

# A CONDITIONAL FUNDING STRATEGY TO ADDRESS THE MODERN FOOD ENVIRONMENT: FROM PUBLIC HEALTH PREVENTION TO STATE AND LOCAL PREEMPTION

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## I. INTRODUCTION

The greatest challenge to public health in the United States stems from chronic diseases related to poor nutrition. Over thirty-five percent of adults<sup>1</sup> and almost seventeen percent of children and adolescents are obese in the United States.<sup>2</sup> Obesity is associated with increased risk of type 2 diabetes, cardiovascular disease, cancer, and hypertension.<sup>3</sup> Experts point to the modern food environment as a primary driver of this epidemic. Technological innovation in processed food manufacturing has led to the creation of over 20,000 new products per year from 2006 through 2010,<sup>4</sup> adding to the abundance of processed products (more than 300,000) on United States store shelves.<sup>5</sup> Cheap, convenient, palatable, nutrient-poor food and beverages are highly accessible and highly marketed to all segments of the United States population.<sup>6</sup>

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1. Cynthia L. Ogden et al., *Prevalence of Obesity and Trends in the Distribution of Body Mass Index Among US Adults, 1999-2010*, 307 JAMA 491, 496 (2012).

2. Cynthia L. Ogden et al., *Prevalence of Obesity and Trends in Body Mass Index Among US Children and Adolescents, 1999-2010*, 307 JAMA 483, 486 (2012).

3. Ctrs. for Disease Control & Prevention, *Vital Signs: State-Specific Obesity Prevalence Among Adults – United States, 2009*, 59 MORBIDITY & MORTALITY WKLY. REP. 1, 1 (2010).

4. Econ. Research Serv., *Processing & Marketing: New Products*, U.S. DEP'T OF AGRIC. (Feb. 6, 2013), available at <http://www.ers.usda.gov/topics/food-markets-prices/processing-marketing/new-products.aspx>.

5. FOOD AND NUTRITION SERV., USDA, *IMPLICATIONS OF RESTRICTING THE USE OF FOOD STAMP BENEFITS – SUMMARY (2007)*, available at [www.fns.usda.gov/ora/menu/Published/snap/FILES/ProgramOperations/FSPFoodRestrictions.pdf](http://www.fns.usda.gov/ora/menu/Published/snap/FILES/ProgramOperations/FSPFoodRestrictions.pdf).

6. David S. Ludwig, *Technology, Diet, and the Burden of Chronic Disease*, 305 JAMA 1352, 1353 (2011); Bo MacInnis & Gordon Rausser, *Does Food Processing Contribute to Childhood Obesity Disparities?*, 87 AM. J. AGRIC. ECON. 1154, 1155 (2005) (noting that one dollar's worth of potato chips provides 1,200 calories compared to 250 calories from a dollar's worth of carrots); David Segal, *When a Sugar High Isn't Enough*, N.Y. TIMES, Apr. 21, 2012, at BU1 (discussing that an analyst at Consumer Edge Research speculated that the reason cereal is losing ground to other breakfast options in America is that, "The ultimate convenience food – which is how cereal was once billed – is just not convenient enough anymore."); David M. Cutler et al., *Why Have Americans Become More Obese?*, 17 J. ECON. PERSP. 93, 101 (2003) (noting that innovations in food technology have led to a "revolution in the mass preparation" of highly processed edible items and potable liquids that are mainstays of the

Public health and economic studies reveal that consuming a higher proportion of processed food and beverages (collectively “food”) is associated with increased weight gain.<sup>7</sup> Processed food is cheaper and less nutritious so high consumption is especially disconcerting for people living in low-income areas where access to healthy food is minimal and cost is a barrier. Not surprisingly, there is a significant relationship between food costs and healthy diets, which most negatively affects low income communities.<sup>8</sup> The public’s health declines as highly processed foods replace whole, unprocessed foods<sup>9</sup> in the diet.<sup>10</sup>

The companies that manufacture some of the most highly processed unhealthy food products are among the most profitable globally,<sup>11</sup> and spend a portion of their profits lobbying against reform.<sup>12</sup> Industry lobbyists urge higher levels of government to pass laws preempting the ability of lower levels of government to pass protective measures, especially regulations that food businesses perceive will decrease consumption of their product.<sup>13</sup> However,

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American diet).

7. E.g., Abay Asfaw, *Does Consumption of Processed Foods Explain Disparities in the Body Weight of Individuals? The Case of Guatemala*, 20 HEALTH ECON. 184, 191 (2011); Dariush Mozaffarian et. al., *Changes in Diet and Lifestyle and Long-Term Weight Gain in Women and Men*, 364 NEW ENG. J. MED. 2392, 2401 (2011); Cutler et al., *supra* note 6, at 94. See also, MacInnis & Rausser, *supra* note 6, at 1155.

8. Colin D. Rehm et al., *The Quality and Monetary Value of Diets Consumed by Adults in the United States*, 94 AM. J. CLINICAL NUTRITION 1333, 1335 (2011); *F as in Fat: How Obesity Threatens America’s Future*, TRUST FOR AMERICA’S HEALTH (2011), [www.healthymamericans.org/report/88/](http://www.healthymamericans.org/report/88/).

9. Carlos Augusto Monteiro et al., *Increasing Consumption of Ultra-Processed Foods and Likely Impact on Human Health: Evidence from Brazil*, 14 PUB. HEALTH NUTRITION 5, 7 (2011) (defining unprocessed food as whole foods that are not processed or minimally processed to make the whole food more durable, accessible, convenient, palatable, or safe). “These processes include cleaning, portioning, removal of inedible fractions, grating, flaking, squeezing, bottling (in itself), drying, chilling, freezing, pasteurization, fermentation, fat reduction, vacuum and gas packing, and [packaging].” *Id.* Examples of these foods are fresh, chilled, frozen, or vacuum-packed fruits, vegetables, beans, legumes, grains, nuts, seeds; fresh, dried and chilled frozen meats, poultry, and fish; fresh and pasteurized milk, eggs, and water. See also, Mark Bittman, *Is ‘Eat Real Food’ Unthinkable?*, N.Y. TIMES OPINIONATOR BLOG (Feb. 8, 2011, 8:30 PM), <http://opinionator.blogs.nytimes.com/2011/02/08/is-eat-real-food-unthinkable/>.

10. See Cutler et al., *supra* note 6, at 107 (discussing the revolution in mass preparation of food and finding the increase in food technology and processed foods has increased the consumption of commercially prepared foods per day). See also MacInnis & Rausser, *supra* note 6, 1154–55; Julian M. Alston et al., *Are Agricultural Policies Making Us Fat? Likely Links Between Agricultural Policies and Human Nutrition and Obesity, and Their Policy Implications*, 28 REV. AGRIC. ECON. 313, 318–19 (2006).

11. *Our Annual Ranking of America’s Largest Corporations 2011*, CNN MONEY, <http://money.cnn.com/magazines/fortune/fortune500/2011/performers/companies/profits/> (last visited Jan. 9, 2013).

12. Duff Wilson & Janet Roberts, *How Washington Went Soft on Childhood Obesity*, REUTERS (Apr. 27, 2012, 9:03 AM), available at <http://www.reuters.com/article/2012/04/27/us-usa-foodlobby-idUSBRE83Q0ED20120427>; Joey Peters, *Soda Taxes Fizzle in Wake of Industry Lobbying*, WASH. POST (July 13, 2010, 1:24 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/13/AR2010071303494.html>.

13. Lisa Baertlein & Dan Levine, *IFA: Pre-emption of State, Local Menu-Labeling Laws Good News for Restaurants*, 15 IFA INSIDER 2 (2010), available at <http://www.franchise.org/Franchise-Insider-Main.aspx?id=50424#Preemption>; Lisa Baertlein & Dan Levine, *Exclusive: Soda Makers Escalate Attacks over Obesity*, REUTERS (July 20, 2011, 12:07 AM), <http://www.reuters.com/article/2011/07/20/us-obesity-lobbying-idUSTRE76I6K120110720>.

these food products are creating a negative health impact on Americans and obesity and related disease cost the government billions of dollars in health care costs alone.<sup>14</sup>

The government has a responsibility to intervene when the status quo results in inequities. State and local governments have primary jurisdiction over public health and related matters, such as community food access and the school food environment, but they lack resources and sometimes political will or support to address issues related to nutrition. In some cases business interests hinder even those with the best intentions to address health issues.<sup>15</sup>

In section II and III the modern food environment and the health implications and economic toll that consumption of highly processed foods has taken on the United States population is reviewed. Section IV then proposes a tax and spend strategy for Congress to enact in order to address the health and financial burden that results from the modern food environment. Specifically, Congress should institute a manufactures' excise tax on producers of highly processed food products. This is a revenue-producing measure designed to provide conditional grants to qualifying state and local governments, agencies, tribes, territories, and non-government organizations to address the modern food environment and poor nutrition. As part of this strategy, the federal government would offer grants to non-profit organizations to engage in government speech as an innovative method to counter industry support for preemptive laws. This last strategy's goal is to promote social change by educating citizens about preemptive legislation designed to put business interests above health and impede the ability of local governments to protect the people in their community. The paper concludes with a vision for the future direction of the tax and spend strategy.

## II. HIGHLY PROCESSED FOOD

### A. The Modern Food Environment

Highly processed food products are those that have undergone secondary processing. For comparison, foods such as vegetables and eggs are considered unprocessed, while cooking oils and yogurt are primarily processed.<sup>16</sup> Highly processed food products, on the other hand, are often industrially prepared and contain preservatives and additives.<sup>17</sup> They often contribute unhealthy amounts of salt and sugar to the diet and tend to be low in nutrients.<sup>18</sup>

Consumption of highly processed food is linked to poor health outcomes and obesity. The modern food environment at best encourages the consumption

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14. Eric A. Finkelstein et al., *Annual Medical Spending Attributable to Obesity: Payer- and Service-Specific Estimates*, 28 HEALTH AFF. 822, 828 (2009).

