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The Growing Obesity Disparity

Digisha R. Bhavsar

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Digisha R. Bhavsar

Public Health Law

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I. INTRODUCTION

Adult obesity rates have more than doubled since 1970, while obesity rates for children and adolescents have tripled during that same period of time.¹ Obesity has become an epidemic due to the lifestyle of a majority of individuals.² The invention and development of new electronic gadgets gives individuals an excuse to stay indoors and remain inactive.³ The rise of fast food restaurants at every corner has provided individuals with cheap, convenient, tasty unhealthy meal options.⁴ Specifically, the portions sizes these food food restaurants offer equates to extremely high calorie intake for each meal.⁵ For example, when McDonald's first introduced the soda beverage in 1955 the company only offered a seven ounce cup.⁶ Today, it is not uncommon to find a 32 ounce cup amongst the most popular options.⁷ Obesity is a huge concern due to the increased risk factors for disease such as diabetes, liver disease, stroke and even cancer.⁸ Children who are obese are more prone to have diabetes, joint problems, asthma, and even initial signs of

¹ Centers for Disease Control and Prevention, Morbidity and Mortality Weekly Report: Obesity – United States 1999-2010 (Nov. 22, 2013),

<http://www.cdc.gov/mmwr/preview/mmwrhtml/su6203a20.htm>

² Ruth S. Chan, *Prevention of Overweight and Obesity: How Effective is the Current Public Health Approach*, Int. J. Environ. Res. Pub. Health, 765, 773 (2010).

³ Paul Zollinger-Read, *How Technology and Inactive Lifestyles are Changing our Children*, THE GUARDIAN, (Aug. 30, 2013), <https://www.theguardian.com/sustainable-business/technology-inactive-lifestyle-changing-children>

⁴ Linda Carroll, *Cheap Food Blamed for America's Obesity Crisis*, NBC NEWS, (May. 22, 2014), <http://www.nbcnews.com/health/diet-fitness/cheap-food-blamed-americas-obesity-crisis-n112141>

⁵ Centers for Disease Control and Prevention, Research to Practice Series: Do Increased Portion Sizes Affect How Much We Eat? (Nov. 1, 2006).

⁶ Michele Simon, *McDonald's and Coca-Cola – An Unhealthy Alliance*, HUFFINGTON POST, (Sept. 13, 2012), http://www.huffingtonpost.com/michele-simon/mcdonalds-coca-cola_b_1874770.html

⁷ *Id.*

⁸ World Health Organization, Chapter 1 – Burden: Mortality, Morbidity, and Risk Factors, (Jan. 6, 2010), http://www.who.int/nmh/publications/ncd_report_chapter1.pdf?ua=1

heart disease.⁹ Children who are viewed as being fat by their peers are more likely to get bullied. Bullying can result in mental health problems including both depression and anxiety.¹⁰ While adult obesity rates are still on the incline, it is not as rapid as it has been in previous decades.¹¹

Obese individuals endure varying burdens due to their weight.¹² For example, obese adults are less likely to be promoted and tend to make less income than their healthy weight counterparts.¹³ Studies have shown that there is a strong correlation between obesity rates and one's household income.¹⁴ In fact, obesity rates tend to decline as one's income increases.¹⁵ There is also a strong relationship between obesity and one's ethnicity.¹⁶ Approximately 14% of white children are obese, while 21% of Latino children and 24% of African American children are obese.¹⁷ A similar trend exists amongst adults; 35% of white adults are obese, while 38% of Latino adults and 50% of African American adults are obese.¹⁸

This paper will explore the obesity epidemic and more specifically the inequalities that led to this epidemic in lower income communities within the United States. This paper will argue that factors such as less access to affordable healthy food, higher exposure to fast food marketing, and limited access to safe places to be physically active, contribute to higher rates of obesity, which in

⁹ Nedlihan Koyuncuoglu Gungor, *Overweight and Obesity in Children and Adolescents*, J. Clin. Res. Pediatr. Endocrinol., 129, 130 (2014).

¹⁰ MJ O'Callaghan, *Adolescents Bullying and Young Adults Body Mass Index and Obesity*, A Longitudinal Study, Int'l J. of Obesity 72, 78 (2013).

