

ALASKA LEGISLATURE COMMITTEE FILES, 2003-2004 8672

10940 HOUSE LABOR & COMMERCE

In 1977, the Supreme Court applied this principle in the context of financial support for speech, holding that governments may not require individuals to subsidize speech with which they disagree, just as they may not require one to speak when they wish to remain silent. That case, *Abod v. Detroit Bd. of Education*,<sup>[18]</sup> involved a challenge by a group of non-union public school teachers to a law that required them to pay service fees to the teachers union for activities that benefited them. The Supreme Court held that the law was valid as to activities that benefited all teachers, such as the union's collective bargaining activities, but that dissenting teachers could not be forced to subsidize the union's political activities. As the Court put it, "at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the state."<sup>[19]</sup> A few years later, the Supreme Court applied the same principle to the California State Bar, holding that while a state could require attorneys to pay dues toward bar activities that maintain the standards of the profession, it could not require them to pay for the Bar's political activities.<sup>[20]</sup>

Applying these principles in the context of compelled subsidies for promotional programs has led the U.S. Supreme Court to issue seemingly contradictory decisions. In 1997, the Court upheld a federal law that required producers of California peaches and nectarines to subsidize a collective advertising program.<sup>[21]</sup> In 2001, the Court struck down a program that required producers of mushrooms to do the same.<sup>[22]</sup> Why allow compelled subsidies for advertising California peaches and nectarines but not for mushrooms? The answer lies in the way the two laws were structured. The law at issue for California peaches and nectarines regulated all aspects of the market for those fruits. It had a purpose beyond speech, and thus the Court viewed it as analogous to a law that required public employees to pay union dues. The law at issue in the mushroom case, however, was designed to do only one thing: advertise. It was, as Justice Stevens described it, a "naked imposition . . . of compulsion" very much like a "naked restraint" on speech that the First Amendment would obviously prohibit.<sup>[23]</sup>

The Dairy Program is almost identical to the Mushroom Program that the Supreme Court struck down. The milk industry, however, is regulated a bit more extensively than the mushroom industry, leading some, including the District Court in the Cochran's case, to conclude that the Dairy Program's compelled subsidies for speech are constitutional even though the Mushroom Program was not. According to this view, it is appropriate to compel producers to subsidize advertising with which they disagree so long as their industries are otherwise heavily regulated. The problem, of course, is that many industries are heavily regulated—pharmaceuticals, securities, law and accounting, to name just a few. Do individuals give up their rights of free speech simply by choosing to do business in these areas? Fortunately, that is not what the Supreme Court has held. In fact, two federal appellate courts have recently struck down similar promotional programs for beef and pork under the First Amendment.<sup>[24]</sup>

### The Plaintiffs

Joseph and Brenda Cochran operate a dairy farm in Tioga County, Pennsylvania, which is located in the north-central part of the state. They tend to about 200 cows on roughly 900 acres of land, 200 of which they own and 700 of which they rent. Dairy farming has been in Joe's family for three generations.

The Cochrans object to the Dairy Program because it forces them to subsidize speech with which they disagree. In Joe's words, "[i]t is our belief that the use of sustainable agriculture in the form of [a] less intensive herd management and grazing system makes for a superior milk, promotes a better use of the resources, promotes the environment, and, in sum, provides a healthier product for humans and our planet." They do not consider milk to be a generic product and object to being forced to subsidize advertising that supports farming and dairy production methods that are, in their view, wasteful and inferior to their own.

The Cochrans are independent dairy farmers. They are not members of any dairy manufacturing or marketing cooperative. They market their milk themselves, and they alone determine how much to produce, how to sell it, and to whom it will be sold. Each year, they independently negotiate with the various processing plants who purchase their milk. They would be perfectly happy if the government would leave dairy farmers alone and let them produce, market and sell their milk themselves.

### Litigation Team

The lead attorney in this case for the Institute for Justice is Steve Simpson, who litigates First Amendment, economic liberty and property rights cases nationwide. Simpson is currently the lead attorney in *ForSaleByOwner.com v. Zinnemann*, the Institute's challenge to California's effort to require for-sale-by-owner advertising websites to obtain real estate brokers licenses. Prior to joining the Institute, Simpson was an associate in the litigation department of the international law firm Shearman & Sterling. He will be joined by William H. Mellor, president and general counsel of the Institute for Justice, and Scott Bullock, a senior attorney at the Institute. Assisting the Institute for Justice as local counsel is Walter Grabowski of Holland & Grabowski in Wilkes Barre, Pennsylvania.

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[1] Thomas Jefferson, "A Bill for Establishing Religious Freedom," *The Papers of Thomas Jefferson*, ed. Julian P. Boyd, vol. 2, p. 545 (1950).

[2] The federal law at issue is the Dairy Promotion Stabilization Act of 1983, Pub. L. 98-180, 97 Stat. 1128, 7 U.S.C. 4501 *et seq.* The Act authorizes the Secretary of Agriculture to create the Dairy Promotion Program and appoint a Dairy Board to oversee it and create advertising and marketing programs for dairy products under the program. The Secretary issued an order consistent with the Act in March 1984. *See* 49 Fed. Reg. 11806-1.

[3] Currently, more than \$10 billion is spent annually on organic foods. That number is projected to grow. *See True to its roots: Organic food industry wins fight on U.S. Standards* (Press Release, April 18, 2003), available at <http://www.organicconsumers.org/organic/wewin041903.cfm>; Carolyn Dimitri and Catherine Greene, *Recent Growth Patterns in U.S. Organic Foods Market*, available at <http://www.ers.usda.gov/publications/aib777/>.

[4] Case No. 4:CV-02-0529 (M.D.Pa. April 2, 2002).

[5] *See* 533 U.S. 405 (2001). The Institute for Justice filed an amicus brief in the case. *See* [http://www.ij.org/media/first\\_amendment/amicus/6\\_25\\_00pr.shtml](http://www.ij.org/media/first_amendment/amicus/6_25_00pr.shtml).

[6] *Id.* at 411.

[7] *See id.* at 413.

[8] *See Glickman v. Wileman Brothers & Elliot, Inc.*, 521 U.S. 457 (1997).

[9] See, e.g., 7 U.S.C. § 2611 *et seq.* (Potato Promotion Act, 1972), § 2901 *et seq.* (Beef Promotion Act, 1976), § 4601 *et seq.* (Honey Promotion Act, 1984), § 4801 *et seq.* (Pork Promotion Act, 1985), § 4901 *et seq.* (Watermelon Promotion Act, 1985), § 6001 *et seq.* (Pecan Promotion Act, 1990) (inactive program), § 6101 *et seq.* (Mushroom Promotion Act, 1990) (invalidated by *United States v. United Foods*, 533 U.S. 405 (2001)), § 6201 *et seq.* (Lime Promotion Act, 1990) (inactive program), § 6301 *et seq.* (Soybean Promotion Act, 1990), § 6801 *et seq.* (Fresh Cut Flowers and Greens Promotion Act, 1993) (inactive program), § 7461 *et seq.* (Kiwifruit Promotion Act, 1996) (inactive program), § 7481 *et seq.* (Popcorn Promotion Act, 1996), § 7801 *et seq.* (Avocado Promotion Act, 2000).

[10] See 7 U.S.C. § 7411 *et seq.* Promotional programs for lamb, blueberries, peanuts, mango and olive oil have been established under this Act.

[11] See 7 U.S.C. § 4504(g).

[12] See *United Foods*, 533 U.S. at 511. See also *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976) ("It is a matter of public interest that [economic] decisions, in the aggregate, be intelligent and well-informed. To this end, the free flow of commercial information is indispensable."); *Thompson v. Western States Medical Center*, 535 U.S. 357, 373 (2002) ("If the First Amendment means anything, it means that regulating speech must be a last—not first—resort."); *Riley v. Nat'l Fed. of the Blind*, 487 U.S. 781, 790-91 (1988) ("The First Amendment mandates that we presume that speakers, not the government, know best what to say and how to say it.").

[13] The so-called federal price support program was passed as part of the Agricultural Act of 1949, 63 Stat. 1052, ch. 792, § 201, 7 U.S.C. § 1446.

[14] In the generic Commodity Promotion Act of 1996, Congress dispensed with any discussion of particular commodities and simply decreed that *all* agricultural commodities were vital to the "national economy." See 7 U.S.C. § 7411.

[15] Since we made this point in the lawsuit, the government has changed the website, which no longer refers to the program as a "\$250 million" business. See <http://www.dairycheckoff.com/howitworks.htm>. Copies of the old web pages are available from the Institute for Justice.

[16] See *West Virginia State Bd. of Education v. Barnette*, 319 U.S. 624, 638 (1943) ("One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.").

[17] *Wooley v. Maynard*, 430 U.S. 705, 714 (1976) ("The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable.").

[18] 431 U.S. 209, 234-35 (1977).

[19] *Id.* at 234-35.

[20] *Keller v. State Bar of California*, 496 U.S. 1, 9-10 (1990).

[21] See *Glickman v. Wileman Brothers & Elliot, Inc.*, 521 U.S. 457 (1997).

[22] See *United States v. United Foods*, 533 U.S. 405 (2001).

[23] See *id.* at 418.

[24] *Michigan Pork Producers Ass'n v. Veneman*, case nos. 02-2337 & 2338, 2003 WL 22398622 (6<sup>th</sup> Cir. Oct. 22, 2003); *Livestock Marketing Ass'n v. U.S.D.A.*, 335 F.3d 711 (8<sup>th</sup> Cir. 2003).

UNITED STATES COURT OF  
APPEALS  
FOR THE THIRD CIRCUIT

—————  
No. 03-2522  
—————

JOSEPH S. COCHRAN;  
BRENDA S. COCHRAN,

Appellants

v.

ANN VENEMAN, Secretary, U.S.  
Department of Agriculture;  
NATIONAL DAIRY PROMOTION  
BOARD

Appellees

And

FRED LOVELL; LEE GREENWALT;  
JACKIE ROOT; EARNEST NORMAN;  
STEPHEN MASHALL; CECIL  
MOYER; JAMES VANBLARCOM

Intervenors-Appellees

—————  
Appeal from the United States District  
Court for the Middle District of  
Pennsylvania

(D.C. Civil No. 02-cv-00529)

District Judge:  
Honorable John E. Jones, III  
—————

Argued: January 12, 2004

Before: Sloviter, Rendell and Aldisert,  
Circuit Judges.

(Filed: February 24, 2004)

—————  
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APPELLEES

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OPINION OF THE COURT

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ALDISERT, Circuit Judge.

The American public is very familiar with the "Got Milk? ®" ads on television and in the print media.

This appeal requires us to decide whether a federal statute may compel a small dairy farm in Pennsylvania to help pay for the white-mustache milk advertisements and other dairy promotions. Implicated here are general First Amendment precepts that protect the right to refrain from speaking and the right to refrain from association, and the specific issue of whether the government may compel individuals to fund speech with which they disagree.

Joseph and Brenda Cochran are independent small-scale dairy farmers. They are not members of any dairy manufacturing or marketing cooperative. They alone determine how much milk to produce, how to sell and market it and to whom it will be sold.

The Dairy Promotion Stabilization Act of 1983, 7 U.S.C. § 4501 *et seq.* ("Dairy Promotion Act," "Dairy Act," or "Act"), provides for the creation of the Dairy Promotion Program and authorizes the Secretary of the Department of Agriculture ("Secretary") to issue an order

creating the National Dairy Promotion and Research Board ("Dairy Board") to administer the program. To finance the promotional projects and the Dairy Board's administration of them, the Dairy Act and implementing order require every milk producer in the United States to pay mandatory assessments of 15 cents per hundredweight of milk sold.<sup>1</sup> *Id.* § 4504(g); 7 C.F.R. § 1150.152. Neither the Dairy Act nor the order permits dissenting milk producers to withhold contributions for advertising or promotional projects to which they object.

The Cochrans object to paying these assessments and filed an action in the

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<sup>1</sup> The Dairy Act provides:

The order shall provide that each person making payment to a producer for milk produced in the United States and purchased from the producer shall . . . collect an assessment based upon the number of hundredweights of milk for commercial use handled for the account of the producer and remit the assessment to the Board.

...  
The rate of assessment for milk . . . prescribed by the order shall be 15 cents per hundredweight of milk for commercial use or the equivalent thereof, as determined by the Secretary.

7 U.S.C. § 4504(g).

United States District Court for the Middle District of Pennsylvania seeking a declaration that the Dairy Act violates their First Amendment rights of free speech and association.

The Cochrans operate a small commercial dairy farm with approximately 150 cows on about 200 acres of land in Tioga County, north-central Pennsylvania. In contrast to many larger-scale commercial dairy farms, the Cochrans employ what is known as "traditional" methods of dairy farming. Traditional dairy farming is less aggressive than larger-scale commercial farming, as it allows cows more room to move and graze and does not use the recombinant Bovine Growth Hormone (rBGH).<sup>2</sup> The Cochrans believe that their methods result in healthier cows, a cleaner environment and superior milk. The Cochrans object to the advertising under the Dairy Act because it conveys a message that milk is a generic product that bears no distinction based on

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<sup>2</sup> rBGH, also known as recombinant bovine somatotropin (rBST), is a genetically engineered growth hormone administered to dairy cows to boost milk production. Although the Food and Drug Administration has approved the use of rBGH for dairy production in the United States, consumer advocates and small dairy producers have questioned the longterm effects of the growth hormone on humans, cows and the environment. See Barnes v. Shalala, 865 F. Supp. 550, 554 (W.D. Wis. 1994).

where and how it is produced, and thereby forces them to subsidize speech with which they disagree.

As the First Amendment may prevent the government from prohibiting speech, it may also prevent the government from compelling individuals to express certain views, Wooley v. Maynard, 430 U.S. 705, 714 (1977); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943), or pay subsidies for speech to which individuals object, Keller v. State Bar of California, 496 U.S. 1, 9-10 (1990); Aboud v. Detroit Dep't of Educ., 431 U.S. 209, 234 (1977).

The Cochrans' lawsuit named as defendants Ann Veneman in her official capacity as Secretary of the United States Department of Agriculture ("USDA") and the National Dairy Promotion Board, and sought declaratory and injunctive relief from the remittance of compelled assessments by all dairy producers to finance generic dairy advertisements. Alleging that the Dairy Act unconstitutionally compels them to subsidize speech with which they disagree, the Cochrans filed a motion for summary judgment contending that their case was controlled by the teachings of United States v. United Foods, Inc., 533 U.S. 405 (2001), in which the Supreme Court held that compelled subsidies under the Mushroom Promotion, Research, and Consumer Information Act of 1990 ("Mushroom Act"), 7 U.S.C. § 6101 et seq., violated First Amendment protections.

The Government filed a motion to

dismiss or, in the alternative, for summary judgment, arguing that this case is controlled by the teachings of Glickman v. Wileman Brothers & Elliot, Inc., 521 U.S. 457 (1997), in which the Supreme Court upheld compelled subsidies for advertising California tree fruit under two marketing orders issued pursuant to the Agricultural Marketing and Agreement Act of 1937 ("AMAA"), 7 U.S.C. § 608c *et seq.* The Government argued that the generic dairy advertising subsidized under the Dairy Act constitutes "government speech" and is therefore immune from First Amendment scrutiny and, moreover, that the Dairy Act is a species of economic regulation that does not violate the First Amendment.<sup>3</sup> The district court agreed with the Government and granted summary judgment in its favor, holding that the Dairy Act survives the deferential First Amendment scrutiny afforded to economic regulation. The Cochrans appeal.

We must decide whether the challenged communications pursuant to the Dairy Act are government speech and thereby immune from First Amendment

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<sup>3</sup> Seven Pennsylvania dairy farmers who support the Dairy Promotion Act and Program petitioned the district court for leave to intervene as defendants and the district court granted the petition for intervention under Rule 24(a) of the Federal Rules of Civil Procedure. The Intervenor filed a cross motion for summary judgment, echoing the arguments made by the Government in its motion.

scrutiny. If these communications are private speech, we must decide whether the Dairy Act violates the First Amendment free speech and association rights of dairy farmers. In doing so, we must consider the quantum of scrutiny to be applied to determine the validity of regulations, such as the Dairy Act, that compel commercial speech.

For the reasons that follow we reverse the judgment of the district court and hold that the compelled speech pursuant to the Dairy Act is private speech, not government speech, and is therefore subject to First Amendment scrutiny. We hold also that the Act violates the Cochrans' First Amendment free speech and association rights by compelling them to subsidize speech with which they disagree. In so doing we conclude that the subsequent Supreme Court decisions of Glickman in 1997 and United Foods in 2001 severely dilute the precedential vitality of our ultimate holding in United States v. Frame, 885 F.2d 1119 (3d Cir. 1989), in which we concluded that the compelled assessments pursuant to the Beef Promotion Research Act of 1985, 7 U.S.C. § 2901 *et seq.*, survived First Amendment scrutiny.

#### I.

In determining the side on which the axe must fall – on Glickman or on United Foods – we must start by examining why the Supreme Court went one way in its first case of Glickman and the other way in its subsequent decision in United Foods.

A.

In Glickman, producers of California tree fruits (including nectarines, plums and peaches) challenged the constitutionality of regulations contained in marketing orders promulgated by the Secretary pursuant to the AMAA, 7 U.S.C. § 608c et seq., that imposed mandatory assessments on fruit tree growers to cover the expenses associated with the marketing orders, including the costs of generic advertising. 521 U.S. at 460. The Court emphasized that besides the advertising decisions, the economic autonomy of the fruit tree growers was otherwise restricted by a broader collective arrangement set forth in the marketing orders:

California nectarines and peaches are marketed pursuant to detailed marketing orders that have displaced many aspects of independent business activity that characterize other portions of the economy in which competition is fully protected by the antitrust laws. The business entities that are compelled to fund the generic advertising at issue in this litigation do so as part of a broader collective enterprise in which their freedom to act independently is already constrained by the regulatory scheme.

Id. at 469.

In addition to advertising, the

marketing orders for California fruit tree growers provided for mechanisms for establishing uniform prices, limiting the quality and quantity of tree fruit that could be marketed, determining the grade and size of the fruit and orderly disposing of any surplus. Id. at 461. The orders also authorized joint research and development projects, quality inspection procedures and standardized packaging requirements – all of which were financed by the compelled assessments. Id.

