

# COMBATING OBESITY: OUR COUNTRY’S NEED FOR A NATIONAL STANDARD TO REPLACE THE GROWING PATCHWORK OF LOCAL MENU LABELING LAWS

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## I. INTRODUCTION

Menu labeling laws are an attempt by the government to reduce one of American society's most significant health issues: obesity. These laws, which target restaurants, typically apply only when a restaurant reaches a certain size, such as chain restaurants. Therefore, the laws have a tremendous impact on fast food restaurants. For example, in New York City, where menu labeling legislation has been in place since 2008, restaurants that are part of a national chain of fifteen or more restaurants are required to provide nutritional information on menu boards, menus, or food item display tags for standard menu items.<sup>1</sup> This legislation affects larger chain restaurants, opposed to the local and small mom and pop restaurants, because these mega-chains are better suited to absorb and administer the burden of complying with the menu labeling requirements.

These laws are intended to increase customer awareness about calories and composition of the foods they purchase. The premise behind these laws is that a consumer should be provided with nutrition information in clear, accessible ways at the time the food is ordered, rather than force the consumer to research that information which, if posted at all, will only be found on the restaurant's website or a pamphlet that is completely disassociated from the menu. Fast food is generally unhealthy and leads to obesity, but many people are unaware of the detrimental effects of this food, and only in recent years have consumers even started to ask restaurants about the caloric content of the foods they sell. Menu labeling laws permit the customer to make an informed decision about the food selected. They do not operate as a ban on fast food consumption or to prevent people from eating fast food. As will be discussed in this Note, it is often difficult to tell how unhealthy something is for you, and food items that sound healthy may actually be very unhealthy. Further, most Americans eat fast food on a regular basis. If customers are able to utilize nutritional information on their menus to order food that contains fewer calories and fat, the obesity problem as a national crisis may be reduced, if not eliminated entirely.

Menu labeling laws are not a new concept but have just begun to be implemented in recent years. Maine was the first to introduce menu labeling legislation. New York City was the first to pass such legislation, followed by Philadelphia and various counties in California. California

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1. California Center for Public Health Advocacy, *Nutritional Labeling in Chain Restaurants: State and Local Bills/Regulations-2007-2008*, at 2, <http://www.cspinet.org/nutritionpolicy/MenuLabelingBills2007-2008.pdf> (last visited Aug. 16, 2009) [hereinafter "*CCPHA Nutrition Labeling in Chain Restaurants*"].

recently became the first state to pass statewide legislation that preempts local city and county menu labeling laws.

This Note will examine current menu labeling laws and argue that menu labeling laws for fast food and other chain restaurants should be implemented to address public health concerns related to obesity in American society. Section II addresses how including nutrition information on menus will combat the country's growing obesity problem. Section III states an overview of current menu labeling legislation. Section IV argues that a national menu labeling standard is necessary, because providing nutrition information on a city-by-city or state-by-state basis creates a patchwork quilt of confused and contradictory local regulation that fails to adequately provide detailed nutrition information to the American consumer. Section V sets forth arguments for uniform statewide standards as a short-term solution or possibly as a complete alternative to a national standard. Sections VI and VII provide legal and policy arguments for and against menu labeling legislation. Section VIII discusses potential constitutional challenges that opponents of menu labeling legislation might assert. Section IX concludes and summarizes arguments in favor of a national standard for menu labeling legislation.

## II. CALORIES ON MENUS AS A WAY TO COMBAT THE GROWING OBESITY PROBLEM

### A. *Fast Food Consumption Correlates With Obesity*

Obesity has skyrocketed in the United States over the last three decades. In the mid-1970s, fifteen percent of the adult population in our country was obese. Now, more than thirty-three percent of adults suffer from obesity.<sup>2</sup> This statistic is troublesome for people who care about staying fit but worse are the financial implications of these obesity statistics, particularly health care costs.

The increasing level of obesity in our country "is a ticking time bomb for the [American] health care system."<sup>3</sup> Obesity increases the risk of heart disease, hypertension, high cholesterol, Type 2 diabetes, and cancer.<sup>4</sup> Obese children are very likely to become obese adults and suffer from more immediate adverse health effects, including the aforementioned conditions and "insulin resistance, orthopedic problems, liver damage, sleep apnea, and

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2. Merrill Goozner, *Public Health Advocates Prepare For Another Calorie Battle: Push for Restaurants to Put Calories on Menus as a Way to Combat the Growing Obesity Problem*, HEALTHCARE J. OF NORTHERN CALIFORNIA, Winter 2007, <http://www.hcinc.com> (last visited Oct. 2, 2008); See also Cynthia L. Ogden et al., *The Epidemiology of Obesity*, GASTROENTEROLOGY 132, 2087, 2087 (2007).

3. Goozner, *supra* note 2.

4. See Goozner, *supra* note 2.

asthma.”<sup>5</sup> Obese children are also likely to be the target of stigmatization and discrimination, and to suffer from low self-esteem and depression.<sup>6</sup> A 2005 study by the Centers for Disease Control and Prevention estimated that approximately 112,000 deaths in the year 2000 were associated with obesity in the United States.<sup>7</sup> In New York City, for example, diabetes has more than doubled in the past decade, and hospitalizations for long-term complications of diabetes have been rising steadily.<sup>8</sup> These health issues put a strain on our country’s health care system, which is a cost carried by our society as a whole. According to at least one study, increasing obesity rates and associated health problems create skyrocketing health-care costs.<sup>9</sup>

Americans are eating out at a rate twice that in the 1970s. “In 2006, Americans spent almost half (48 percent) of their food dollars on foods prepared outside the home, in comparison to 26 percent in 1970.”<sup>10</sup> This increase in consumption of away-from-home foods has been facilitated by the expansion of restaurant chains and fast food restaurants.<sup>11</sup>

“[F]requent intake of fast food has been associated with increased calorie intake, weight gain...and obesity.”<sup>12</sup> When people eat out they are more likely to eat larger portions, thus consuming more calories than they would by preparing food at home.<sup>13</sup> Just one meal ordered in a fast food

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5. PAUL SIMON ET AL., COUNTY OF LOS ANGELES DIVISION OF CHRONIC DISEASE & INJURY PREVENTION, MENU LABELING AS A POTENTIAL STRATEGY FOR COMBATING THE OBESITY EPIDEMIC: A HEALTH IMPACT ASSESSMENT 2 (2008), available at [publi-health.lacounty.gov/docs/Menu\\_Labeling\\_Report\\_2008.pdf](http://publi-health.lacounty.gov/docs/Menu_Labeling_Report_2008.pdf) (last visited March 1, 2009).

6. *Id.*

7. Katherine M. Flegal et al., *Excess Deaths Associated With Underweight, Overweight, and Obesity*, 293 JAMA 1861, 1863-64 (2005).

8. Dept. of Health and Mental Hygiene Board of Health, Notice of Intention to Repeal and Reenact §81.50 of the New York City Health Code 4 (Jan. 22, 2008), available at <http://www.nyc.gov/html/doh/downloads/pdf/public/notice-intention-hc-art81-50-1007.pdf> [hereinafter “Notice of Adoption”].

9. See Eric A. Finkelstein et al., *State-Level Estimates of Annual Medical Expenditures Attributable to Obesity*, 12 OBESITY RESEARCH 18, 22-23 (2004) (listing increased annual medical expenditures of states attributable to obesity in several states, including New York where medical expenditures attributable to obesity totaled over \$6 million from 1998 to 2000).

10. DR. ROBERT C. & VERONICA ATKINS CENTER FOR WEIGHT & HEALTH, UNIVERSITY OF CALIFORNIA – BERKLEY, POTENTIAL IMPACT OF MENU LABELING OF FAST FOODS IN CALIFORNIA 1 (2008) (citation omitted) [hereinafter “CENTER FOR WEIGHT & HEALTH”].

11. *Id.* at 2

In a 2007 consumer survey of Californians 16-64 years of age, 82% of Californian adults in the five largest market areas in California...made fast food purchases at least once per month. These fast food consumers made fast food purchases an average of 14.9 times per month, the equivalent of 3.4 times per week.

12. Mary T. Bassett et al., *Purchasing Behavior and Calorie Information at Fast-Food Chains in New York City, 2007*, 98 AM. J. OF PUB. HEALTH 1457, 1457 (2008).

13. *Id.* at 1458 (“Fast food, which represents approximately 74% of all restaurant traffic nationally, typically contains more calories per serving than does food prepared at home.”); See also Goozner, *supra* note 2.

restaurant might contain more calories than the recommended daily caloric intake for the consumer. Further, portion sizes at fast food restaurants have increased over time, an increase that parallels the obesity epidemic.<sup>14</sup> “According to a recent national survey, over one quarter...of adults eat fast food on any given day, consuming approximately 200 calories more on days when fast food is eaten.”<sup>15</sup> In sum, people are eating fast food more often and consuming more calories, on average, than they ordinarily would at home. Chain restaurants serve food associated with excess calorie consumption and weight gain. Therefore, it is important for consumers to know what they are consuming when they go out to eat. Even more important is the recognition of a correlation between fast food consumption and growing obesity rates, because there will be substantial long term costs to our health and wallets if action is not taken sooner than later.