¹¹ The State of Obesity, Obesity Rates & Trends Overview, (Nov. 1, 2016), <http://stateofobesity.org/obesity-rates-trends-overview/>

¹² Karen Jaffe, *Forming Fat Identities*, Rutgers Univ. Sch. of Sociology, 27 (2008).

¹³ *Adult Obesity*, HARVARD SCHOOL OF PUBLIC HEALTH (Feb. 13, 2016, 4:24 PM), <https://www.hsph.harvard.edu/obesity-prevention-source/obesity-trends/obesity-rates-worldwide/#References>

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

turn results in illnesses and early death amongst such populations. Part II will discuss the factors that drive such great disparities between racial and socioeconomic groups. Part III will examine existing legislation in place to help prevent obesity. Part IV will explore recommendations for change to help reduce the disparities that are experienced by underserved communities.

II. IDENTIFYING THE PROBLEM

a. Lack of Access to Affordable Healthy Food

“Food Deserts” are large areas, normally in low income communities, where residents lack easy access to affordable and nutritious meals.¹⁹ Many times there are easily accessible low cost options, such as fast food chains, in closer proximity, but fresh high quality food is either outside the community, outside the community’s budgetary limitations, or completely lacking.²⁰

Lower-income, Latino and African American communities have fewer supermarkets that provide high-quality nutritious, affordable food than wealthier white communities.²¹ On a national level, low income neighborhoods have 25% fewer chain supermarkets and 1.3 times as many convenience stores compared to middle income communities.²² Predominately Black communities have half as many supermarkets as predominantly White neighborhoods, whereas Latino communities have approximately one-third as many as White neighborhoods.²³ A perfect example of this can be found in Los Angeles County, where middle and upper income communities

¹⁹ Margot Sanger-Katz, *Giving the Poor Easy Access to Healthy Food Doesn’t Mean They’ll Buy It*, THE NEW YORK TIMES (May 8, 2015), http://www.nytimes.com/2015/05/09/upshot/giving-the-poor-easy-access-to-healthy-food-doesnt-mean-theyll-buy-it.html?_r=0

²⁰ *Id.*

²¹ Policy Link, *The Grocery Gap: Who Had Access to Healthy Food and Why It Matters* (Mar. 4, 2010), <http://policylink.org/sites/default/files/FINALGroceryGap.pdf>

²² *Id.* at 13.

²³ *Id.* at 7.

have 2.3 times as many supermarkets per capita as low income communities.²⁴ In West Louisville, Kentucky, a low income African American community that suffers from diabetes has one supermarket for every 25,000 residents versus the county average of one per every 12,500 residents.²⁵ In Atlanta, Georgia, even wealthy black communities have fewer grocery stores within a five minute travel distance than wealthy white communities, suggesting that even independent of income level, racial composition plays a significant role with access to food.²⁶

The effects of food deserts can be seen by examining obesity statistics. Here we will take a look at the city of Los Angeles; both West and South Los Angeles,²⁷ which are approximately 30 minutes from each other.²⁸ With West Los Angeles having more grocery stores stocked with fresh fruits and vegetables, their obesity rates are at 10%, whereas South Los Angeles with the same demographic hits 35.4%.²⁹ Furthermore, the concept of food insecurity is directly related to the existing food desert problem.³⁰ Food insecurity arises in individuals who have limited or uncertain availability of nutritionally adequate and safe foods.³¹ Since individuals living in food deserts anticipate future caloric shortfalls, they tend to compensate by over-eating calorically dense foods thereby purchasing cheaper less nutrient rich foods.³²

²⁴ Slater Powell, *Food Store Availability and Neighborhood Characteristics in the United States*, 44 AMERICAN J. OF PREVENTIVE MED. 189, 192 (2007).

²⁵ Policy, *supra* note 18 at 14.

²⁶ AMY HELLING, RACE AND RESIDENTIAL ACCESSIBILITY TO SHOPPING AND SERVICES. 69 (2003).

²⁷ Joelle Wolstein and Allison L. Diamant, *Obesity in California*. Los Angeles, CA: UCLA Center for Health Policy Research (June 2015),

<http://healthpolicy.ucla.edu/publications/Documents/PDF/2015/obesityreport-jun2015.pdf>.