The Court determined that the collective arrangement of the fruit tree farmers was similar to the union arrangement at issue in Abood v. Detroit Board of Education, 431 U.S. 209 (1977), and the bar association at issue in Keller v. State Bar of California, 496 U.S. 1 (1990). In Abood, the Court held that the infringement upon First Amendment associational rights by compelled assessments for a union shop arrangement was “constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress.” 431 U.S. at 222. Similarly, in Keller, the Court held that the infringement upon First Amendment associational rights by compelled assessments for a state bar program was constitutionally justified by the State’s interest in regulating the legal profession and improving the quality of legal services. 496 U.S. at 13. Finding parallels between the facts of Abood and Keller, in Glickman the Court concluded that as part of the AMAA marketing

orders, the compelled assessments for generic advertising of California tree fruit were ancillary to a comprehensive marketing program, and therefore were "a species of economic regulation that should enjoy the same strong presumption of validity that we accord to other policy judgments made by Congress." 521 U.S. at 477.

"The opinion and the analysis of the Court [in Glickman] proceeded upon the premise that the producers were bound together and required by the statute to market their products according to cooperative rules. To that extent, their mandated participation in an advertising program with a particular message was the logical concomitant of a valid scheme of economic regulation." United Foods, 533 U.S. at 412.

B.

Four terms later, in United Foods the Court held that mandatory assessments imposed on mushroom producers for the purpose of funding generic mushroom advertising under the Mushroom Act, 7 U.S.C. § 6101 *et seq.*, violated the First Amendment. 533 U.S. at 416. The Court distinguished the statutory context at issue in United Foods from that in Glickman, explaining that under the stand-alone Mushroom Act "the compelled contributions for advertising are not part of some broader regulatory scheme" and the advertising was itself the "principal object" of the Mushroom Act. Id. at 415. As such, "the mandated support is contrary to the First Amendment principles set forth in

cases involving expression by groups which include persons who object to the speech, but who, nevertheless, must remain members of the group by law or necessity." Id. at 413 (citing Abood, 431 U.S. at 209; Keller, 496 U.S. at 1). The Court concluded that the compelled assessments pursuant to the Mushroom Act were unlike the situation in Abood, Keller and Glickman, in which:

Those who were required to pay a subsidy for the speech of the association already were required to associate for other purposes, making the compelled contribution of moneys to pay for expressive activities a necessary incident of a larger expenditure for an otherwise proper goal requiring the cooperative activity.

Id. at 414.

Fundamentally, the Court noted that "[w]e have not upheld compelled subsidies for speech in the context of a program where the principal object is speech itself." Id. at 415. Concluding that the only program the compelled contributions for advertising pursuant to the Mushroom Act serve "is the very advertising scheme in question," the Court ruled that the compelled assessments were not permitted under the First Amendment. Id. at 416.

C.

Guided by the express reasoning of the Court in Glickman and United Foods, we must first look at the broader statutory scheme presented in the Dairy

Act, or more specifically, we must ascertain whether the dairy producers are "bound together and required by the statute to market their products according to cooperative rules" for purposes other than advertising, or speech. United Foods, 533 U.S. at 412. It is to a description of the Dairy Act we now turn.

## II.

The Dairy Promotion Program set forth in the Dairy Act is one in a long series of federal "checkoff" programs for promoting agricultural commodities.<sup>4</sup>

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<sup>4</sup>Other stand-alone checkoff programs established by Congress which have been subject to First Amendment challenges include: Beef Research and Information Act of 1976 ("Beef Act"), 7 U.S.C. § 2901 *et seq.* (invalidated by Livestock Marketing Ass'n v. U.S. Dep't of Agric., 335 F.3d 711 (8th Cir. 2003) (*reh'g den.* Oct. 16, 2003)); Pork Promotion, Research, and Consumer Information Act of 1985 ("Pork Act"), 7 U.S.C. § 4801 *et seq.* (invalidated by Michigan Pork Producers Ass'n, Inc. v. Veneman, 348 F.3d 157 (6th Cir. 2003)); Mushroom Act, 7 U.S.C. § 6101 *et seq.* (invalidated in 2001 by United Foods, 533 U.S. at 405). *Cf. Glickman*, 521 U.S. at 457 (upholding as constitutional marketing orders for California tree fruits promulgated pursuant to the AMAA, 7 U.S.C. § 608c *et seq.*, which included compelled assessments to fund, among

Enacted in 1983, the Dairy Act authorizes the Secretary of Agriculture to establish a program for the "advertisement and promotion of the sale and consumption of dairy products [and] for research projects related thereto." 7 U.S.C. § 4504(a). The declared purpose of the Dairy Act is to provide for "an orderly procedure for financing . . . and carrying out a coordinated program of promotion designed to strengthen the dairy industry's position in the marketplace . . ." *Id.* § 4501(b).

The Dairy Act is a stand-alone law that was not passed as part of any other federal dairy regulatory scheme. It directs the Secretary to appoint a Dairy Board composed of private milk producers to administer the Dairy Promotion Program. *Id.* §§ 4504 (b) & (c). The Act provides that every milk producer must pay a mandatory assessment of 15 cents per hundredweight of milk sold to finance the promotional programs and the Dairy Board's administration of them.

Pursuant to the authority provided in 7 U.S.C. § 4503(a), the Secretary issued an order in March 1984 establishing the Dairy Board, 7 C.F.R § 1150.131, and the Board proceeded to collect the mandatory assessments from all milk producers, 7 C.F.R § 1150.152. For the Cochran's, the compelled assessments amount to roughly \$3,500 to \$4,000 per year.

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other things, generic advertising).

The Dairy Board is composed of commercial milk producers who are nominated by "eligible associations," which are private associations of milk producers that engage in dairy promotion at the state and regional level. *Id.* §§ 1150.133, 1150.273. The primary consideration in determining an organization's eligibility is "whether its membership consists primarily of milk producers who produce a substantial volume of milk" and whose overriding interests lay in the production and promotion of fluid milk and other dairy products. *Id.* § 1150.274(b).

In 1994, the Dairy Board created Dairy Management, Inc. ("DMI"), a District of Columbia corporation that now oversees and administers the promotional activities of the Dairy Act. DMI is a joint undertaking of the Dairy Board and the United Dairy Industry Association ("UDIA"), which is an association of state and regional dairy promotional programs that are considered "Qualified Programs" under the Dairy Act. "Qualified Programs" are local promotional programs, many of which preexisted the Dairy Act, to which milk producers may contribute a portion of the money they would otherwise pay in assessments under the Act. *See* 7 U.S.C. § 4504(g)(4), 7 C.F.R. §§ 1150.152(c), 1150.153. The Act thus requires dairy farmers to pay either the full 15 cent per hundredweight assessment to the Dairy Program or part to the Dairy Program and part to a Qualified Program that engages in state or regional generic advertising. The

Dairy Board and the DMI Board are composed entirely of private milk producers and other private parties, and the Dairy Promotion Program is funded entirely by private milk producers through the compelled assessments. The Dairy Promotion Program website explains: "Checkoff programs are funded by dairy producers – NOT TAXPAYERS. They are not governmental programs; rather, they are businesses with governmental oversight."<sup>5</sup>

The Secretary's oversight responsibilities pursuant to the Dairy Act are conducted by the Agricultural Marketing Service ("AMS"), a division of the USDA, and are limited to ensuring that the Dairy Promotion Program is in compliance with the Act. *See, e.g.,* 7 U.S.C. § 4507(a) (authorizing the Secretary to terminate an order issued under the Act only when she determines that it "obstructs or does not tend to effectuate the declared policy of" the Act). AMS guidelines explain that "[i]t is the policy of AMS in carrying out the oversight responsibility to ensure that legislative, regulatory, and Department policy requirements are met. It is not the intent to impose constraints on board operations beyond these requirements." AMS, Guidelines for AMS Oversight of Commodity Research and Promotion

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<sup>5</sup> Dairy checkoff Works! – How the Dairy Checkoff works, [available at](http://www.dairycheckoff.com/howitworks.htm) <http://www.dairycheckoff.com/howitworks.htm> (last visited June 3, 2002 (J.A. at 231)).

Programs 1 (1994). The Secretary's oversight functions for the Dairy Program are funded by the compelled assessments. 7 U.S.C. § 4504(g)(2); 7 C.F.R. § 1150.151(b). Moreover, the dairy producers, not the government, control whether the Dairy Promotion Program continues via a referendum process. 7 U.S.C. § 4506(a).

All advertising and promotional programs that are financed by the compelled assessments under the Dairy Act and created by the Dairy Board and DMI promote milk as a generic product. 7 C.F.R. § 1150.114. Among advertising campaigns financed by the Dairy Promotion Program are "Got milk? ®" and "Ahh, the power of cheese."

### III.

In addition to the Dairy Act, the dairy industry is subject to a patchwork of federal and state regulatory laws. The district court noted four federal laws in particular that it deemed relevant to this case: (1) the Agricultural Marketing Agreement Act of 1937 ("AMAA"), 7 U.S.C. § 608c *et seq.*; (2) the Agriculture Act of 1949, 7 U.S.C. § 1446; (3) import control regulations under 19 U.S.C. § 1202; and (4) the Capper-Volstead Act, 7 U.S.C. § 291.

An examination of the provisions of these statutes is crucial to determine whether these legislative acts, in conjunction with the Dairy Act, bring the case at bar within the rubric of Glickman – *i.e.*, requiring that milk producers are

bound together and obligated by statute to market their products according to some set of cooperative rules. The district court held that such a cooperative arrangement exists for dairy producers, but we conclude otherwise.

#### A.

The AMAA, 7 U.S.C § 608c, permits the Secretary to issue marketing orders that regulate the handling and sales of various agricultural commodities, including milk, in different regions of the country. For milk, the marketing orders establish a classification system and set minimum prices that handlers must pay in the regions in which the orders apply. *See* 7 U.S.C. § 608c(5); 7 C.F.R. § 1000.1 *et seq.* The AMAA applies only to "handlers"<sup>6</sup> of the covered commodities. 7 U.S.C. §§ 608c(1) & (5)(A). "Producers," such as dairy farmers in general, and Joseph and Brenda Cochran in particular, are specifically exempted from the application of marketing orders. *Id.* § 608c(13)(B) (stating that no marketing order "shall be applicable to any producer in his capacity as a producer").

Although milk marketing orders restrict the decisions of dairy handlers, they do not interfere with the decisions of dairy producers, such as the Cochrans,

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<sup>6</sup>A handler is a person who purchases milk from a producer in an unprocessed form for the purpose of processing it.

with regard to how much milk to produce, sell or whether they must sell milk at all to dairy handlers. See id. § 608c(5).<sup>7</sup> At least 25 percent of the milk sold in the United States is sold outside of federal milk marketing orders. The Cochrans are able to and do sell much of their milk outside any milk marketing order.

B.

The Agricultural Act of 1949, 7 U.S.C. § 1446, establishes a price support program wherein manufacturers and processors of cheese, nonfat dry milk and butter can sell those products to the federal government as buyer of last resort. Producers of fluid milk, such as

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<sup>7</sup> Milk marketing orders under the AMAA are implemented on a regional basis. See 7 U.S.C. § 608c(11). Not all parts of the country are covered, and some states – including California, Virginia, Maine and Montana – are outside the territory of any milk marketing order. Portions of Pennsylvania fall within two different milk marketing regions, the Northeast Area and the Mideast Area. See 7 C.F.R. §§ 1001.1, 1033.1. Certain portions of the state, however, including where the Cochrans are located, fall outside of any federal milk marketing order. The effect of the AMAA provisions is that any particular producer's milk is subject to a marketing order only if the producer chooses to sell to a regulated handler in an area covered by a marketing order. See id. §§ 1001.13, 1033.13.

the Cochrans, however, are not covered by the Agricultural Act and are not permitted to sell their product to the government under the price support program.

C.

Similarly, the import control regulations under Chapter 4 of the Harmonized Tariff Schedule of the United States, 19 U.S.C. § 1202, subject a multitude of commodities and products to annual import quotas. Although certain dairy products are included – namely butter, dry milk and cheese – fluid milk is not. See 7 C.F.R. Pt. 6, Apps. 1, 2, 3.

D.

Finally, the Capper-Volstead Act, 7 U.S.C. § 291, permits producers of agricultural products – including milk, mushrooms and others – to enter into manufacturing and marketing cooperatives without fear of violating antitrust laws. It does not, however, require producers to enter into such cooperatives, as federal law expressly protects producers' freedom not to join any cooperative. See Agricultural Fair Practices Act of 1967, 7 U.S.C. § 2301 et seq.; Michigan Cannery & Freezers Ass'n, Inc. v. Agric. Mktg. & Bargaining Bd., 467 U.S. 461, 477-478 (1984). The Cochrans do not belong to any cooperatives protected by the antitrust exemption created by the Capper-Volstead Act.

E.

Considering the foregoing provisions of the Dairy Act and other statutes governing the dairy industry, we now turn to the First Amendment issues that constitute the heart of this appeal.<sup>8</sup>

#### IV.

We must first consider whether the compelled assessments generated under the Dairy Act constitute private or government speech. Although the district court did not address this issue, the Government contended before the district court that the expressions generated under the Dairy Act constitute government speech. Therefore, the issue is subject to our review.

The First Amendment prohibits the government from regulating private speech based on its content, but the Court has "permitted the government to regulate the content of what is or is not

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<sup>8</sup> The United States District Court for the Middle District of Pennsylvania had jurisdiction pursuant to 28 U.S.C. § 1331 based on the Cochran's First Amendment claim. We have jurisdiction in this timely appeal pursuant to 28 U.S.C. §§ 1291. We review de novo the constitutionality of an Act of Congress. Dyszal v. Marks, 6 F.3d 116, 123 (3d Cir. 1993). Similarly, our review of the district court's granting of judgment on the pleadings and summary judgment is plenary. Anker Energy Corp. v. Consolidation Coal Co., 177 F.3d 161, 169 (3d Cir. 1999).

expressed when [the government] is the speaker or when [the government] enlists private entities to convey its own message." Rosenberger v. Rector & Visitors of the Univ. of Virginia, 515 U.S. 819, 833 (1995).

The Court has not decided whether speech generated under commodity promotion laws such as the Dairy Act constitutes government speech and is thereby immune from First Amendment scrutiny.<sup>9</sup> But in Frame, this court did meet the issue. 885 F.2d at 1132-1133.

In line with our sister Courts of Appeals in Michigan Pork Producers Ass'n, Inc. v. Veneman, 348 F.3d 157, 161-162 (6th Cir. 2003) and Livestock Marketing Ass'n v. U.S. Dep't of Agric., 335 F.3d 711, 720 (8th Cir. 2003), we held that the Beef Promotion Program was not government speech because it required only beef producers to fund it and it attributed the advertising under the program to the beef producers. Frame, 885 F.2d at 1132-1133. Recognizing that the Beef Promotion Program directed the

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<sup>9</sup>The two decisions of the Court involving commodity promotion programs do not address the issue of government speech. In Glickman, the Secretary of Agriculture waived the issue by not pursuing it before the Supreme Court. 521 U.S. at 482 n.2 (Souter, J., dissenting). In United Foods, the Court refused to address the issue because the government failed to raise it before the Court of Appeals. 533 U.S. at 416-417.

Secretary to appoint all Cattlemen Board members and approve all budgets, plans, contracts and projects entered into by the Board, this court nevertheless concluded that “[t]he Secretary’s extensive supervision . . . does not transform this self-help program for the beef industry into ‘government speech.’” We explained:

The Cattlemen’s Board seems to be an entity “representative of one segment of the population, with certain common interests.” Members of the Cattlemen’s Board and the Operating Committee, though appointed by the Secretary, are not government officials, but rather, individuals from the private sector. The pool of nominees from which the Secretary selects Board members, moreover, are determined by private beef industry organizations from the various states. Furthermore, the State organizations eligible to participate in Board nominations are those that “have a history of stability and permanency,” and whose “primary or overriding purpose is to promote the economic welfare of cattle producers.”

Id. at 1133 (quoting 7 U.S.C. § 2905(b)(3) & (4)). The government’s role in the Dairy Promotion Program is in all material respects the same as it was in the Beef Promotion Program, and under the precedent established in Frame, the

Secretary’s supervisory responsibilities are not sufficient to transform the dairy industry’s self-help program into “government speech.” On the dairy checkoff website, the government itself describes the Dairy Promotion Program as a non-governmental program, financed and directed by dairy farmers.

Although this court’s First Amendment discussion and ultimate holding in Frame have been abrogated by Glickman and United Foods, none of the Court’s subsequent decisions regarding “government speech” undermine our analysis of that issue in Frame.<sup>10</sup>

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<sup>10</sup>Notwithstanding the Government’s assertions to the contrary, we are not convinced that any decisions rendered by the Court in the years following our decision in Frame require us to cast aside the government speech analysis we performed in Frame. See Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001) (concluding that restrictions placed on the private speech of a lawyer receiving government funding from the Legal Services Corporation were unconstitutional); Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217 (2000) (stating in dicta, in a case where the government affirmatively disavowed any connection to the speech involved, that a government speech analysis might apply if a state university used general tuition money to fund speech attributed to the school or its administrators); Lebron v. Nat’l R.R. Passenger Corp., 513 U.S. 374

Accordingly, we conclude that this is a private speech case, and thus is not immune from First Amendment scrutiny.

V.

The teachings of United Foods require us to decide whether the dairy producers are “bound together and required by the statute to market their products according to cooperative rules[,]” 533 U.S. at 412, for purposes other than advertising, or speech. That is our next task.

The Cochran contend that the Dairy Act violates their First Amendment free speech and association rights by compelling them to subsidize generic advertising that promotes milk produced by methods they view as wasteful and harmful to the environment.

The First Amendment protects the right to refrain from speaking and the right to refrain from association. See, e.g., Wooley, 430 U.S. at 714. Moreover, the government may not compel individuals to fund speech or

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(1995) (holding that Amtrak is a government actor for First Amendment purposes because it was created by statute to further government objectives and the government maintained substantial control over its daily operations); Rust v. Sullivan, 511 U.S. 173 (1991) (concluding that the government can prevent private doctors at family planning clinics that receive federal funding from providing abortion counseling).

expressive associations with which they disagree. See United Foods, 533 U.S. at 411. “First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors . . . . As a consequence, the compelled funding for the advertising must pass First Amendment scrutiny.” Id. The individual’s disagreement can be minor, as “[t]he general rule is that the speaker and the audience, not the government, assess the value of the information presented.” Id. (quoting Edenfield v. Fane, 507 U.S. 761, 767 (1993)). When, however, regulation compelling funding for speech is ancillary to a broader collective enterprise that otherwise restricts the individual’s market autonomy, it is considered “economic regulation,” which enjoys a “strong presumption of validity” when facing a First Amendment challenge. See Glickman, 521 U.S. at 477.