15. See *Can Beverage Industry Buy Its Way Out of Soda Tax?*, PHILLY.COM (May 13, 2010), [http://www.philly.com/philly/blogs/heardinthehall/Is\\_beverage\\_industry\\_buying\\_its\\_way\\_out\\_of\\_soda\\_tax.html](http://www.philly.com/philly/blogs/heardinthehall/Is_beverage_industry_buying_its_way_out_of_soda_tax.html) (implying that Mayor Nutter of Philadelphia is trying to lower a proposed tax on sweetened beverages because Pepsi Co. offered to pay the town ten million dollars).

16. Asfaw, *supra* note 7, at 186.

17. Monteiro et al., *supra* note 9, at 7.

18. *Id.* at 9-10.

of these products, but at its worst, it leaves consumers with little choice. Food choices are based on a series of complex factors that stem from income, food prices, the availability of alternatives, and preferences shaped by tastes, marketing, and information. The socio-economic status of the community, consumers' proximity to food stores, and the quality of goods and retail outlets all contribute to access and thus, choice.<sup>19</sup> Lack of food access and high prices can be barriers to making healthy choices even if other factors, such as information, are present.<sup>20</sup>

Communities that lack access to healthy food are called "food deserts" and are found in both urban and rural locations. A food desert commonly signifies that residents have limited access to full-service grocery stores,<sup>21</sup> and thus rely on convenience stores—establishments known to sell a higher ratio of processed food—for sustenance.<sup>22</sup> In one study of low-income rural parents who lived ten to eighty miles from a grocery store, respondents' primary concern was food affordability and the cost of car fuel.<sup>23</sup> They reported wanting to purchase healthy foods for their family but they could not afford to do so; simply put, they explained that "junk food is cheaper."<sup>24</sup>

The increased availability and low price of highly processed foods contributes greatly to the modern food environment. It is this food environment that is responsible for poor health outcomes such as obesity and diabetes.

## B. Health Implications

Studies find that dietary nutritional quality decreases and obesity increases as people consume a higher proportion of processed food in their diets.<sup>25</sup> A Harvard study followed almost 100,000 men and women for twenty years and found that they gained weight as they increased consumption of specific foods: potato chips, fries, sugary beverages, unprocessed and processed red meat, sweet desserts, refined grains, and fruit juice.<sup>26</sup> United States adults report that they snack most frequently on many of these exact same products (i.e., sugary beverages, chips, sweet desserts, candy, and fruit juices).<sup>27</sup> These same items are among the most frequently purchased foods at fast-food restaurants.<sup>28</sup>

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19. Renee E. Walker et al., *Disparities and Access to Healthy Food in the United States: A Review of Food Deserts Literature*, 16 HEALTH & PLACE 876, 881 (2010).

20. See Sandra Braunstein & Risa Lavizzo-Mourey, *How the Health and Community Development Sectors Are Combining Forces to Improve Health and Well-Being*, 30 HEALTH AFFS. 2042 (2011) (explaining that low-income neighborhoods are documented to have reduced access to health care, limited food choices and higher exposure to environmental hazards).

21. *Id.*; Anush Yousefian, Al Leighton, Kimberley Fox, & David Hartley, *Understanding the Rural Food Environment - Perspectives of Low-Income Parents*, RURAL & REMOTE HEALTH 8 (2011).

22. Walker et al., *supra* note 19, at 877; Yousefian et al., *supra* note 21, at 23.

23. *Id.* at 6.

24. *Id.* at 7.

25. Asfaw, *supra* note 7, at 185; Mozaffarian et al., *supra* note 7, at 2401.

26. Mozaffarian et al., *supra* note 7, at 2396.

27. Rhonde S. Sebastian et al., *Snacking Patterns of U.S. Adults*. 4 USDA FOOD SURVEY RESEARCH GROUP DIETARY DATA 1, 1-5 (2011).

28. Kerri N. Boutelle et al., *Nutritional Quality of Lunch Meal Purchased for Children at a Fast-Food Restaurant*, 7 CHILDHOOD OBESITY 316, 322 (2011) (noting menu items most frequently purchased for

Conversely, weight gain was inversely related to consuming unprocessed or primarily processed foods such as vegetables, whole grains, fruit, nuts, and yogurt.<sup>29</sup>

Highly processed products also contribute to overall poor nutrition because they generally have high levels of sodium and added sugar, both of which are independently associated with disease. High intake of sodium is associated with an increased risk for hypertension, stomach cancer, heart disease, and stroke.<sup>30</sup> The foods that contribute the most sodium to the diet of Americans include a now familiar list: restaurant meals, processed and cured meats, processed bread products, and savory snacks.<sup>31</sup>

High intake of added sugar, however, is likely the biggest threat to good nutrition today.<sup>32</sup> A diet high in added sugar is positively correlated with weight gain, poor cholesterol, diabetes, increased insulin resistance, and micronutrient dilution.<sup>33</sup> Micronutrient dilution occurs when people replace healthy food in their diet with highly processed sugary food, resulting in an inability to derive the proper amount of vitamins and minerals from the food they consume.<sup>34</sup> The major sources of added sugar in the American diet are commercially-sweetened, highly processed products, including sugary beverages, grain-based and dairy desserts, syrups, candy, and ready-to-eat cereals for children.<sup>35</sup>

adults were French fries, soda, cheeseburger, baked hot apple pie, and Big Mac).

The most frequent items purchased for preschoolers were French fries, soda, chicken nuggets, cheeseburgers, and hamburgers. The most frequent items purchased for children were French fries, chicken nuggets, cheeseburgers, soda, and hot apple pie. The most frequent items purchased for adolescents were French fries, soda, cheeseburgers, chicken nuggets, and chocolate chip cookies.

29. Mozaffarian et al., *supra* note 7, at 2392.

30. Mary K. Hoy et al., *Sodium Intake of the U.S. Population: What We Eat in America*, 8 NAT'L HEALTH & NUTRITION EXAMINATION SURV. 1, 1 (2011).

31. *Id.* (recommending that sodium intake not exceed 2,300 mg a day for healthy persons over two years old; however, the average US intake is 3,300 mg a day); Ctrs. for Disease Control & Prevention, *Usual Sodium Intakes Compared with Current Dietary Guidelines – United States, 2005-2008*, 60 MORBIDITY & MORTALITY WKLY. REP. 1413 (2011).

32. U.S. Dep't of Agric., *Dietary Guidelines for Americans, 2010*, app. 7 (2011), available at <http://www.cnpp.usda.gov/Publications/DietaryGuidelines/2010/PolicyDoc/Appendices.pdf> (advising, in its latest dietary guidance for Americans, that added sugar and solid fat together should provide no more than thirteen percent of total calories for an average person requiring a 2,000 calorie diet); Rachel K. Johnson et al., *Dietary Sugars Intake and Cardiovascular Health: A Scientific Statement from the American Heart Association*, 120 CIRCULATION 1011, 1017 (2009) (suggesting that women should consume only 100 calories of added sugar daily, which amounts to approximately 6.6 % of total energy). Men should consume only 150 calories of added sugar, or approximately 7.5% of total calories per day. United States consumption levels are much higher. The average intake of added sugar is 14.5% of total energy for the entire population, and is much higher for large subsets of the population. Americans aged six to seventeen years old consume 17% of total energy intake from added sugar and added sugar represents 16.3% of the calories consumed by eighteen to thirty-four year olds. Jean A. Welsh et al., *Consumption of Added Sugars Is Decreasing in the United States*, 94 AM. J. CLINICAL NUTRITION 726, 733 (2011).

33. Jean A. Welsh et al., *Caloric Sweetener Consumption and Dyslipidemia Among US Adults*, 303 JAMA 1490, 1496 (2010); Jean A. Welsh et al., *Consumption of Added Sugars and Indicators of Cardiovascular Disease Risk Among US Adolescents*, 123 CIRCULATION 249, 254 (2011); Robert H. Lustig et al., *The Toxic Truth About Sugar*, 482 NATURE 27, 27 (2012).

34. Johnson et al., *supra* note 32, at 1015.

35. Welsh et al., *supra* note 32, at 726; Linda Van Horn et al., *Translation and Implementation of*

### C. Financial Toll

America's reliance on highly processed products for sustenance comes with major costs. The top four chronic diseases in the country—heart disease, stroke, cancer, and diabetes—are associated with obesity.<sup>36</sup> Chronic disease accounts for seventy-five percent of all health care spending and leads to seventy percent of all deaths in the United States.<sup>37</sup> Health care costs are rising at an unsustainable rate and society as a whole must bear the burden.

The estimated medical cost of obesity in the United States was \$147 billion in 2008.<sup>38</sup> But poor nutrition cost society more than just the cost of medical care; increased costs also result from lost production and increased disability. In 2010, the Society of Actuaries estimated that the total economic cost of overweight and obesity to the United States is actually closer to \$270 billion a year accounting for lost production, disability, and health care costs.<sup>39</sup> An estimated 8.5 percent of Medicare and 11.8 percent of Medicaid spending is attributable to obesity.<sup>40</sup> The government must address poor nutrition and obesity as a public health crisis, but also as a major drain on the country's finances.

### III. FEDERAL PREVENTION AND INDUSTRY PREEMPTION

America's consumption of highly processed food has taken an enormous toll on the nation's health. The government has a responsibility to act in light of the increased prevalence of chronic disease stemming from excessive consumption of these products. Segments of the government at the federal, state, and local levels have been working to address the obesity epidemic, but state and local actions are increasingly being thwarted by the food industry. Companies that produce, market, and sell highly processed foods benefit from current eating patterns in America. When state and local governments attempt to address the modern food environment the industry lobbies for legislation preempting these efforts.<sup>41</sup> Thus, Congressional intervention is necessary.

In the following sections, the paper reviews the dual problems that need to be addressed by Congress: first, the need for funding dedicated exclusively for obesity prevention and second, the industry's strategy to preempt state and local

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*Added Sugars Consumption Recommendations: A Conference Report from the American Heart Association Added Sugars Conference 2010*, 122 CIRCULATION 2470 (2010).

36. *Chronic Diseases and Health Promotion*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/chronicdisease/overview/index.htm> (last visited Jan 7, 2013).