²⁸ *Id.*

²⁹ *Id.*

³⁰ Elliot McCarthy, Food Security, Food Desserts, and Community Formation (May 4, 2012) (Published Ph.D. dissertations, Tufts University).

³¹ *Id.*

³² *Id.*

Many argue that the Supplemental Nutrition Assistance Program (“SNAP”) infrastructure over the last few decades have made food deserts and food insecurity worse for these populations. SNAP was established as part of the Food Stamp Act of 1964 and was aimed to provide low income individuals “a greater share of the nation’s food abundance.”³³ SNAP benefits are made available on the same date of every month.³⁴ There is no existing option to change this date.³⁵ Many scholars argue that requiring individuals who use SNAP to budget for the entire month forces them to avoid fresh foods since these foods are perishable.³⁶ Even grocers in major cities like Baltimore who accept SNAP benefits face problems.³⁷ This is because the majority of SNAP users purchase their groceries during the first two weeks of the month. During this time the demand is extremely high for the grocers.³⁸ The remaining last two weeks of the month, the same grocers have plummeting sales leaving them unable to sustain their business and, at times, forcing them to move to more middle class neighborhoods.³⁹

Another component of food access for low income communities is the issue of transportation.⁴⁰ Not only are grocery stores limited, many members of these communities lack transportation in order to get to the grocery stores located in other towns.⁴¹ While the average San Francisco Bay area resident can travel to three (3) supermarkets by car in a matter of ten (10)

³³ Christine Fry and Sara Zimmerman, *Healthy Reform, Healthy Cities: Using Law and Policy to Reduce Obesity Rates in Underserved Communities*, 40 FORDHAM URBAN L.J. 1265, 1307 (2013).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 1309

³⁷ *Id.*

³⁸ *Id.* at 1308

³⁹ *Id.*

⁴⁰ James R. Farmer and Sara Minard, *Local Foods and Low Income Communities: Location, Transportation and Values*, J. OF AGRIC. FOOD SYS. AND COMM. DEV. 41, 48 (2016).

⁴¹ *Id.*

minutes, those residents who rely on public buses to get to the same grocery store can spend about one (1) hour each way.⁴² Many times, even if the individual travels out to the larger grocery store, they stay away from the fresh fruits and vegetables because on average they tend to be more perishable.⁴³ They are drawn to choose a food that has a longer shelf life until they can revisit the grocery store.⁴⁴ The combination of very few nearby grocery stores and limited transportation options leads many of these residents to shop at convenience stores that are closer to their home.⁴⁵ Convenience stores are known to charge higher prices, primarily because they have less storage space and do not buy quantities in bulk.⁴⁶ Furthermore, the majority of convenience stores stock snacks, soft drinks, and a much more limited supply of dairy products and fruits.⁴⁷ Due to this, many low income families spend much more on food than they would if they had access to supermarkets.⁴⁸

Access matters because better access contributes to healthier eating. Research demonstrates that when people of color and low income individuals have access to a wide variety of affordable, high quality, nutritious foods, they make healthier choices and have better health outcomes.⁴⁹ A great deal of studies have shown that the presence of supermarkets correspond with lower rates of diseases that are diet related.⁵⁰ A New York City study found that obesity rates were lower for

⁴² *Id.* at 51.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Policy, *supra* note 21.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ ROBERT WOOD JOHNSON FOUNDATION, DECLINING CHILDHOOD OBESITY RATES - WHERE ARE WE SEEING SIGNS OF PROGRESS? (2013).

⁵⁰ *Id.*

people lived near healthy food stores than for those who lived near unhealthy food stores.⁵¹ Furthermore the study's authors concluded that an increased density of healthy food markets showed a reduction in obesity rates.⁵² A California study revealed that, the highest rates of obesity and diabetes can be found in lower income communities that have a high density of both convenience stores and fast food stores in the vicinity.⁵³ Specifically the rate of diabetes and obesity was 20% higher.⁵⁴ Access matters because better access contributes to lower rates of obesity and many diseases that are directly related to diet.⁵⁵

b. Fast Food Availability in Low Income Communities

Fast food has become one of the main sources of nutrition for low income, urban communities throughout the United States.⁵⁶ Fast Food is defined as food “designed for ready availability, use, or consumption with little consideration given to quality or significance.”⁵⁷ Fast food is highly processed and made using standardized ingredients.⁵⁸ The majority of fast food is deep-fried in oils, which commonly lead to both high cholesterol and heart attacks.⁵⁹ Then there are the starchy “vegetable” and sugary drinks that contribute to obesity and diabetes.⁶⁰ Since the rise of the fast food culture in the 1970s, fast food chains such as McDonalds have moved away

⁵¹ Policy, *supra* note 21 at 7.