We conclude that in upholding as constitutional the compelled subsidies under the Dairy Act, the district court misapplied Glickman and misconstrued the effect of the “entire regulatory scheme applicable to milk producers . . . .” (District Court Op. at 15 n. 5.) The Court in United Foods made clear that Glickman applied only in circumstances similar to Abood and Keller – in which individuals are “bound together” in a collective enterprise, such as a union or an integrated state bar, and the compelled subsidies are the “logical concomitant of a valid scheme of economic regulation.”

533 U.S. at 412.

The provisions of the Dairy Act do not require milk producers to participate in a collective enterprise and do not compel them to market their product, fluid milk, according to any rules of a cooperative. Although the dairy industry is "regulated" in the sense that it is subject to a patchwork of state and federal laws, there is no association that all milk producers must join that would make the entire industry analogous to a union, an integrated bar or the collective enterprise at issue in Glickman.

The Dairy Act is a free-standing promotional program that applies to all dairy producers regardless of whether they are subject to marketing orders or any other dairy regulations. It is not ancillary to any collective enterprise or compelled association with a non-speech purpose because there is no such enterprise or association for milk that encompasses all dairy producers. Indeed, the AMAA provision for milk marketing orders, which preexisted the Dairy Act, authorizes the Secretary and marketing administrators to create dairy promotional programs that literally would be ancillary to the regulatory aspects of the milk marketing orders. See 7 U.S.C. 608c(5)(1). Congress chose not to utilize this precise provision of the AMAA, however, and instead adopted an entirely separate program which does not operate in concert with any collective aspect of any milk marketing order.

Moreover, as independent small-

scale dairy producers, the Cochrans are exempted from the regional marketing orders under the AMAA and have chosen not to enter into manufacturing and marketing cooperatives. They, and they alone, determine how much milk to produce, how to sell and market it and to whom it will be sold. Nevertheless under the Dairy Act they are compelled to pay assessments to subsidize generic dairy advertising, a form of speech with which they are in total disagreement. Cf. Glickman, 521 U.S. at 471 (noting that "none of the generic advertising conveys any message with which respondents disagree").

Furthermore, as the Court in United Foods determined that speech is the principal purpose of the Mushroom Act, so it is of the Dairy Act.<sup>11</sup> Indeed,

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<sup>11</sup> Congress' declared policy of the Mushroom Act was

that it is in the public interest to authorize the establishment, through the exercise of the powers provided in this chapter, of an orderly procedure for developing, financing through adequate assessments on mushrooms produced domestically or imported into the United States, and carrying out, an effective, continuous, and coordinated program of promotion, research, and consumer and industry information designed to - (1) strengthen the mushroom

“almost all of the funds collected under the mandatory assessments are for one purpose: generic advertising.” United Foods, 533 U.S. at 412. In United Foods, the Court made clear that compelled subsidies may not be upheld where they are only germane to a program whose “principal object is speech itself.” Id. at 415.

We conclude, therefore, that being compelled to fund advertising pursuant to the Dairy Act raises a First

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industry’s position in the marketplace; (2) maintain and expand existing markets and uses for mushrooms; and (3) develop new markets and uses for mushrooms.

7 U.S.C. § 6101(b). Congress’ declared purpose for the Dairy Act is

that it is in the public interest to authorize the establishment . . . of an orderly procedure for financing (through assessments on all milk produced in the United States for commercial use and on imported dairy products) and carrying out a coordinated program of promotion designed to strengthen the dairy industry’s position in the marketplace and to maintain and expand domestic and foreign markets and uses for fluid milk and dairy products.

7 U.S.C. § 4501(b).

Amendment free speech and associational rights issue. But our determination that the Act’s compelled assessments for generic advertising implicate the Cochran’s First Amendment rights does not end our inquiry. As this court held in Frame, “[t]he rights of free speech and association are not absolute. Thus, we must next identify the proper standard for evaluating whether the statute . . . nevertheless passes constitutional muster.” 885 F.2d at 1133.<sup>12</sup>

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<sup>12</sup> Upon concluding that milk producers are regulated to a similar degree as the California tree fruit growers in Glickman, the district court applied a three-part test set forth by the Supreme Court in Glickman: (1) whether the Act imposes a restraint on the freedom to communicate; (b) whether the Act compels any person to engage in any actual or symbolic speech; (c) whether the Act compels dairy producers to endorse or finance any political or ideological views. (District Court Op. at 16-18.) This test, however, is inappropriate because, like the Supreme Court in United Foods, we have concluded that the Dairy Act is not a species of economic regulation, as it is not ancillary to a more comprehensive program restricting the marketing autonomy of dairy farmers. In United Foods the Court did not apply this three-part test. Nor do we.

## VI.

This case is properly characterized as a compelled commercial speech case. See United Foods, 533 U.S. at 410; Frame, 885 F.2d at 1146 (Sloviter, J., dissenting). The Supreme Court, however, has left unresolved the standard for determining the validity of laws compelling commercial speech, and the circuit courts are divided on the issue. There are at least four variations in the judiciary's cumulative experience. One is the more lenient standard applied to commercial speech cases. See Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564 (1980). Another is the "germaneness" test of compelled speech cases. See, e.g., Abood, 431 U.S. at 235-236. Still another is an adaptation of the commercial speech standard. See Livestock Marketing, 335 F.3d at 722-723. And, in Frame, a pre-Glickman and pre-United Foods case, this court applied the stringent level of scrutiny for associational rights cases. 885 F.2d at 1134. We now summarize the various standards.

### A.

In Central Hudson, the Supreme Court held that to evaluate the constitutionality of regulatory restrictions on commercial speech the Constitution requires only intermediate scrutiny – namely, that (1) the state must "assert a substantial government interest"; (2) "the regulatory technique must be in proportion to that interest"; and (3) the incursion on commercial speech "must

be designed carefully to achieve the State's goal." 447 U.S. at 564. Commercial speech is "expression related solely to the economic interests of the speaker and its audience." Id. at 561.

But the Court has left open the question of whether Central Hudson's more relaxed First Amendment test applies to cases involving compelled commercial speech. In United Foods the Court stepped back from addressing the issue in ipsis verbis, explaining: "the Government itself does not rely upon Central Hudson to challenge the Court of Appeals' decision, . . . and we therefore do not consider whether the Government's interest could be considered substantial for purposes of the Central Hudson test." 533 U.S. at 410. Nevertheless, in the earlier case of Glickman, the Court questioned the application of the commercial speech test to compelled speech cases:

The Court of Appeals fails to explain why the Central Hudson test, which involved a restriction on commercial speech, should govern a case involving the compelled funding of speech. Given the fact that the Court of Appeals relied on Abood for the proposition that the program implicates the First Amendment, it is difficult to understand why the Court of Appeals did not apply Abood's "germaneness" test.

521 U.S. at 474 n. 18.

Indeed, in United Foods,

notwithstanding its specific disclaimer regarding Central Hudson, the Court seemingly applied the “germaneness” test:

The only program the Government contends the compelled contributions serve is the very advertising scheme in question. Were it sufficient to say speech is germane to itself, the limits observed in Abood and Keller would be empty of meaning and significance. The cooperative marketing structure relied upon by a majority of the Court in Glickman to sustain an ancillary assessment finds no corollary here; the expression respondent is required to support is not germane to a purpose related to an association independent from the speech itself; and the rationale of Abood extends to the party who objects to the compelled support for this speech. For these and other reasons we have set forth, the assessments are not permitted under the First Amendment.

533 U.S. at 415-416 (emphasis added).

As we previously explained, the purpose of the Dairy Act is in all material respects the same as that of the Mushroom Act at issue in United Foods, and the Dairy Act is not ancillary to a broader cooperative marketing regime like the fruit tree marketing orders at issue in Glickman. The compelled assessments for generic dairy advertising

under the Dairy Act are germane to nothing but the speech itself. “[A]lmost all of the funds collected under the mandatory assessments are for one purpose: generic advertising.” Id. at 412. It would thus seem that the Dairy Act would not survive Abood’s germaneness test.

Other courts have applied the germaneness test to cases involving compelled assessments pursuant to promotional programs and have rejected the application of Central Hudson. See, e.g., Michigan Pork, 348 F.3d at 163 (noting that “[e]ven assuming that the advertising funded by the [Pork] Act is indeed commercial speech, the more lenient standard of review applied to limits on commercial speech has never been applied to speech – commercial or otherwise – that is compelled”); In re Washington State Apple Adver. Comm’n, 257 F. Supp. 2d 1274, 1287 (E.D. Wash. 2003) (concluding that “[b]ecause the Commission’s assessments do not restrict speech, it is inappropriate to apply the Central Hudson test for restrictions on commercial speech”).

In Livestock Marketing, however, the Eighth Circuit concluded that an adaptation of the Central Hudson test applied, explaining that “Central Hudson and the case at bar both involve government interference with private speech in a commercial context.” 335 F.3d at 722. All the same, the court concluded that the Beef Act did not survive the intermediate scrutiny of

Central Hudson, Id. at 725-726. Relying on the reasoning set forth in United Foods, the court determined that the beef checkoff program is in all material respects identical to the mushroom checkoff program, and concluded that “the government’s interest in protecting the welfare of the beef industry by compelling all beef producers and importers to pay for generic beef advertising is not sufficiently substantial to justify the infringement on appellees’ First Amendment free speech right.” Id.

Finally, in Frame, which was decided before the teachings of both Glickman and United Foods, this court applied the stringent associational rights standard but nevertheless upheld the constitutionality of the Beef Act, 7 U.S.C. § 2901 et seq. Back in 1989, this court concluded that the government’s interest in “maintaining and expanding beef markets proves . . . compelling[.]” and “[m]aintenance of the beef industry ensures preservation of the American cattlemen’s traditional way of life.” Frame, 885 F.2d at 1134-1135 (citations omitted).

Judge Sloviter, however, dissented on this issue in Frame:

I doubt that the type of compelled speech at issue here can be justified on any basis. Nonetheless, I do not reach the majority’s stringent associational rights standard because I believe that no justification can be found, even under the less exacting criteria adopted by the Supreme

Court in evaluating the permissibility of regulation of commercial speech [in Central Hudson] . . . . While the government has a general interest in the health of the beef industry, it does not follow that the government has a substantial interest in compelling the beef industry to make and support such a promotion campaign. Instead, . . . the messages represent the economic interests of one segment of the population . . . .

Id. at 1146-1147 (Sloviter, J., dissenting) (citations and internal quotations omitted).

As in Frame, the Government here argues that it has a sufficient interest in increasing the demand for an agricultural product. Moreover, the Government contends that it has an interest in decreasing its obligation to purchase dairy products under the price support program, 7 U.S.C § 1446. We previously have emphasized, however, that the Court’s subsequent holding in United Foods that clarified and limited the teachings of Glickman, cut away the underpinning of this court’s analysis in Frame. United Foods makes clear that the government may not compel individuals to support an advertising program for the sole purpose of increasing demand for that product. 533 U.S. at 415. In United Foods, the Court concluded that the Mushroom Act’s compelled subsidies would be unconstitutional even under the lesser

scrutiny accorded to commercial speech. Id. at 410.

Although the Government's contention that it has a substantial interest in decreasing its obligation under the dairy price support program is somewhat unique from the government interest asserted in United Foods, this interest is undermined by the fact that as a stand-alone statute, the Dairy Act does not operate in conjunction with the price support program. Indeed, producers of liquid milk such as the Cochran are not covered by the support program. Moreover, reductions in the government's obligations under the price support program are insignificant to the Dairy Promotion Program's existence, as whether the compelled assessments continue is controlled by the dairy producers via the referendum process. 7 U.S.C. § 4506(a).

We conclude, therefore, that the government's interest in promoting the dairy industry is not sufficiently substantial to justify the infringement on the Cochran's First Amendment free speech and association rights. As Judge Sloviter suggested in her dissent in Frame, promotional programs such as the Dairy Act seem to really be special interest legislation on behalf of the industry's interest more so than the government's. We believe that the Supreme Court reached the same conclusion by ruling in United Foods that the compelled assessments pursuant to the Mushroom Act are not permitted by the First Amendment.

B.

In light of the reluctance of the Supreme Court in United Foods to enter the controversy over the applicable scrutiny for compelled commercial speech cases, however, we will follow suit. "[W]e find no basis under either Glickman or our other precedents to sustain the compelled assessments sought in this case." 533 U.S. at 410.<sup>13</sup>

The compelled assessments for generic dairy advertising under the Dairy Act relate to speech and only to speech. Indeed, "almost all of the funds collected under the mandatory assessments are for one purpose: generic advertising." Id. at 412.

Measured by any degree of scrutiny set forth in the foregoing discussion, we conclude that this case runs on all fours with the teachings and holding of United Foods, and accordingly hold that the Dairy Promotion Stabilization Act of 1983 does not survive the First Amendment challenge lodged by Appellants Joseph and Brenda Cochran. The district court erred in sustaining the constitutionality of the Dairy Act on the basis of Glickman.

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<sup>13</sup> We reach this conclusion whether accepting the standard explicitly expressed in Frame or deciding that in view of the Court's discussion in United Foods, that standard is not longer controlling.

In sum, we conclude that the generic advertising pursuant to the Dairy Promotion Stabilization Act of 1983 does not constitute government speech and is therefore subject to First Amendment scrutiny. We hold that the Dairy Act violates the Cochran's First Amendment free speech and associational rights. Although the dairy industry may be subject to a labyrinth of federal regulation, the Dairy Act is a stand-alone law and the compelled assessments for generic dairy advertising are not germane to a larger regulatory purpose other than the speech itself.

The judgment of the district court sustaining the constitutionality of the Dairy Promotion Stabilization Act of 1983 will be reversed and the proceedings remanded with a direction to enter a decree in favor of Appellants in accordance with the foregoing.

RENDELL, Circuit Judge, concurring.

I join in our opinion and judgment but write separately to register my view that, having found that the assessments do not pass muster under the Supreme Court's analysis in United Foods, and, having noted at the end of Part IV that the compelled subsidies were assessed to support a program whose principal object was speech itself, we need not engage in the exercise of determining the "standard" regarding the extent of the government's interest for purposes of a commercial speech analysis under Central Hudson, as the opinion does

at Part VI-A. Twice – in both Glickman and United Foods – the Supreme Court has questioned the need for engaging in a Central Hudson analysis.<sup>14</sup> And, I think it

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<sup>14</sup>The Court has not treated these cases as involving a discrete commercial speech issue, instead indicating that "[t]he question is whether the government may underwrite and sponsor speech with a certain viewpoint using special subsidies exacted from a designated class of persons, some of whom object to the idea being advanced." United Foods, 533 U.S. at 410; see also id. (stating that, even if commercial speech is less protected than other speech, there is "no basis under either Glickman or our other precedents to sustain the compelled assessments," but refusing to consider "whether the Government's interest could be considered substantial for purposes of the Central Hudson test"); Glickman, 521 U.S. at 474 & n.18 (noting that it was "error for the [Ninth Circuit] to rely on Central Hudson for the purpose of testing the constitutionality of market order assessments for promotional advertising," and stating that the Ninth Circuit "fails to explain why the Central Hudson test, which involved a restriction on commercial speech, should govern a case involving the compelled funding of speech"). In fact, in United Foods the Court appears to explicitly endorse the applicability of the Abood/Keller germaneness test: "It is true that the party who protests the assessment here is required simply to support speech by others, not to utter the speech itself. We conclude, however, that the mandated support is contrary to the First Amendment principles set forth in cases involving expression by groups which include persons who object to the speech, but who,

unnecessary to apply Central Hudson in light of the Court's analysis in United Foods.<sup>15</sup>

In United Foods the Court distinguished the situation it faced from the one it considered in Glickman by examining the following question: Is the challenged assessment part of a "broader regulatory system" that does not have speech as its primary object. 533 U.S. at 415. There appear to be two parts to this basic inquiry. First, are the plaintiffs part of a group that is "bound together and required . . . to market their products according to cooperative rules?" Id. at 412.

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nevertheless, must remain members of the group by law or necessity." 533 U.S. at 413 (citing Abood and Keller).

<sup>15</sup>The Sixth Circuit, in Michigan Pork Producers Ass'n, Inc. v. Veneman, 348 F.3d 157 (6th Cir. 2003), also rejected the application of the Central Hudson test to an assessment created by a similar promotional program. I find that court's comments on this matter to be instructive: "[W]e find inapplicable to this case the relaxed scrutiny of commercial speech analysis provided for by Central Hudson, and relied upon by Appellants. The Pork Act does not directly limit the ability of pork producers to express a message; it compels them to express a message with which they do not agree. Even assuming that the advertising funded by the Act is indeed commercial speech, the more lenient standard of review applied to limits on commercial speech has never been applied to speech – commercial or otherwise – that is compelled. It is one thing to force someone to close her mouth; it is quite another to force her to become a mouthpiece." Id. at 163 (citation omitted).

Second, is the assessment regulation related to and in furtherance of other non-speech purposes, carrying out other aspects to further other economic, societal, or governmental goals? Id. at 415. Even if the answer to the first question is "no," the assessment might nonetheless be permitted if it is not only related to speech. This second inquiry could signal consideration of "germaneness" if, in fact, other goals were implicated. But here, we answered "no" to both questions: we decided that the Cochrans did not surrender their freedom to make independent competitive choices to any collective enterprise, and we concluded that speech was the only purpose of the Dairy Act. Thus, it was purely "compelled speech," forbidden by United Foods under any level of scrutiny. 533 U.S. at 410. In fact, after discussing the various standards potentially applicable here, Judge Aldisert clearly states in the ensuing Part VI-B that under any level of scrutiny, the assessments for speech only do not pass constitutional muster given United Foods. The analysis in Part VI-A regarding the proper level of scrutiny is therefore unnecessary, and, I believe, dicta.

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# CORRECTION

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**Pete Kott**  
**Speaker of the House**

## Sponsor Statement

### CSHB 426

"An Act relating to the levy and collection of an assessment on certain tourism-related and recreation-related goods and services, to tourism marketing contracts, and to vehicle rental taxes; and providing for an effective date."

House Bill 426 has been introduced by request of the Alaska Travel Industry Association. The legislature and the Administration asked ATIA to bring forward a self-funding model to finance tourism marketing, and this is their plan.

