To: NPLAN Marketing to Children Learning Community, Food Marketing Workgroup, Marketing Roundtable Attorneys, and other colleagues
From: NPLAN
Re: Recent Supreme Court decisions affecting our work
Date: August 15, 2011

Two recent U.S. Supreme Court decisions have caused considerable buzz in the marketing world and may have a tangible effect on our coalition's work. This memo offers a brief overview of *Sorrell v. IMS Health* and *Brown v. Entertainment Merchants Association*. The general tenor of the decisions could well make it more difficult for government to restrict food marketing to children. But the decisions don't fundamentally change the constitutional context for the regulatory approaches we have been considering—despite what industry has been asserting in the press, court documents, and comments submitted to federal agencies.

Sorrell v. IMS Health
Court expands First Amendment protection for commercial speech.

Vermont passed a law barring the sale or use of doctors' prescription histories to pharmaceutical companies for marketing purposes. Drug companies had used this information to make pitches to individual doctors. The Supreme Court held that the statute violated the First Amendment because it discriminated against only one type of speaker—brand-name pharmaceutical companies, and only one type of speech—prescription drug marketing.

The decision explored several issues relevant to food marketing:

- "Commercial speech" vs. business activity: The Supreme Court has interpreted the First Amendment to give significant protection to "commercial speech." A law regulating commercial speech is much more likely to be struck down than one regulating commercial practices that aren't considered "speech." The *Sorrell* opinion strongly suggests that the scope of "commercial speech" is expanding. This means that the government may have a harder time regulating certain types of business conduct that yesterday may have been considered unprotected "commercial activity" but that tomorrow might be characterized as protected "commercial speech."

  Key takeaway: When drafting policies that address marketing practices other than advertising—such as toy giveaways, free sampling, and pricing—we need to frame the policies as addressing business operations that do not involve speech. In other words, we want to avoid using terms like "advertising," "marketing," and "communication." And we have to be prepared for industry to argue that the government is (despite that careful drafting) trying to regulate commercial speech.

- Commercial speech vs. core speech: Government regulation of commercial speech has never triggered the same "strict scrutiny" from courts as regulation of "core speech" like political or artistic expression. But the trend over the past 35 years has been greater and greater

protection for commercial speech, and the *Sorrell* opinion continues that trend. In particular, the opinion mixes together commercial and core speech case law and standards to an extent that the Court never had before. On the other hand, *Sorrell* technically left in place the separate, more lenient commercial speech test (known as the "*Central Hudson* test"). So experts disagree about whether the decision has *actually* made it harder to regulate commercial speech (and you can probably guess who's on which side of that debate).

Key takeaway: *Sorrell* does not provide clear direction to lower courts about the proper First Amendment test to apply to a law regulating commercial speech. A government defending a policy that regulates commercial speech can and should argue that the *Central Hudson* test applies and that it is more lenient than the strict scrutiny generally used to evaluate government restrictions on core speech.

- Privacy remains an important value: The Court in *Sorrell* doubted Vermont's interest in doctors' privacy, given that the statute allowed prescription histories to be shared with a range of users other than marketers. The Court distinguished the Vermont statute from "coherent" policies such as HIPAA that are broadly designed to protect consumer privacy interests.

  Key takeaway: The decision leaves the door open for effective government privacy measures that don't discriminate against marketers.

Brown v. Entertainment Merchants Ass'n
First Amendment limits government's ability to regulate to protect youth.

In *Brown*, the Supreme Court invalidated a California law that (among other things) prohibited the sale or rental of violent video games to minors. The law defined violent video games as those that involve killing, injuring or assaulting images of human beings in a manner that appeals to minors' deviant or morbid interest.

The decision raised several issues relevant to food marketing:

- The First Amendment protects violent speech to youth: A few categories of speech (obscenity, fraud, etc.) have traditionally received no First Amendment protection at all, so the government can ban them outright. The Court emphasized in *Brown* that it is very difficult to add to this list. Specifically, the Court rejected the idea of creating a new category of "violent speech to minors."

  Key takeaway: This case basically forecloses the possibility of establishing a new category of unprotected speech called, say, "harmful advertising to children." However, "inherently deceptive" commercial speech remains an unprotected category. So it may still be possible to argue successfully that, as a matter of cognitive science, all advertising to younger children is inherently deceptive and therefore unprotected. The same could perhaps be said of certain advertising techniques that have recently been used to target adolescents.

- Children have First Amendment rights: The Court emphasized in *Brown* that children, especially older children, have substantial First Amendment rights. According to one Justice, this case marks the first time that the Court has held that "the freedom of speech includes a right to speak to minors" directly without going through their parents.

  Key takeaway: It is going to be very hard for the government to restrict advertising to adolescents solely to shield them from messages about products that are harmful to them.

- New media equivalent to old media: When considering whether their interactive nature makes video games unique, the Court determined that the difference between books and video games is "more a matter of degree than of kind."

  Key takeaway: A majority of the Justices were disposed to look at the new medium, video games, through traditional lenses. On the other hand, three Justices suggested that video games might be uniquely harmful. We will want to encourage a strategic campaign to educate courts and the public about why various digital marketing techniques are more harmful than, say, TV commercials.

- Evidence and scientific consensus: The majority found it significant that the state could not point to a scientific consensus on a direct causal link between violent video games and harm to minors. The Court rejected Justice Breyer's approach, which would have deferred to the legislature to determine whether the science was sufficient.

  Key takeaway: We are going to have to marshal and frame the evidence carefully to be able to defend government restrictions on junk food advertising to kids. And, given *Sorrell*, we would be wise to be prepared with the same quality of evidence even for non-speech-related marketing practices, just in case a court finds those practices to constitute "commercial speech." Hopefully expert scientists in our coalition will identify where the *Brown* Court went wrong (at least from our perspective) in its assessment of the evidence and will help strategize about how to make a better case regarding the harms of junk food marketing to children.

- Government should not act "paternalistically": The Court looked askance at government's substituting its own judgment for that of parents, or even trying to anticipate parents' preferences: "While some of the legislation's effect may indeed be in support of what some parents of the restricted children actually want, its entire effect is only in support of what the State thinks parents *ought* to want."

  Key takeaway: In the findings for any future legislation restricting food marketing, policymakers will want to avoid stating that the purpose of the legislation is to help parents raise their children.

In sum, the *Sorrell* and *Brown* decisions signal the Court's continuing expansion of the scope of First Amendment doctrine at the expense of government efforts to regulate business to protect privacy and children. However, the decisions do not close the door on carefully crafted regulation of junk food advertising and other food industry marketing practices.