⁵² *Id.*

⁵³ *Id.* at 18.

⁵⁴ *Id.* at 8.

⁵⁵ *Id.*

⁵⁶ Andrea Freeman, *Fast Food: Oppression through Poor Nutrition*, 95 Cal. L. Rev. 2221 (2007).

⁵⁷ Merriam-Webster's Online Dictionary, <https://www.merriam-webster.com/dictionary/fast-food> (last visited Nov 4, 2016).

⁵⁸ Andrea, *supra* note 55 at 2225

⁵⁹ CNNMoney.com, *Report: McDonald's Admits to Fattier Fries*, Feb. 8. 2006, <http://money.cnn.com/2006/02/08/news/companies/mcdonalds-fat-fries/index.htm> (last visited Nov 2, 2016).

⁶⁰ David S. Ludwig & Robert H. Eckel, *The Glycemic index at 20 y*, 76 AM. J. OF CLINICAL NUTRITION 264S-265S (July 2002)

from suburban markets and have infiltrated urban neighborhoods.⁶¹ Major fast food chains consider these communities to be more “dependable markets.”⁶² These chains now expand their business and open new locations based on software that predicts urban growth and satellite imagery that pinpoints school districts.⁶³ The industry places 3 to 4 times as many fast food locations within walking distance of schools than in locations where there are no schools nearby.

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Fast food has a specific appeal to members of lower income communities.⁶⁵ Part of the appeal is that “working class families can finally afford to feed their kids restaurant food.”⁶⁶ There are many defining elements of fast food restaurants.⁶⁷ Food quality and appearance specifically, portion size is consistent across all fast food chains.⁶⁸ This type of standardization puts customers at ease.⁶⁹ Even the process of paying prior to eating reduces potential anxiety about not being able afford the meal.⁷⁰ In addition, fast food restaurants generally do not require a customer to tip the employee.⁷¹ These factors are attractive to many within these communities, because they know what to expect food wise and know that they can afford their meal.⁷²

⁶¹ ERIC SCHLOSSER, *FAST FOOD NATION* (2001).

⁶² *Id.*

⁶³ Jacob Ward, *Better Directions: Digital Maps are Changing How We Navigate Our Lives*, WIRED MAG., Oct. 2005.

⁶⁴ *Id.*

⁶⁵ Eric, *supra* note 60 at 20.

⁶⁶ *Id.*

⁶⁷ *Robertson v. Burger King*, 848 F. Supp. 78 (E.D. La. 1994).

⁶⁸ Andrea, *supra* note 55 at 2231.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

The fast food industry's attempts to target both African Americans and Latinos is based on the desire for profit.⁷³ These corporations spend millions of dollars on a yearly basis creating advertising and various marketing tactics in order to appeal to these populations.⁷⁴ These corporations have appropriated ethnic food items, cultural icons, and even attuned restaurant decorations.⁷⁵ For example, many fast food chains have adopted “fiesta menus” in order to accommodate Latino families.⁷⁶ McDonald’s is known to commonly feature cultural “heroes” such as Enrique Iglesias and Serena Williams.⁷⁷ They particularly target children amongst these populations because children in general are easily manipulated and are viewed as a long term investments.⁷⁸ Schools that are barely funded because of the lower tax base in their towns are more likely to be sought after by the fast food industry.⁷⁹ Fast food companies strategically target these schools because they are not in the financial position to turn down a corporate sponsorship.⁸⁰ Schools that are sponsored by these large corporations receive up to date technology and funding. In exchange the district must allow the corporation to sell their food at the school or have their advertisements placed around the school.⁸¹ When corporations are permitted to sell their food at public schools, “it is not subject to the nutrition standards that govern meals sold under the National School Lunch program.”⁸²

⁷³ Ross D. Petty et al., *Regulating Target Marketing and Other Race-Based Advertising Practices*, 8 MICH. J. RACE & L. 335, 342 (2003).