This legislation would levy a two percent assessment on the tourism industry in order to raise funds for tourism marketing. This self-assessment would be broad-based, similar to those imposed by other industries, levying a two percent tax on the sales generated at hotels, car rentals, gift shops, shore excursions, day tours and land-based package tours.

Recent surveys done by the Department of Community and Economic Development of 2003 summer visitor arrivals found those coming to Alaska by domestic air, by highway and ferry had declined two percent over 2002 arrivals. Other studies done for ATIA have shown that small adventure-based business and those in the Interior part of the state have been hit the hardest by the worldwide downturn in tourism.

The ATIA board adopted the self-assessment strategy because it recognized the distress suffered primarily by the small, independent tourism businesses around the state. I respectfully request your careful consideration of this legislation.

**HB**

**428**



# FISCAL NOTE

STATE OF ALASKA  
2004 LEGISLATIVE SESSION

Fiscal Note Number: \_\_\_\_\_  
Bill Version: HB428-DPS-ABC-2-24-04  
( ) Publish Date: \_\_\_\_\_

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: Public Safety  
Title An act related to civil liability for acts related to RDU Statewide Support  
obtaining alcohol for persons under 21 years... Component ABC Board  
Sponsor Representative Meyer  
Requester H. Labor and Commerce Component No. 2690

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
-----------------------------	--	--	--	--	--	--

<b>CHANGE IN REVENUES ( )</b>						
-------------------------------	--	--	--	--	--	--

**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2004) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** (Attach a separate page if necessary)

No fiscal impact is anticipated by the Department of Public Safety.

Prepared by: Douglas B. Griffin, Director Phone 269-0351  
Division ABC Board Date/Time 2/24/04 9:35 AM  
Approved by: Commissioner William Tandeske Date 2/24/2004  
Agency Department of Public Safety

# FISCAL NOTE

**STATE OF ALASKA**  
**2004 LEGISLATIVE SESSION**

Fiscal Note Number: \_\_\_\_\_  
 Bill Version: HB428-ACS-TC-2-24-04  
 ( ) Publish Date: \_\_\_\_\_

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: \_\_\_\_\_  
 Title Civil Penalty/Underage Alcohol BRU Alaska Court System  
Purchases Component Trial Courts  
 Sponsor Representative Meyer  
 Requester \_\_\_\_\_ Component No. \_\_\_\_\_

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
-----------------------------	--	--	--	--	--	--

<b>CHANGE IN REVENUES ( )</b>						
-------------------------------	--	--	--	--	--	--

**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2004) cost: 0.0  
 Mark this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** (Attach a separate page if necessary)

The court system does not anticipate any fiscal impact from the passage of HB 428.

Prepared by: Doug Wooliver Administrative Attorney Phone 463-4750  
 Division: Alaska Court System Date/Time 2/24/04 9:46 AM  
 Approved by: Stephanie Cole Administrative Director by Doug Wooliver Date 2/24/2004  
 Agency: Alaska Court System



# REPRESENTATIVE KEVIN MEYER

HOUSE DISTRICT 30

## MEMORANDUM

DATE: February 11, 2004

TO: Representative Tom Anderson  
Chairman, House Labor and Commerce Committee

FROM: Representative Kevin Meyer *Ki U*

RE: HB 428 Civil Penalty: Underage Alcohol Purchases

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At your earliest convenience, please schedule HB 428 Civil Penalty: Underage Alcohol Purchases for a hearing in the House Labor and Commerce Committee.

Under HB 428, an adult who orders or receives an alcoholic beverage, for the purpose of selling, giving, or serving it to a person under the age of 21 years, can be civilly liable to the licensee for a penalty of \$1,000. Likewise, the parent or legal guardian of a minor that solicits an adult to violate AS 04.16.060, can be civilly liable for a penalty of \$1,000 to the licensee from which the alcoholic beverage was purchased, ordered or received.

Thank you for your time and consideration of this matter.



# REPRESENTATIVE KEVIN MEYER

HOUSE DISTRICT 30

## SPONSOR STATEMENT

### HOUSE BILL 428

**“An Act relating to civil liability for acts related to obtaining alcohol for persons under 21 years of age or for persons under 21 years of age being on licensed premises.”**

Under House Bill 428 Civil Penalty: Underage Alcohol Purchases, an adult who orders or receives an alcoholic beverage, for the purpose of selling, giving, or serving it to a person under the age of 21 years, can be civilly liable to the licensee for a penalty of a \$1,000. Likewise, the parent or legal guardian of a minor that solicits an adult to violate AS 04.16.060, can be civilly liable for a penalty of \$1,000 to the licensee from which the alcoholic beverage was purchased, ordered, or received.

There is nothing new about misguided adults buying alcohol for minors. Often, minors ask a stranger outside of a liquor store to buy alcohol.

Alcohol remains a leading drug problem among our nation's young people, with earlier and earlier initiation of consumption. Underage drinking is associated with the leading causes of death among young people, including car crashes, murder, and suicide. HB 428 will provide an economic deterrent for adults and for minors to abstain from purchasing or soliciting the purchase of alcohol.

Currently, the Municipality of Anchorage has a similar ordinance to HB 428 in place. The money that is collected by the licensees goes toward alcohol education and intervention programs, as well as to the employees of the licensee as incentives for paying close attention to all customers.

The method of deterrent that HB 428 will provide increases the awareness of the overall cost that alcohol and underage drinking has on our communities. HB 428 provides an economic incentive for employees of liquor stores and bars to pay close attention to customers, for minors to refrain from soliciting alcohol from adults, and for irresponsible adults to think twice before providing alcohol to a minor upon request.

Last Updated: February 11, 2004

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## Brown Jug aims to turn ID busts into life lessons

**CLASS: Liquor retailer creates alcohol awareness program.**

By LISA DEMER

Anchorage Daily News

(Published: December 8, 2003)

One evening last fall, a man tried to buy wine coolers, vodka and Mike's Hard Lemonade for a couple of 15-year-old girls. The head of security at Brown Jug made a citizen's arrest, handcuffing the buyer. Police came. The man was busted, and so were the girls.

That may seem a fitting end to the store's role. But Brown Jug, one of the state's biggest liquor retailers, has a reputation for being extra aggressive in preventing sales to kids as well as adults who buy for them.

The company has pursued \$1,000 civil claims against people who try to buy booze illegally. Now the retailer wants to transform its campaign against underage drinking into an effort that not only stings the wallet but also convinces youths not to drink.

Under the new approach, anyone who goes through a new alcohol awareness program crafted for Brown Jug will get a break on the civil penalty. The store will seek \$300 instead of \$1,000.

"We're trying to educate on the responsible approach to the product," said Ed O'Neill, one of Brown Jug Inc.'s owners.

The program isn't free. Participants will have to pay another \$290 for the main course, 15 to 16 hours of classroom sessions led by Akeela Inc., a private substance abuse prevention and treatment agency.

Two other agencies are joining in. Standing Together Against Rape will talk to participants about sexual assault and its connections to alcohol.

Participants also must listen to people whose lives have been upended by drinking. The panel, put together by Mothers Against Drunk Driving, includes people hurt by drunken drivers and those on the other side, inmates serving time for killing someone while driving drunk. There's a separate \$35 fee for that panel.

Other retailers are starting to be more diligent about checking IDs.



This fake ID is made from a scanned document that was altered and then laminated over the original ID. (Photo by Erik Hill / Anchorage Daily News)



Brown Jug vice chairman Ed

"But no one is in Brown Jug's league," said Doug Griffin, director of the state Alcohol Beverage Control Board. "It shows good leadership on behalf of this company and this industry to do the right thing."

O'Neill hopes more retailers and bars follow suit.

Brown Jug pushed through a local Anchorage ordinance five years ago that allows liquor stores and bars to seek civil penalties against youths who walk in without a parent or guardian. Big yellow signs on Brown Jug's front doors warn kids to stay away. In 2001, the provision was put into state law.

The civil measure is needed as both deterrent and punishment because prosecutors rarely pursue fake ID cases, said O.C. Madden III, Brown Jug's manager of personnel and loss prevention.

Since 1998, Brown Jug has demanded \$1,000 payments from more than 900 underage youths who tried to buy something -- from beer to cigarettes to Coke. Those not trying to buy booze are likely just testing the store, Madden said. Not all have paid, but many have, Madden said. The civil cases now fill more than 20 binders.

Last year, the Anchorage Assembly approved a measure to allow liquor establishments to seek similar civil penalties against adults who buy for kids, and the kids who are part of the scheme.

Those cases are more often prosecuted, but the consequence may be a small fine and community work service. So, under this provision, Brown Jug has sought \$1,000 civil payments from another 120 kids and adults.

Madden has noticed the adults trying to buy for kids often fit in one of three categories: older friends or siblings, public inebriates or registered sex offenders. Over the Thanksgiving weekend, a 34-year-old man with a record of sexually abusing a minor was caught at a Brown Jug store trying to buy beer and liquor for three youths, including a 17-year-old boy, according to Brown Jug.

Dozens of confiscated IDs that Madden keeps in his office show how kids try to trick the clerks. Some are homemade, sloppy and obvious. One kid scanned his real license into a computer, fiddled with the dates, and glued a printout of his reworked card atop the laminate of the real one.

But other cards are bought through the Internet as slick renditions. Fake IDs from New Jersey have been especially popular lately. Kids also have schemes to get IDs from the state Division of Motor Vehicles, Madden said. They may use someone else's birth certificate, especially an older sibling's, he said.

The bust involving the two 15-year-old girls prompted Brown Jug to add the education component. The girls probably didn't realize how close they were to real trouble, Madden said. The man had intended to take them to a drinking party where they would have been the only girls.

O'Neill put out the word about the new education program in a recent e-mail to dozens of community council activists, Assembly members and police officers. Some people replied to the group with praise, but at least one took issue with how the store rewards its clerks who catch minors.

A Brown Jug clerk who seizes an ID suspected of being fake gets \$20 from the store and another \$250 if the store wins a civil penalty or judgment, Madden said. The IDs are sent to the ABC board, where owners can collect them.

O'Neill displays confiscated IDs and 22 binders containing paperwork on 40 fake ID cases at company offices in Midtown Anchorage. (Photo by Erik Hill / Anchorage Daily News)

[Click on photo to enlarge](#)

The incentive doesn't sit well with Tim Stevens, who is active on the Huffman-O'Malley Community Council.

"I commend your desire to curb underage drinking but I do not care for your methods," Stevens e-mailed back to the group. "Seems to me its just another way of putting extra money in your employees pockets at the expense of the offenders parents."

But other people like the approach.

"This small monetary caveat (civil penalty/diversion program) is nano-scale in comparison to a life being saved," Carol Holden, an officer on the Taku-Campbell Community Council, wrote in an e-mail reply. "We need to make winners out of those who support the laws. Half of the solution is reward, the other is penalty."

"As a taxpayer, I am sick and tired of no one taking any responsibility for their action and we are suppose to keep paying for more police to enforce the laws," wrote Bonnie Jack, an aide to Assemblywoman Fay Von Gemmingen. "I say, 'Good Job, Brown Jug!' "

People are just now signing up for the first of the new alcohol education courses. Adults trying to buy for kids will spend a Friday evening and all day Saturday in alcohol class. Those under 21 will spend four weeknights.

The classes are revamped from the Prime for Life course that middle and high school students already can take after being suspended for drugs or alcohol to get back to school more quickly.

"We dispel myths. We take away the shame and guilt and trappings that go with this whole issue," said Diane Ogilvie, director of prevention, education and training at Akeela Inc.

"It is designed to require you to be very honest about yourself."

Daily News reporter Lisa Demer can be reached at [ldemer@adn.com](mailto:ldemer@adn.com) and 257-4390.

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**ALCOHOL BEVERAGE CONTROL  
ENFORCEMENT:  
Legal Research Report**

Division of Legal Analysis and Enforcement  
Center for Policy Analysis and Training  
**Pacific Institute for Research and Evaluation**

Completed under contract with the  
National Highway Traffic Safety Administration  
IDC DTNH22-98-D-35079

April, 2003

**ALCOHOL BEVERAGE CONTROL ENFORCEMENT:  
Legal Research Report**

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# ALCOHOL BEVERAGE CONTROL ENFORCEMENT

## Legal Research Report

### Introduction

With the enactment of the 21<sup>st</sup> Amendment in 1933, the United States ended its experiment with national Prohibition. The amendment gave states the primary authority for determining whether alcohol could be sold legally and, if so, how. Since that time, 51 different alcohol control systems (in each state and the District of Columbia) have evolved, creating a patchwork of laws and regulations with wide variation across jurisdictions. In practice, the federal government retains primary authority over the production of alcohol, and the states exercise primary jurisdiction over the retail distribution system.

A fundamental premise of the state regulatory systems is that alcoholic beverages are potentially hazardous products and therefore should be subject to special conditions not applied to other commercial products. Underage drinking and intoxication are of particular concern because of their connection to alcohol-related motor vehicle crashes. States vary widely in their approach to these alcohol problems, and although these variations may have enormous implications for prevention and treatment, few studies have described them or assessed their effectiveness. This report addresses this gap in the research literature by analyzing variations in 12 key legal policies addressing underage drinking and drinking to intoxication:

- Purchase of alcohol by minors
- Attempted purchase of alcohol by minors
- Possession of alcohol by minors
- Consumption of alcohol by minors
- Use of false ID cards
- Furnishing alcohol to minors
- Furnishing alcohol to intoxicated individuals
- Responsible Beverage Service
- Keg registration
- False and misleading advertising
- Advertising that targets minors
- Limitations on happy hours and drink specials.

A typology in chart form is presented for each policy. The 50 states plus the District of Columbia are listed on the left-hand side. Selected variables and exceptions related to each policy appear across the top. Checkmarks indicate the presence of the policy and its variables and exceptions. An introductory section for each policy defines the variables and exceptions and briefly analyzes the policy, including noteworthy characteristics or variations and the relationship of the policy to other policies in the report. The legal research is current as of January 1, 2003.

PLEASE NOTE:

1. *Each of the typologies contains variables that have been defined in specific and narrow ways that may not mirror either the law of any particular state or the customary definition in any one state or group of states. We chose the categories and definitions with legal conventions and requirements in mind. Please refer to the definitions as you interpret the variables in each category. State law may cover a topic generally but not include the specific language required in our definitions.*
2. *Our analysis is based on a review of state statutes and regulations. In some cases, alcohol beverage control (ABC) agencies may have implemented laws in a manner that accomplishes the result we were seeking even though the laws themselves do not meet our criteria. The charts do not include the results of this formal or informal administrative decision making.*
3. *Our analysis focuses exclusively on state legislation. Although local jurisdictions may have enacted provisions that fit into these categories, we did not include these provisions in our analysis.*

## ATTEMPTED PURCHASE/PURCHASE OF ALCOHOL BY MINORS

In 1984, Congress enacted the National Minimum Drinking Age Law, which required that states – as a condition of receiving state highway funds – prohibit persons under the age of 21 from purchasing or publicly possessing alcohol. By 1988, every state had passed legislation to meet the federal funding requirements. Since that time, there have been significant reductions in fatal highway traffic crashes and other public health problems as a result of the federal and state legislation raising the minimum purchase age.<sup>1</sup> This positive public health impact has occurred despite insufficient enforcement. Researchers have hypothesized that effective enforcement would enhance the beneficial impact of the legislation, and they have noted that some states have provisions that hamper enforcement efforts.<sup>2</sup>

Accordingly, most states specifically prohibit minors from purchasing alcohol. However, four states – Delaware, Indiana, New York, and Vermont – prohibit minors from purchasing alcohol only if the minor uses fraudulent identification or false statements. It is unclear how significant this variation is in practice. As discussed below, a purchase made in these states without using fraudulent means is probably still illegal under possession statutes. In addition, several states have exceptions to their purchase statutes that allow minors to purchase alcohol under limited circumstances. Unlike possession statutes (see below), the exceptions are relatively rare and provide very limited opportunities for minors to purchase alcohol. The most common exception – a purchase that occurs as part of a compliance check – provides an important tool for reducing illegal sales to minors. Exceptions included in the chart below are defined as follows:

- **Employment**—one state permits minors to purchase alcohol if in connection with their employment.
- **Student**—two states allow minors to purchase alcohol if in connection with being a student or for educational purposes.
- **Religious services**—one state permits minors to purchase alcohol if in connection with religious services.
- **Medical treatment**—two states permit minors to purchase alcohol if in connection with medical treatment.
- **Parent, guardian, or custodian consent or presence**—two states allow minors to purchase alcohol in the presence of, accompanied by, or with the consent of a parent, guardian, or custodian.
- **Spouse consent or presence**—one state allows minors to purchase alcohol in the presence of or with the consent of their legal-aged spouse.
- **Law enforcement**—13 states permit minors to purchase alcohol in connection with an investigation or “sting” operation conducted in conjunction with law enforcement officials (and, in several states, licensees or employers, see footnotes in the chart below) to identify illegal alcohol sales. This

<sup>1</sup> Wagenaar A and Toomey T. (2002). Effects of minimum drinking age laws: Review and analyses of the literature from 1960 to 2000. *Journal of Studies on Alcohol, Supplement No. 14*: 206-225.

<sup>2</sup> Wagenaar A. and Wolfson M. (1994). Enforcement of the legal minimum drinking age in the United States. *Journal of Public Health Policy* 15: 37-53.

exception often requires parental consent and specifies a minimum age at which minors can participate; many states require minors to be at least 18 years old. Many states may have this exception as part of an administrative decision even though there is no statutory provision. As noted above, our analysis does not include such decisions.

In contrast to the possession and consumption statutes analyzed below, no state exempts purchases in private settings, probably because to do so would appear to violate the National Minimum Drinking Age Law of 1984.

The same exceptions apply or can be applied by implication to statutory provisions that prohibit attempted purchase of alcohol by minors. Attempted purchase is often, but not always, explicitly included in the statute related to the purchasing of alcohol by minors. Attempted purchases are conceptually a lesser-included part of the offense of purchasing – one cannot purchase alcohol without attempting to purchase it. Most states permit prosecutions for attempted crimes that involve affirmative acts even if the statutory crime does not explicitly include “attempt” language. Thus, states that do not explicitly include “attempted purchase” language probably still permit prosecution for such an offense. In addition, law enforcement officials did not identify the lack of an “attempted purchase” statute as a barrier to law enforcement.