37. *Rising Health Care Costs Are Unsustainable*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/workplacehealthpromotion/businesscase/reasons/rising.html> (last visited Jan 7, 2013).

38. Finkelstein et al., *supra* note 14, at 822.

39. DONALD F. BEHAN ET AL., SOCIETY OF ACTUARIES, OBESITY AND ITS RELATION TO MORTALITY AND MORBIDITY COSTS 59 (Dec. 2010).

40. Finkelstein et al., *supra* note 14, at 822.

41. Preemption is defined as a "doctrine adopted by [the United States] Supreme Court holding that certain matters are of such a national, as opposed to local, character that federal laws preempt or take precedence over state laws. As such, a state may not pass a law inconsistent with the federal law . . . . As applied to state action versus local action, "preemption" means that where legislature has adopted scheme for regulation of given subject, local legislative control over such phases of subject as are covered by state regulation ceases." BLACK'S LAW DICTIONARY (6th ed. 1991).

prevention measures. This paper goes on to propose a novel tax-and-spend strategy to fund public health interventions and address preemptive legislation.

### A. Prevention

The United States spent 2.7 trillion dollars on health care in 2011,<sup>42</sup> which means it spent a greater percentage of its GDP on health care than any other country,<sup>43</sup> but the United States simultaneously scores lower than its peer nations on life expectancy, infant mortality, and other indicators of population health.<sup>44</sup> The United States dedicates the majority of its health care dollars financing clinical care at the expense of population-based actions that would “influence health more profoundly than medical services.”<sup>45</sup> In 2009, only 3.1 percent of the total government spending on health was dedicated to population-based, or public health efforts.<sup>46</sup> The Institute of Medicine (IOM) analyzed the financial challenges facing the governmental public health infrastructure and found that public health was both insufficiently and dysfunctionally funded.<sup>47</sup>

The Patient Protection and Affordable Care Act (ACA), passed by Congress in 2010 and largely upheld by the Supreme Court in 2012, comprehensively reformed the national market for health-care products and services.<sup>48</sup> The ACA provides grants for a variety of health programs to state, local, and tribal health departments and, in some cases, non-profits and academic centers. For the first time, the federal government dedicated substantial funds toward prevention.<sup>49</sup> Through the ACA the White House established the National Prevention, Health Promotion, and Public Health Council which focuses on the public health goals of reducing tobacco use, sedentary behavior, and poor nutrition.<sup>50</sup>

Despite the amount of funding the ACA dedicated toward prevention, the American Public Health Association expressed concern that the prevention funds may be threatened.<sup>51</sup> Additionally, even if the funds do fully become available for prevention efforts, the Association stated:

The harsh reality is, however, that the amount of money authorized is not as large as the need. Tough choices lay ahead . . . [including] difficult decisions

42. Louise Radnofsky, *Health-Cost Pause Nears End*, WALL ST. J. (Jan. 7, 2013, 7:16 PM), <http://online.wsj.com/article/SB10001424127887323706704578227902858649758.html>.

43. Jason Kane, *Health Costs: How the U.S. Compares with Other Countries*, PBS NEWSHOUR (Oct. 22, 2012, 10:30 AM), <http://www.pbs.org/newshour/rundown/2012/10/health-costs-how-the-us-compares-with-other-countries.html>.

44. *Press Release: Reallocation of Health Dollars and New Sources of Funds Needed to Strengthen Nation’s Public Health Capacity*, INST. MED. (Apr. 10, 2012), <http://www.iom.edu/Reports/2012/For-the-Publics-Health-Investing-in-a-Healthier-Future/Press-Release.aspx>.

45. INST. OF MED., *FOR THE PUBLIC’S HEALTH: INVESTING IN A HEALTHIER FUTURE 1* (2012), available at <http://www.iom.edu/Reports/2012/For-the-Publics-Health-Investing-in-a-Healthier-Future.aspx> [hereinafter *FOR THE PUBLIC’S HEALTH*].

46. See *Press Release*, *supra* note 44.

47. *FOR THE PUBLIC’S HEALTH*, *supra* note 45, at 4.

48. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2609 (2012) (Ginsburg, J., concurring).

49. GAIL SHEARER, AM. PUB. HEALTH ASS’N, *PREVENTION PROVISIONS IN THE AFFORDABLE CARE ACT 2* (2010).

50. Exec. Order No. 13,544, 3 C.F.R. 33983 (2010).

51. SHEARER, *supra* note 49, at 3.

about how to allocate the funds among different public health initiatives (e.g., tobacco cessation, nutrition, physical activity), the public health infrastructure, research and tracking, and public health workforce training.<sup>52</sup>

In order to ensure that funding is available and specifically dedicated to prevention in the area of nutrition-related disease, a new funding strategy for this purpose alone is necessary. A new strategy is proposed in section IV. However, lack of funding is not the only barrier to preventative measures. The industry has employed a strategy to thwart state and local actions to improve health when it perceives that intervention would threaten business.

## B. Preemption's Impact on Prevention

Public health is traditionally an area of concern for state and local governments which are often in the best position to address public health inequities that result from community-based structures. State and local governments are routinely at the forefront of creating innovative measures to address products that burden public health. For example, now widely adopted nationally, the first indoor smoke-free laws were implemented by local governments in California in 1990.<sup>53</sup> The nation's first menu label law and first ban on trans fat use by restaurants originated in New York City in 2008.<sup>54</sup>

Because the industry is also aware that local jurisdictions effectively address public health problems, it often seeks to prevent local regulation.<sup>55</sup> Industries that make products with potential public health ramifications lobby federal and state legislators to urge the passage of preemptive laws which would withdraw the ability of lower levels of government to regulate their products. This strategy has been employed by industries seeking preemption of local regulation over tobacco,<sup>56</sup> firearms,<sup>57</sup> and products that cause environmental hazards<sup>58</sup> among other threats to public health.<sup>59</sup>

The food industry is responsible for recent pro-preemption campaigns to

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52. *Id.* at 13-14.

53. AMS. FOR NONSMOKERS' RIGHTS, CHRONOLOGICAL TABLE OF U.S. POPULATION PROTECTED BY 100% SMOKEFREE STATE OR LOCAL LAWS 1 (2012).

54. DEP'T OF HEALTH & MENTAL HYGIENE BD. OF HEALTH, NOTICE OF ADOPTION OF A RESOLUTION TO REPEAL AND REENACT § 81.50 OF THE NEW YORK CITY HEALTH CODE (2008).

55. Mark Pertschuk et al., *Assessing the Impact of Federal and State Preemption in Public Health: A Framework for Decision Makers*, J. PUB. HEALTH MGMT. PRACTICE 1-7 (2012).

56. See, e.g., AMS. FOR NONSMOKERS' RIGHTS, PREEMPTION: TOBACCO CONTROL'S #1 ENEMY 1 (1996); Jean C. O'Connor et al., *Preemption of Local Smoke-Free Air Ordinances: The Implications of Judicial Opinions for Meeting National Health Objectives*, 36 J.L. MED. & ETHICS 403, 403 (2008).

57. Eric Gorovitz et al., *Preemption or Prevention? Lessons from Efforts to Control Firearms, Alcohol, and Tobacco*, 19 J. PUB. HEALTH POL'Y 36, 36 (1998).

58. Betsy Z. Russell, *Oil/Gas Pre-Emption Bill Clears Senate Panel 6-3 After 3.5-Hour Hearing*, THE SPOKESMAN-REVIEW, Mar. 2, 2012, available at <http://www.spokesman.com/blogs/boise/2012/mar/02/oilgas-pre-emption-bill-clears-senate-panel-6-3-after-3-hour-hearing/> (reprinting John Miller, *Idaho Senate Panel Oks Gas-Industry-Backed Measure*, ASSOCIATED PRESS, Mar. 2, 2012). See also AM. BEVERAGE ASS'N, *Comments to the Proposed Rule for Arsenic Levels in Bottled Water*, Docket No. 2004N-0416 (Jan. 31, 2005).

59. Brian C. Rittmeyer, *Home Builders, Sellers Battle Pennsylvania's Fire Sprinkler Requirement*, PITTSBURGH TRIBUNE-REVIEW (Mar. 7, 2010), [http://triblive.com/x/valleynewsdispatch/s\\_670477.html#axzz2HmNRLaiX](http://triblive.com/x/valleynewsdispatch/s_670477.html#axzz2HmNRLaiX).



thwart public health efforts. For example, when menu labeling laws began passing around the country, the restaurant industry opposed the practice and started a concerted nationwide campaign.<sup>60</sup> As a result, Georgia<sup>61</sup> and Utah<sup>62</sup> passed laws preempting the authority of their respective political subdivisions to pass menu labeling laws.<sup>63</sup> Similarly, after Santa Clara, California passed an ordinance establishing nutrition criteria for a restaurant meal accompanied by a children's toy, the restaurant industry worked to preempt similar laws nationwide.<sup>64</sup> It was successful in Arizona and Florida, both of which preempted their local subdivisions from doing the same.<sup>65</sup>

Some preemptive laws are even more detrimental to public health than the issue-specific ones mentioned above. Utah<sup>66</sup> and Ohio<sup>67</sup> passed much more broad-reaching laws preempting local governments from addressing pressing public health matters. The Ohio law is particularly troubling because it stemmed from Cleveland's passage of a proven public health measure, a trans fat ban, for its city.<sup>68</sup> The Ohio Restaurant Association fought Cleveland's law by lobbying the state legislature to prohibit such local action. The Association was successful and the legislature amended the state budget to prohibit all municipalities from regulating the ingredients restaurants use to prepare food, a matter traditionally within local control.<sup>69</sup>

Industry has more resources than public health organizations and has successfully lobbied legislators to pass preemptive laws that protect business at the expense of the public. Therefore, preemption is a direct threat to public health innovation and protection.<sup>70</sup>

60. KATE ARMSTRONG, TOBACCO L. CTR., MENU LABELING LEGISLATION: OPTIONS FOR REQUIRING THE DISCLOSURE OF NUTRITIONAL INFORMATION IN RESTAURANTS 5-6 (2008).