*B. Posting Nutritional Information at the Point of Purchase Would Help Consumers Make Informed, Healthier Food Choices*

Fast food chains should display calorie information prominently at the point of purchase where it can be seen and used to inform purchases. “Without nutrition information at the point of decision-making in chain restaurants, it’s hard for people to make informed choices for themselves and their children,” according to Margo G. Wootan, director of nutrition policy at the Center for Science in the Public Interest (CSPI).<sup>16</sup> Nutritional information, however, is not always readily available to customers until after they order.<sup>17</sup> Many restaurants currently disclose nutritional information in brochures, tray liners, or post information online, but such measures are inadequate if people can not use the information when they are actually deciding what to order. In fact, in its notice to adopt menu labeling legislation, the New York City Department of Health and Mental Hygiene Board of Health noted that voluntary activities by restaurants were “woefully inadequate,” failed to inform the vast majority of customers, and “ha[d] little or no impact on choice.”<sup>18</sup> For example, the majority of people dining in New York City restaurants did not even notice caloric information when the

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14. Notice of Adoption, *supra* note 9, at 4 (“[S]ince the 1970s, the typical serving size for soft drinks increased by 49 calories, for French fries by 68 calories, and for hamburgers by 97 calories” (footnote omitted)).

15. CENTER FOR WEIGHT & HEALTH, *supra* note 11, at 2 (citation omitted).

16. Center for Science in the Public Interest, *California Legislature Passes Historic Menu Labeling Bill: Governor Schwarzenegger Urged to Make California First State to Require Nutrition Info*, CSPI NEWSROOM, Sept. 11, 2007, <http://www.cspinet.org/new/2007091111.html> (last visited March 17, 2010) [hereinafter “*Historic Menu Labeling Bill*”].

17. California Center for Public Health Advocacy, *Menu Labeling Poll: Californians Overwhelmingly Support Mandatory Menu Labeling*, <http://www.publichealthadvocacy.org/menulabelingpoll.html> (last visited Aug. 16, 2009) [hereinafter “*CCPHA Californians Support*”].

18. Notice of Adoption, *supra* note 9, at 8.

information appeared on a counter mat, wall or poster, or the restaurant website.<sup>19</sup> On the other hand, when people see nutrition information at the point of sale, just before ordering, it has been shown that those individuals order meals containing fewer calories.<sup>20</sup> Health experts project that mandated menu labeling for fast food and other large chain restaurants “would prevent [approximately] 38.9% of the annual weight gain in the country,”<sup>21</sup> even if consumers make only small changes during the decisionmaking process.<sup>22</sup> In fact, researchers believe that preventing annual weight gain can be achieved if menu labeling caused only ten percent of restaurants patrons to order meals with 100 less calories.<sup>23</sup>

Having nutritional information displayed on the menu helps consumers exercise personal responsibility when ordering because restaurant customers no longer have to guess what is in their meals. The legislative history of the California Senate recognized the importance of nutritional information in helping customers make informed decisions about their health and diet.<sup>24</sup> Informed decisions throughout one’s daily dietary decisions can literally save “hundreds, even thousands, of calories.”<sup>25</sup>

A 2007 study regarding purchasing behaviors and calorie information at New York City fast-food chains found that when fast food chains provide its patrons with prominent calorie information prior to purchase, many customers will use that information to reduce their caloric intake.<sup>26</sup> In the study, less than five percent of fast food customers saw the nutrition information before they ordered.<sup>27</sup> This statistic, however, did not include Subway customers, who reported seeing the nutrition information prior to ordering and consequently purchasing fifty-two fewer calories than those who did not see the information.<sup>28</sup> “[O]ver one-third of...Subway [custom-

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19. CCPHA *Californians Support*, *supra* note 18; Bassett et al., *supra* note 13, at 1458-59.

20. CCPHA *Californians Support*, *supra* note 15; Bassett et al., *supra* note 10, at 1459.

21. CCPHA *Californians Support*, *supra* note 15; *See also* SIMON, *supra* note 5, at 1 (suggesting that increased caloric intake accounts for the average annual weight gain of almost seven million pounds in the U.S. population).

22. SIMON ET AL., *supra* note 5, at 1; *See also* CENTER FOR WEIGHT & HEALTH, *supra* note 11, at 6 (“If 80% of adult customers notice calorie information on menu boards in California, and reduce calories in their purchases by 52 calories per visit, for example, this could result in an average annual weight gain avoided of 2.1 pounds per adult who frequents fast food restaurants.”)

23. Simon et al., *supra* note 5, at 1.

24. S.B. 120 – BILL ANALYSIS at 3, January 8, 2008, available at [http://info.sen.ca.gov/pub/0708/bill/sen/sb\\_01010150/sb\\_120\\_cfa\\_20080108\\_154841\\_sen\\_floor.html](http://info.sen.ca.gov/pub/0708/bill/sen/sb_01010150/sb_120_cfa_20080108_154841_sen_floor.html).

25. Maryclaire Dale, *A Philly Cheesesteak, With a Healthy Side of New Law Requires Eateries to Serve Info on Calories, Fats and Sodium*, THE STAR-LEDGER, Dec. 20, 2008, at 12.

26. Bassett et al., *supra* note 13, at 1457.

27. *Id.* at 1458.

28. *Id.* (“Patrons purchased a mean of 827 calories, with 34% purchasing 1000 calories or more, and 15% purchasing 1250 calories or more”).

ers] reported that this information affected their purchase.”<sup>29</sup> On the other hand, there was no significant difference in mean calories purchased by customers who saw the nutrition information, but decided not to use it, and customers who never saw the information.<sup>30</sup> Some people simply do not care about the amount of calories they consume, but one-third of the customers did care and used the information to order menu items with fewer calories. “Given the frequency of fast food consumption, even modest reductions in calories (e.g., fifty calories per meal) could significantly reduce the country’s overall caloric intake.”<sup>31</sup> Moreover, as consumers select those menu items containing fewer calories, it follows that, over time, restaurants will modify their menus and offer the lower-calorie foods most requested by their customers.

Another reason to place nutrition information at the point of purchase is that many consumers often underestimate the caloric content of food, and could “benefit from having readily accessible information on the calorie content of menu items.”<sup>32</sup> Moreover, increasingly larger portion sizes in restaurants make it difficult for a consumer to determine the nutritional content of a meal and how many servings a single portion really contains. Similar items can differ greatly in size, even at the same chain, and there is a wide range of calories contained seemingly identical products.<sup>33</sup> People are likely to underestimate the amount of calories they consume when they eat out, especially if they think that they have made healthy food choices.<sup>34</sup> Even “healthy” choices, however, are oftentimes only health when compared to other menu items and vary in their nutritional value. Many customers concerned about their health may order a menu item that seems healthy but may be surprised to know the truth, as “differences in calories among various options are not always intuitively obvious.”<sup>35</sup> For example, a Starbucks Reduced-Fat Turkey Bacon, Cholesterol-Free Egg, Reduced-Fat White Cheddar Breakfast Sandwich contains 350 calories and eleven

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29. *Id.* at 1458.

30. *Id.*

31. *Id.* at 1459.

32. SIMON ET AL., *supra* note 5, at 2-3 (citations omitted); *See also* S.B. 120– BILL ANALYSIS, *supra* note 24, at 5.

33. *See e.g.*, SIMON ET AL., *supra* note 5, at 7 (“[C]hanging from a double meat patty to a single meat patty hamburger would save 244 calories, from a large to a medium order of french fries would save 163 calories or from a large to medium soft drink would save 95 calories.”).

34. *See* Gozner, *supra* note 2.; *See also* California Center for Public Health Advocacy, *California Leads Nation with Passage of Menu Labeling Law*, BUS. WIRE (Sacramento, CA), Sept. 30, 2008, <http://www.businesswire.com/news/home/20080930006295/en> (“[A] statewide Field Research Corporation poll was released showing that only 10 percent of Californians could pick the healthiest item from a short list of common fast foods”) [hereinafter “CCPHA *California Leads Nation*”].

35. Notice of Adoption, *supra* note 9, at 6 (“Even experienced nutrition professionals have difficulty accurately estimating the calorie content of restaurant food. In one study, these professionals underestimated calories in restaurant food by 200-600 calories”).

grams of fat, while a Lowfat Blueberry Muffin has 300 calories and five grams of fat.<sup>36</sup> If caloric information was made readily available prior to ordering, a patron would realize the difference of the nutritional value of these items. Furthermore, the Starbucks consumer would know that the Perfect Oatmeal, at 140 calories and approximately two grams of fat, is significantly healthier than either of the other two “healthy” options. By choosing the oatmeal, this customer cuts 210 calories and almost nine grams of fat out of his or her breakfast, but the customer will not have this information to make these decisions if it is not clear at the point of purchase.

*C. Menu Labeling at the Point of Purchase is Similar to Nutrition Labeling under the Nutrition Labeling and Education Act of 1990 (NLEA)*

For over a decade, the FDA has required, by law, nutrition labeling of packaged foods.<sup>37</sup> NLEA, which generally prohibits misbranding of food, requires sellers of packaged food and beverages to disclose the ingredients contained in the product and place a standardized nutrition facts panel on the packaging.<sup>38</sup> Food manufacturers are required to disclose the amount of “fat (saturated and unsaturated), Trans fat, cholesterol, sodium, potassium, carbohydrates, dietary fiber, sugar, protein, as well as calories in their products.”<sup>39</sup> Anyone who has bought groceries has likely looked at nutrition labels when buying food at the grocery store.