Purchase provisions should be analyzed in conjunction with possession statutes (see below for analysis of possession statutes). Arguably, one cannot purchase alcohol without possessing it although one can possess it without purchasing (or attempting to purchase) it. Thus, a minor who purchases alcohol is potentially liable for two offenses. Purchasing alcohol is generally considered the more serious of the two offenses. This is an important factor in the analysis of several states’ lack of a purchasing statute comparable to that of the other 46 states and the District of Columbia.

#### Attempted Purchase/Purchase of Alcohol by Minors

	Attempted Purchase by Minors	Purchase by Minors	EXCEPTIONS						
			Employment	Student	Religious Services	Medical Treatment	Parent/Guardian/Custodian Consent/Presence	Spouse Consent/Presence	Law Enforcement
Alabama	√	√							
Alaska		√							
Arizona		√							√
Arkansas		√							
California	√	√							√
Colorado	√	√							
Connecticut	√	√							
Delaware <sup>3</sup>									
District of Columbia	√	√							
Florida	√	√							
Georgia	√	√			√	√			
Hawaii		√							√

<sup>3</sup> Delaware does not have a statute that specifically prohibits attempted purchase or purchase but does prohibit “obtaining” alcohol in connection with making a false statement.

	Attempted Purchase by Minors	Purchase by Minors	EXCEPTIONS						
			Employment	Student	Religious Services	Medical Treatment	Parent/Guardian/Custodian Consent/Presence	Spouse Consent/Presence	Law Enforcement
Idaho	√	√							
Illinois <sup>4</sup>		√							√
Indiana <sup>5</sup>									
Iowa	√	√							
Kansas <sup>6</sup>	√	√							√
Kentucky	√	√							
Louisiana		√				√			
Maine		√							
Maryland		√							
Massachusetts	√	√							
Michigan <sup>7</sup>	√	√							√
Minnesota <sup>8</sup>	√	√		√					
Mississippi		√							
Missouri	√	√							
Montana	√	√							
Nebraska	√	√							
Nevada		√							
New Hampshire	√	√							
New Jersey	√	√							
New Mexico	√	√							
New York <sup>9</sup>									
North Carolina	√	√							
North Dakota	√	√							
Ohio	√	√							
Oklahoma	√	√					√		√
Oregon <sup>10</sup>	√	√							√
Pennsylvania	√	√							√
Rhode Island	√	√							
South Carolina		√	√	√					
South Dakota	√	√							

<sup>4</sup> Illinois's exception allows minors to purchase or possess alcohol if they are participating in a licensee "sting operation."

<sup>5</sup> Indiana does not have a statute that specifically prohibits attempted purchase or purchase, but does prohibit attempted purchase or purchase in connection with making a false statement of age. Enforcement officials indicated that they use the possession statute or law prohibiting minors in taverns.

<sup>6</sup> Kansas's exception allows minors to "violate the provisions of the Kansas Liquor Control Act" if they are under the direction of a licensee self-compliance program.

<sup>7</sup> Michigan's exception allows minors to "purchase or receive" alcohol as a part of an undercover operation by direction of an employer.

<sup>8</sup> Minnesota's exception allows attempted purchase or purchase by minors if they are supervised by a person 21 years or older for "training, education, or research purposes."

<sup>9</sup> New York does not have a statute that specifically prohibits attempted purchase or purchase but does prohibit attempted purchase or purchase through "fraudulent means."

<sup>10</sup> Oregon's exception indicates that its prohibitions do not apply to minors who are acting under the direction of a licensee for the purpose of investigating possible violations by the licensee's employees of laws prohibiting sales to minors.

	Attempted Purchase by Minors	Purchase by Minors	EXCEPTIONS						
			Employment	Student	Religious Services	Medical Treatment	Parent/Guardian/Custodian Consent/Presence	Spouse Consent/Presence	Law Enforcement
Tennessee	√	√							√
Texas	√	√							√
Utah	√	√							
Vermont <sup>11</sup>									
Virginia	√	√							
Washington <sup>12</sup>	√	√							√
West Virginia	√	√							√
Wisconsin	√	√					√	√	
Wyoming	√	√							
<b>State Totals</b>	<b>36</b>	<b>47</b>	<b>1</b>	<b>2</b>	<b>1</b>	<b>2</b>	<b>2</b>	<b>1</b>	<b>13</b>

<sup>11</sup> Vermont does not have a statute that specifically prohibits attempted purchase or purchase but does prohibit "procuring" or "attempting to procure" alcohol in connection with false representations of age.

<sup>12</sup> Washington's exception allows minors 18 years and older to purchase alcohol if they are participating in employer self-compliance checks.

## POSSESSION OF ALCOHOL BY MINORS

As noted above, the National Minimum Drinking Age Law of 1984 provides that states will lose certain highway funds unless they make the purchase and public possession of alcohol by minors illegal. The statute does not provide specific guidance regarding the definition of "public possession," which by its terms does not include possession in privately owned locations.

All states prohibit possession of alcohol by minors to some extent, and all appear to be in compliance with the federal statute. However, states apply various statutory exceptions, and these exceptions are more expansive and more prevalent than those found in purchasing statutes.

Exceptions found in the chart below are defined as follows:

- **Employment**—45 states permit minors to possess alcohol in connection with their employment. One state, Wyoming, also allows possession by minors who are licensees.
- **Student**—six states permit minors to possess alcohol in connection with being a student or for educational purposes (often specifically linked to culinary schools).
- **Religious services**—18 states allow minors to possess alcohol in connection with religious services.
- **Medical treatment**—14 states allow minors to possess alcohol in connection with medical treatment.
- **Parent, guardian, or custodian consent or presence**—33 states permit minors to possess alcohol in the presence of, accompanied by, or with the consent of a parent, guardian, or custodian. States vary widely in terms of which relatives must be present for the exception to apply and in what circumstances. For example, Massachusetts allows possession by minors if they are "accompanied by parent or legal guardian"; Delaware allows possession in the "private home" of any "members of the same family"; Oregon allows possession of alcohol in a "private residence . . . accompanied by parent or guardian . . . with [his or her] consent," etc.
- **Spouse consent or presence**—nine states permit minors to possess alcohol in the presence of or with the consent of their legal-aged spouse.

Three exceptions are related: the first, Any Private Location, includes Private Residence, which, in turn, includes Only Minor's/Parent's/Guardian's Home. States were categorized according to the most narrowly drawn category into which their statutory provisions fit. States vary in the extent of the private property exception and the specific wording.

- **Any private location**—ten states allow minors to possess alcohol in any private location (including any private residence or venue). This exception is often implied by statutory provisions that indicate the converse – that is, a state prohibits minors from possessing alcohol in any *public* place.
- **Private residence**—seven states allow minors to possess alcohol only in a private residence.

- **Only minor's, parent's, or guardian's home**—four states permit minors to possess alcohol only in the minor's, parent's, or guardian's home or primary residence.
- **Law enforcement**—nine states permit minors to possess alcohol in connection with an investigation or "sting" operation conducted by law enforcement officials (and, in several states, licensees or employers, see footnotes below) to identify illegal alcohol sales. This exception often requires parental consent and specifies a minimum age at which minors can participate; many states require minors to be at least 18 years old. Many states may have this exception as part of an administrative decision even though there is no statutory provision. As noted above, our analysis does not include such decisions.

The exceptions related to possession on private property and in private residences are the most important in terms of underage drinking and related problems. Law enforcement officials report that the exceptions can create significant barriers to preventing or ending underage drinking parties in private settings, particularly in private residences. Many communities report that these events often involve heavy drinking, drinking and driving, sexual assaults, and other forms of violence. Yet in some states, the minors involved in the events are not violating the law, and if no adult is present, no crime is being committed.

As with purchase statutes, the law enforcement exception provides an important tool for enforcing prohibitions on sales to minors. Note that this exception probably does not need to be present in both the possession and the purchase provisions. An effective compliance check can be conducted if the minor involved is allowed to purchase or possess alcohol as part of the enforcement procedure.

### Possession of Alcohol by Minors

	Possession by Minors	EXCEPTIONS									
		Employment	Student	Religious Services	Medical Treatment	Parent/Guardian/Custodian Consent/Presence	Spouse Consent/Presence	Any Private Location	Private Residence	Only Minor's/Parent's/Guardian's Home	Law Enforcement
Alabama	√	√									
Alaska	√				√	√	√				
Arizona	√	√		√							
Arkansas	√	√									
California <sup>1</sup>	√	√				√		√			
Colorado <sup>2</sup>	√			√	√	√		√			
Connecticut	√	√			√	√	√	√			
Delaware <sup>3</sup>	√	√		√		√			√		

<sup>1</sup> California's exception allows possession when a minor is making a delivery by order of a parent, relative, or another adult designated by the parent.

<sup>2</sup> Colorado's exception requires the knowledge and consent of the owner of the private property when minors possess or consume alcohol (in addition to the consent or presence of a parent or guardian). Also, it is an affirmative defense to illegal possession or consumption that existence of ethyl alcohol in a minor's body is due solely to ingested confectionery or a beverage that contained less than 0.5 percent of ethyl alcohol by weight.

<sup>3</sup> Delaware's exception includes "members of the same family" and allows possession or consumption in the "private home of any of said members."

	Possession by Minors	EXCEPTIONS									
		Employment	Student	Religious Services	Medical Treatment	Parent/ Guardian/ Custodian Consent/ Presence	Spouse Consent/ Presence	Any Private Location	Private Residence	Only Minor's/ Parent's/ Guardian's Home	Law Enforce- ment
District of Columbia	√	√									
Florida	√	√	√								
Georgia	√	√		√	√	√				√	
Hawaii	√	√		√	√	√		√			√
Idaho <sup>4</sup>	√	√				√			√		
Illinois <sup>5</sup>	√	√		√		√		√			√
Indiana	√	√									
Iowa	√	√			√	√			√		
Kansas <sup>6</sup>	√	√				√					√
Kentucky	√	√									
Louisiana	√	√		√	√	√	√		√		
Maine	√	√				√			√		
Maryland <sup>7</sup>	√	√		√		√			√		
Massachusetts	√	√				√					
Michigan <sup>8</sup>	√	√		√							√
Minnesota	√	√				√				√	
Mississippi	√	√				√	√	√			
Missouri	√	√			√	√					
Montana	√	√		√	√	√					
Nebraska	√	√		√	√					√	√
Nevada	√	√		√	√	√	√	√			
New Hampshire	√	√									
New Jersey <sup>9</sup>	√	√	√	√		√					
New Mexico	√	√				√		√			
New York	√	√	√			√					
North Carolina	√										
North Dakota	√	√									
Ohio	√			√	√	√	√				
Oklahoma	√	√				√		√			
Oregon <sup>10</sup>	√			√		√			√		√

<sup>4</sup> Idaho's exception allows possession of beer or wine when the minor is making a delivery by order of his or her parent.

<sup>5</sup> Illinois's exception allows minors to purchase or possess if they are part of a licensee's "sting operation."

<sup>6</sup> Kansas's exception allows minors to "violate the provisions of the Kansas Liquor Control Act" if they are under the direction of a licensee's self-compliance program.

<sup>7</sup> Maryland's exception allows possession or consumption of alcohol by minors if an adult member of their immediate family allows it.

<sup>8</sup> Michigan's exception allows minors to "purchase or receive" alcohol as a part of an undercover operation by direction of an employer.

<sup>9</sup> New Jersey's exception allows possession or consumption of alcohol by minors with the permission of and in the presence of a relative 21 years or older.

<sup>10</sup> Oregon's exception indicates that its prohibitions do not apply to minors who are acting under the direction of a licensee for the purpose of investigating possible violations by the licensee's employees of laws prohibiting sales to minors.

	Possession by Minors	EXCEPTIONS									
		Employment	Student	Religious Services	Medical Treatment	Parent/ Guardian/ Custodian Consent/ Presence	Spouse Consent/ Presence	Any Private Location	Private Residence	Only Minor's/ Parent's/ Guardian's Home	Law Enforce- ment
Pennsylvania	√			√							√
Rhode Island	√	√									
South Carolina	√	√	√	√		√				√	
South Dakota	√	√			√	√	√				
Tennessee	√	√									
Texas	√	√				√	√				√
Utah	√	√									
Vermont	√	√	√								
Virginia	√	√				√					
Washington	√	√	√	√	√	√					
West Virginia	√	√									√
Wisconsin	√	√				√	√				
Wyoming <sup>11</sup>	√	√				√		√			
<b>State Totals</b>	<b>51</b>	<b>45</b>	<b>6</b>	<b>18</b>	<b>14</b>	<b>33</b>	<b>9</b>	<b>10</b>	<b>7</b>	<b>4</b>	<b>9</b>

<sup>11</sup> Wyoming's exception allows a minor licensee to possess alcohol.

## CONSUMPTION OF ALCOHOL BY MINORS

Most but not all states prohibit consumption of alcohol by minors as well as possession. Possession and consumption are closely linked. One can't consume alcohol without possessing it although one can possess it without consuming it. Possession and consumption are usually treated as equivalent offenses and are seldom charged separately. Nevertheless, law enforcement officials report that it is important to have a separate law for each activity. The distinction may facilitate enforcement at drinking parties where the alcohol cannot be recovered, but evidence of consumption is available through observation or breath or urine tests. We were unable to verify through any legal analysis that such a fact pattern would be more easily accomplished through a prohibition against consumption than through a possession provision. The evidence appears to be equally relevant to both activities because one cannot consume without possessing. However, specific fact patterns in case law have made this distinction between possession and consumption, indicating that a minor may not necessarily be charged with possession despite evidence of consumption.

Moreover, in states maintaining a distinction between these provisions, the employment exception appears to hold some significance: a minor employee of an alcohol establishment may be permitted to possess but not to consume. In addition, some states apply different exceptions to their possession and consumption statutes.

Exceptions to consumption of alcohol by minors are identical (except for the employment Exception) to those found in the possession statutes. Please refer to the definitions above.

### Consumption of Alcohol by Minors

	Consumption by Minors	EXCEPTIONS								
		Student	Religious Services	Medical Treatment	Parent/Guardian/Custodian/Consent/Presence	Spouse Consent/Presence	Any Private Location	Private Residence	Only Minor's/Parent's/Guardian's Home	Law Enforcement
Alabama	√									
Alaska	√			√	√	√				
Arizona	√		√	√						
Arkansas										
California	√									
Colorado <sup>1</sup>	√		√	√	√		√			
Connecticut										
Delaware <sup>2</sup>	√		√		√			√		
District of Columbia	√									
Florida										
Georgia										
Hawaii										

<sup>1</sup> Colorado's exception requires the knowledge and consent of the owner of the private property when minors possess or consume alcohol (in addition to the consent or presence of a parent or guardian). Also, it is an affirmative defense to illegal possession or consumption that existence of ethyl alcohol in minor's body is due solely to ingested confectionery or a beverage that contained less than 0.5 percent of ethyl alcohol by weight.

<sup>2</sup> Delaware's exception includes "members of the same family" and allows possession or consumption of alcohol by minors in the "private home of any of said members."

	Consumption by Minors	EXCEPTIONS								
		Student	Religious Services	Medical Treatment	Parent/ Guardian/ Custodian/ Consent/ Presence	Spouse Consent/ Presence	Any Private Location	Private Residence	Only Minor's/ Parent's/ Guardian's Home	Law Enforcement
Idaho	√									
Illinois	√		√		√			√		
Indiana	√									
Iowa										
Kansas <sup>3</sup>	√				√					√
Kentucky										
Louisiana	√		√	√	√	√		√		
Maine	√				√			√		
Maryland <sup>4</sup>	√		√		√			√		
Massachusetts										
Michigan	√	√	√							
Minnesota	√				√				√	
Mississippi										
Missouri										
Montana	√		√	√	√					
Nebraska	√		√						√	√
Nevada	√									
New Hampshire										
New Jersey <sup>5</sup>	√		√		√					
New Mexico										
New York	√	√			√					
North Carolina	√									
North Dakota	√		√							
Ohio	√		√	√	√	√				
Oklahoma	√				√					
Oregon	√		√		√			√		
Pennsylvania	√		√							
Rhode Island	√									
South Carolina										
South Dakota	√		√	√	√	√				
Tennessee	√		√							
Texas	√				√	√				
Utah	√			√						
Vermont	√	√								
Virginia										
Washington	√		√	√	√					

<sup>3</sup> Kansas's exception allows minors to "violate the provisions of the Kansas Liquor Control Act" if they are under the direction of a licensee's self-compliance program.

<sup>4</sup> Maryland's exception allows possession or consumption of alcohol by minors if an adult member of their immediate family allows it.

<sup>5</sup> New Jersey's exception allows possession or consumption of alcohol by minors with the permission and in the presence of a relative 21 years or older.

	Consumption by Minors	EXCEPTIONS								
		Student	Religious Services	Medical Treatment	Parent/ Guardian/ Custodian Consent/ Presence	Spouse Consent/ Presence	Any Private Location	Private Residence	Only Minor's/ Parent's/ Guardian's Home	Law Enforcement
West Virginia	√									
Wisconsin	√				√	√				
Wyoming										
<b>State Totals</b>	<b>36</b>	<b>3</b>	<b>17</b>	<b>9</b>	<b>19</b>	<b>6</b>	<b>1</b>	<b>6</b>	<b>2</b>	<b>2</b>

## USE OF FALSE IDENTIFICATION CARDS

There are several policies that address the use of false identification cards by minors. Specific prohibitions against the use of such cards to purchase alcohol are usually found in the ABC codes in each state. Associated policies include the following: (1) prohibitions against lending or transferring false identification cards for the purpose of purchasing alcohol; (2) prohibitions against the manufacture or sale of false identification cards; (3) exemptions for alcohol retailers who mistakenly rely on apparently valid identification cards that are false; and (4) the rights of retailers to confiscate false identification cards.

Though all of these policies are relevant in deterring underage purchases of alcohol, we focused our research on two: (1) prohibiting the use of false identification by minors to purchase alcohol; and (2) prohibiting the lending or transferring of false identification cards to others. We determined that these two provisions were important to law enforcement in deterring underage purchases and were also the most feasible in terms of conducting the necessary legal research.

Prohibitions against the manufacture or sale of false identifications are also important to law enforcement, but according to secondary sources, many sales of false identifications are made in interstate commerce via the Internet. It is unclear to what extent a state has authority to regulate these sales. Because this rapidly developing policy area would require extensive review of the case law in each state, we determined that it was not feasible to analyze this area for this project.