61. *See id.* at 9-10.

62. Restaurant Nutrition Labeling Act of 2009, UTAH CODE ANN. §§ 10-8-44.5, 17-50-327 (West 2012).

63. A federal law eventually passed and the National Restaurant Association successfully urged for the inclusion of a preemption provision. *See ARMSTRONG, supra* note 60, at 10. The franchise industry characterized the preemption provision as "good news" and "the one bright spot of the bill." *Pre-emption of State and Local Menu Labeling Laws Good News for Franchise Restaurants*, 6 IFA INSIDER 2 (Apr. 5, 2010), available at <http://www.franchise.org/Franchise-Insider-Main.aspx?id=50424>.

64. Sharon Bernstein, *Fast-Food Industry Is Quietly Defeating Happy Meal Bans*, L.A. TIMES (May 18, 2011), <http://articles.latimes.com/2011/may/18/business/la-fi-happy-meal-backlash-20110518>.

65. ARIZ. REV. STAT. ANN. § 44-1379 (2011); FLA. STAT. § 509.032 (2011).

66. Local Health Regulation Act of 2012, UTAH CODE ANN. § 26-1-23 (West 2012).

67. *See* Stephanie Strom, *Local Laws Fighting Fat Under Siege*, N.Y. TIMES (June 30, 2011), <http://www.nytimes.com/2011/07/01/business/01obese.html?pagewanted=all>.

68. Joe Palazzolo, *Judge Gets Behind Cleveland's Trans Fat Ban*, WALL ST. J. (June 13, 2012), <http://blogs.wsj.com/law/2012/06/13/judge-gets-behind-clevelands-trans-fat-ban/>.

69. Cleveland sued the state to prevent enforcement of the law and a state judge found in favor of Cleveland. Dan Levine, *Judge Sides with Cleveland in Its Trans Fat Ban*, CHI. TRIB. (June 12, 2012), <http://www.chicagotribune.com/news/sns-rt-us-usa-food-ohiobre85c00h-20120612,0,3760756.story>. Ohio is appealing the judgment. Appeal, *City of Cleveland v. Ohio*, CA-12-098616 (Cuyahoga County Court of Common Pleas June 28, 2012).

70. *See Former White House Staffer Fights Obama Obesity Efforts*, NAT'L J. (July 10, 2011), <http://www.nationaljournal.com/healthcare/former-white-house-staffer-fights-obama-obesity-efforts-20110710>. The Sensible Food Policy Coalition includes General Mills, Kellogg, PepsiCo, and

#### IV. "TAX AND SPEND" PROPOSAL: A CONDITIONAL FUNDING STRATEGY

Against the background of scant resources allocated to health agencies for obesity prevention efforts and the food industry's successful efforts to thwart public health measures, government intervention is needed. The method proposed in this section is for the federal government to institute a manufacturers' excise tax on the manufacturers, producers, and importers of highly processed food and beverage items. This tax proposal would raise revenue to be earmarked for conditional funding to state, tribal, and local governments, health agencies, and certain non-government organizations to address nutrition and food-related disparities. The conditional grant is specifically geared toward altering the modern food environment and addressing industry efforts to pass preemptive laws. The proposed strategies are largely based on the Institute of Medicine's report on accelerating progress in obesity prevention with one significant addition to address preemptive laws.

##### A. The Tax

Article I of the U.S. Constitution grants Congress the power to "lay and collect taxes, duties, imposts and excises to . . . provide for the . . . general welfare of the United States."<sup>71</sup> The "tax and spend" proposal here involves an excise tax, which is a tax "levied upon the manufacture, sale, or consumption of commodities within the country."<sup>72</sup> This tax is a manufacturers' excise tax, which is specifically levied on the manufacturers, producers, and importers (collectively manufacturers) of the "taxable article."<sup>73</sup> Here, the taxable articles are highly processed foods and beverages that meet a definition established to include edible and potable items that have undergone secondary processing to make them durable and ready-to-consume or ready-to-heat and eat.<sup>74</sup> This will capture the same products responsible for poor health outcomes and weight gain.<sup>75</sup>

The Public Health Security and Bioterrorism Preparedness and Response Act of 2002 requires owners, operators, and agents of a facility engaged in the manufacturing, processing, packing, or holding of food for consumption in the United States to register with the Food and Drug Administration (FDA).<sup>76</sup> Registration is required for domestic and foreign facilities, whether or not the

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Time Warner. Disclosure records show they spent 6.6 million dollars on lobbying in the first quarter of 2011. Nancy Watzman, *Food and Media Companies Lobby to Weaken Guidelines on Marketing Food to Children*, SUNLIGHT FOUNDATION, (Dec. 5, 2011, 11:38 AM), [http://reporting.sunlightfoundation.com/2011/Food\\_and\\_media\\_companies\\_lobby/](http://reporting.sunlightfoundation.com/2011/Food_and_media_companies_lobby/). Other lobbying expenditure data for 2011 reveals that Coke reported spending \$4,740,000 in lobbying and PepsiCo spent \$2,610,000. *Id.*

71. U.S. CONST. art I, § 8.

72. U.S. MASTER EXCISE TAX GUIDE 26 (6th ed. 2008).

73. *See United States v. Kahriger*, 345 U.S. 22, 28 (1953) (holding that Congress cannot tax exports).

74. *See Monteiro et al.*, *supra* note 9, at 7 (defining ultra-processed food as "the processing of a mix of ingredients and foodstuffs in order to create durable, accessible, convenient and palatable ready-to-eat or ready-to-heat food products liable to be consumed as snacks or to replace home prepared dishes").

75. *See, e.g., Asfaw*, *supra* note 7, at 186.

76. 21 C.F.R. § 1.225 (2008).

food from the facility enters interstate commerce.<sup>77</sup> Each registrant is required to list the applicable food product categories for which they are responsible and the federal regulations already enumerate the taxable articles as required for disclosure purposes.<sup>78</sup> Thus, manufacturers of the taxable items are currently required to register with the FDA and list the taxable items. Under the tax proposal here, Congress would direct the FDA to identify the registered facilities that manufacture the taxable articles and these manufacturers would be subject to the tax.<sup>79</sup> Congress would amend the Internal Revenue Code and direct the Internal Revenue Service to collect the excise tax from these manufacturers.

The proposed tax would not initially be high enough to deter consumption or to replace a tax policy with that intent.<sup>80</sup> Although consumption of highly processed food is problematic from a public health standpoint, current income and access disparities in the United States would likely make taxing these products to deter consumption excessively regressive at this point in time.<sup>81</sup> As discussed below, once the grantees successfully alter the local food environment, the tax may be increased to discourage consumption of the taxable articles.

Congress' power to tax is quite broad. The Supreme Court has said that, "the constitutional restraints on taxing are few," explaining that federal excise taxes are valid, even if they discourage or deter the activities taxed, if the revenue is negligible, or if they have a regulatory effect.<sup>82</sup> The proposed tax is a standard revenue producing measure.<sup>83</sup>

The proposed tax would be instituted to raise revenue to provide for the general welfare of the country.<sup>84</sup> The federal government institutes a wide range

77. *Id.* Facilities exempt under the Bioterrorism Act include those not applicable for this tax: farms, retail and nonprofit food establishments, restaurants, fishing vessels and USDA regulated facilities that produce meat, poultry and eggs. 21 C.F.R. § 1.226 (2008).

78. See 21 C.F.R. § 1.232 (2008) (requiring registrants to list applicable food product categories as identified in 21 C.F.R. § 170.3). See also 21 C.F.R. § 170.3 (2008) (listing 43 general food categories that group specific related foods together including for example: (n)(1) Baked goods, (n)(3) Non-alcoholic beverages, including soft drinks, (n)(20) Frozen dairy desserts (n)(37) Snack foods, including chips, pretzels, (n)(38) Soft candy).

79. See 21 C.F.R. § 1.240 (2008) (stating that registrants must comply with "any other Federal, State, or local registration requirements that apply to your facility"). Note that Congress' power to tax does not seek to be valid even if "collection of the tax also is difficult." *Kahriger*, 345 U.S. at 28.

80. This is unlike the purpose of the policy proposal to institute an excise tax on sugary beverages. See Kelly D. Brownell & Thomas R. Frieden, *Ounces of Prevention – The Public Policy Case for Taxes on Sugared Beverages*, 360 NEW ENG. J. MED. 1805, 1805 (2009). The very purpose of such a tax would be to fundamentally increase the price of the product to deter consumption because substitutes are usually available and water can be free. Excise taxes are valid even if they are instituted for regulatory purposes or to deter or discourage behavior. *Kahriger*, 345 U.S. at 28. This is the purpose behind the proposed sugary beverage taxes. See also *Sebelius*, 132 S.Ct. at 2596 ("But taxes that seek to influence conduct are nothing new.").

81. Yousefian et al., *supra* note 21, at 10.

82. *Kahriger*, 345 U.S. at 28 (listing the constitutional restraints as follows: "Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity.").

83. Jennifer Pomeranz, *Taxing Food and Beverage Products: A Public Health Perspective and a New Strategy for Prevention*, U. MICH. J.L. REFORM (forthcoming 2013).

84. *United States v. Butler*, 297 U.S. 1, 65 (1936) ("Congress is expressly empowered to lay taxes to provide for the general welfare.").

of excise taxes on items and producers of items that are deemed “inimical to the public welfare.”<sup>85</sup> For example, there are federal excise taxes on other products associated with poor health outcomes, such as alcohol and tobacco, and on businesses responsible for environmental degradation, such as manufacturers of automobiles that do not meet fuel economy standards established by the Environmental Protection Agency.<sup>86</sup>

Excise taxes are also the most amenable to earmarking and federal excise taxes are routinely earmarked for a specific federal trust fund. This taxing method acts as a significant source of revenue for the beneficiary of the fund.<sup>87</sup> For example, a manufacturers’ excise tax on coal is placed in the Black Lung Disability Benefits Trust Fund to finance benefits for miners.<sup>88</sup> The proposed tax would be earmarked for an “Obesity Prevention Fund.”