⁷⁴ *Id.*

⁷⁵ McLIBEL (Spanner Films Ltd. 2005).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ NAOMI KLEIN, *No LOGO* 87-105 (2000).

⁷⁹ *Id.* at 88.

⁸⁰ *Id.*

⁸¹ *Id.* at 89.

⁸² Lisa Craypo et al., *Fast Food Sales on High School Campuses: Results form the 2000 California High School Fast Food Survey*, 72 J. SCH. HEALTH 78, 80 (2002).

The fast food industry further targets children and teenagers at home, through television advertising.⁸³ Studies have shown that Latinos and African Americans watch more television and play more video games than their white counterparts. More television time essentially means more exposure to fast food marketing.⁸⁴ Reports have shown that African American children are more likely to have televisions in their rooms in comparison to white children.⁸⁵ Interestingly, low income households are more likely to agree with the notion that advertising is helpful in selecting products than higher income households.⁸⁶ The money spent by fast food corporations on advertising has doubled from six billion to twelve billion dollars from 1991 to 2000.⁸⁷ The average child approximately views 10,000 food related advertisements per year, and even brief exposure can impact a child's food preference.⁸⁸

c. Limited Access to Safe Places to be Physically Active

Low income communities and communities of color are disproportionately excluded from the benefits of safe open areas for physical activity in both public parks and public schools.⁸⁹ The difference in distribution of parks and recreation areas in low income communities in comparison to middle income communities is well documented.⁹⁰ A University of Southern California study indicated that unequal distribution of parks in areas such as Los Angeles found that low income

⁸³ Shiriki Kumanyika & Sonya Grier, *Targeting Interventions for Ethnic Minority and Low-Income Populations*, 16 FUTURE CHILD 187, 194 (Spring 2006)

⁸⁴ *Id.*

⁸⁵ *Id.* at 192.

⁸⁶ *Id.*

⁸⁷ David Barboza, *Rampant Obesity, a Debilitating Reality for the Urban Poor*, N.Y. TIMES, Dec. 26, 2000, <http://www.nytimes.com/2000/12/26/health/rampant-obesity-a-debilitating-reality-for-the-urban-poor.html>

⁸⁸ *Id.*

⁸⁹ Robert Garcia, *Healthy Children, Health Communities: Schools, Parks, Recreation and Sustainable Regional Planning*, 31 FORDHAM URBAN L.J. 1267, 1268 (2003).

⁹⁰ *Id.* at 1276.

communities with predominantly colored residents had less access to parks and recreational areas than higher income areas with predominantly white residents.⁹¹ Low income neighborhoods and communities of color are commonly marginalized in the decision making process, lack the knowledge necessary to understand the impact of environmental policies in their own communities, and tend to be denied public benefits such as parks and recreational facilities.⁹²

Schools in many of these urban areas are seeing a decrease in school yards.⁹³ This is due to the increasing price of land and the increase in portable classrooms.⁹⁴ A portable classroom is a relocate-able building installed at a school to temporarily and quickly provide additional classroom space where there is a shortage of capacity and/or space.⁹⁵ An ever increasing problem is that more schools are cutting their physical education programs because of a lack of safe recreational facilities for their students.⁹⁶ Schools that have ample space for recreational activities are not properly enforcing their own physical education requirements.⁹⁷ A perfect example of this problem can be found in California public middle schools.⁹⁸ Their physical education classes have too many students and not enough teachers.⁹⁹ The average student to child ratio is currently 43:1, which significantly surpasses that recommended ratio of 25:1.¹⁰⁰ The Los Angeles Unified School

⁹¹ *Id.*

⁹² *Id.*

⁹³ Katherine A. Took, *Schoolyard Renovations in the Context of Urban Agreeing* (May 4, 2012) (Published Ph.D. dissertations, Univ. Mass. Amherst).

⁹⁴ *Id.* at 18.