Although NLEA controls disclosure of nutritional information on packaged foods, restaurants are exempted from these standards.<sup>40</sup> Thus, NLEA does not preempt other governments, state or federal, from implementing similar standards.<sup>41</sup> Moreover, NLEA provides a practical framework for nutrition disclosure for restaurant food, and “is an approach consumers across the country have used effectively for more than [eighteen] years.”<sup>42</sup> The Coalition for Responsible Nutrition Information (CRNI) was recently formed to promote the expansion of flexible federal legislation, specifically through the expansion of NLEA to include more detailed nutritional information for food sold nationwide by major chain restaurants.<sup>43</sup>

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36. Starbucks Coffee, *Nutrition Information*, [http://www.starbucks.com/retail/nutrition\\_freshfood.asp](http://www.starbucks.com/retail/nutrition_freshfood.asp) (last visited Aug. 16, 2009).

37. See CENTER FOR WEIGHT & HEALTH, *supra* note 11, at 4.

38. Nutrition Labeling and Education Act of 1990, 21 U.S.C. §343 (2000).

39. The Coalition for Responsible Nutrition Information, Frequently Asked Questions About Food and Nutrition Facts, <http://www.nationalnutritionstandards.com/faq.html> (last visited Aug. 16, 2009) [hereinafter “CRNI FAQs”].

40. Jennifer Pomeranz & Kelly Brownell, *Legal and Public Health Considerations Affecting the Success, Reach, and Impact of Menu-Labeling Laws*, 98 AM. J. OF PUB. HEALTH 1578, 1579 (2008).

41. *Id.*

42. CRNI FAQs, *supra* note 40.

43. *Id.*



This Note will discuss the CRNI in greater depth in section IV.

One can analogize between putting a restaurant's nutrition information at the point of purchase and labeling food products sold in a grocery store. After all, most menu labeling laws require the same factual information that NLEA requires food producers to disclose, such as the amount of calories and fat in a particular food item.<sup>44</sup> Further, people tend to study and compare nutrition facts before they put the item in their cart or during check-out. Similar to consumers making food choices in a grocery store, restaurant customers should be able to fully evaluate and compare their food choices before making a purchase.

Nutrition labels are important because, as studies show, people use the information contained in those labels to help them make decisions about what to eat. "Three quarters of American adults report using food labels, and about half (48%) report that nutrition information on food labels has caused them to change their food purchasing habits."<sup>45</sup> Therefore, it is likely the same will be true if chain restaurant customers are able to see nutrition information before ordering. People are still purchasing groceries and will most likely continue to purchase fast food. If nutrition facts are placed at the point of purchase, however, consumers can use the nutritional information and compare their options to make informed choices.

Currently, in cities and states with no menu labeling legislation, people do not receive the same nutritional information when they eat out as they do when they read labels on packaged food at the grocery store.<sup>46</sup> When nutrition information is labeled explicitly, consumers can compare options and make informed dietary decisions.

### III. MENU LABELING LEGISLATION: AN OVERVIEW

Menu labeling legislation is not a new concept, but it has rapidly developed in recent years. In February 2003, Maine became the first state to introduce a menu labeling bill. Subsequently, New York and Texas passed legislation requiring "the warning label 'Eating Fatty Foods May Lead To Obesity' next to all menu items that [have] more than

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44. See Brief for Professor Robert Post et al., as Amici Curiae Supporting Defendants at 10-11, *California Restaurant Association v. The City and County of San Francisco and the San Francisco Dep't of Public Health*, No. CV-08-3247 CW (N.D. Cal. July 31, 2008) [hereinafter "Brief for Professor Robert Post"]; See 21 U.S.C. §343 (2000).

45. Notice of Adoption, *supra* note 9, at 6 (citations omitted) ("With nutrition information, consumers are 24% to 37% less likely to select high-calorie items" (citation omitted)).

46. Center for Science in the Public Interest, *Menu Labeling Bill Clears Key Hurdle in California: Health Advocates Urge Passage in Assembly*, CSPI NEWSROOM (Aug. 30, 2007), [http://www.cspinet.org/new/200708301\\_print.html](http://www.cspinet.org/new/200708301_print.html) [hereinafter "Key Hurdles"].

47. Center for Consumer Freedom, *Menu Labeling Legislation: An Overview*, Nov. 12, 2003, [http://www.consumerfreedom.com/news\\_detail.cfm?headline=2215](http://www.consumerfreedom.com/news_detail.cfm?headline=2215) (last visited August 16, 2009).

one-third of their calories from fat.”<sup>48</sup> To date, only New York City, King County (Seattle), Washington State, Philadelphia and California have enacted menu labeling legislation requiring nutrition information on menus and menu boards for chain restaurants. In 2007, twenty states and localities introduced menu labeling bills.<sup>49</sup> Currently, twenty-six states, Washington D.C., Puerto Rico and numerous cities and counties around the country have proposed menu labeling legislation.<sup>50</sup> This legislative trend illustrates how quickly the idea is gaining popularity.

#### A. *New York City*

New York City was the first city to adopt menu labeling requirements when the New York City Department of Health and Mental Hygiene enacted New York City Health Code Section 81.50 (Regulation 81.50) on December 5, 2006.<sup>51</sup> Set to take effect on July 1, 2007, Regulation 81.50 would have required New York City restaurants, already providing calorie content information about their menu items<sup>52</sup> to post such information on restaurant menu boards and menus.<sup>53</sup> The purpose behind enacting Regulation 81.50 was to combat the obesity epidemic in New York City.<sup>54</sup> However, the New York State Restaurant Association (NYSRA), a not-for-profit business association of over 7,000 restaurants, challenged the regulation as invalid (NYSRA I).<sup>55</sup> The NYSRA argued that the NLEA expressly preempts Regulation 81.50.<sup>56</sup> The NYSRA also argued that Regulation 81.50 is unconstitutional because the regulation violates the First Amendment.<sup>57</sup> A New York district court found that the City does have the power to mandate nutritional labeling by restaurants. The manner by which the city actually mandated was found to run afoul of the federal statutory scheme for voluntary nutritional claims since Regulation 81.50 applies only

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48. *Id.*

49. *Historic Menu Labeling Poll*, *supra* note 17.

50. National Conference of State Legislatures, *Trans Fat and Menu Labeling Legislation*, [www.ncsl.org/programs/health/transfatmenulabelingbills.htm](http://www.ncsl.org/programs/health/transfatmenulabelingbills.htm) (last visited Jan. 3, 2009); *See also* CCPHA *Menu Labeling in Chain Restaurants*, *supra* note 1 (providing a list of all cities, counties and state in which legislation is pending).

51. *N.Y. State Rest. Ass'n v. N.Y. Bd. of Health*, 509 F. Supp. 2d 351, 353 (S.D.N.Y. 2007) [hereinafter “*NYSRA I*”].

52. *Id.* (explaining that the regulation would apply to “standardized menu items ‘for which calorie content information is made publicly available on or after March 1, 2007’”).

53. *New York City, N.Y.*, Health Code §81.50 (2006); *NYSRA I*, 509 F.Supp.2d at 352 (“This regulation would affect roughly ten percent of restaurants in New York City, including chain restaurants such as McDonald’s”).

54. *NYSRA I*, 509 F.Supp.2d at 353.

55. *NYSRA I*, 509 F.Supp.2d at 352 (This regulation would affect about ten percent of restaurants in New York City).

56. *Id.* at 352; *See also* 21 U.S.C. §343.

57. *NYSRA I*, 509 F.Supp.2d at 352-353.

to restaurants that already provide calorie information for its products.<sup>58</sup> The Court did not decide the First Amendment claims.<sup>59</sup>

After the judgment, the New York City Department of Health and Mental Hygiene reenacted a new section Section 81.50 (Revised 81.50) on January 22, 2008.<sup>60</sup> Revised 81.50 would have required *all* New York City restaurants with fifteen or more locations nationally to display calorie content on menus and menu boards.<sup>61</sup> Like the original Regulation 81.50, Revised 81.50 was enacted for the advancement of public health by combating obesity.<sup>62</sup> NYSRA again sued the New York City Board of Health in the Southern District of New York (“NYSRA II”).<sup>63</sup> The NYSRA argued that, in direct contrast to the NYSRA I ruling, that laws and regulations requiring *all* restaurants of a certain class to disclose nutritional content information are subject to NLEA preemption.<sup>64</sup> NYSRA sought to enjoin the enforcement of Revised 81.50. New York City responded by filing a cross-motion for summary judgment on the preemption claim. The NYSRA II court reiterated that NLEA permits states and localities to require restaurants to disclose factual nutritional information about their food.<sup>65</sup> The court upheld the reasoning behind NYSRA I, and concluded that the regulation was not preempted by NLEA because New York City’s revised regulation was permissible in its nutritional labeling requirements.<sup>66</sup> The court granted New York City’s summary judgment and NYSRA appealed.<sup>67</sup> NYSRA sought a stay pending appeal, which the Court of Appeals of the Second Circuit denied.<sup>68</sup> The court held oral arguments on June 12, 2008, during which it heard from counsel for NYSRA, New York City, and the Food and Drug Administration.<sup>69</sup>

In the meantime, “[t]he New York City menu labeling regulations went into effect [on] March 31, 2008.”<sup>70</sup> The regulation requires establishments with fifteen or more restaurants nationally, to list calories for standard menu items at the point of purchase.<sup>71</sup> “Font and format used for

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58. *Id.* at 352-53.