## B. Conditional Funding

The tax plan delineated above provides a revenue stream for a conditional funding strategy to provide grants to qualifying state, tribal, and local governments and non-government organizations. Under its powers enumerated in the Spending Clause, Congress may attach conditions to the receipt of federal funds to accomplish federal policy objectives.<sup>89</sup> The Supreme Court has characterized this spending arrangement as a contractual-type relationship.<sup>90</sup> One of the more well-known conditional funding relationships is one upheld by the Supreme Court in 1987, whereby the federal government conditioned the receipt of federal highway funds to the states upon passage of a law that institutes a minimum alcohol drinking age of twenty-one years old.<sup>91</sup> All fifty states have now agreed to this arrangement.

### 1. Grant Requirements

Under the proposal, Congress would dedicate the funding to an Obesity Prevention Fund to be administered by the Centers of Disease Control (CDC). The CDC has a long history of managing grant opportunities such as this one,<sup>92</sup> pursuant to which it monitors and evaluates the implementation and efficacy of the funded strategy. In 2011, Congress passed the Consolidated Appropriations

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85. *Kahriger*, 345 U.S. at 28.

86. U.S. MASTER EXCISE TAX GUIDE, *supra* note 72, at 135, 227–36.

87. *Id.* at 27.

88. *Id.* at 138.

89. *South Dakota v. Dole*, 483 U.S. 203, 206 (1987).

90. *Sebelius*, 132 S.Ct. at 2596 (“We have repeatedly characterized . . . Spending Clause legislation as ‘much in the nature of a contract.’”) (quoting *Barnes v. Gorman*, 536 U.S. 181, 186 (2002)); *see also* *Printz v. United States*, 521 U.S. 898, 936 (O’Connor J. concurring) (describing the conditional funding under 23 U.S.C. § 402 as a contractual relationship between Congress and the states).

91. *Dole*, 483 U.S. at 207–08.

92. *See, e.g., Community Transformation Grant*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/communitytransformation/funds/index.htm> (last update Oct.11, 2012); PPHF 2012: *Community Transformation Grants - Small Communities Programs financed solely by 2012 Prevention and Public Health Funds*, GRANTS.GOV, <http://www.grants.gov/search/search.dojsessionid=RgW1PFPPQshPqDGLW5sBW8ZQImTpXQwjMLllqTy7zJdwfc1QLpXP!-1021879135?oppId=173114&mode=VIEW> [hereinafter PPHF 2012].

Act of 2012, which establishes conditions on funding for the Department of Health and Human Services.<sup>93</sup> The CDC is a subdivision of this department. In this Act, Congress passed a new section to the Anti-Lobbying provision, which prohibits the use of funds for “any activity to advocate or promote any proposed, pending or future Federal, State or local tax increase, or any proposed, pending, or future requirement or restriction on any legal consumer product, including its sale or marketing.”<sup>94</sup> This has resulted in a chilling effect on all speech by the CDC and its grantees, and would thus prevent the execution of certain prerequisites for the grant opportunity. Therefore, this provision must be repealed prior to enactment of the proposed funding strategy.

The potential grantees of the proposed conditional funding strategy are state and local governments, agencies, tribes, territories, and non-government organizations. Health agencies would likely be the primary recipients of the funds. The IOM has found that public health agencies are severely underfunded.<sup>95</sup> Some state public health agencies have not made the prevention of obesity and related chronic diseases a priority.<sup>96</sup> This is likely due to a lack of resources and a simultaneous dedication of efforts to other public health issues. For example, since September 11, 2001, significant federal funding for public health has been devoted to bioterrorism preparedness.<sup>97</sup>

The federal government recently established two funding opportunities to be administered by the CDC that include obesity related prevention as one of several public health goals.<sup>98</sup> The Obesity Prevention Fund would be solely for obesity prevention through the implementation of specific strategies in a prescribed manner. By funding state and local health agencies directly for obesity-prevention work, the government would give them the ability to address the problem to the extent necessary to further change.<sup>99</sup> The CDC would grant funding to qualifying grantees in locations with a disproportionate amount of health disparities, obesity and diabetes. In order to qualify, the grantee must be

93. Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, 125 Stat. 1069 (2011).

94. *Id.* at § 503.

95. FOR THE PUBLIC’S HEALTH, *supra* note 45, at 4.

96. See Kusuma Madamala et al., *Structure and Functions of State Public Health Agencies in 2007*, 101 AM. J. PUBLIC HEALTH 1179, 1182 (2011) (indicating their major responsibilities in 2001 and 2007 included: institutional certifying for federal reimbursement, state mental health, state tuberculosis hospitals, medical examiners, state mental institutions/hospitals, health insurance regulation, disability determination, state health planning and development, minority health, rural health, correctional health, and public health pharmacies). See also Jennifer L. Pomeranz, *The Unique Authority of State and Local Health Departments to Address Obesity*, 101 AM. J. PUBLIC HEALTH 1192, 1192 (2011).

97. COURTNEY M. PERLINO, THE PUBLIC HEALTH WORKFORCE SHORTAGE 10 (Sept. 2006).

98. *Community Transformation Grants*, *supra* note 92. The first was awarded to state and local government agencies, tribes and territories, and state and local non-profit organizations, in districts serving more than 500,000. The second round of funding was for small communities of up to 500,000 in neighborhoods, school districts, villages, towns, cities and counties. These grants focused on tobacco, active living, healthy eating, high blood pressure and high cholesterol. See also PPHF 2012, *supra* note 92. These grants focused on the prevention of heart attacks, stroke, cancer, diabetes and other leading chronic diseases. *Id.*

99. Jamie M. Cousins et. al., *The Role of State Health Departments in Supporting Community-Based Obesity Prevention*, 8 PREVENTING CHRONIC DISEASE A87 (2011). See generally Madamala, et al., *supra* note 96 (finding when grants and other funding sources become available, the agencies were able to focus on prevention in the area specified).

willing to enact the enumerated policy changes to impact a substantial number of people.<sup>100</sup> Receipt of the funds would be conditioned on grantees enacting these policies or enacting legislation or regulation (as is applicable) according to the criteria discussed below.

The IOM issued a report in 2012 that provides key recommendations for strategies to accelerate progress in obesity prevention.<sup>101</sup> The committee identified almost 800 recommendations and assessed the potential of each to achieve this goal, including those with the broadest reach and greatest potential for impact based on the best scientific evidence.<sup>102</sup> These recommendations target several areas of the food environment and suggest laws and policies that can be undertaken by state and local governments and non-profit organizations.

Six strategies will be funded through the Obesity Prevention Fund. The first five strategies are substantially synthesized from the IOM recommendations and have been successfully and legally implemented by communities on a small scale. The sixth strategy is an innovative method to address state-wide obesity prevention efforts.

The CDC will put out an announcement for the funding opportunity to notify qualifying grantees to apply for the funds.<sup>103</sup> Grantees will choose the strategies they will undertake according to the conditions set forth below. The CDC will administer the grant and monitor and evaluate grantees compliance with the grant conditions.<sup>104</sup>

#### a. Obesity Prevention Fund Required Strategies for Grantees

1. Create a food and beverage environment that ensures healthy food and beverage options are the affordable and easy choice.<sup>105</sup>
  - a. Make clean, potable water readily available.

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100. The definitions employed by the CDC for other grants would be used here:

Governmental agencies and non-governmental organizations. This includes, but is not limited to, school districts, local housing authorities, local transportation authorities, health departments, planning and economic development agencies, non-profit and community based organizations, area aging agencies, and cooperative extension agencies (educational programs within land grant universities). Federally recognized American Indian Tribes and Alaska Native Villages Tribal organizations, which include Intertribal Councils and American Indian Health Boards which meet the definition set forth in 25 U.S.C. § 1603(26), 25 U.S.C. § 450(b) and are under a resolution that such organizations, councils, and boards represent the underlying tribes. Urban Indian Health Programs, tribal and intertribal consortia that meet the definition set forth in 25 U.S.C. § 1603(29) (defines Urban Indian Organization), 25 U.S.C. § 1603(26) and 25 U.S.C. § 450(b) (defines Tribal Organization), and 25 U.S.C. § 1603(25) (defines tribal health program).

See PPHF 2012, *supra* note 92.

101. DAN GLICKMAN ET AL., ACCELERATING PROGRESS IN OBESITY PREVENTION: SOLVING THE WEIGHT OF THE NATION (2012).

102. *Id.* at 3.

103. See, e.g., *Grants - Funding Opportunity Announcements*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/od/pgo/funding/grants/foamain.shtm> (last visited Mar. 18, 2013).

104. For an explanation of the CDC's management practices for federal grants, see *Prevention and Public Health Fund (PPHF) Strategy and Implementation Office*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/fmo/topic/PPHF/index.html> (last visited Mar. 18, 2013).

105. GLICKMAN ET AL., *supra* note 101, at 430.

- b. All state and local government-owned and operated buildings, worksites, facilities, and other locations where foods and beverages are sold or served to workers or the public (including cafeterias, stores, vending machines, and concession stands) adopt and implement strong nutritional standards and an enforcement policy that ensures that the healthy options are available and competitively priced.
  - c. States and localities utilize financial incentives, such as flexible financing or tax credits, streamlined permitting processes, and zoning strategies, to enhance the quality of local food environments, particularly in low-income communities. These efforts should include encouraging or attracting retailers and distributors of healthy food (e.g., supermarkets) to locate in underserved areas.
2. Create a food and beverage environment that discourages unhealthy options.<sup>106</sup>
    - a. Implement fiscal policies aimed at reducing over-consumption of sugar-sweetened beverages through substantial and specific excise taxes on sugar-sweetened beverages with the revenues being dedicated to obesity prevention programs.
    - b. States and localities utilize conditional licensing requirements and zoning strategies to limit the concentration of unhealthy food venues (for example, fast-food restaurants and convenience stores), particularly in low-income communities.
    - c. Enforce the federal menu labeling law passed in 2010 as part of the Affordable Care Act and codified in 21 U.S.C. § 343(q)(5)(H).
  3. Make schools (K-12) and child-care settings a national focal point for nutrition education and obesity prevention.<sup>107</sup>
    - a. Government agencies (state, local, and school district) ensure strong nutritional standards for all foods and beverages sold or provided through schools, including making clean, potable water available and prohibiting access to sugar-sweetened beverages.
    - b. State legislatures, school boards, and departments of education adopt, require, and financially support K-12 standards for food and nutrition education curriculum (including cooking and budgeting skills)<sup>108</sup> based on USDA guidance; and establish requirements for training teachers in effectively incorporating nutrition education into their curricula.
    - c. State legislatures, school boards, and departments of education develop school district policies (including wellness policies for districts participating in federal child nutrition programs) and related regulations that include nutrition standards for foods sold or served outside of the federal programs (including competitive foods and foods sold during fundraisers and sporting events) that are aligned with guidance

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106. *Id.*

107. *See id.* at 430, 441.

