteristics to animals, plants, or other objects; (iii) The attribution of animal, plant, or other object characteristics to humans; (iv) The attribution of unnatural or extra-human abilities.⁴⁶

The Washington State Liquor and Cannabis Board (WSLCB) went a step further to clarify exactly what is prohibited from appearing on labels when it published its Packaging and Labeling Guide for Medically Compliant and Recreational Marijuana. The guide shows examples of the cartoon definition including, but not limited to, a gorilla smoking a pipe and a singing marijuana leaf.⁴⁷

Comparing Washington's edibles label regulation with its beer label regulation, one can see many similarities. The beer label regulation states:

No beer shall be imported or sold within the state of Washington until the licensed brewery, or certificate of approval holder, submitted to the board, one copy of the federal certificate of label approval for such beer, issued by the Bureau of Alcohol, Tobacco, and Firearms, U.S. Treasury Department . . . No label will be approved which is designed to be especially

⁴⁵ WASH. ADMIN. CODE § 314-55-105(c)(2022).

⁴⁶ *Id.* § 314-55-105(a).

⁴⁷ WASH. STATE LIQUOR & CANNABIS BD., Packaging and Labeling Guide for Medically Compliant and Recreational Marijuana 16 (2019).

appealing to children or other persons under legal age to consume.⁴⁸

The use of the same “especially appealing to children” language implies that the Washington legislature intended there to be no use of cartoons on labels of beer sold within the state. However, as this note will show, beer labels featuring cartoons and other graphics that appeal to children are common in the state. It is this disparity that gives rise to a potential First Amendment claim on behalf of edible manufacturers.

III. Constitutional Implications of State Regulations on Edibles Labels

The information on a product’s label is considered commercial speech.⁴⁹ As the Supreme Court first held in *Central Hudson*, commercial speech is protected under the First Amendment.⁵⁰ Before delving into whether Washington’s edibles regulation violates the First Amendment, it is important to understand what level of scrutiny the court views regulations limiting commercial speech.

In *Central Hudson*, the court developed a four-prong test to determine whether commercial speech is protected by the First Amendment. This four-prong test asks whether (1) “the commercial speech concerns a lawful activity and is not misleading,” (2) “the asserted governmental interest is substantial,” (3) “the regulation directly advances the governmental interest asserted,” and (4) “whether [the regulation] is not more extensive than necessary to serve that interest.”⁵¹ If the second, third, or fourth prong of the test fails, then the commercial speech is protected under the First Amendment.⁵² Intermediate scrutiny is the standard utilized by the courts when using the *Central Hudson* test to decide most commercial speech cases, meaning that the court looks at the government restriction to determine if it is substantially related to an important governmental interest.⁵³

Having determined the test and level of scrutiny applicable to regulations like the one in Washington, the next question is whether the regulation would survive the *Central Hudson* test. Given

⁴⁸ WASH. ADMIN. CODE § 314-20-020(5)(2022).

⁴⁹ *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995).

⁵⁰ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980).

⁵¹ *Id.*

⁵² *Id.* at 569–71.

⁵³ *Id.*

the lack of litigation regarding this law, it is easiest to make this determination after presenting a hypothetical set of facts and applying the *Central Hudson* test to that scenario.

The first obstacle an edible manufacturer would have to overcome to satisfy the *Central Hudson* test is the requirement that the label not be misleading.⁵⁴ One could argue that placing cartoons or other designs that appeal to children on edibles or other products not meant for children would be misleading even to the most reasonable consumer, especially if those labels resemble the labels of other, non-cannabis products consumed by children. Such products have been the subject of recent intellectual property litigation between candy manufacturers and edible manufacturers.⁵⁵ Moreover, an edibles package in compliance with Washington law, would have prominent warning labels showing that it is a marijuana product.⁵⁶ Thus, it is likely the label of an edible would satisfy the first requirement of *Central Hudson* to be protected by the First Amendment.

The next prong of *Central Hudson* is more easily determined. The government's asserted interest in protecting children from accidentally ingesting potentially harmful substances is a substantial interest as required by *Central Hudson*'s second prong. Thus, this prong is satisfied, and the analysis can move to the third prong.

For Washington's labeling regulation to satisfy the third prong of the *Central Hudson* test, it must directly advance the government's asserted interest.⁵⁷ The Supreme Court has stated that "the third step of *Central Hudson* requires that the government demonstrate that the harms it recites are real and that its restriction will, in fact, alleviate them to a material degree."⁵⁸ The Court has repeatedly held that evidence of alleviation is required to satisfy the third prong of *Central Hudson*, although this evidence may simply be a reference to studies affirming the government's position.⁵⁹ While the WSLCB relied on studies stating children are attracted to colorful packages with cartoons or other graphics appealing to children, those studies also point out many other factors that appeal

⁵⁴ *Id.*

⁵⁵ See *WM. Wrigley Jr. Co. v. Terphogz, LLC*, No. 21 C 2357, 2021 WL 5356229 (E.D. Ill. Nov. 17, 2021); see also *Ferrara Candy Co. v. Inland Empire 420 Supply*, Case No. EDCV 20-2357 JGB (KKx), 2021 WL 2915086 (C.D. Cal. Jun. 23, 2021).