59. *Id.* at 353.

60. New York City, N.Y. Health Code §81.50 (2008).

61. *Id.*

62. N.Y. State Rest. Ass’n v. N.Y. Bd. of Health, 545 F. Supp.2d 363, 368 (S.D.N.Y. 2008) [hereinafter “NYSRA I”].

63. *Id.*

64. Lainie Rutkow et al., *Preemption and the Obesity Epidemic: State and Local Menu Labeling Laws and the Nutrition Labeling and Education Act*, 36 J.L. MED. & ETHICS 772, 786 (2008) (quoting Brief for Plaintiff at 17, N.Y. State Rest. Ass’n v. N.Y. City Bd. of Health (S.D.N.Y. Jan.31, 2008)).

65. *NYSRA II*, 545 F. Supp.2d at 366.

66. *Id.*

67. *Id.*

68. N.Y. State Rest. Ass’n v. N.Y. Bd. of Health, 556 F.3d 114, 122 (2d Cir. 2009).

69. *Id.*

70. See CCPHA *Nutrition Labeling in Chain Restaurants*, *supra* note 1, at 2.

71. *Id.*

calorie information must be at least as prominent in size as is used for the name or price of the menu item.”<sup>72</sup>

On appeal, the lower court’s decision was affirmed, with the appellate court holding that: (1) New York City law was not preempted by the NLEA; (2) rational basis was the appropriate standard for determining whether city law violated the First Amendment’s protection of commercial speech; and (3) New York City law was reasonably related to the City’s goal of reducing obesity.<sup>73</sup>

### *B. California Local Patchwork Preempted By New State Wide Legislation*

Besides New York City, California has been a leader in menu labeling legislation. Before statewide menu labeling legislation was passed in October 2008, numerous cities and counties in California either had passed menu labeling laws or had legislation pending.

In San Francisco City and County, food establishments with twenty or more units in California were required to post nutrition information on their menus and menu boards. Nutrition information did not have to be displayed on menus for items placed on the counter for general use, such as condiments, alcoholic beverages and items that were on the menu for less than thirty days. Chains were required to report their nutrition information to the Department of Health on an annual basis.<sup>74</sup>

In Santa Clara County, food establishments with fourteen or more units in California were required to post nutrition information on their menus and menu boards. Nutrition information did not have to be displayed on menus for “[i]tems placed at the counter for general use, alcoholic beverages, and items that are on the menu for less than [thirty] days.”<sup>75</sup> Although similar, the various local laws in California differed in such a way that restaurants could not comply with each local law simultaneously. Not only did restaurants have to decide if the regulation even applied to them from city to city, but they also had to comply with minute details regarding what should be displayed, exceptions to the rules, and various reporting requirements.

As a response to pressure from the restaurant industry to have a more uniform law in California, the California legislature introduced statewide legislation on January 22, 2007. Known as SB 120 and sponsored by Senators Alex Padilla and Carole Midgen, the proposed bill made it successfully through both chambers of the legislature.<sup>76</sup> If passed, SB 120 would have applied to restaurants with fifteen or more chains nationally, standardized

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72. *Id.*

73. *New York State Restaurant Ass'n*, 556 F.3d at 135-36.

74. *CCPHA Nutrition Labeling in Chain Restaurants*, *supra* note 1, at 2.

75. *Id.* at 3.

76. *Historic Menu Labeling Bill*, *supra* note 16, at 1.

menu items only, and would not have applied to daily specials or customized orders.<sup>77</sup> Further, SB 120 excluded menu items that were on the menu for less than six months, condiments, and other items placed on the table or counter for general use without charge and alcoholic beverages.<sup>78</sup> If a restaurant violated the requirements of SB 120, it will be found guilty of an infraction and fined from \$50 to \$500.<sup>79</sup> Nonetheless, the proposed Bill was vetoed October 14, 2007.

Almost a year later, on October 1, 2008, Governor Schwarzenegger signed SB 1420, California's statewide menu labeling bill, as part of an effort to address the state's growing obesity epidemic.<sup>80</sup> As a result, California has become a leader among states in passing menu labeling legislation.<sup>81</sup> S.B. 1420 was the first state law of its kind in the nation and won the support of the California Restaurant Association, because it standardized requirements and preempted local ordinances in the cities of Santa Clara and San Francisco.<sup>82</sup>

SB 1420 is an important measure in combating obesity in California due to the "estimated 15,000 fast food establishments" in the State, but also nearly sixty percent of Californians are either overweight or obese.<sup>83</sup> This landmark legislation became a necessary response to the local patchwork of menu labeling laws across California that had made implementation very difficult for restaurants and caused confusion among customers. Although SB 120 was not passed, SB 1420 successfully passed through the California legislature, and accomplished the ultimate goal of providing consumers with the nutrition information they need to make informed choices.<sup>84</sup> A public opinion poll conducted in 2007 demonstrates that eighty-four percent of Californians backed the bill.<sup>85</sup> The statewide legislation goes into full effect on January 1, 2011,<sup>86</sup> requiring restaurants with twenty or more locations in California to provide nutritional information in brochures.<sup>87</sup> Restau-

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77. *Id.*

78. S.B. 120— BILL ANALYSIS, *supra* note 24, at 4.

79. *Id.* at 4.

80. *California Menu Labeling Law Passes*, Oct. 1, 2008 <http://www.vpico.com/articlemanager/printerfriendly.aspx?article=211378> (last visited Oct. 1, 2008).

81. *Id.*

82. Jerry Hirsch, *Stepping Up to the Plate for More Food Regulation*, L.A. TIMES, Dec. 17, 2008.

83. CENTER FOR WEIGHT & HEALTH, *supra* note 11, at 1.

84. RUDD CENTER FOR FOOD POLICY AND OBESITY, YALE UNIVERSITY, A CASE STUDY OF CALIFORNIA'S MENU LABELING LEGISLATION (2008).

85. *See* Goozner, *supra* note 2.

86. California Center For Public Health Advocacy, *SB 1420 Fact Sheet*, <http://www.publichealthadvocacy.org/PDFs/SB1420Factsheet.pdf> (last visited Aug. 16, 2009) [hereinafter "CCPHA SB1420"].

87. California First State to Pass Menu Labeling Law: Chain Restaurant Menus Must Include Calorie Counts, [http://consumeraffairs.com/news04/2008/10/ca\\_menu\\_labels.html](http://consumeraffairs.com/news04/2008/10/ca_menu_labels.html) (Oct. 1, 2008) [hereinafter "California First State"]; CCPHA *California Leads Nation*, *supra* note 35 (explaining how SB 1420 provides for a two-year phase in period, but restaurants are

rants are permitted to provide nutritional information prior to the effective date, and the legislature hopes “that some restaurants will skip the first phase of implementation and go straight to posting calories on the menu in 2009.”<sup>88</sup> The first implementation phase will take place “[f]rom July 1, 2009 to December 31, 2010 when restaurants must provide a brochure placed at the point of purchase that includes” figures associated with calories, sodium, saturated fat and carbohydrates for each menu item.<sup>89</sup> Although these requirements apply to all restaurants, sit-down restaurants must provide the information at the table while drive-thrus must provide a notice of and give brochures to customers upon request.<sup>90</sup> In the second implementation phase, restaurants must list calories on menus and menu boards next to each menu item by January 1, 2011.<sup>91</sup> The bill also preempts cities and counties from enacting competing menu labeling provisions.<sup>92</sup>

### C. King County (Seattle), Washington

In King County, Washington, food establishments with fifteen or more national locations with one million dollars in annual sales must list nutrition information at the point of purchase. Restaurants, however, do not need to list nutrition facts “for items on the menu for less than [ninety] days; unopened prepackaged foods; food in salad bars, buffet lines, cafeteria service and other self serve arrangements.”<sup>93</sup> Legislation enacted and proposed in New York City, California and Washington demonstrate both similarities and differences in the fine details, and how the differences causing difficulty for restaurants attempting to comply with such legislation.

### D. Philadelphia

The City of Philadelphia recently amended its health code on October 23, 2008, by passing a menu labeling ordinance taking effect on January 1, 2010.<sup>94</sup> The ordinance follows similar legislation in New York City, California, and elsewhere. Because this legislation outlines requirements for more types of menu items and has fewer exemptions, however, it is one of the toughest menu labeling laws for restaurants to comply with in the country.<sup>95</sup> The new ordinance applies to chain restaurants or retail food estab-

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required to provide brochures containing nutritional information at the point of sale beginning July 1, 2009).

88. CCPHA *SB 1420 Fact Sheet*, *supra* note 82.

89. *Id.*

90. *Id.*

91. *Id.*

92. *See* California First State, *supra* note 83.

93. *See* CCPHA *Nutrition Labeling in Chain Restaurants*, *supra* note 1.

94. PHILADELPHIA, PA., HEALTH CODE tit. 6, ch. 6-100 (2008), available at <http://webapps.phila.gov/council/attachments/5823.pdf> (last visited April 14, 2010).