108. *See Cooking Classes 'A Boost to Healthy Diet'*, BBC NEWS (Feb. 16, 2013), <http://www.bbc.co.uk/news/health-21478156> (describing how parents who took government-funded cooking courses showed increased confidence in the kitchen).

on optimal nutrition.

- d. State and local departments of education work with local education agency wellness policies to link changes in the meals provided through child nutrition services with the food literacy and nutrition education curriculum to the extent possible.
- e. Ban all food marketing on all public school facilities, including schools, campuses, fields, and buses or restrict marketing to only the foods sold according to strong nutritional guidelines.<sup>109</sup> Only permit grandfathering of very large equipment (such as scoreboards) but require branding to be covered.
- f. Funding may be provided for physical activity, only if school-based nutritional requirements are met.<sup>110</sup> Research shows that increased intake of food, not lack of exercise, is responsible for the increased incidence and prevalence of overweight and obesity.<sup>111</sup> Physical exercise cannot burn the amount of calories consumed through a diet consisting of highly processed foods.<sup>112</sup> Studies additionally reveal that the rate of physical activity among United States youth has not significantly decreased while youth obesity rates have increased.<sup>113</sup> However, physical activity has numerous other health benefits.<sup>114</sup> Therefore, funding will be provided to local education agencies to enact

109. INST. OF MED., LOCAL GOVERNMENT ACTIONS TO PREVENT CHILDHOOD OBESITY 5, (2009). *See, e.g.,* ME. REV. STAT. TIT. 20-A, § 6662 (2011). Schools are nonpublic fora and not subject to the same First Amendment challenges as bans or restrictions on marketing in the general community. *DiLoreto v. Downey Unified Sch. Dist.*, 196 F.3d 958, 965 (9th Cir. 1999).

110. Studies support the theory that the food environment plays a larger role in obesity outcomes than physical activity. *See supra* Section II.A. Because encouraging physical activity is important, the grant would provide funding for increased opportunities for meaningful physical activity in the school environment for schools that adequately address the school food environment.

111. *See supra* Section III.

112. HERMAN PONTZER ET AL., HUNTER-GATHERER ENERGETICS AND HUMAN OBESITY, PLOS ONE 40503 (2012) available at <http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0040503#>.

Our results indicate that active, 'traditional' lifestyles may not protect against obesity if diets change to promote increased caloric consumption. Thus, efforts to supplement diets of healthy populations in developing regions must avoid inundating these individuals with highly-processed, energy-dense but nutrient-poor foods. Since energy throughput in these populations is unlikely to burn the extra calories provided, such efforts may unintentionally increase the incidence of excess adiposity and associated metabolic complications such as insulin resistance.

*Id.*

113. *See* S. Li, Margarita S. Treuth & Youfa Wang, *How Active Are American Adolescents and Have They Become Less Active?*, 11 OBESITY REVS. 847, 855 (2010); Jean Adams, *Trends in Physical Activity and Inactivity Amongst US 14–18 Year Olds by Gender, School Grade and Race, 1993–2003: Evidence from the Youth Risk Behavior Survey*, 6 BIOMED CENT. PUB. HEALTH 57, 62 (2006).

114. Physical activity has a number of health benefits including increased mental, bone, and joint health and decreased risk of chronic diseases. Li, *supra* note 113, at 855. Physical inactivity is linked to substantial public health problems worldwide. One study found that in 2008, physical inactivity caused an estimated six percent increase in burden of disease from coronary heart disease, type 2 diabetes, breast cancer, and colon cancer; and that inactivity causes more than 57 million deaths worldwide. I-Min Lee et al., *Effect of Physical Inactivity on Major Non-Communicable Diseases Worldwide: An Analysis of Burden of Disease and Life Expectancy*, 380 LANCET 1553, 1553 (2012). These facts do not implicate the lack of physical activity as the primary driver of obesity. *Id.*



- policies with appropriate funding to ensure the provision of daily quality physical education at school for all students in grades K-12; adopt requirements that include opportunities for daily physical activity outside of physical education, such as intramural sports and activity programs, after-school physical activity programming, and integration of physical activity into curricula lesson plans.
4. Collaborate across agencies to ensure health is considered in all policies, also known as: Health in All Policies. This strategy recognizes that no single entity can address obesity alone. Cross-sectoral partnerships are needed to change communities and improve population health.<sup>115</sup>
    - a. Health agencies work collaboratively with other agencies by using Obesity Prevention Funding to fund cross-agency solutions to ensure health is considered in other policies.<sup>116</sup> Distribution is based on creating transparent partnerships and a process for collaboration.
      - i. Example: Work with urban planning and transportation agencies to increase public transportation to provide low-income communities and senior citizens with access to food markets, employment opportunities, and spaces to recreate, and to address environmental pollutants due to automobiles, and encourage walking to/from public transportation.<sup>117</sup>
    - b. States and localities create cross-agency teams to analyze and streamline regulatory processes and create tax incentives for retailing of healthy foods in underserved neighborhoods; states and localities create cross-sectoral collaborations among the food and beverage industry, philanthropy, the finance and banking sector, the real estate sector, and the community to develop private funding to facilitate the development of healthy food retailing in underserved areas.
  5. Encourage communities to organize for change through comprehensive nutrition education and social marketing programs. Strategy five may not be enacted alone, but rather must be enacted with strategies one through four

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115. Stephanie B. Coursey Bailey, *Focusing on Solid Partnerships Across Multiple Sectors for Population Health Improvement*, 7 PREVENTING CHRONIC DISEASE A115, A115 (2010). See also Ctrs. for Disease Control & Prevention, *Recommended Community Strategies and Measurements to Prevent Obesity in the United States*, 58 MORBIDITY & MORTALITY WKLY. REP. 1 (2009), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5807a1.htm> (encouraging local governments to participate in coalitions or partnerships); Cousins et al., *supra* note 99, at A93 (“Addressing obesity is complex, requiring expertise in nutrition, physical activity, urban planning, sustainable food systems, school health, and other disciplines.”). See generally GLICKMAN ET AL., *supra* note 101.

116. WORLD HEALTH ORG., GOVERNMENT OF SOUTH AUSTRALIA, ADELAIDE STATEMENT ON HEALTH IN ALL POLICIES (2010).

117. Ctrs. for Disease Control & Prevention, *supra* note 115; NAT’L REACH COAL., CREATING MORE EQUITY IN HEALTH: A COMPREHENSIVE APPROACH TO HEALTH REFORM (July 2008). Laws and policies that increase access to public transportation also improve economic opportunities in distressed communities and increase the ability for those in lower socioeconomic areas to access grocery stores, community facilities and employment opportunities. Robert J. Stokes, John MacDonald, & Greg Ridgeway, *Estimating the Effects of Light Rail Transit on Health Care Costs*, 14 HEALTH PLACE 45, 55 (2008) (benefiting (1) property development activities around planned transit stations; (2) decreased air pollution; and (3) potential health benefits related to increased exercise for residents living in the surrounding communities).

above.<sup>118</sup> The nutrition education and social marketing campaigns can be incorporated into the plan as one piece of a broader program based on these recommendations, but potential grantees cannot rely on this strategy alone.<sup>119</sup> It is an axiom of public health policy that education alone cannot change behavior without making the conditions possible for people to make the behavior change. Groups that oppose government interventions in the area of food and nutrition often point to educational efforts as sufficient to address the problem.<sup>120</sup> It is necessary, for example, that food labels are clear, accurate, and not misleading to provide factual information to consumers. Education cannot correct the access and price disparities that ultimately influence consumers' ability to purchase healthy items. It is not enough to have the knowledge of what is healthy without the resources to obtain healthy foods and beverages. Knowledge about the nutritional qualities of food has not been shown to be a primary driver to behavior change.<sup>121</sup>

- a. Funding for development of a sustained social marketing program on topics related to food, nutrition, and physical activity. This program should encompass carefully targeted, culturally appropriate messages aimed at specific audiences (for example, teens or mothers) with information or clear behavior-change goals (such as reduce consumption of sugar-sweetened beverages) or shed light on industry-wide practices aimed at the community (such as targeted marketing to specific ethnic groups).<sup>122</sup>

#### 6. Disseminate information about the Obesity Prevention Fund: a government

118. See GLICKMAN ET AL., *supra* note 101, at 435. See also INST. OF MED., *supra* note 109, at 4 (2009).

119. *Rust v. Sullivan*, 500 U.S. 173, 193 (1991) ("The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way."). Of course nothing in this prohibition would prevent grantees from using their own funds for larger education movements. See *id.* at 197.

120. See, e.g., *News Releases & Statements: Beverage Industry Addresses Sugar-Sweetened Beverages and Obesity Articles in the New England Journal of Medicine*, AM. BEVERAGE ASS'N (Sept. 21, 2012), <http://www.ameribev.org/news-media/news-releases-statements/more/285/> ("Taxes, bans and other forms of government regulation are not the solution to childhood obesity - nutrition education, information and support for physical education are.").

121. Yousefian et al., *supra* note 21, at 2 (finding that respondents living in rural food deserts were knowledgeable about which food was in fact healthy, i.e., unprocessed whole foods including fresh and frozen fruit and vegetables, lean meat, poultry, fish, low fat dairy, but they simply could not afford to purchase them).