The exemption for retailers who mistakenly rely on false identification cards is a provision more closely associated with illegal sales than with illegal purchases. The existence of this provision in a state will have no effect on the likelihood of a minor using a false identification card for his or her purchase. Thus, we did not include this provision in our research.

Finally, although the right of a retailer to confiscate false identification cards might reduce illegal sales by removing the confiscated IDs from circulation, this provision does not appear to increase the likelihood of detection or prosecution, and secondary sources suggest that false identifications are readily available (and therefore easily replaced after confiscation). Consequently, we did not include this provision in our research.

It is worthwhile to note that state statutes may prohibit false statements and/or the use of false identification cards. Interviews with state alcohol law enforcement officials confirm our legal analysis: a statute that prohibits the use of false statements includes by inference the use of a false identification card. In other words, presenting a false identification card is equivalent to making a false statement. We have concluded that it is not necessary to distinguish between "false statement" and "false identification" language in the statutes. A minor who makes a false statement regarding age but does not use a false identification card is most likely to be prosecuted for an illegal attempted purchase whether or not the false identification statute encompasses the use of both false statements and false identification cards.

The chart below indicates that all 50 states and the District of Columbia prohibit the use of false identification cards by minors, and the majority make lending and transferring identification cards illegal as well.

### Use of False Identification Cards

	Use of False ID Cards by Minors	Lending/Transferring ID Cards
Alabama	√	
Alaska	√	
Arizona	√	
Arkansas	√	√
California	√	√
Colorado	√	√
Connecticut	√	
Delaware	√	
District of Columbia	√	
Florida	√	√
Georgia	√	
Hawaii	√	√
Idaho	√	√
Illinois	√	√
Indiana	√	√
Iowa	√	√
Kansas	√	√
Kentucky	√	
Louisiana	√	√
Maine	√	√
Maryland	√	
Massachusetts	√	√
Michigan	√	√
Minnesota	√	√
Mississippi	√	√
Missouri	√	
Montana	√	
Nebraska	√	√
Nevada	√	√
New Hampshire	√	√
New Jersey	√	√
New Mexico	√	√
New York	√	√
North Carolina	√	√
North Dakota	√	
Ohio	√	
Oklahoma	√	
Oregon	√	√
Pennsylvania	√	
Rhode Island	√	√
South Carolina	√	√
South Dakota	√	√
Tennessee	√	
Texas	√	
Utah	√	√
Vermont	√	

	Use of False ID Cards by Minors	Lending/Transferring ID Cards
Virginia	√	√
Washington	√	√
West Virginia	√	
Wisconsin	√	√
Wyoming	√	√
<b>State Totals</b>	<b>51</b>	<b>32</b>

## FURNISHING ALCOHOL TO MINORS

All states and the District of Columbia prohibit furnishing alcoholic beverages to minors, even though the 1984 federal legislation does not explicitly require this prohibition. The prohibition usually applies to both commercial and noncommercial servers, although extensive case law research would be required to determine which states limit the prohibition to commercial sellers. This is because the language is unclear in many statutes. In addition, the prohibition is usually found in the Alcoholic Beverage Control Codes, which apply primarily to commercial sellers and servers. Because of these difficulties, we did not determine whether the prohibition found in each state applies to noncommercial as well as commercial transactions.

The states vary widely regarding the specific acts that are prohibited. Arizona law, for example, states that it is illegal to "sell, furnish, dispose of or give [alcohol], or cause [alcohol] to be sold, furnished, disposed of or given" to an underage person. California's provision is almost identical but omits the reference to "disposing of" alcohol to a minor. Kansas prohibits delivering and exchanging alcohol with a minor in its list of prohibitions. Michigan, on the other hand, only includes the terms "sell" and "give". Our analysis concluded that it wasn't important which specific prohibited acts were included in the state statutes. Michigan's short list of "sell" and "give" is as effective legally as the longer lists found in other states. As noted above, even if the list appears incomplete (e.g., it does not appear on its face to cover noncommercial transactions), courts may interpret the statutory language expansively. We therefore did not catalog the specific acts that were prohibited, but merely confirmed that both sales and gifts were included.

The categories of exceptions applied to minor possession, consumption, and purchase of alcohol also apply to those who provide alcohol to minors.<sup>1</sup> States do not always apply the same exception to both the provider and the minor. California, for example, permits minors to possess alcohol in private venues, but it is illegal for anyone to provide alcohol to minors in either public or private settings. In certain situations, courts may conclude that an exception for the provider should be implied from that granted to the minor even if it is not explicitly included in the statutes (and vice versa). This is particularly relevant to exceptions for the parents and relatives and for employment. For example, a court might conclude that if a law that explicitly allows a minor to possess alcohol in the presence of his or her parent, the parent is permitted to provide it to the child.

As in the possession statutes, exceptions are provided for furnishing alcohol to persons under the age of 21 who are employees of licensed establishments. These exceptions are often covered under separate statutes that deal with the minimum age of sellers and servers in licensed outlets. We did not include these in this chart. Exceptions included in the chart are defined as follows:

- **Parent/guardian**—23 states permit parents and legal guardians to provide alcohol to their minor children or wards.
- **Legal-aged spouse**—eight states allow a person age 21 years or older to provide alcohol to his or her underage spouse.
- **Religious services**—nine states permit alcohol to be served to minors in connection with religious services.

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<sup>1</sup> Note that these exceptions apply to noncommercial furnishers of alcohol. States that have these exceptions, by implication, prohibit noncommercial service of alcohol to minors. As noted above, states without an exception listed in our chart may permit noncommercial furnishing to minors generally.

- **Medical treatment**—11 states permit alcohol to be given to minors in connection with medical treatment.
- **Education**—three states permit educational institutions to provide alcohol to minors in connection with being a student or for educational purposes.

### Furnishing Alcohol to Minors

	Furnishing Alcohol to Minors	EXCEPTIONS				
		Parent/Guardian	Legal-aged Spouse	Religious Services	Medical Treatment	Education
Alabama	√					
Alaska <sup>2</sup>	√	√	√		√	
Arizona	√					
Arkansas <sup>3</sup>	√	√	√	√		
California	√					
Colorado	√					
Connecticut	√	√	√		√	
Delaware	√	√		√		
District of Columbia	√					
Florida	√					√
Georgia	√					
Hawaii	√					
Idaho	√					
Illinois	√			√		
Indiana	√					
Iowa	√	√			√	
Kansas <sup>4</sup>	√	√				
Kentucky	√	√				
Louisiana	√					
Maine	√	√				
Maryland	√					
Massachusetts	√	√				
Michigan	√					
Minnesota	√	√				
Mississippi	√					
Missouri	√	√				
Montana <sup>5</sup>	√	√		√	√	
Nebraska	√					

<sup>2</sup>Alaska's statute includes references to "legal spouse" rather than "legal-aged spouse." The exceptions apply only off the licensed premises.

<sup>3</sup>Arkansas's statute refers to "family members" but does not specify which family members.

<sup>4</sup>In Kansas, parents or legal guardians may provide only cereal malt beverage to their minor child or ward.

<sup>5</sup>In Montana, §16-6-305 1(b) specifies that "a parent, guardian, or other person may not knowingly sell or otherwise provide an alcoholic beverage in an intoxicating quantity to a person under 21 years of age." Section 16-6-305 1(c) defines "intoxicating quantity" as "a quantity of an alcoholic beverage that is sufficient to produce: (i) a blood, breath, or urine alcohol concentration in excess of 0.05; or (ii) substantial or visible mental or physical impairment."

	Furnishing Alcohol to Minors	EXCEPTIONS				
		Parent/Guardian	Legal-aged Spouse	Religious Services	Medical Treatment	Education
Nevada	√	√			√	
New Hampshire	√					
New Jersey	√					
New Mexico	√	√				
New York	√					√
North Carolina	√					
North Dakota	√					
Ohio	√	√	√	√	√	
Oklahoma	√					
Oregon	√	√				
Pennsylvania	√			√		
Rhode Island	√					
South Carolina	√	√	√	√		√
South Dakota	√	√	√		√	
Tennessee	√					
Texas	√					
Utah	√	√			√	
Vermont	√					
Virginia	√				√	
Washington	√	√		√	√	
West Virginia <sup>o</sup>	√	√	√			
Wisconsin	√	√	√	√		
Wyoming	√	√			√	
<b>State Totals</b>	<b>51</b>	<b>23</b>	<b>8</b>	<b>9</b>	<b>11</b>	<b>3</b>

<sup>o</sup> In West Virginia, both §60-3-22a and §60-3A-24 state that "Any person who knowingly buys for, gives to or furnishes to anyone under the age of twenty-one to whom he or she is not related by blood or marriage any liquor from whatever source, is guilty of a misdemeanor...."

## FURNISHING ALCOHOL TO INTOXICATED INDIVIDUALS

Almost every state and the District of Columbia have a provision that prohibits sales and service of alcohol to intoxicated persons. The primary ways in which the states describe the offense include specific wording related to intoxication levels and the types of prohibitions enumerated. For example, the following words are used to describe intoxicated persons:

- obviously intoxicated
- visibly intoxicated
- appears to be intoxicated
- noticeably intoxicated
- reason to believe is intoxicated
- apparently under the influence of liquor.

At least one state, Arizona, defines what it means to be obviously intoxicated. AZ ST 4-244 states:

For purposes of this section, "obviously intoxicated" means inebriated to the extent that a person's physical faculties are substantially impaired and the impairment is shown by significantly uncoordinated physical action or significant physical dysfunction that would have been obvious to a reasonable person.

Although there is variation in the language used to describe the state of intoxication, it does not appear to make a practical difference in terms of court interpretation or enforcement practices.

Differences across state statutes also include the standard of proof required as evidence of intoxication. For example, some states require knowledge of the person's intoxication, although most apply a negligence standard (a reasonable person in like circumstances should have known that the person was intoxicated). The only method for determining the standard of proof applied in a given state is to analyze case law, and, in many cases, such an analysis will be inconclusive. Therefore we did not attempt to catalog the standard of proof variable.

### Furnishing Alcohol to Intoxicated Individuals

	Furnishing Alcohol to Intoxicated Individuals
Alabama	√
Alaska	√
Arizona	√
Arkansas	√
California	√
Colorado	√
Connecticut	√
Delaware	√
District of Columbia	√
Florida	
Georgia	√
Hawaii	√
Idaho	√

	Furnishing Alcohol to Intoxicated Individuals
Illinois	√
Indiana	√
Iowa	√
Kansas	√
Kentucky	√
Louisiana	√
Maine	√
Maryland	√
Massachusetts	√
Michigan	√
Minnesota	√
Mississippi	√
Missouri	√
Montana	√
Nebraska	√
Nevada	
New Hampshire	√
New Jersey	√
New Mexico	√
New York	√
North Carolina	√
North Dakota	√
Ohio	√
Oklahoma	√
Oregon	√
Pennsylvania	√
Rhode Island	√
South Carolina	√
South Dakota	√
Tennessee	√
Texas	√
Utah	√
Vermont	√
Virginia	√
Washington	√
West Virginia	√
Wisconsin	√
Wyoming <sup>1</sup>	
<b>State Totals</b>	<b>48</b>

<sup>1</sup> In Wyoming, §12-5-301 states that "No order shall be received from nor delivery made to a person under twenty-one (21) years of age or an intoxicated person in the area." Since this provision applies only to "Drive-In Areas," we did not include this state as having a provision that prohibits furnishing alcohol to intoxicated individuals.

## RESPONSIBLE BEVERAGE SERVICE

Responsible Beverage Service (RBS) or server training programs have two goals: (1) to establish policies and procedures in retail alcohol outlets for preventing alcohol sales and service to minors and intoxicated persons; and (2) to train managers and servers/clerks to implement those policies and procedures effectively.

Server/clerk training focuses on serving and selling procedures, signs of intoxication, methods for checking age identification, and intervention techniques. Manager training includes the server/clerk training as well as policy and procedures development and staff supervision.

Experimental RBS programs first appeared in the early 1980s. States with RBS provisions have either mandatory programs or incentive-based voluntary programs. Voluntary, private programs exist to varying degrees in the other states, but those states do not have provisions that provide statewide structure for the design and implementation of these programs.

A program is designated as mandatory if state law requires at least some alcohol retail employees to attend a RBS training. Thirteen states require some type of RBS training, but these states vary widely in who must participate:

- *Type of employee:* statutes may require owners or licensees, managers and servers/clerks, or a subset of these classifications to participate;
- *Type of outlet:* statutes may require either on-sale or off-sale establishments, or both, to participate; and
- *Date of license issuance:* statutes may require participation from establishments with licenses issued after the legislation is enacted or from all establishments, regardless of the date of the license.

The eleven states that have established voluntary programs provide incentives for retailers to participate in RBS, but do not impose penalties for those who don't. Incentives vary by state and include (1) a decrease in dram shop liability law suits; (2) mitigation of fines for sales to minors or intoxicated persons; (3) discounts in dram shop liability insurance; and (4) protection against revocation of a license for sales to minors or intoxicated persons.

Whether mandatory or voluntary, RBS programs vary in training curricula components; procedures for administering the program; certificate requirements for RBS trainers, servers/clerks, and managers; penalties for violations; and enforcement practices. These variables may have a dramatic impact on the program's effectiveness in reducing sales to minors and intoxicated persons.

The following variables pertain to mandatory provisions:

- **Employee categories**—of the 13 states that require mandatory RBS training, 7 require the licensee, managers, and servers to attend; 5 states require only managers and servers to take the training; and 1 requires the licensee and managers to attend.
- **Establishment types**—eight states require that on- and off-sale establishments participate in RBS training; four states require only on-premise establishments to participate; and one requires only off-premise establishments to receive training.

- **Date of issuance of license**—all 13 of the states that require mandatory RBS training require new licensees to participate, and 2 states exempt establishments licensed before the legislation was enacted.

The variables that pertain to voluntary incentives are as follows:

- **Liability defense**—three states allow licensees to use their RBS training as a defense in dram shop liability cases.
- **Mitigation of fines**—seven states allow fines for sales of alcohol to minors or intoxicated persons to be mitigated if the licensee can demonstrate that he or she participated in RBS training.
- **Discount insurance**—three states allow discounts in dram shop liability insurance if the licensee has participated in RBS training.
- **Protection of license**—three states provide protection against revocation for sales of alcohol to minors or intoxicated persons if the licensee has participated in RBS training.

### Responsible Beverage Service

	RBS Provision		Mandatory States							Voluntary States			
			Categories of Employees Required to Attend RBS Training			Establishment Type Required to Participate		Applies to New or Existing Licenses		Incentives			
			Licensee	Manager	Server	On	Off	New	Existing	Liability Defense	Mitigation of Fines	Discount Ins.	Protection of License
Alabama		√										√	√
Alaska	√			√	√	√	√	√	√				
Arizona		√									√		
Arkansas		√									√		
California													
Colorado													
Connecticut													
Delaware	√		√	√	√	√	√	√	√				
District of Columbia													
Florida		√									√		√
Georgia													
Hawaii													
Idaho													
Illinois		√									√	√	
Indiana		√									√		
Iowa													
Kansas													
Kentucky													
Louisiana	√			√	√	√	√	√	√				

	RBS Provision		Mandatory States							Voluntary States			
			Categories of Employees Required to Attend RBS Training			Establishment Type Required to Participate		Applies to New or Existing Licenses		Incentives			
	Man-datory	Volun-tary	Licensee	Manager	Server	On	Off	New	Existing	Liability Defense	Miti-gation of Fines	Dis-count Ins.	Pro-tection of License
Maine		√								√			
Maryland	√		√	√	√	√	√	√	√				
Massachusetts													
Michigan		√										√	
Minnesota													
Mississippi													
Missouri													
Montana													
Nebraska													
Nevada													
New Hampshire		√								√	√		
New Jersey	√		√	√	√	√	√	√	√				
New Mexico	√			√	√	√	√	√	√				
New York													
North Carolina													
North Dakota													
Ohio													
Oklahoma													
Oregon	√			√	√	√		√	√				
Pennsylvania	√			√	√	√	√	√	√				
Rhode Island		√								√	√		
South Carolina													
South Dakota													
Tennessee	√		√	√	√	√		√	√				
Texas		√											√
Utah	√		√	√	√	√		√	√				
Vermont	√		√	√	√	√	√	√	√				
Virginia													
Washington	√		√	√	√	√		√	√				
West Virginia													
Wisconsin	√		√	√	√	√	√	√					
Wyoming													
<b>State Totals</b>	<b>13</b>	<b>11</b>	<b>8</b>	<b>13</b>	<b>12</b>	<b>12</b>	<b>9</b>	<b>13</b>	<b>11</b>	<b>3</b>	<b>7</b>	<b>3</b>	<b>3</b>

## KEG REGISTRATION

Keg registration allows tracking of beer kegs from the time of purchase to the time the empty keg is returned to the vendor. The purpose of these laws is to deter adults from providing keg beer to minors and to identify and punish those who do. The laws are also designed to protect distributors from being accused of selling kegs to underage consumers.

Keg registration laws require wholesalers or retailers to attach a tag, sticker, or engraving with an identification number to kegs exceeding a specified capacity. When the keg is purchased, the retailer records identifying information about the purchaser. A refundable deposit may also be collected, but very few states specify whether a deposit is required and, if required, the amount of the deposit. For those states that do specify, the information appears in the footnotes to the chart below.

The recent introduction of disposable kegs presents a complicating factor for keg registration laws. These containers cannot be tagged or traced easily because they are meant to be disposed of when empty. This new technology suggests that deposit provisions are particularly important as a disincentive against destroying the keg, which defeats the purpose of the law. The analysis below indicates whether a state has a keg registration law, how "keg" is defined for the purposes of the keg provision, the type of purchaser information a retailer is required to obtain (and keep on file for a specified time period), and the type of information to be placed on kegs.

Currently 22 states have keg registration provisions of the type analyzed in this document. The variables analyzed in the chart below are as follows:

- **Keg definition**—this variable describes the minimum number of gallons a keg must hold to require registration. It varies from 2 to 16 gallons. One state (Rhode Island) does not specify the number of gallons needed to constitute a keg.
- **Purchaser information**—all states that require keg registration require that the purchaser provide his or her name or signature on the registration form. Sixteen states require that the purchaser show some type of identification; eight states allow the use of a driver's license, and two allow the use of car registration information. In addition, four states require that the purchaser specify where the keg will be consumed.
- **Type of identification label**—in most states with keg registration, the ABC will either issue forms to be used to track purchasers or sales (10 states) or specify the forms to be used (13 states). In three states, the ABC department or agency must approve the form used by those who sell kegs.