95. Dale, *supra* note 26, at 12.

lishments that conduct business under “the same trade name as used by teen...or more other establishments...regardless of” whether those establishments are located in the City of Philadelphia or elsewhere.<sup>96</sup> Restaurants are required to put “[t]he total number of calories..., grams of saturated fat, grams of trans fat, grams of carbohydrates and milligrams of sodium...adjacent to each item on the menu, in a size and typeface similar to [the] price.”<sup>97</sup> If a restaurant does not use menus, it only must include calorie information on the menu board while also including the words “Additional nutrition information for all menu items available upon request” in a clear and conspicuous typeface.<sup>98</sup> Restaurants may petition the Philadelphia Board of Health if they want to vary the presentation method of the required information, but the required information must still be at the point of purchase and consistent with public health.<sup>99</sup>

### *E. Indiana: Pending Legislation*

Indiana’s menu labeling legislation was introduced to the Indiana House of Representatives by Representative Charlie Brown on January 16, 2008.<sup>100</sup> “Advocates point to the state’s high obesity rate as one of the most compelling reasons to adopt the bill.”<sup>101</sup> Indiana House Bill 1361 “[r]equires a food establishment with ten or more locations in Indiana to make certain nutritional information available to customers for each item or unit of food.”<sup>102</sup> The Bill also establishes civil penalties for violations, in which a penalty shall not exceed \$1,000.<sup>103</sup> The Bill requires the following nutritional information to be made available to customers for each unit of food available for consumption: total calories, fat, saturated fat, trans fat, cholesterol, sodium, carbohydrates, fiber, sugar and protein.<sup>104</sup> Information required by the Bill must be made available in a manner that allows consumers to consider the information when selecting their food, including placement of the information on the menu board or on a separately printed

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96. PHILADELPHIA, PA. HEALTH CODE tit. 6, ch. 6-100, §6-102(6.1).

97. PHILADELPHIA, PA. HEALTH CODE tit. 6, ch. 6-100, §6-308(1)(a); See PHILADELPHIA, PA. HEALTH CODE tit. 6, ch. 6-100, §6-308(2) (Restaurants must include the following statement on menus and menu boards: “A 2,000 calorie daily diet is used as the basis for general nutrition advice; individual calorie needs, however, may vary.”).

98. PHILADELPHIA, PA. HEALTH CODE tit. 6, ch. 6-100, §6-308(1)(b)

99. PHILADELPHIA, PA. HEALTH CODE tit. 6, ch. 6-100, §6-308(1)(c).

100. H.B. 1361, 115th Gen. Assem., 2d. Reg. Sess. (Ind. 2008), available at [www.in.gov/legislative/house\\_democrats/brown\\_index.html](http://www.in.gov/legislative/house_democrats/brown_index.html) (last visited July 22, 2009).

101. Barb Berggoetz, *Calories Could Be Coming to Your Menu*, THE INDIANAPOLIS STAR, Feb.13, 2009, at A1 (Indiana’s obesity rate is 27.5 percent which ranks 11th nationally).

102. H.B. 1361.

103. H.B. 1361, ch. 14.1, §4; See also OFFICE OF FISCAL & MGMT. ANALYSIS, FISCAL IMPACT STATEMENT: H.B. 1361 (The bill does not specify the enforcement authority but presumably it would be the Indiana State Department of Health).

104. H.B. 1361, ch. 14.1, §2(1)-(10).

document made available to consumers.<sup>105</sup> If the required nutrition information is provided to consumers on a menu board of the restaurant, it must be in the same or similar font and format as the surrounding information regarding a particular food.<sup>106</sup> If restaurant franchises offer the information on a separately printed document, it must be in a legible font and appropriately formatted for the type of document chosen.<sup>107</sup> House Bill 1361 was referred to the Indiana House Committee on Public Health,<sup>108</sup> and passed fifty-one to forty-six on February 25, 2009. The Bill now moves to the Senate, but its fate in the Senate is uncertain. State senator Patricia Miller, chairwoman of the Senate Health and Providers Services Committee, said that she is undecided as to whether she will “give the legislation a hearing because she [is not] sold on the idea that [it is] the government’s role to interfere in such matters.”<sup>109</sup> Senator Miller further mentioned the possibility of holding a hearing to make information surrounding the Bill available to the public.<sup>110</sup>

#### IV. ARGUMENT FOR A NATIONAL STANDARD

Some restaurant organizations go further than demanding uniform state legislation and seek uniform legislation at the national level. While the National Council of Chain Restaurants (NCCR) recognizes that California’s new statewide menu labeling legislation (SB 1420) provides a statewide standard replacing a “confusing and inefficient hodgepodge of local California ordinances,”<sup>111</sup> the NCCR has expressed disappointment over SB 1420,<sup>112</sup> because it would like to see a “consistent, uniform, nationwide standard.”<sup>113</sup> NCCR indicated that it takes issue with the current legislation because the law applies to only twenty percent of California restaurants.<sup>114</sup> While a state standard is better than a patchwork of local standards within a state, a national standard would provide even more clarity, consistency and flexibility for restaurants.<sup>115</sup>

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105. H.B. 1361, ch. 14.1, §3(a).

106. H.B. 1361, ch. 14.1, §3(b)(1) and (2).

107. H.B. 1361, ch. 14.1, §3(c).

108. Session Information-Action List: House Bill 1361, <http://www.in.gov/apps/lisa/session/billwatch/billinfo?year=2008&request=getActions&doctype=HB&docno=136> (last visited Aug. 16, 2009).

109. See Berggoetz, *supra* note 97.

110. *Id.*

111. Press Release, Chain Leader, NCCR Disappointed by California Menu Labeling Law (Sept. 30, 2008), available at <http://www.chainleader.com/article/CA6600801.html> [hereinafter “NCCR Press Release”].

112. *Id.*

113. *Id.*

114. *Id.*

115. National Restaurant Association, *Public Policy Issue Briefs: Menu Labeling/Nutrition Information*, Jan. 17, 2009, <http://www.restaurant.org/government/issues/issue.cfm?issue=menulabel> (last visited Aug. 16, 2009).



Many state and local menu labeling laws and proposed laws are similar; however, the differences are enough to make implementation difficult without a national standard. For example, there are variations in the number of establishments required before the regulation applies. Pending menu labeling legislation in Chicago would apply to restaurants with fifteen or more chains nationally.<sup>116</sup> Montgomery County, Maryland's pending menu labeling law would apply to establishments "with at least ten national locations."<sup>117</sup> Arizona's legislation would apply to establishments with "[ten] locations nationally and [five] or more locations" within the state of Arizona.<sup>118</sup> Some states like Iowa, have pending legislation that only applies to establishments with "twenty or more locations statewide."<sup>119</sup> Other differences include how long restaurants have until implementation becomes mandatory, what type of nutritional information must be included,<sup>120</sup> when exemptions will be given for nonstandard and temporary food items, required physical font size of the information, and alternative ways information can be displayed. One can see how burdensome it will become for restaurants to determine the applicability of these laws and how to comply with the different requirements. A national standard would assist with compliance among states.

Restaurants that will be subject to menu labeling legislation are not necessarily against providing nutrition information to their customers. In fact, restaurants recognize that people "are becoming more health conscious" and want customers to have access to detailed and consistent nutrition information.<sup>121</sup> With a national standard, consumers will receive a consistent set of detailed nutrition facts across the country. This is why many restaurant groups call for a national standard. The not-for-profit entity, Center for Science in the Public Interest (CSPI) has spearheaded a nationwide menu labeling movement.<sup>122</sup> Margo Wootan, nutrition policy director of CSPI, furthered her support of a nationwide mandate, stating, "Ten years from now, it will probably seem strange that once upon a time, chain restaurants didn't list calories on menus and menu boards for everyone to see."<sup>123</sup> Not all restaurants are against menu labeling.<sup>124</sup> Kevin West-

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116. See CCPHA *Nutrition Labeling in Chain Restaurants*, *supra* note 1, at 3.

117. *Id.* at 4.

118. *Id.* at 6.

119. *Id.* at 8.

120. See e.g., Press Release, National Restaurant Association, New Coalition Advocates National Nutrition Standard for Chain Restaurants (Oct. 22, 2008), available at <http://www.restaurant.org/pressroom/pressrelease.cfm?ID=1702> ("New York City requires just caloric information while Seattle requires calories, sodium, saturated fat and carbohydrates be listed on their menu") [hereinafter "NRA Press Release"].

121. *Id.*

122. Center for Consumer Freedom, *supra* note 48.

123. California First State, *supra* note 83.

124. California Center For Public Health Advocacy, *City of Los Angeles Formally Endorses Bill: Coalition of Health Advocates Optimistic Governor Will Sign Menu-Labeling*

ley, executive director of the Golden Gate Restaurant Association, pointed out, however, that “[r]estaurants would prefer not to be regulated..., but if this is part of a larger program to fight childhood obesity, then [restaurants are] ready to do [their] part.”<sup>125</sup> Nevertheless, it is important that proposed legislation address industry concern in order to obtain support and cooperation from restaurants. Many restaurants are in favor of more uniform standards at the state level as opposed to numerous local laws differing in requirements.