122. It is not likely that government would encourage speech targeting a specific brand or company given, for example, its reluctance to do so under the Supplemental Nutrition Assistance Program Education program. JEROLD MANDE, U.S. DEP'T OF AGRIC., PRESENTATION AT THE YALE RUDD CENTER FOR FOOD POLICY & OBESITY (Aug. 6, 2012). The social marketing campaign might be about industry-wide practices. See, e.g., Karlene Lukovitz, *Coke Effort Encourages African-American Teens*, MARKETING DAILY, Feb. 2, 2012, available at <http://www.mediapost.com/publications/article/167017/coke-effort-encourages-african-american-teens.html?edition=42973>. See also Berkeley Media Studies Group, *The Soda and Fast Food Industries Target Their Marketing Towards Mothers of Color*, Dec. 1, 2010, available at <http://www.bmsg.org/node/274>; Piñata Delivers Hits for Tampico, HISPANIC MARKET WKLY., Dec. 20, 2012 ("Social media and Hispanic traditions came together in Tampico Beverages' latest Latino campaign when the brand turned to a piñata in order to drive direct interaction with consumers . . . Over the last two years, Tampico has intensified its digital and social media activations targeting [United States] Hispanics.").

education program triggered by state preemption of strategies one through five. This is a government-generated informational message to inform communities about the Obesity Prevention Fund. This strategy is triggered when a state legislature preempts the ability of a potential grantee in the state from enacting any of the aforementioned strategies in their community. Funding will be provided to a non-governmental organization to target the community with an informational message about the state legislature's preemptive action.

b. Details of the Anti-preemption Strategy Number Six

The Obesity Prevention Fund can be used for strategy six's information dispersion if specific conditions exist. This occurs when a state legislature preempts the ability of local governments or state or local health agencies to participate in any portion of the funding arrangement. The purpose would be to educate citizens on the conditional funding opportunity in these locations. Under this section, the federal government would offer funding to a non-government organization within the jurisdiction when the state government has preempted the ability of an otherwise-qualifying grantee from carrying out the funding opportunity in any of the specified areas. The funding would be conditioned on the grantee's agreement to educate citizens on two points: first, the existence of grant funding opportunities for the community, and second, that the state preempted a potential government grantee from accepting the funding. This section would not apply to *state or local decisions to reject* the conditional funding opportunity. It would only apply if a state legislature preempts the ability of local governments or state or local health agencies to enact laws or regulations to carry out any of the delineated interventions. The federal government would prescribe the message to be transmitted by the non-government organization.<sup>123</sup>

Under the anti-preemption strategy, Congress would be seeking to educate citizens about its program and the availability of funds for public health prevention programs.<sup>124</sup> This would provide citizens with factual information so they could decide if this is a beneficial policy for their community and determine for themselves if their elected officials have their best interests in mind. Without

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123. The non-government organizations may be 501(c)(3) non-profits, which are considered tax exempt as long as they do not violate certain prohibitions including attempting to influence legislation or participating in political campaigns. 26 U.S.C. § 501(c)(3) (2011). Nonprofits can engage in political speech but they still must comply with IRS rules which provide that they may engage in non-partisan activities such as non-partisan voter education, as long as the activity fulfills the tax exempt purposes. Voter education on federal funding opportunities and the status of funding in their state would not be prohibited. The IRS permits nonprofits to engage in voter education that includes a compilation of voting records of legislators as long as it does not imply approval or disapproval of any member or their voting record. Organizations would need to determine the extent they can do this within the bounds of the law and their own internal protocols. *See generally* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

124. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 578–88 (1998).

Finally, although the *First Amendment* certainly has application in the subsidy context, we note that the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake. So long as legislation does not infringe on other constitutionally protected rights, Congress has wide latitude to set spending priorities.

this provision in place, such information might not make it to the general public. For example, after the Supreme Court upheld the ACA, the Governor of Florida publicized his decision not to take the Medicaid expansion funds, making national news.<sup>125</sup> This is the conditional funding arrangement at its best: a state exercising its right to forgo funds and notifying its citizens of the elected officials' choice. More commonly, however, government operates less publicly and preemption provisions are passed that thwart a health agency or local government's ability to address a public health matter. This occurs relatively unacknowledged.<sup>126</sup> Under the Obesity Prevention Fund, the federal government would be taking into account this possibility and using its own speech to notify the citizens of the funding opportunity and their state legislature's decision to preempt acceptance of funds.

## 2. Constitutionality

The Supreme Court has held that the constitutionality of a conditional funding arrangement depends on it meeting four specific criteria, all of which are met by this plan. First, the exercise of spending must be in pursuit of the general welfare.<sup>127</sup> The Supreme Court defers to the judgment of Congress regarding whether an expenditure serves the general welfare because the concept of welfare "is shaped by Congress."<sup>128</sup> Here, the provision proposes to fund public health prevention measures. The Supreme Court has upheld the constitutionality of conditional funding arrangements for public health in the past, including its' most recent decision on the ACA.<sup>129</sup> It would be difficult to argue that this conditional funding program for public health and obesity prevention does not similarly serve the general welfare.

Second, states must be given a "legitimate choice" whether to accept the funds.<sup>130</sup> This has two implications. First, Congress must be unambiguous about the conditions so grantees can "exercise their choice knowingly, cognizant of the consequences of participation."<sup>131</sup> The conditions of this proposed grant are transparent and potential grantees would be able to accept or reject funds knowingly. The potential grantees will be required to undertake the strategies discussed above in exchange for the funding to successfully accomplish the public health goals. Congress will develop the specifics of the proposal according to historically approved conditional funding opportunities.<sup>132</sup>

Additionally, this second requirement means that "the financial inducement

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125. Louise Radnofsky et al., *Some States Balk at Medicaid Expansion*, WALL ST. J. (July 2, 2012), <http://online.wsj.com/article/SB10001424052702304211804577502912265771898.html>.

126. Bernstein, *supra* note 64 ("Moving under the radar so stealthily that in some cases local politicians and anti-obesity activists missed it entirely, lobbyists in Florida and Arizona backed successful efforts to take away the power to enact such bans from cities and counties.").

127. *South Dakota v. Dole*, 483 U.S. 203, 207 (1987).

128. *Id.* at 208 (citation and quotations omitted).

129. *Sebelius*, 132 S.Ct. at 2607. See also *Sullivan*, 500 U.S. at 187 (upholding provision Title X of the Public Health Service Act, 84 Stat. 1506, as amended, 42 U.S.C. §§ 300-300a-6, which provides federal funding for family-planning services).

130. *Sebelius*, 132 S.Ct. at 2608.

131. *Dole*, 483 U.S. at 207.

132. Public Health Service Act, 42 U.S.C. §§ 201 et seq. (1944).

offered by Congress” cannot be “so coercive as to pass the point at which ‘pressure turns into compulsion.’”<sup>133</sup> Mild encouragement is permissible. However, the Supreme Court struck down a provision of the ACA because it would penalize states that choose not to participate in that new program by taking away their existing Medicaid funding.<sup>134</sup> The Court found that this provision evidenced a regime in which “persuasion gives way to coercion” and this was unconstitutional.<sup>135</sup> Unlike that case, there would be nothing coercive about the proposed funding arrangement and no loss of funds for refusal to participate. A potential grant recipient can choose between accepting and rejecting the funds, and determine for itself whether or not it wants to enact obesity prevention measures through this program.<sup>136</sup> If the grantee accepts the funds, it would be subject to the government’s conditions; courts have repeatedly upheld “the use of this technique to induce governments and private parties to cooperate voluntarily with federal policy.”<sup>137</sup>

Third, the conditions must be related to the federal interest in national programs or projects.<sup>138</sup> As discussed above, it is estimated that obesity costs the United States 270 billion dollars a year in mortality, disability and lost productivity,<sup>139</sup> and the government is responsible for a significant portion of these costs through Medicare and Medicaid.<sup>140</sup> Almost thirteen percent of private health insurance spending is also attributable to obesity.<sup>141</sup> There is thus, an “undeniable link between rising rates of obesity and rising medical spending.”<sup>142</sup> Congress has an interest in reducing the costs associated with obesity that are burdening federal programs providing health care.

Under the fourth requirement, other constitutional provisions must not bar the agreement to carry out the grant’s conditions.<sup>143</sup> The Supreme Court explained this “‘independent constitutional bar’ limitation” as one that means Congress cannot use its spending power “to induce the states to engage in activities that would themselves be unconstitutional.”<sup>144</sup> Legal commentators have suggested that this doctrine can be characterized as holding that the “government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that

133. *Sebelius*, 132 S. Ct. at 2604 (quoting *Chas. C. Steward Mach. Co. v. Davis*, 57 S. Ct. 548, 590 (1937)).

134. *Id.* at 2608.

135. *Id.* at 2606.

136. *Sullivan*, 500 U.S. at 199 n.5 (discussing that potential grant recipients can choose between accepting funds subject to the government’s conditions or decline the subsidy and finance their own unsubsidized program).

137. *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980).

138. *South Dakota v. Dole*, 483 U.S. 203, 207 (1987).

139. BEHAN ET AL., *supra* note 39, at 27 (2010).

140. Finkelstein et al., *supra* note 14, at 828 (“.85 percent of Medicare spending, 11.8 percent of Medicaid spending.”).

141. *Id.*

142. *Id.* at 822.

143. *Dole*, 483 U.S. at 208.

144. *Id.* at 210.

benefit altogether.”<sup>145</sup>

The spending proposals are non-threatening and not likely candidates for a constitutional challenge, with the exception of the sixth proposal. This permits the use of federal funds to be provided to non-government organizations to educate citizens about the Obesity Prevention Funding program if the state in which the organization works preempts the ability of local governments or state or local health agencies to address this problem. However, this strategy would be a form of government speech, not subject to a legitimate First Amendment challenge.<sup>146</sup>

The federal government would be enlisting private entities to convey its own message about the program and the state legislature’s preemption of the ability of potential grantees to accept the funds.<sup>147</sup> Congress has a legitimate interest in addressing obesity among the states to reduce the costs and health burdens associated with not addressing the epidemic. Congress has a strong interest in potential grantees having a true choice to accept the funds and not being thwarted by state legislatures.