## Keg Registration

	Keg Registration Provision	Keg Definition: Minimum Number of Gallons	Purchaser Information				Type of Identification Label		
			Identification	Driver's License	Car Registration	Keg Consumption Location	Form Specified	ABC Issued	Approved by ABC
Alabama									
Alaska									
Arizona									
Arkansas									
California <sup>1</sup>	√	6	√	√			√	√	
Colorado									
Connecticut <sup>1</sup>	√	6			√		√		
Delaware									
District of Columbia	√	4	√			√		√	
Florida									
Georgia <sup>1</sup>	√	2	√	√		√	√		√
Hawaii									
Idaho	√	7.75					√	√	
Illinois									
Indiana	√	7.75					√		
Iowa									
Kansas	√	4	√	√				√	
Kentucky									
Louisiana									
Maine <sup>2</sup>	√	7.75	√				√		√
Maryland	√	4	√				√	√	
Massachusetts <sup>3</sup>	√	2	√				√	√	
Michigan									
Minnesota	√	7	√						
Mississippi									
Missouri									
Montana									
Nebraska	√	5	√	√			√		
Nevada									
New Hampshire	√	7	√	√			√		
New Jersey									
New Mexico	√	More than 6	√	√			√		
New York									
North Carolina									
North Dakota <sup>4</sup>	√	6	√	√					

<sup>1</sup> In California, Connecticut, and Georgia, a deposit is required to obtain a keg, but the deposit amount is not specified.

<sup>2</sup> In Maine, a deposit of up to \$50 is required.

<sup>3</sup> In Massachusetts, there are two types of fees required: (1) a container fee of not less than \$10.00 for each keg of six or more gallons and not less than \$1.00 for each container of less than six gallons; (2) a registration fee of \$10.00 for each keg of six or more gallons and \$4.00 for each keg of less than six gallons.

<sup>4</sup> North Dakota is the only state that specifies the type of ink to be used on the keg label.

	Keg Registration Provision	Keg Definition: Minimum Number of Gallons	Purchaser Information				Type of Identification Label		
			Identifi- cation	Driver's License	Car Registration	Keg Consumption Location	Form Specified	ABC Issued	Approved by ABC
Ohio <sup>5</sup>	√	5					√	√	
Oklahoma									
Oregon	√	7	√	√	√		√	√	
Pennsylvania									
Rhode Island	√								
South Carolina									
South Dakota <sup>6</sup>	√	8 or 16							
Tennessee									
Texas									
Utah <sup>7</sup>									
Vermont <sup>8</sup>	√	5	√						√
Virginia	√	4	√			√		√	
Washington	√	4	√			√		√	
West Virginia									
Wisconsin									
Wyoming									
<b>State Totals</b>	<b>22</b>		<b>16</b>	<b>8</b>	<b>2</b>	<b>4</b>	<b>13</b>	<b>10</b>	<b>3</b>

<sup>5</sup> In Ohio, keg registration is mandatory only if five or more kegs are being purchased.

<sup>6</sup> South Dakota statute 35-1-11 defines a keg as "an eight or sixteen gallon reusable plastic or metal container."

<sup>7</sup> In Utah, "a person may not sell, offer to sell, or otherwise furnish or supply beer to the general public in containers larger than two liters. This does not preclude licensed beer wholesalers from selling, offering to sell, or otherwise furnishing or supplying beer in containers larger than two liters to beer retailers authorized by this title to dispense beer on draft for consumption on the beer retailer's licensed premises." In addition, "a person may not purchase or possess beer in containers larger than two liters unless that person is a beer retailer authorized by this title to dispense beer on draft for consumption on the beer retailer's licensed premises."

<sup>8</sup> In Vermont, a \$25 deposit is required.

## FALSE AND MISLEADING ADVERTISING

Commercial speech is protected under the First Amendment of the U.S. Constitution, but there is no constitutional protection for false or misleading advertising. For example, any advertisement that targets underage persons for alcohol sales or consumption (the typology immediately following this one) can be interpreted as misleading because it invites an illegal transaction. Although legal interpretations of the terms "false", "misleading", and "targeting minors" are not well developed as they apply to alcohol advertising, a state with such a provision provides a basis for conducting investigations, establishing specific rules regarding ad content that is attractive to minors, and developing remedies to ensure that the ads will not be misleading.

In the typology below, we note the states with laws that expressly prohibit false and misleading advertising. All but two of these states (Maryland and Tennessee) cover all types of alcoholic beverages (distilled spirits, wine, and beer). We also list specific references to the type of advertising in which false and misleading claims are prohibited (newspapers and magazines, outdoor advertising, and electronic media). At present, 30 states have policies prohibiting false and misleading advertising.

### False and Misleading Advertising

	False and Misleading Provision	Advertising Type			
		Newspapers and Magazines	Outdoor Advertising	Electronic Media	Not Specified
Alabama	√				√
Alaska					
Arizona					
Arkansas					
California					
Colorado					
Connecticut <sup>1</sup>	√				√
Delaware	√	√	√	√	
District of Columbia	√				√
Florida					
Georgia	√				√
Hawaii					
Idaho	√	√	√	√	
Illinois	√				√
Indiana					
Iowa					
Kansas	√				√
Kentucky	√				√
Louisiana					
Maine					
Maryland <sup>2</sup>	√				√
Massachusetts	√				√
Michigan <sup>1</sup>	√				√
Minnesota	√				√
Mississippi <sup>1</sup>	√				√

<sup>1</sup> The relevant provisions for Connecticut, Michigan, and Mississippi are found outside the ABC code.

<sup>2</sup> In Maryland and Tennessee, the provisions apply only to distilled spirits and wine.

	False and Misleading Provision	Advertising Type			
		Newspapers and Magazines	Outdoor Advertising	Electronic Media	Not Specified
Missouri	√				√
Montana					
Nebraska	√				√
Nevada					
New Hampshire	√				√
New Jersey	√				√
New Mexico					
New York <sup>3</sup>	√				√
North Carolina	√				√
North Dakota					
Ohio					
Oklahoma					
Oregon	√				√
Pennsylvania	√				√
Rhode Island					
South Carolina					
South Dakota					
Tennessee <sup>2</sup>	√	√			
Texas	√	√	√	√	
Utah	√				√
Vermont	√	√	√	√	
Virginia	√				√
Washington <sup>4</sup>	√		√		√
West Virginia <sup>5</sup>	√			√	
Wisconsin					
Wyoming	√				√
<b>State Totals</b>	<b>30</b>	<b>5</b>	<b>5</b>	<b>5</b>	<b>24</b>

<sup>3</sup> In New York, the provision applies only to package stores.

<sup>4</sup> Washington has two provisions that relate to false and misleading advertising: one deals with outdoor advertising, and one does not specify the type of advertising.

<sup>5</sup> Virginia does not allow radio or TV ads for alcoholic beverages. A Constitutional issue concerning content-based restrictions and First Amendment protections may be relevant here.

## ADVERTISING THAT TARGETS MINORS

Legal provisions in many states prohibit ads of any type in which advertisers intend to target children, minors, or those under the legal drinking age, or encourage them, induce them, or make a special appeal to them to buy or consume alcoholic beverages. Targeting minors provisions can also prohibit advertising that uses images of children or models who are under the legal drinking age. We have focused on the specific wording of each statute because, although a state agency can pursue legal action against such ads through false or misleading provisions, enforcement is much easier when there is a specific provision against targeting minors. On the other hand, a provision that is poorly drafted will probably undermine a general false or misleading statute; a court is likely to conclude that the state legislature intended the targeting minors provisions to override (or serve as an interpretation of) a general false and misleading provision. For this reason, if a state has a targeting minors provision, it is important that the scope of the provision not be unduly restricted.

At present, 25 states have provisions of the type analyzed for this report. The variables in the chart below are defined as follows:

- **Reference**—this variable describes how the legal provision defines the audience that is not to be targeted. Nine states use the term “children” while six states refer to those “under the legal drinking age.” Fourteen states refer to “minors”, and in Kentucky and New Mexico the audience is not specified.
- **Placement**—nine states prohibit the placement of alcohol advertisements in school-related locations (this may include schools, universities, school buses, and yearbooks). Three states prohibit advertising near churches, and three states prohibit advertisements near playgrounds.
- **Symbols**—states may also restrict the use of symbols that can be depicted in advertisements. Six states prohibit the use of symbols of children; four states restrict symbols related to holidays such as Christmas or Easter; and five states prohibit the use of toys or other items that might appeal to children.
- **Wording**—seven states prohibit advertising that “induces” minors to drink; five states prohibit advertising that “encourages” minors to drink; and eight states prohibit advertising that “makes a special appeal” to minors. In some states, more than one of these phrases may be used to prohibit advertising that targets minors.

## Advertising That Targets Minors

	Targets Minors	Reference			Placement			Symbols			Wording		
		Children	Under Legal Drinking Age	Minors	School Related	Churches	Play-grounds	Symbols of Children	Holidays	Toys	Induces	Encourages	Makes Special Appeal
Alabama	√			√									√
Alaska													
Arizona													
Arkansas													
California <sup>1</sup>	√			√						√		√	
Colorado													
Connecticut	√	√						√	√	√			
Delaware	√			√							√		
District of Columbia <sup>2</sup>	√	√							√	√			√
Florida													
Georgia	√		√										
Hawaii													
Idaho													
Illinois	√	√											√
Indiana													
Iowa													
Kansas													
Kentucky <sup>3</sup>	√												
Louisiana													
Maine	√			√							√		
Maryland													
Massachusetts													
Michigan <sup>4</sup>	√			√									
Minnesota	√	√			√			√		√			√
Mississippi <sup>5</sup>	√	√											
Missouri													
Montana													
Nebraska	√	√		√				√					
Nevada													
New Hampshire	√		√	√	√						√		
New Jersey	√	√		√				√			√		
New Mexico	√				√								
New York													
North	√		√		√						√		

<sup>1</sup> California includes language that prohibits "the use in any advertisement of alcoholic beverages of any subject matter, language, or slogan addressed to and intended to encourage minors to drink the alcoholic beverages."

<sup>2</sup> The District of Columbia prohibits "the use of any picture or illustration depicting a child or immature person..."

<sup>3</sup> Kentucky has a general alcohol advertising provision that prohibits scenes of family or the home.

<sup>4</sup> Michigan has a general alcohol advertising provision that prohibits any references to minors on alcohol cartoons or containers.

<sup>5</sup> Mississippi has a provision that prohibits TV ads five minutes before or after a program that consists primarily of animated material intended for children.

	Targets Minors	Reference			Placement			Symbols			Wording		
		Children	Under Legal Drinking Age	Minors	School Related	Churches	Play- grounds	Symbols of Children	Holidays	Toys	Induces	Encou- rages	Makes Special Appeal
Carolina													
North Dakota													
Ohio	√	√			√	√	√	√	√				
Oklahoma													
Oregon	√			√								√	√
Pennsylvania	√		√		√	√	√						
Rhode Island													
South Carolina													
South Dakota													
Tennessec													
Texas													
Utah	√			√	√			√	√			√	√
Vermont	√		√									√	√
Virginia	√			√	√						√		
Washington	√	√	√	√	√	√	√			√			√
West Virginia	√			√							√	√	
Wisconsin													
Wyoming													
<b>State Totals</b>	<b>25</b>	<b>9</b>	<b>6</b>	<b>14</b>	<b>9</b>	<b>3</b>	<b>3</b>	<b>6</b>	<b>4</b>	<b>5</b>	<b>7</b>	<b>5</b>	<b>8</b>

## HAPPY HOURS AND DRINK SPECIALS

Excessive drinking practices include happy hours, all-you-can-drink specials, unlimited quantities of alcohol for one low price (usually during specified hours), ladies' nights, two-for-one promotions, nickel pitchers, and other practices that encourage customers of bars and restaurants to drink large quantities of alcohol quickly thereby reducing the incentive to monitor consumption levels and drink responsibly. The consequences of this high-risk drinking include automobile crashes and fatalities, injuries, unplanned sexual activity, assault, rape, and property damage.

In this analysis, we focused on state statutes and regulations that specifically targeted happy hour types of promotions. At present, 27 states have such a provision. Although some states may have provisions that prohibit awarding alcohol as a prize or providing free beverages, in other parts of statutory or regulatory codes as a stand-alone statute or regulation, the information below focuses on states with provisions expressly prohibiting excessive drinking practices. Additionally, several states, such as New Hampshire, have separate provisions prohibiting advertising happy hours or happy hour-related activities, such as ladies' nights. We did not include these provisions in this analysis.

The variables found in the chart below are defined as follows:

- **Free beverages**—ten states have happy hour provisions that contain specific prohibitions against the distribution of free alcoholic beverages.
- **Additional servings**—16 states prohibit an establishment from providing additional servings of alcoholic beverages until previous servings have been consumed.
- **Reduced price – specified day or time**—18 states prohibit the sale of alcoholic beverages at reduced prices during a specified days or time.
- **Unlimited beverages – fixed price, fixed time**—23 states prohibit the sale of alcoholic beverages during a fixed period of time for a fixed price.
- **Increased volume**—12 states prohibit increasing the volume of alcoholic beverages in a drink without increasing the price.
- **Prizes**—15 states have happy hour provisions that contain specific prohibitions against giving alcoholic beverages as prizes.

### Happy Hours and Drink Specials

	Happy Hours and/or Drink Specials	Free Beverages	Additional Servings	Reduced Price - Specified Day or Time	Unlimited Beverages - Fixed Price, Fixed Time	Increased Volume	Prizes
Alabama	√			√	√		
Alaska	√	√	√	√	√		√
Arizona	√		√		√		
Arkansas							
California							
Colorado							
Connecticut	√		√		√		√
Delaware	√			√	√		√
District of Columbia							
Florida							
Georgia							
Hawaii							
Idaho							
Illinois	√		√	√	√	√	√
Indiana	√		√	√			
Iowa							
Kansas	√	√		√	√	√	√
Kentucky							
Louisiana <sup>1</sup>	√				√		
Maine	√	√	√		√		√
Maryland							
Massachusetts	√	√	√	√	√	√	√
Michigan	√				√		√
Minnesota							
Mississippi							
Missouri							
Montana							
Nebraska	√				√		
Nevada							
New Hampshire							
New Jersey	√				√	√	√
New Mexico	√	√	√	√	√		√
New York	√	√			√		
North Carolina	√			√	√		
North Dakota							
Ohio	√		√	√	√	√	√
Oklahoma	√		√	√	√	√	√
Oregon <sup>2</sup>							
Pennsylvania	√		√	√	√	√	
Rhode Island	√	√	√	√	√	√	√

<sup>1</sup> In Louisiana, selling or serving alcoholic beverages at a fixed price after 10 p.m. is prohibited.

<sup>2</sup> Although Oregon has no happy hour statute per se, it does have a provision that prohibits providing alcohol as prizes.

	Happy Hours and/or Drink Specials	Free Beverages	Additional Servings	Reduced Price - Specified Day or Time	Unlimited Beverages - Fixed Price, Fixed Time	Increased Volume	Prizes
South Carolina	√	√		√			
South Dakota							
Tennessee	√	√	√	√	√	√	√
Texas	√		√	√	√	√	
Utah							
Vermont	√		√			√	
Virginia	√	√	√	√	√	√	√
Washington	√			√			
West Virginia							
Wisconsin							
Wyoming							
<b>State Totals</b>	<b>27</b>	<b>10</b>	<b>16</b>	<b>18</b>	<b>23</b>	<b>12</b>	<b>15</b>

## Conclusion

The analyses of these policies relating to key provisions of alcohol beverage control laws reveal that there are considerable discrepancies in the ways in which states regulate the sale and consumption of alcohol in the United States. Key findings produced by the study include:

- Four states prohibit the purchase of alcohol by a minor only if the minor makes a false statement or representation of age in order to purchase the alcohol.
- Ten states allow minors to possess alcohol in any private location, including any private residence or venue.
- Three states do not prohibit the furnishing of alcohol to intoxicated individuals.
- Thirteen states require some type of mandatory Responsible Beverage Service (RBS), and 11 states provide incentives for retailers to participate. Three of the states with voluntary programs provide protection against license revocation for sales to minors or intoxicated persons if the licensee has participated in RBS training.
- Twenty-two states have passed keg registration laws, but the requirements vary widely from the definition of what constitutes a keg to the type of purchaser information required.
- Twenty-five states prohibit alcohol advertising that target minors.

Our analysis highlights the importance of understanding state laws that address underage consumption and drinking to intoxication. The presence or absence of a law may have a significant effect on the rate of alcohol-related problems in a state, particularly alcohol-related motor vehicle crashes. A law's wording, or the inclusion of an exception, may undercut the ability of law enforcement officials, regulatory agencies, and the courts to enforce it, thereby negating the law's intended effect. Research is needed to assess the impact of these laws and the variations across jurisdictions. When researchers engage in this work, it is important that they note the variations and loopholes in provisions to ensure accurate interpretation of results.

Our report provides a first, important step in assessing these state laws. There are several limitations that have already been noted. Most important, we do not include any analysis of local legislation, and we have not researched case law interpretations. These critical aspects of a comprehensive legal analysis are more appropriately accomplished on a state-by-state basis. Our goal is to provide an overview and introduction to the subject that can serve as an important starting point for researchers, policymakers, public health and law enforcement officials, and community organizations across the country.



## Making the Link



A national survey reported that 13 percent of youths, aged 12 to 17, had at least one serious alcohol problem related to drinking in the past year.<sup>1</sup>

### Underage drinking is linked to an increase in risky sexual behavior.

According to a national survey of sexually active young people, 12 percent of teens aged 15 to 17 reported having unprotected sex as a result of having been drinking or using drugs. In addition, 24 percent reported that because of their substance use, they had "done more" sexually than they had planned.<sup>2</sup>

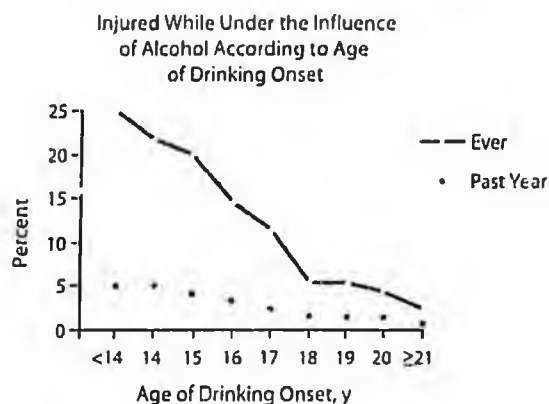
Teenage girls who are heavy drinkers are five times more likely than nondrinkers to engage in sexual intercourse and a third less likely to use condoms, which can result in pregnancy and sexually transmitted diseases.<sup>3</sup>

### Underage drinking is linked to an increased risk of fatalities and unintentional injuries.

In 2000, youths aged 12 to 17 who reported past year alcohol use (19.6 percent) were more likely than youths who did not use alcohol (8.6 percent) to be at risk for suicide.<sup>4</sup>

Young drinking drivers are involved in fatal crashes at twice the rate of drivers aged 21 and older.<sup>5</sup>

Early age of onset drinking may be an indicator of increased risk of alcohol-related injury. Those who start drinking before age 14 are 12 times more likely to be injured while under the influence of alcohol sometime in their life.<sup>6</sup>



No. of Respondents  
130 845 1507 3155 2861 5693 2213 2078 7315

P<.001 for comparison of association between age of drinking onset and percentage engaging in each outcome

Source: Hingson, et al. 2000.