⁵⁶ See WASH. ADMIN. CODE § 314-55-105 (2020).

⁵⁷ *Central Hudson*, 447 U.S. at 566.

⁵⁸ *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001) (quoting *Greater New Orleans Broad. Ass'n v. United States* 527 U.S. 173, 188 (1993)).

⁵⁹ *Id.*

to children, such as odor, color, and shape of the food itself.⁶⁰ Those studies do not argue that removing colorful labels viewed as appealing to children would reduce the number of small children who accidentally ingest edibles. The evidence shows the opposite is true.

In the first nine months of 2020, Washington Poison Control received 139 reports of children under 12 accidentally ingesting marijuana.⁶¹ That is 19 more cases than the total number of marijuana incidents in that age group reported to Washington Poison Control in 2019.⁶² To prove the regulation alleviates the harm to a material degree, Washington would have to provide evidence proving that the labeling regulation has helped to curb the problem of small children accidentally ingesting marijuana.⁶³ However, the labeling regulation prohibiting edibles from using labels that appeal to children has proven ineffective as accidental ingestion of edibles among children has increased not decreased. Thus, a court would likely find Washington's regulation fails to satisfy the third prong of the *Central Hudson* test, thereby violating the First Amendment. For the sake of argument, however, this note's analysis will continue to the fourth prong.

The fourth prong of *Central Hudson* Washington's labeling regulation would have to satisfy is that it must not be more extensive than necessary to serve the asserted interest.⁶⁴ If there are less restrictive methods to satisfy the government's interest, the fourth prong is not satisfied and the regulation violates the First Amendment.⁶⁵ As the earlier referenced Washington University School of Law study notes, one of the main factors attracting children to food is the shape of the food.⁶⁶ While Washington regulates the labeling and packaging of edibles sold in the state, it leaves the edible itself unregulated. Cannabis retailers in Washington have menus featuring edibles that resemble baked goods, candy, chips, and other items on which children would normally snack. Regulating the shape and type of edibles able to be sold in Washington is a type of regulation that would be less restricting of edible manufacturers' First Amendment rights than the current labeling regulation. Thus,

⁶⁰ SEAN O'CONNOR ET. AL., CONCERNING CANNABIS INFUSED EDIBLES: FACTORS THAT ATTRACT CHILDREN TO FOODS (Univ. of Wash. Sch. Of L., Cannabis L. & Pol'y Project 2016).

⁶¹ WASH. POISON CTR., EXPOSURE TRENDS DURING THE COVID-19 PANDEMIC, SPECIAL FOCUS: CANNABIS (THC) (2020).

⁶² *Id.*

⁶³ *Lorillard Tobacco Co.*, 533 U.S. at 555.

⁶⁴ *Central Hudson*, 447 U.S. at 566.

⁶⁵ 44 *Liquormart v. R.I.*, 517 U.S. 484, 487 (1996) (citing *Bd. of Trs. v. Fox*, 492 U.S. 469, 480 (1989)).

⁶⁶ See O'Conner, *supra* note 60.

because of the existence of less restrictive alternatives, the Washington regulation fails to satisfy the fourth prong of *Central Hudson*, thereby violating the First Amendment.

As the above analysis concludes, because the Washington regulation would likely fail to satisfy the third and fourth prongs of the *Central Hudson* test the regulation likely violates the First Amendment. *Central Hudson* requires courts to employ intermediate scrutiny in deciding commercial speech cases.⁶⁷ However, it is likely the Court would hold that government actions like the Washington edibles labeling regulation should be subject to strict scrutiny.

Recent cases have suggested that strict scrutiny, not intermediate scrutiny is the right standard to decide commercial speech cases, particularly those concerning commercial speech regulations demonstrating a preference for certain content.⁶⁸ As the Supreme Court has stated, “laws favoring some speakers over others demand strict scrutiny when the legislature’s speaker preference reflects a content preference.”⁶⁹ This content preference rule has been employed by the Court in several cases involving commercial speech. *Rubin v. Coors Brewing, Inc.* is an example of this. In *Rubin*, the Court held a ban against beer labels that listed the alcohol by volume content on the label was irrational deferential treatment given the fact that wine labels were not subject to such restriction.⁷⁰ Another example of the court employing strict scrutiny in cases involving a content preference is *Reed v. Town of Gilbert, Ariz.*, which held that a city sign code imposing stricter restrictions on directional signs for nonprofit groups than on those conveying other messages did not survive strict scrutiny.⁷¹

An individual can observe a clear disparity when looking at Washington’s labeling regulations of both edibles and beer. One example of the disparity is Fort George Brewery’s 3-Way IPA. Fort George Brewery, which is located in Astoria, Oregon but sells in Washington stores is one example of this.⁷² Like most breweries, Fort George has year-round beers as well as seasonal beers. One of Fort George’s seasonal beers is the 3-Way IPA which features a peacock, turkey, and penguin playing a violin, guitar, and drum set

⁶⁷ See *Central Hudson*, 447 U.S. at 568-572.