*A. The Labeling Education and Nutrition Act of 2008—Proposed National Measure*

In September 2008, the Labeling Education and Nutrition Act of 2008 (LEAN Act) was introduced in the House by Representative Jim Matheson and in the Senate by Senators Tom Carper and Lisa Murkowski.<sup>126</sup> The LEAN Act will build upon NLEA, which requires uniform labels for nutrition information on packaged foods and beverages, to include mandatory listing of nutritional information for food sold in chain restaurants in all fifty states. The LEAN Act would establish a uniform national nutrition labeling standard for chain restaurants by “provid[ing] for a single set of guidelines in how nutrition information is calculated,”<sup>127</sup> and bestowing legal protection on law-abiding restaurants.<sup>128</sup> The LEAN Act would apply only to chains with twenty or more establishments under the same trade name regardless of ownership.<sup>129</sup> In sum, the Act only applies to larger chain restaurants better suited to meet the Act’s requirements since typically they already have standard menus and standard preparation methods in place.

*B. The Coalition For Responsible Nutrition Information (CRNI)*

When Congress introduced the LEAN Act, the CRNI was formed to promote the expansion of flexible federal legislation.<sup>130</sup> The CRNI wants to

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*Bill*, Sacramento, CA (Sept. 25, 2007), available at [http://www.coavision.org/media/press\\_releases/SB%20120%20Advocates%20Optimistic%20Release\\_FINAL.pdf](http://www.coavision.org/media/press_releases/SB%20120%20Advocates%20Optimistic%20Release_FINAL.pdf).

125. *Id.*

126. See National Restaurant Association, *supra* note 111; The Coalition For Responsible Nutrition Information, *Lean Act Senate*, <http://www.nationalnutritionstandards.com/senatelegislation.html> (last viewed Jan. 17, 2009) (The Senate version of the LEAN Act (S. 3575) was introduced on September 25, 2008 by Senator Tom Carper of Delaware and Senator Lisa Murkowski of Alaska. The bill was referred to the Senate Committee on Health, Education, Labor and Pensions).

127. CRNI FAQs, *supra* note 40.

128. See National Restaurant Association, *supra* note 111.

129. Labeling Education and Nutrition Act of 2008, S. 3575, 110th Cong., §6(8) (2008).

130. See National Restaurant Association, *supra* note 111. (“The Coalition has more than thirty companies and associations” as members, led by the National Restaurant Association).

ensure that fast food customers receive detailed written nutrition information in a consistent and convenient manner by creating a uniform, national standard.<sup>131</sup> The CRNI also supports expanding NLEA to include more detailed nutritional information than just calories for food sold nationwide by major chain restaurants.<sup>132</sup>

The LEAN Act provides a compromise between restaurants trying to comply with mandatory nutrition labeling, and customers who would benefit from nutrition information at the point of purchase. The Act requires calorie information to be on the menu or menu board at restaurants.<sup>133</sup> The Act is less stringent, however, with regard to the display of nutritional information, as long as the required information is available to the customer in writing somewhere in the restaurant before the point of purchase.<sup>134</sup> The LEAN Act still mandates a referral statement at the point of purchase that directs the consumer to the availability of additional nutrition information required under the Act,<sup>135</sup> but restaurants are given some flexibility and customers still receive important information. While a restaurant could provide nutrition information on the main menu, it could also resort to other less effective means such as tray liners, kiosks and brochures, if customers are directed to the information explicitly by the referral statement. The CRNI supports national legislation which allows restaurants some flexibility in posting or providing nutritional information in a consistent manner and according to customer preferences.<sup>136</sup>

Local governments are not able to regulation nutrition information labels on packaged foods, as these national standards are provided by NLEA. Accordingly, the individual cities, counties, and states should not be able to set different nutritional information requirements for food served in restaurants. The CRNI argues for nationwide uniformity in menu labeling requirements:

Consumers deserve to have convenient access to the same detailed nutrition information that they now find on packaged foods in their grocery store...The more nutrition information consumers have at their disposal, the better decisions they are able to make for their individual dietary needs and those of their families.<sup>137</sup>

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131. See NRA Press Release, *supra* note 116.

132. See CRNI FAQs, *supra* note 40.

133. See *e.g.*, S. 3575, §6(8)(A) (providing requirements for what information must be displayed on a menu board and where and what information must be provided if the information is not displayed on a menu board

134. S. 3575, §6(8)(B).

135. S. 3575, §6(8)(C).

136. CRNI FAQs, *supra* note 40.

137. *Id.*

## V. ARGUMENT FOR A UNIFORM STANDARD AT THE STATE LEVEL

In the absence of federal legislation, states should consider statewide legislation as an alternative to varying and inconsistent local laws. California was the first state to pass statewide legislation for menu labeling. The California Restaurant Association (CRA) had urged state legislators to create “a uniform statewide standard for nutritional information disclosure:”<sup>138</sup> As Jot Condie, president of the CRA pointed out, stated, “A patchwork of differing local ordinances such as those in Santa Clara and San Francisco would be challenging for restaurants to meet and confusing for their customers...A flexible statewide approach to nutritional information disclosure would serve the best interests of both restaurants and their consumers.”<sup>139</sup> California Governor Schwarzenegger agreed, stating that “[i]nflexible mandates applied sporadically are not an effective way to continue our progress in educating Californians about healthy living.”<sup>140</sup>

### *A. The NLEA Does Not Regulate Nutrition Information Labeling on Restaurant Food, and States and Localities Are Free to Adopt Their Own Rules*

Federal law does not preempt state and local governments from adopting their own menu labeling laws. The United States Court of Appeals for the Second Circuit has provided the only existing case law interpreting state and local menu labeling laws and federal preemption to date. According to the Second Circuit, Congress intended to exempt restaurant food from the preemption sections required for the sale of food interstate.<sup>141</sup> The Court stated that, in requiring chain restaurants to post calorie information on their menus, “New York City merely stepped into a sphere that Congress intentionally left open to state and local governments.”<sup>142</sup> The Court concluded that the scheme of NLEA is simple when it comes to restaurant food—NLEA does not regulate nutrition information labeling on restaurant food, and, therefore, states and localities are free to adopt their own rules.<sup>143</sup> NLEA, however, generally regulates nutrition content claims on restaurant foods, and states and localities may only adopt rules that are identical to those provided in NLEA.<sup>144</sup> For example, the NLEA does not preempt New York City from adopting its own requirements for nutrition labeling,<sup>145</sup> but

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138. Press Release, California Restaurant Association, CRA Files Second Menu Labeling Lawsuit, (July 23, 2008), available at <http://www.calrest.org/go/cra/news-events/news/press-releases/cra-files-second-menu-labeling-lawsuit/> (last visited Oct. 2, 2008).

139. *Id.*

140. S.B. 120—BILL ANALYSIS, *supra* note 24, at 7.

141. N.Y. State Rest. Ass’n, 556 F.3d at 118.

142. *Id.*

143. *Id.*

144. *Id.*

145. See 21 U.S.C. § 343-1(a)(4).

it does generally preempt it from adopting different rules for nutrient content claims.<sup>146</sup>

## VI. POLICY IN FAVOR OF MENU LABELING LEGISLATION

The obesity epidemic in the United States has grown at a rate similar to that of consumption of restaurant foods over the past several decades, signaling that regulation is necessary. Reversing the epidemic will require a broad range of solutions operating at multiple governmental levels and involving multiple segments of society. Menu labeling at fast food restaurants is but one solution to combat obesity. Menu labeling by itself will not cure the obesity epidemic, but it provides a start.

Obesity does not just adversely affect the obese individual, but places an extensive economic burden on the whole nation when health care costs and lost productivity are considered. "Between 1987 and 2001, the rising rate of obesity and related medical conditions accounted for more than one-quarter of the growth in health care spending in the United States."<sup>147</sup> Further, the costs associated with lost productivity "attributable to obesity have been estimated to be even greater than health care costs."<sup>148</sup>

The obesity-related health concerns of the American people warrant additional legislation in this area despite the opposition from members of the restaurant industry.<sup>149</sup> The intention of such laws is not to ban fast food, but rather to encourage customers to consider their choices more carefully in light of additional nutritional information. Although restaurants may oppose adoption of menu labeling legislation, restaurants are already subject to laws "requiring them to pay a higher minimum wage, post health inspection grades and prohibit smoking—all of which they vigorously opposed."<sup>150</sup> Thus, restaurant chains will survive and adapt to the new requirements as they have done for past requirements to which they had initially opposed.<sup>151</sup>

Menu labeling legislation does not have a purpose of deterring people from eating fast food entirely. People will still eat fast food, but they will be able to make informed decisions when they do so. Nutrition information

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146. *See id.* at 343-1(a)(5).

147. SIMON ET AL, *supra* note 5, at 2.

148. *Id.*; Brief for Professor Robert Post, *supra* note 45, at 8. ("The San Francisco Department of Public Health estimates that the obesity epidemic costs San Francisco \$192 million per year in medical expenses, lost productivity and worker's compensation" (citation omitted)).

149. Harold Goldstein & Eric Schlosser, *Putting Health on the Menu: Requiring Fast Food and Restaurant Chains to Post Calorie Information Wouldn't Hurt Them and Could Help Us*, L.A. TIMES, Aug. 5, 2008, available at <http://www.latimes.com/news/printedition/opinion/la-oe-schlosser5-2008aug05,0,1626001.story> (last visited April 14, 2010).