### Early initiation is linked to future alcohol use and dependency problems.

According to a longitudinal study of students in three States, middle school students were almost three times more likely to use alcohol if they had previously used alcohol in elementary school.<sup>7</sup>

If drinking is delayed until age 21, a child's risk of serious alcohol related problems is decreased by 70 percent.<sup>8</sup>

<sup>1</sup> Substance Abuse and Mental Health Services Administration, National Household Survey on Drug Abuse Population Estimates 1998, Rockville, MD: U.S. Department of Mental Health and Human Services, 1999.  
<sup>2</sup> Kaiser Family Foundation. Survey Snapshot: Substance Use and Risky Sexual Behavior: Attitudes and Practices Among Adolescents and Young Adults. Menlo Park CA: The Henry J. Kaiser Foundation, 2002.  
<sup>3</sup> The National Center on Addiction and Substance Abuse at Columbia University. Substance Abuse and the American Woman. New York: Columbia University, June 1996.  
<sup>4</sup> Office of Applied Studies. Substance Abuse and Mental Health Services Administration. NHSDA Report: Substance Use and the Risk of Suicide Among Youths. Rockville, MD: Substance Abuse and Mental Health Services Administration, 2002.  
<sup>5</sup> National Highway Traffic Safety Administration (NHTSA). 2000 Youth Fatal Crash and Alcohol Facts. Washington, DC: US Department of Transportation, 2001.  
<sup>6</sup> Hingson RW, Heeren T, Jansak A, et al. Age of drinking onset and unintentional injury involvement after drinking. JAMA 284(12):1527-1533, 2000.  
<sup>7</sup> Wilson N, Battistich V, Syme L, et al. Does elementary alcohol, tobacco, and marijuana use increase middle school risk? J Adolesc Health 30(6):442-447, 2002.  
<sup>8</sup> Grant BF, Dawson DA. Age at onset of alcohol use and association with DSM-IV alcohol abuse and dependence: Results from the National Longitudinal Alcohol Epidemiologic Survey. J Subst Abuse 9:103-110, 1997.

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# Making the Link



## Underage drinking is linked to violent and aggressive behavior.

According to a national survey, youths ages 12 to 17 who reported violent behaviors in the past year reported higher rates of past year illicit drug or alcohol use compared with youths who did not report violent behaviors.<sup>1</sup>

Almost 12 percent of adolescent drinkers (about 1.2 million 7<sup>th</sup> – 12<sup>th</sup> graders) engage in alcohol-related physical fighting.<sup>2</sup>

A national study indicates that those who began drinking before age 14 were 11 times more likely to have ever been in a fight while drinking or after drinking than adults who began drinking after the age of 21.<sup>3</sup>

Youths ages 12 to 17 who had engaged in past month binge alcohol use were almost four times as likely to have carried a handgun in the past year compared with youths who had not engaged in binge drinking.<sup>4</sup>

## Studies suggest that boys who drink are prone to fighting and sexual aggression.

In one study, males were almost twice as likely as females to engage in alcohol-related physical fighting (15.6 percent of males and 8.0 percent of females).<sup>5</sup>

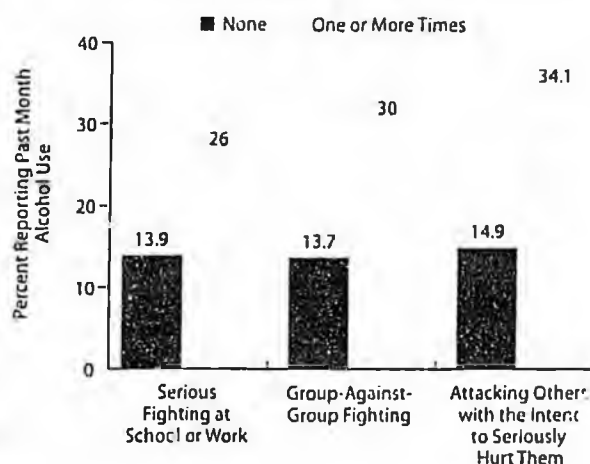
Among male high school students, 39 percent say it is acceptable for a boy to force sex with a girl who is drunk or high.<sup>6</sup>

## Studies suggest that girls who drink are more likely to be victims of self-inflicted violence.

Among eighth grade girls who drink heavily, 37 percent report attempting suicide, whereas 11 percent of girls who do not drink report attempting suicide.<sup>7</sup>

Researchers estimate that alcohol use is implicated in one- to two-thirds of sexual assault and "date rape" cases among teens and college students.<sup>8</sup>

Percentage of Youths Aged 12 to 17 Reporting Past Month Alcohol Use, by Whether or Not They Participated in Violent Behaviors During the Past Year: 1999\*



\* Data presented differ from previously published data from the 1999 NHSDA because of corrections made to imputation procedures.

Source: NHSDA Report, Youth Violence Linked to Substance Use, 2001.

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<sup>1</sup> Office of Applied Studies, Substance Abuse and Mental Health Services Administration. NHSDA Report, Youth Violence and Substance Use, 2001 Update. Rockville, MD: Substance Abuse and Mental Health Services Administration, 2002.

<sup>2</sup> Swahn MH. Epidemiology of alcohol-related fighting among adolescents. Paper presented at the 129<sup>th</sup> Annual Meeting of the American Public Health Association, October 23, 2001, Atlanta, GA.

<sup>3</sup> Hingson R, Heeren T, Zakus R. Age of drinking onset and involvement in physical fights after drinking. *Pediatrics* 108(4):872-877, 2001

<sup>4</sup> Office of Applied Studies, Substance Abuse and Mental Health Services Administration. NHSDA Report: Youths Who Carry Handguns. Rockville, MD: Substance Abuse and Mental Health Services Administration, 2001.

<sup>5</sup> Swahn. Epidemiology of alcohol-related fighting among adolescents.

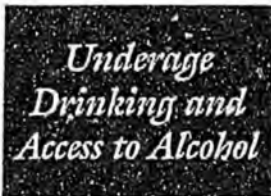
<sup>6</sup> Office of the Inspector General, U.S. Department of Health and Human Services. Youth and Alcohol: Dangerous and Deadly Consequences. Washington, DC: Health and Human Services, 1992.

<sup>7</sup> Windle MA, Miller-Tutzauer C, Domenico D. Alcohol use, suicidal behavior, and risky activities among adolescents. *J Res Adolesc* 2(4):317-330, 1992.

<sup>8</sup> Office of the Inspector General. Youth and Alcohol.



## Making the Link



### Communities need to do more to reduce the availability of alcohol to youth.

Research shows that controlling alcohol availability is effective in preventing alcohol-related problems.<sup>1</sup>

These facts on alcohol availability show the challenge communities face:<sup>2</sup>

Where access to alcohol is greater, consumption is greater. When consumption rates are high, problems related to alcohol increase dramatically.

Local communities have the power to control alcohol availability, but most do not make full use of their power and resources.

### Questions the community should address to help develop policies.<sup>3</sup>

#### *What are the problems related to underage drinking in the community?*

- What is the extent of underage drinking? Which groups of young people are using alcohol?
- When and where does underage drinking take place?
- When adults serve alcohol in their homes to other adults, are nonalcoholic alternatives also offered? Are underage youth typically served alcohol in private homes?
- How is alcohol marketed in the community? Are young people the target of any of this marketing?

#### *What are the law enforcement issues?*

- How many establishments that sell alcohol are within walking distance in a typical neighborhood?
- Is the 21-year-old legal drinking age strictly enforced in the community?
- Do members of the community support the police in their efforts to enforce the drinking age?
- What happens to vendors who habitually sell alcohol to minors?
- What happens to minors who purchase alcohol? Is the infraction taken seriously?

### Actions communities can take to prevent underage access to alcohol.

The Center for Substance Abuse Prevention found that six approaches show the most promise for effective prevention.<sup>4</sup>

- Prevent underage youth from obtaining alcohol.
- Establish laws and policies to govern alcohol distribution methods, "happy-hour" policies, minimum legal purchase age, alcohol taxes, and licensing of alcohol outlets.
- Promote and enforce responsible beverage service.
- Change the conditions of availability—for example, regulate outlet density, create restrictions on alcohol sales, and develop regulations for alcohol at special events and locations.
- Limit the hours and days of alcohol sales.
- Use a community-based approach—involve concerned citizens and community groups, law enforcement and public officials, in an effort to recognize the need to change local laws, regulations, and policies.

<sup>1</sup> Substance Abuse and Mental Health Services Administration, Center for Substance Abuse Prevention. Prevention Enhancement Protocols System (PEPS). Preventing Problems Related to Alcohol Availability: Environmental Approaches, Parent and Community Guide. Rockville, MD: Substance Abuse and Mental Health Services Administration, 1999.

<sup>2</sup> Ibid.

<sup>3</sup> Substance Abuse and Mental Health Services Administration, Center for Substance Abuse Prevention. Underage Drinking Prevention Action Guide and Planner. Rockville, MD: Substance Abuse and Mental Health Services Administration, 2001.

<sup>4</sup> Substance Abuse and Mental Health Services Administration, Center for Substance Abuse Prevention. Prevention Enhancement Protocols System (PEPS).

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**American Medical Association  
Office of Alcohol and Other Drug Abuse  
Robert Wood Johnson Foundation National Alcohol Program Offices  
515 North State Street, Chicago, IL 60610**

**Policy Options for Reduction of Alcohol Problems (3/03)**

**Family and Home**

- Family policy, traditions, values
- Parental monitoring (of alcohol use, availability, child activities, after school hours)
- Parental modeling
- Supervise and monitor teenage parties (ban alcohol)
- Responsible/social hosting
- Clear family rules consistently enforced
- Parent-child communications

**Specific to Schools (K-12)**

- Adopt comprehensive school policy (prevention, intervention, enforcement) and support services
- Support after school activities Ban alcohol on school property
- Ban alcohol at all school events
- Ban alcohol advertising and sponsorship of activities
- Ban product advertising on student clothing

**Opportunities for Social/Normative Controls**

**Community**

- Counter-advertising campaigns
- Correction of misperceptions
- Highlight/counter second-hand effects of drinking (violence, diminished performance, etc.)
- Youth Advocacy (training, mentoring)
- Peer interactions
- Consumer education/media literacy
- Assure access to and promote alcohol screening, intervention and treatment services
- Community Cues:
  - Visible, consistent, clear enforcement
  - Low bar density
  - Restricted or banned alcohol service, promotion and advertising at public events (fairs, festivals, celebrations) and on public property
  - Merchant voluntary refusals to sell child-oriented drinks; reduce in store ads and promotions/displays

**Media (Community, campus, organizations)**

- Ban alcohol advertisements
- Prioritize stories about alcohol issues
- Limit pro-alcohol use images
- Place warnings on alcohol advertisements
- Portray only responsible alcohol use
- Refuse advertising which promotes unsafe or underage drinking practices (e.g., happy hours and drink specials)

### **Law enforcement (Community, Campus)**

- Check alcohol outlets for compliance with state and municipal licensing and safety codes
- Conduct compliance checks
- Prioritize enforcement against adults who illegally provide alcohol to youth
- Alcohol incident data collection, mapping and publication
- Educate public, key populations about problems, laws, enforcement measures

### **Stadiums and Arenas (Community, Campus)**

- Restrict sales and consumption to certain areas
- Sell only low-alcohol or non-alcoholic beverages
- Cease alcohol sales before end of event
- Prohibit bringing your own alcohol
- Ban alcohol advertisements
- Alcohol-free tail gate areas
- Prohibit re-entry to stadium

### **Hotels/motels**

- Restrict age of room renters
- Adult supervision of party rooms/facilities

### **Worksites**

- Restrict alcohol at work events
- Discourage alcohol consumption during work day
- Prohibit use of alcohol as a bonus

### **Insurance and Health Care Policies**

- Premium discounts for
  - Outlets that train servers
  - Individuals who sign waivers of coverage if they have alcohol-related crashes
- Coverage of alcohol screening, intervention and treatment services

### **Religious institutions**

- Restrict access to alcohol at social events
- Prohibit use of alcohol as a prize
- Refuse alcohol sponsorship of events and activities

## Public Policy Options

### Access: Underage

- Maintain & enforce minimum legal drinking age (MLDA), purchase/possession age
- Minimum age of seller
- Keg registration
- Drivers' license enhancement
- Require age identification
- Restrict sales of classes of alcohol
- Social Host Liability
- Ban minors in bars
- Ban adult sales and/or provision to minors – social host liability

### Access: How and When Alcohol is Sold

- Maintain Public/private control of alcohol distribution systems
- Restrict hours and days of sale
- Restrict or ban sales at community events
- Mandatory server training
- Require server licensing
- Commercial/Dram shop/server liability
- Stop state preemption of local control
- Ban Electronic/internet sales
- Licensing and permit controls/limits
- Ban drive-up sales and sales as gas stations
- Ban home delivery
- Reduce drink/container size and number of drinks per sale

### Zoning: Where Alcohol is Consumed and Sold

- Lower outlet Density
- Restrict outlet Locations (near schools, parks, churches, residential areas)
- Monitor outlet types (restaurant, tavern, off-sale, etc.)
- Ban sale and consumption in parks, public spaces (including government buildings & property, sidewalks, fairgrounds) – conditional permits only for special events
- Ban sales, consumption in stadiums/ greatly restrict sales
- Pass noise, nuisance, public disturbances, public intoxication ordinances
- Lease requirements (e.g. party size limitations, landlord accountability)

### Pricing

- Raise excise taxes
- Increase license fees and penalties
- Ban or limit happy-hour sales
- Ban drink-specials (2 for one, all you can drink, ladies night, etc.)

### Advertising and Promotion

- Require and post visible warning signs and labels (health risks, DUI, caloric and alcoholic content)
- Restrict alcohol advertisements/signage (location, number, size, placement, visibility)
- Refuse alcohol producer and distributor sponsorship of events, publications, activities
- Restrictions of alcohol advertisements on television and radio
- Advertising to children
- Restrict or ban alcohol billboards

### **Enforcement Mechanisms**

- Administrative penalties – civil rather than criminal offenses more likely to be implemented
- Compulsory compliance checks
- Restricting open house assemblies
- Hotlines to report sales to minors or intoxicated persons
- Adequate funding for enforcement

### **Drinking and Driving**

- Zero tolerance
- Lower legal BAC
- Graduated Licensing for minors
- Check points for intoxicated driving
- Media Campaigns
- Ban open containers in cars
- Administrative License Review
- Mandatory screening and referral for DUI offenders

### **Alcohol Merchants**

- Mandatory manager and staff training and incentives (for compliance)
- Check age identification
- Post warning signs/ distribute warning fliers
- Secret shopper program
- Prohibit sales to individuals accompanied by minors (parents and guardians excepted)
- Eliminate drinking competitions and drink specials
- Serve drinks in standard sizes
- Promote food and non-alcoholic beverages
- Campus permits, restrictions or bans
- Service to intoxicated patrons/ over service

### **Some Useful Alcohol Policy and Alcohol Advocacy Resources**

- American Medical Association Alcohol Programs: [www.alcoholpolicysolutions.net](http://www.alcoholpolicysolutions.net)
- Center on Alcohol Marketing and Youth: [www.camy.org](http://www.camy.org)
- Center for Science in the Public Interest (CSPI) Alcohol Program: [www.cs핀ct.org](http://www.cs핀ct.org)
- Higher Education Center (HEC) for Alcohol and Other Drug Prevention: [www.edc.org/hec](http://www.edc.org/hec)
- Leadership to Keep Children Alcohol Free: [www.alcoholfreechildren.org](http://www.alcoholfreechildren.org)
- Lincoln Responsible Hospitality Council:  
[www.interline.ci.lincoln.ne.us/city/council/rhc/index.html](http://www.interline.ci.lincoln.ne.us/city/council/rhc/index.html)
- Marin Institute: [www.marininstitute.org](http://www.marininstitute.org)
- Mothers Against Drunk Driving: [www.madd.org](http://www.madd.org)
- National Council on Alcoholism and Drug Dependency (NCADD): [www.ncadd.org](http://www.ncadd.org)
- NIAAA College Task Force: [www.collegedrinkingprevention.gov](http://www.collegedrinkingprevention.gov)
- OJJDP Underage Drinking Enforcement Training Center: [www.udetc.org](http://www.udetc.org)
- Trauma Foundation - Alcohol and Violence Project: [www.tf.org/tf/alcohol/ariv](http://www.tf.org/tf/alcohol/ariv)
- University of Minnesota Division of Epidemiology: [www.epi.umn.edu/alcohol](http://www.epi.umn.edu/alcohol)

### **For research, data, analyses, discussion of issues, and news:**

- National Institute on Alcohol Abuse and Alcoholism (NIAAA): [www.niaaa.nih.gov](http://www.niaaa.nih.gov)
- Join Together: [www.jointogether.org](http://www.jointogether.org)

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### FOR IMMEDIATE RELEASE

## **Nationwide Strategy to Combat Underage Drinking Requires Shared Responsibility; Action Also Needed to Improve Compliance With Laws**

WASHINGTON -- More young people drink alcohol than use other drugs or smoke tobacco, and underage drinking costs the nation an estimated \$53 billion annually in losses stemming from traffic fatalities, violent crime, and other behaviors that threaten the well-being of America's youth. Curbing underage drinking is an uphill battle because alcohol is legal and readily available to adults. To tackle the problem, a new report from the National Research Council and Institute of Medicine of the National Academies offers a comprehensive strategy

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