⁶⁸ See *Reed v. Town of Gilbert*, 576 U.S. 155, 170 (2015); See *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490-91 (1995).

⁶⁹ *Barr v. Am. Ass’n of Political Consultants*, 140 S. Ct. 2335, 2347 (2020) (quoting *Reed*, 576 U.S. at 170).

⁷⁰ *Rubin*, 514 U.S. at 483, 488–89.

⁷¹ *Reed*, 576 U.S. at 170-71.

⁷² *Distribution*, FORT GEORGE BREWERY, <https://fortgeorgebrewery.com/beers/fort-george-distribution/> (Last visited Nov. 17, 2022).

respectively on its 2021 edition can.⁷³ Previous versions of 3-Way IPA have featured images of cats wearing clothes and playing instruments as well as a gorilla, dragon, and armadillo playing instruments.⁷⁴ Recall that, for beer to be sold in Washington, the label must be approved by the WSLCB, meaning that Fort George annually gets its cartoonish labels approved whereas edible manufacturers are punished for similar conduct.

Since the regulation prohibiting labels that appeal to children on edibles went into effect in 2019, eight edible manufacturers have been issued written warnings for violating the regulation.⁷⁵ While this number may seem insignificant, it should be noted that the marijuana industry has a 95% compliance rate according to the WSLCB.⁷⁶ Further, the written warnings are a precursor to an Administrative Violation Notice (“AVN”) which would impose a penalty on the manufacturer, meaning that if the manufacturers do not change their labels, they will be forced to pay penalties for violating the regulation, both avenues are a significant cost to the manufacturer. Further, the eight written warnings are eight more than Washington breweries received for labels appealing to children during the same period.⁷⁷

Washington is not the only state that seems to favor the alcohol industry through labeling regulations. In its advisory bulletin, Michigan’s Marijuana Regulatory Agency (MRA) gives several examples of what it considers labels that are appealing to children and thus, illegal under Michigan Law.⁷⁸ One example of a label that allegedly appeals to children is the label of Fireball’s Cinnamon Cannabis Gummies which bears the same fire-breathing demon Fireball uses on its whiskey bottles.⁷⁹ In its bulletin, the MRA states that the label is appealing to children because it features an “image[] of [an] animal/caricature.”⁸⁰ The MRA stated that the removal of

⁷³ 3-WAY IPA 2021, Fort George Brewery, <https://fortgeorgebrewery.com/beer/3-way-ipa-2021/> (Last visited Nov. 17, 2022).

⁷⁴ 3-WAY IPA Series, Fort George Brewery, <https://fortgeorgebrewery.com/beers/3-way-series/> (Last visited Nov. 17, 2022).

⁷⁵ *Cannabis Violations*, WASH. STATE LIQUOR & CANNABIS BD (2021), <https://lcb.wa.gov/records/frequently-requested-lists>).

⁷⁶ WASH. STATE LIQUOR & CANNABIS BD, Annual Report Fiscal Year 2021 6 (2021).

⁷⁷ *Liquor Violations*, WASH. STATE LIQUOR & CANNABIS BD (2021), <https://lcb.wa.gov/records/frequently-requested-lists>.

⁷⁸ *Advisory Bulletin, Marijuana Infused Edibles: Enforcement Guidance*, MICH. MARIJUANA REGUL. AGENCY (Aug. 2, 2021) https://www.michigan.gov/documents/mra/Marijuana-Infused_Edibles_Bulletin_-_080221_731636_7.pdf.

⁷⁹ *Id.* at 11.

⁸⁰ *Id.*

Fireball's fire-breathing demon is necessary to make the product compliant under Michigan law.⁸¹ The MRA claims the logo is appealing to children even though the logo does not appear on any other product besides Fireball Whiskey.⁸² This is a blatant content preference for alcohol and should also be subject to strict scrutiny.

Like the prohibition on labels showing alcohol content of beer at issue in *Rubin*, Washington's current regulatory scheme is a clear example of a regulation on commercial speech showing a content preference. Thus, because the Washington edibles statute would most likely be classified as showing a content preference for alcohol manufacturers, the Court would likely apply strict scrutiny in a case brought before it regarding Washington's edibles labeling regulation rather than the *Central Hudson* test. This means Washington would have to prove the regulation is narrowly tailored to meet a compelling government interest. Since, as outlined above, Washington's regulation would fail to survive the intermediate scrutiny standard required by *Central Hudson*, the chances of the same regulation surviving strict scrutiny are remote.

IV. Conclusion

States with regulations prohibiting edibles from having labels that are appealing to children display a preference for the alcohol industry. This preference violates the First Amendment rights of edible manufacturers. Not only that, but they have also failed to protect children from accidentally ingesting edibles. This will soon become a national issue. More and more states are legalizing recreational marijuana and are adopting similar regulations prohibiting what edible manufacturers may put on their labels. These regulations show a preference for alcohol manufacturers and are subject to strict scrutiny which they do not satisfy. Because of this, states should stop showing a preference for the alcohol industry and remove regulations that prohibit edible labels that appeal to children.

⁸¹ *Id.*

⁸² *Id.*