150. *Id.*

151. *Id.*

at the point of purchase will “give consumers the option to choose items on the menu that meet their nutritional needs.”<sup>152</sup> More informed decisions would alter consumption habits and, in turn, alter the demand for unhealthy products, causing restaurant franchises to change their menus to healthier selections. Instead of going out of business, restaurants will merely have an incentive to reformulate their products to reduce calories and add healthier options to their menu. Based on experiences with the Nutrition Labeling Act for packaged foods, and recent legislation to include trans fatty acids on labels, companies were shown to be able to change formulation in ways that promote health and also maintain product appeal.<sup>153</sup> Possible reformulations include changing ingredients, changing cooking methods, and reducing portion sizes of menu items.<sup>154</sup>

## VII. POLICY ARGUMENTS AGAINST MENU LABELING LEGISLATION

Where should government regulation end and personal responsibility for one’s own health begin? Opponents of menu labeling laws, such as the National Restaurant Association, view such legislation as governmental exercise of the *parens patriae* doctrine, arguing that the government is overreaching its powers to result people’s lives and health when it acts of “food police.”<sup>155</sup> Furthermore, advocacy groups, such as the California Alliance for Consumer Protection, agree with the intent of menu labeling laws, but believe that such laws are not restrictive enough, especially when a patchwork of local laws within a state do not apply to every restaurant in the state.<sup>156</sup>

Restaurants argue that implementation of menu labeling requirements is difficult, costly and impractical. Although most menu labeling laws only apply to larger restaurants with standardized menu items, “[m]andatory labeling of restaurant foods could potentially lead to significant economic costs for the restaurant industry, especially in calculating and displaying information.”<sup>157</sup> For a restaurant whose menu has 100 items, it is estimated that the restaurant will spend \$22,000 to determine the nutrition information.<sup>158</sup> Further, it may cost a restaurant as much as \$25,000 for new restau-

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152. Yale University Rudd Center for Food Policy and Obesity, *Menu Labeling Laws*, [http://yaleruddcenter.org/what\\_we\\_do.aspx?id=124](http://yaleruddcenter.org/what_we_do.aspx?id=124) (last visited August 16, 2009).

153. SIMON ET AL., *supra* note 5, at 5.

154. *Id.*

155. Jerry Hirsch, *Stepping Up to the Plate for More Food Regulation*, L.A. TIMES, Dec. 17, 2008.

156. S.B. 120 – BILL ANALYSIS, *supra* note 24, at 6.

157. Rebecca S. Fribush, *Putting Calorie And Fat Counts On The Table: Should Mandatory Nutritional Disclosure Laws Apply To Restaurant Foods?*, 73 GEO. WASH. L. REV. 377, 386 (2005).

158. *Id.*

rant menus,<sup>159</sup> which must be reprinted every time the menu changes. In addition to the extreme costs in implementing these measures,, many food items that are similar in size may differ greatly in nutritional value. Lastly, “restaurant portions are almost impossible to standardize.”<sup>160</sup>

The California Restaurant Association (CRA) argues that menu labeling may discourage “creativity in the kitchen, especially in fine dining establishments.”<sup>161</sup> However, the law will only affect chain restaurants that are not fine dining establishments. In vetoing SB 120, Governor Schwarzenegger stated that the bill “would place burdens and costs upon some restaurant owners while imposing no burdens or costs on others.”<sup>162</sup> He further stated that the bill does not allow much flexibility in how restaurants give nutritional information to their customers.<sup>163</sup>

Finding ways to adapt these pre-existing methods to a more readily available format at the point of sale is not the problem. The problem lies in having to spend considerable time and money to incorporate this information on their already congested menu boards, and in the possibility of slowing consumer traffic down. Fast food will no longer be fast. Most of the chain restaurants affected, however, are willing to make nutritional data available, and, in fact, already provide nutritional information on the Internet and posters, and in brochures and kiosks.

#### VIII. POSSIBLE CONSTITUTIONAL CHALLENGE TO MENU LABELING LEGISLATION-INFRINGEMENT OF COMMERCIAL SPEECH

A federal law requiring restaurants to disclose nutrition information on their menus and menu boards could potentially be challenged on First Amendment grounds if mandatory disclosure is found to infringe on a restaurant’s commercial speech. It is undisputed that commercial speech is entitled to First Amendment protection.<sup>164</sup> Mandatory menu labeling laws deal with commercial speech, which is defined as speech that proposes a commercial transaction, here the sale of a restaurant meal. While the First Amendment guarantees protection of both commercial and noncommercial speech,<sup>165</sup> “less protection is [afforded] to commercial speech than other

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159. *Id.* at 387.

160. Center for Consumer Freedom, *supra* note 48 (“[I]magine trying to ensure that each steak is cut to the exact same size and that each order of stir fried vegetables uses the exact same amount of oil. A generous chef could trigger the arrival of unscrupulous and opportunistic lawyers.”).

161. S.B. 120 – BILL ANALYSIS at 6, January 8, 2008, *available at* [http://info.sen.ca.gov/pub/0708/bill/sen/sb\\_01010150/sb\\_120\\_cfa\\_20080108\\_154841\\_sen\\_floor.html](http://info.sen.ca.gov/pub/0708/bill/sen/sb_01010150/sb_120_cfa_20080108_154841_sen_floor.html).

162. *Id.* at 6.

163. *Id.*

164. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637, (1985).

165. *See Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

forms of expression.<sup>166</sup> Even within the class of regulations affecting commercial speech, varying levels of protection are given to the speech depending on the type of commercial speech at issue. The Supreme Court has stated that there are material differences between purely factual and uncontroversial disclosure requirements and outright prohibitions on speech<sup>167</sup> regulations that compel purely factual and uncontroversial commercial speech are subject to more lenient review than regulations that restrict accurate commercial speech.<sup>168</sup>

The Second Circuit Court of Appeals explained:

Mandated disclosure of accurate, factual, and uncontroversial commercial information does not offend the core First Amendment values of promoting efficient exchange of information or protecting individual liberty interests. Such disclosure furthers, rather than hinders, the First Amendment goal of discovery of truth and contributes to the efficiency of the "marketplace of ideas." Protection of the robust and free flow of accurate information is the principal First Amendment justification for protecting commercial speech, and requiring disclosure of truthful information promotes that goal. In such a case, then, less exacting scrutiny is requirement than where truthful, non-misleading commercial speech is restricted.<sup>169</sup>

Although First Amendment speech rights are implicated by menu labeling requirements, such regulations are given less scrutiny than normal speech and do not violate the Constitution under certain circumstances.

*A. Central Hudson Gas & Electric Corp. v. Public Service Commission.*

The United States Supreme Court has explicitly stated that a commercial speaker's constitutionally protected interest in not providing any particular factual information is minimal.<sup>170</sup> Regulations compelling commercial speech may be upheld. The Supreme Court uses a reasonable relationship test to uphold purely factual information as constitutional if such speech is reasonably related to an appropriate state interest.<sup>171</sup> This test was set out in

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166. Pomeranz & Brownell, *supra* note 41, at 1581.

167. *Zauderer*, 471 U.S. at 650.

168. *Id.* at 651.

169. *National Electric Manufacturers Ass'n v. Sorrell et al.*, 272 F.3d 104, 114 (2d Cir. 2001).

170. *Zauderer*, 471 U.S. at 651.

171. Pomeranz & Brownell, *supra* note 41, at 1581. (citing *Zauderer*, 471 U.S. at 651).



detail by the United States Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission* in 1980 (*Central Hudson* Four Part Test).<sup>172</sup> Under the *Central Hudson* Four Part Test, in order for a regulation compelling commercial speech to be upheld, “a court must look at whether: (1) the expression concerns lawful activity and is not misleading; (2) the government’s interest is substantial; (3) the restriction directly serves the asserted interest; and (4) the restriction is no more extensive than necessary.”<sup>173</sup>

Under this test, “[s]ome labeling requirements have been found to infringe on a food purveyor’s right to commercial speech,”<sup>174</sup> but courts have still left open the possibility that public health might be a substantial interest to permit compelled food labeling.<sup>175</sup> For example, the Second Circuit Court of Appeals has recently held that New York City plainly demonstrates a reasonable relationship between the purposes of its disclosure requirements and the means employed to rectify the cited problem at hand: what the City termed an “obesity epidemic”.<sup>176</sup>

### 1. Nutrition Disclosure Concerns Lawful Activity and is not Misleading

Mandatory disclosure of factual information “is a routine regulatory mechanism in the commercial marketplace,” and the government has the power to require sellers of products to disclose factual information about their goods.<sup>177</sup> Menu labeling laws are another form of mandated factual disclosure. “A menu-labeling law compels the disclosure of factual information (a calorie is a unit of measure for energy obtained from food and beverage) and not a subjective viewpoint (e.g., fried food is bad).”<sup>178</sup>

### 2. The Government’s Interest in Public Health is Substantial

Most, if not all, menu labeling legislation is proposed to address public health issues. “Between health-care costs and lost productivity, the con-

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172. *Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980).