In *Rust v. Sullivan*, the Court upheld Title X of the Public Health Service Act, which provided conditional funding for several speech related measures, including “preconceptional counseling, education, and general reproductive health care.”<sup>148</sup> Grantees were also required to refer pregnant clients “for appropriate prenatal and/or social services by furnishing a list of available providers that promote the welfare of mother and unborn child.”<sup>149</sup> In addition to these requirements, Title X explicitly forbids grantees from providing “counseling concerning the use of abortion as a method of family planning or provid[ing] referral for abortion as a method of family planning.”<sup>150</sup> These latter speech-related restrictions were challenged by non-governmental potential grantees under the First Amendment. The Supreme Court upheld these conditions as tangential to the government’s program to selectively fund certain activities, while not funding alternatives, stating that a potential grantee can

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145. Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989).

146. The Supreme Court may provide more insight into the ability of the federal government to condition funding on a speech requirement. The case of *Alliance for Open Soc’y Int’l, Inc. v. U.S. Agency for Int’l Dev.*, 651 F.3d 218 (2d Cir. 2011), created a circuit split regarding Section 7631(f) of the Leadership Act, which provides that no funds may be granted for the HIV/AIDS fight unless organizations explicitly oppose prostitution. *But see* DKT Int’l, Inc. v. U.S. Agency for Int’l Dev., 477 F.3d 758 (D.C. Cir. 2007) (holding this section does not violate potential recipient agencies’ freedom of speech under the First Amendment). The Second Circuit struck down the provision against a strong dissent and denied a rehearing en banc against dissent. *See Alliance*, 651 F.3d at 240–68 (Straub, J. dissenting). *See also* *Alliance for Open Soc’y Int’l, Inc. v. U.S. Agency for Int’l Dev.*, 678 F.3d 127, 128 (2d Cir. 2011) (denying rehearing en banc). The United States Supreme Court granted certiorari on January 11, 2013. *See also* *Alliance for Open Soc’y Int’l, Inc. v. U.S. Agency for Int’l Dev.*, 133 S. Ct. 928 (2013) (granting certiorari).

147. *See* Robert C. Post, *Subsidized Speech*, 106 YALE L. J. 151, 156 (1996) (“In cases of subsidized speech, however, the provision of a benefit can sometimes convert a citizen into a public functionary and thereby alter the nature of the relevant First Amendment rights and analysis.”).

148. *Sullivan*, 500 U.S. at 179 (citing 42 CFR § 59.2 (1989)).

149. *Id.* (citing 42 CFR § 59.8(a)(2)).

150. *Id.* (quotations and citations omitted).

“avoid the force of the regulations” by declining the subsidy.<sup>151</sup>

In subsequent cases, the Court provided further explanation for the speech provisions upheld in *Rust v. Sullivan*, stating that “the counseling activities of the doctors under Title X amounted to governmental speech.”<sup>152</sup> The Court explained that “viewpoint-based funding decisions can be sustained in instances in which the government . . . [uses] private speakers to transmit information pertaining to its own program.”<sup>153</sup> When the government disburses funds to a private entity to convey the government’s own message, “to promote its own policies or to advance a particular idea,” the government “may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.”<sup>154</sup> In the proposed plan, the government would be seeking to accurately educate citizens about the availability of Obesity Prevention Funding opportunities. This would be a form of government speech. In this context, the Supreme Court explained that “when the government appropriates public funds to a particular policy of its own it is entitled to say what it wishes.”<sup>155</sup>

Separate from the provision of funding for obesity-related prevention campaigns, this would be a specific designation of funding to non-government organizations to engage in government speech.<sup>156</sup> As in other government speech cases, it is not constitutionally problematic if the government “solicits assistance from nongovernmental sources in developing specific messages” when the government ultimately establishes “the overall message to be communicated,” and approves of the dissemination.<sup>157</sup> The fact that it takes one perspective, the government’s, is not prohibitive.<sup>158</sup> The conditional funding opportunity under strategy six is entirely separate from the other enumerated strategies so it does not otherwise impact the ability of an organization to qualify for the remaining funds. This fact further immunizes strategy six from a First Amendment challenge and invalidates a claim that it violates the constitution.

### C. The Future of the Plan

The foremost goal of the proposed manufacturers’ excise tax is to generate revenue for the conditional funding program. The taxable articles will be taxed at a rate which is low enough to not intentionally deter significant consumption. The goal is to have the grantees fundamentally alter the food environment so consumers no longer need to rely on highly processed food products for sustenance and so low-income areas gain increased access to affordable whole

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151. *Id.* at 199 n.5.

152. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001).

153. *Id.* (quotations and citations omitted).

154. *Id.* (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995)).

155. *Rosenberger*, 515 U.S. at 833.

156. *Cf. Legal Servs. Corp.*, 531 U.S. at 554 (Scalia, J. dissenting) (“If the private doctors’ confidential advice to their patients at issue in *Rust* constituted ‘government speech,’ it is hard to imagine what subsidized speech would *not* be government speech.”).

157. *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 562 (2005).

158. *See Legal Servs. Corp.*, 531 U.S. at 541 (finding that the government may regulate the speech of private entities when public funds are being used by the private entities to convey the government’s message).

foods. The CDC will be required to conduct ongoing evaluations of the program to determine efficacy and success. Once the CDC determines that the program has positively impacted the food environment, Congress may determine that an increase in the manufacturer's excise tax rate is warranted to discourage consumption of highly processed foods nationwide. This will be a political question. Legally, there will be no question that this secondary tax structure would be valid.

The Supreme Court has held that Congress's power to tax is not limited to revenue raising purposes, but remains valid even if implemented specifically to deter behavior:

It is beyond serious question that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed. The principle applies even though . . . the revenue purpose of the tax may be secondary. Nor does a tax statute necessarily fall because it touches on activities which Congress might not otherwise regulate.<sup>159</sup>

Congress' ability to tax is so broad that a tax properly passed remains legitimate even if it has a "crushing effect on businesses" that Congress deems antithetical to public welfare.<sup>160</sup> Congress may rightfully decide that businesses responsible for highly processed food products are in fact inimical to public health and thus, the public welfare. Tax increases to deter consumption would likely have a positive impact on public health.

## V. CONCLUSION

The modern food environment is responsible for the decline in America's health, which creates instability in our health care system. The food industry and those who support business interests characterize poor nutrition as a personal choice, and thus negative health outcomes are often seen as a personal responsibility issue.<sup>161</sup> In this vein, the industry has lobbied against public health measures claiming that government intervention hinders consumers' liberty interests.<sup>162</sup> These arguments are contradicted by research and reality.

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159. *United States v. Sanchez*, 340 U.S. 42, 44 (1950) (citations omitted).

160. *Kahriger*, 345 U.S. at 28.

161. JP Mangalindan, *PepsiCo CEO: 'If All Consumers Exercised. . . Obesity Wouldn't Exist'*, CNN, (Apr. 27, 2010, 1:02 PM), [http://money.cnn.com/2010/04/27/news/companies/indra\\_nooyi\\_pepsico.fortune/index.htm](http://money.cnn.com/2010/04/27/news/companies/indra_nooyi_pepsico.fortune/index.htm). Twenty-five states have passed what are called "Personal Responsibility in Food Consumption Acts" or "Commonsense Consumption Acts," which shield the food industry from civil litigation by plaintiffs claiming their food caused them obesity, diabetes, or other related health issues. Alabama became the 25th state to pass such a law. Commonsense Consumption Act, Ala. Code § 6-5-730 (2012). *See also* Jennifer Pomeranz & Lainie Rutkow, *Efforts to Immunize Food Manufacturers from Obesity-Related Lawsuits: A Challenge for Public Health*, CORP. & HEALTH WATCH, (Aug. 17, 2011), <http://corporationsandhealth.org/2011/08/17/efforts-to-immunize-food-manufacturers-from-obesity-related-lawsuits-a-challenge-for-public-health>. The elected officials' views are evidenced in the debate. *See, e.g.*, 151 Cong. Rec. H8927 (daily ed. Oct. 19, 2005) (statement of Rep. Chabot) (debating the Personal Responsibility in Food Consumption Act of 2005, H.R. 554, 109th Cong. (2005): "This bill is about self-responsibility . . . . If you eat too much, you get fat. It is your fault. Don't try to blame somebody else.").

162. COMMENTS OF THE AMERICAN BEVERAGE ASSOCIATION IN OPPOSITION TO THE PROPOSED AMENDMENT OF ARTICLE 81 OF THE NEW YORK CITY HEALTH CODE, 56-57, July 23, 2012 (stating that



Only the government has power sufficient to implement the changes needed to protect the population at large and to regulate the industries that promote and encourage consumption of unhealthy foods. Real change is thus required to alter the status quo. Congress should pass the proposed “tax and spend” strategy for the dual purposes of funding public health prevention at the state and local levels, and protecting local efforts from preemptive legislation. The proposed conditional funding program is intended to alter the current food environment to make the healthy choice affordable and convenient. Once successful, Congress should reevaluate the program and increase the tax levied on manufacturers of processed food items to specifically deter consumption.

This strategy proposes a unique method to address preemptive legislation. Industries’ successful efforts to preempt public health measures are a true threat to public health and welfare and often occur below the radar. Industries’ strategy to protect revenue at the expense of public health has contributed to the health and financial toll the modern food environment has had on America. Government is the only body in a position to address these industry practices and it must respond by supporting preventative measures and preventing preemption of state and local efforts to improve the food environment.

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New York City’s sugary beverage serving size restriction “infringes upon consumers’ liberty interests” under the substantive component of the due process clause). *But see* David Frum, *Bloomberg’s Visionary Move Against Obesity*, CNN (June 4, 2012, 8:32 AM), <http://www.cnn.com/2012/06/04/opinion/frum-bloomberg-soda/index.html>.