173. Fribush, *supra* note 154, at 388 (citing *Central Hudson Gas & Electric Corp.*, 447 U.S. at 566).

174. *Id.* (“[I]n *International Dairy Foods Ass’n. v. Amestoy*, the United States Court of Appeals for the Second District found that a state law requiring identification of dairy product from cows treated with certain hormones violated producers’ First Amendment rights to hold back information...[T]he [court] found that the state’s asserted interests [of] consumer interest, and the right to know[,] were not substantial enough to justify the regulation” *Int’l Dairy*, 92 F.3d (2d Cir. 1996)).

175. Fribush, *supra* note 154, at 388 (citing *Int’l Dairy Foods Ass’n*, 92 F.3d at 73).

176. N.Y. State Rest. Ass’n, 556 F.3d at 134.

177. Pomeranz & Brownell, *supra* note 41, at 1581 (providing examples of federal laws regulating labels of products in other facets, such as textile products and prescription drugs).

178. *Id.*

sequences of obesity are in the billions and billions of dollars...With menu labeling, we can begin to turn the corner on the (obesity) epidemic," said California Senator Alex Padilla, sponsor of the menu labeling legislation in his state.<sup>179</sup>

Further, in upholding New York City's regulation, the Second Circuit Court of Appeals found that New York City's interest in public health was substantial,<sup>180</sup> recognizing studies presented by New York City to support its claim that public health was a substantial interest. The studies supported the Court's findings that obesity is a contributing factor for heart disease, diabetes, stroke, and cancer, which caused seventy percent of deaths in New York City in 2005.<sup>181</sup> Further, the Court found that the obesity epidemic is mainly due to excess calorie consumption, often resulting from meals eaten away from the home<sup>182</sup> Lastly, the Court found that chain restaurants serve food that is associated with excess calorie consumption and weight gain.<sup>183</sup>

New York City is not alone in claiming that public health is a substantial interest. In support of its conclusion that public health is a substantial interest for New York City, the Second Circuit Court of Appeals discussed various other relevant studies:

A 2006 FDA-commissioned report concluded that "obesity has become a public health crisis of epidemic proportions." In addition, a 2005 study by the Center for Disease Control and Prevention (the "CDC") estimated that approximately 112,000 deaths in 2000 were associated with obesity in the United States. Another study concluded that rising obesity rates led to increasing diabetes rates, finding that as of 2005, 15.8 million Americans had diabetes, almost triple the number from 1980. Yet another study concluded that with these increased rates of obesity and associated health problems, have come increased health costs.<sup>184</sup>

To survive a free speech challenge, legislators should set out the government's public health objectives to show that the legislation rationally relates to the government's interest. It is arguable that menu labeling legislation rationally relates to the government's interest in the promotion of informed decision making and the reduction and prevention of obesity.<sup>185</sup>

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179. Berggoetz, *supra* note 97.

180. *N.Y. State Rest. Ass'n*, 556 F.3d 114 at 134.

181. See Notice of Adoption, *supra* note 9, at 3.

182. *Id.* at 4-5

183. *Id.* at 5.

184. *New York State Restaurant Association*, 556 F.3d at 136 (citations omitted).

185. Pomeranz & Brownell, *supra* note 41, at 1580.

Public health would likely be permissible as a substantial government interest because not only have courts previously recognized public health as a substantial interest for the purpose of commercial speech regulation,<sup>186</sup> but there is also substantial convincing evidence out there to support the link between eating at chain restaurants and health risks such as obesity.<sup>187</sup>

### 3. *The Restriction Directly Serves the Asserted Interest*

Under the *Central Hudson* Four Part Test, the government must also show that any proposed menu labeling legislation directly relates to promoting public health. According to the Rudd Center for Food Policy and Obesity at Yale University, “[c]onsuming fast-food is positively associated with weight gain, insulin resistance and increased risk for obesity and type two diabetes.”<sup>188</sup> One study found that each meal at a fast food establishment often contains more calories than a person should eat in an entire day and most fast food consumers eat fast food an average of two times per week.<sup>189</sup> Eating an excess of calories two times per week causes the fast food consumer to pack on the pounds and increases the risk of health issues associated with being overweight or obese.<sup>190</sup> Americans currently spend forty-eight percent of their food dollars on food prepared away from the home, and food prepared outside the home constitutes thirty-four percent of Americans’ daily caloric intake.<sup>191</sup> Therefore, by regulating fast food and chain restaurants, the government directly addresses a major cause of health issues. The advancement of public health and obesity reduction is served by consumer disclosure requirements increasing the accuracy of factual information available to consumers.

### 4. *The Restriction Is Not More Extensive than Necessary*

To meet the last prong of the *Central Hudson* Four Part Test, the gov-

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186. Fribush, *supra* note 154, at 388.

187. *Id.*

188. Brief for Jennifer L. Pomeranz and Kelly D. Brownell of the Rudd Center For Food Policy and Obesity at Yale University as Amicus Curiae Supporting Defendants at 3, *New York State Restaurant Association v. New York City Board of Health*, 509 F.Supp.2d 351 (S.D.N.Y. 2007) (No. 08 Ci. 100) (Feb. 8, 2008).

189. *Id.*

190. See ROBERTA R. FRIEDMAN, RUDD CENTER FOR FOOD POLICY & OBESITY, MENU LABELING IN CHAIN RESTAURANTS: OPPORTUNITIES FOR PUBLIC POLICY 3 (2008), available at <http://www.yaleruddcenter.org/resources/upload/docs/what/reports/RuddMenuLabelingReport2008.pdf> (A health impact assessment done in Los Angeles County, California suggests that menu labeling will help combat the obesity epidemic. If menu labeling helped ten percent of chain restaurant patrons reduce their average meal by 100 calories, it could prevent close to forty percent of the average annual 6.75 million pound weight gain in the county population).

191. *N.Y. State Rest. Ass’n.*, 556 F.3d at 135 (2d Cir. (N.Y.), 2009) (discussing the *Keystone Report*, a 2006 FDA-commissioned report at 30, 122).

ernment must show that menu labeling is no more extensive than necessary and that nutrition information on menus is most relevant to obesity prevention. It could be argued that menu labeling is more extensive than necessary in addressing public health because all restaurants could publish nutrition information for their customers in other ways besides directly on the menu. Providing calorie information, however, similar to that provided in NLEA's Nutrition Fact panel, at the point of purchase would help consumers make more informed, healthier choices.<sup>192</sup> In addition, putting nutrition information at the point of purchase has proven to be one of the most effective means of helping consumers make more informed decisions and healthier choices. Studies have shown that alternative means of disclosure are not insufficient, and customers tend to miss seeing the nutrition information.<sup>193</sup> Ordering at restaurants is one of the few places where, with a simple, split-second decision, people can cut hundreds, even thousands, of calories. The link between obesity and eating outside the home suggests that information at point of purchase helps customers order healthier options, and a disclosure regulation is not too extensive to serve asserted health interests.

#### IX. CONCLUSION

Mandatory nutrition labels on fast food and chain restaurant menus and menu boards is an idea that is quickly catching on. While only a few major cities and one state have passed menu labeling legislation, cities, counties, and states across the country have proposed similar legislation in the last couple of years. The idea is catching on, and in the near future, it is likely to be common to see nutrition information on fast food menus. Leading health authorities and national organizations including AARP, American Cancer Society, American Diabetes Association, American Medical Association, Institute of Medicine, Society for Nutrition Education and the United States Food and Drug Administration's Obesity Working Group all recommend addressing the lack of calorie information in restaurants.<sup>194</sup>

A single national standard or, at a minimum, various state-wide standards, would not be difficult to implement and can solve an exponentially growing epidemic. Mandating the display of calorie information by fast food and chain restaurants is feasible, will reach many consumers, and can be reasonably expected to have an overall positive health impact. Our country is relatively unhealthy and the obesity epidemic is getting worse each year. Since so many people eat fast food, menu labeling legislation will have an effect on a lot of meals. Further, menu labeling legislation

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192. See Notice of Adoption, *supra* note 9, at 6.

193. See *id.* at 7-8.

194. FRIEDMAN, *supra* note 187, at 9.

primarily affects large chain restaurants that have the resources to post nutrition information about standardized menu items at the point of purchase. Regulation of fast food is an important part of an integrated public response to the epidemic of obesity. It will not end obesity all by itself, but it is a decent place to start. Menu labeling legislation also would not dictate what restaurants can serve or what people should eat but rather simply provides diners with the nutritional information they need to make healthier food decisions.

In the absence of a national standard, states should strongly consider statewide legislation as an alternative to the current variety of local laws. While a state standard is better than a patchwork of local standards within a state, a national standard would provide greater clarity, consistency and flexibility for restaurants. California's recent passage of statewide legislation will hopefully prompt other states to follow its lead and similarly pass statewide legislation. Statewide legislation is not as favored by restaurant associations because it will not only provide a nationally consistent law, but it is better than local patchwork of laws in the meantime. Nevertheless, it will become quite burdensome for restaurants to figure out whether they fall under these laws and then determine how to comply with the different requirements. A national standard would provide uniform requirements to comply with instead of setting different standards from state to state. With a national standard, consumers will receive a consistent set of detailed nutrition facts across the country.

Consumers deserve to have convenient access to the same detailed nutrition information that they now find on packaged foods in the grocery store. Menu labeling legislation is not meant to deter people from eating fast food. People will still eat fast food, but they will be able to make informed decisions. Nutrition information at the point of purchase will give consumers the option to choose items on the menu that meet their nutritional needs.