⁹⁵ *Id.*

⁹⁶ Joan Patterson, *Many Schools Cutting Back on Physical Education*, LAS VEGAS REVIEW JOURNAL (Jul.14, 2013, 3:54PM), <http://www.reviewjournal.com/news/education/many-schools-cutting-back-physical-education>

⁹⁷ *Id.*

⁹⁸ HW KOHL III, *EDUCATING THE STUDENT BODY: TAKING PHYSICAL ACTIVITY AND PHYSICAL EDUCATION TO SCHOOL* 15 (National Academic Press 2013).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

District, specifically the middle school physical education program averages 60 students per class.¹⁰¹ There are even some even classes that fall within the 75:1 student teacher range.¹⁰² Due to the size, many students spend the majority of the class waiting their turn to participate.¹⁰³

III. CURRENTLY ADOPTED POLICY INTERVENTIONS

a. Legislation within Schools

The ongoing obesity epidemic is forcing many states to implement policies and pass legislation. Many of these interventions are geared towards promoting healthier lifestyles amongst our youth.¹⁰⁴ These policies are geared towards eating more fruits and vegetables, portion sizing, and staying active.¹⁰⁵ The notion being that healthy habits are learned at a young age and these habits will continue into adulthood.¹⁰⁶

Alaska passed legislation prohibiting the sale of soft drinks in public schools.¹⁰⁷ The act states that between the hours of 8am to 5pm carbonated soft drinks that have more than 42 or more grams of sugar per 20 ounce serving may not be sold on public school property.¹⁰⁸ The downside of this legislation is that it does not include non-carbonated beverages.¹⁰⁹ There are plenty of non-carbonated ‘juice drinks’ on the market that have far more than 42 grams of sugar and are commonly available in public schools. These juice drinks are constantly being overlooked because

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ Melissa Scharoun Lee, *Race/Ethnicity, Socioeconomic Status and Obesity Across the Transition from Adolescence to Adulthood* (Mar 2, 2008) (Published Ph.D. dissertations, University of North Carolina, Chapel Hill).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 32.

¹⁰⁷ H.B. 80, Assemb. Reg. Sess. (AK 2003).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

there is a positive connotation with juices.¹¹⁰ The assumption being that juice drinks are a natural healthier option, which is not always the case.¹¹¹

New Mexico passed a bill, which focuses solely on vending machine foods.¹¹² New Mexico intends to impose an excise tax on low nutrition foods sold by vending machines that are located on school district property.¹¹³ The excise tax revenues will then be used to support physical education and nutrition programs in public schools all around the state.¹¹⁴ It is unclear whether this tax will prevent people from purchasing items from the vending machine. Primarily because people may not be aware of the fact that they are being taxed for using the vending machine. For the purpose of this bill, it is important that the consumer knows if they are being taxed or not. If they are put on notice regarding the tax and choose not to purchase the snack, then we can determine that the bill is potentially effective. If they are put on notice regarding the tax and choose to purchase the snack, then we can determine that the bill is potentially ineffective. If they are not aware of the tax, then we do not necessarily know if the bill is potentially effective or ineffective. A posting on the vending machine that indicates that all food items purchased from the vending machine will be charged an additional “x” tax would be beneficial.

For years California has been at the forefront of the obesity epidemic.¹¹⁵ The state has enforced nine (9) different bills directed at obesity amongst children and adults.¹¹⁶ One of their

¹¹⁰ Kris Gunnars, *Fruit Juice is as Unhealthy as a Sugary Drink*, AUTHORITY NUTRITION (Dec. 13, 2014), <https://authoritynutrition.com/fruit-juice-is-just-as-bad-as-soda/>

¹¹¹ *Id.*

¹¹² H.B. 563, Assemb. Reg. Sess. (NM 2015).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Michael P. Fierro, *The Obesity Epidemic: How States Can Trim the Fat*, NGA CENTER FOR BEST PRACTICES (Jul. 13, 2003),

<https://www.nga.org/files/live/sites/NGA/files/pdf/OBESITYIB.pdf>

¹¹⁶ *Id.*

bills, urges the State Department of Education and Health Services to create “nutritionally sound” lunch menu plans in public schools.¹¹⁷ The meal plans would provide optional plant-centered vegetarian school lunches on a daily basis.¹¹⁸ These meals would also include nutritional educational materials with instruction and information about multicultural eating patterns as well as both vegetarian and vegan eating patterns.¹¹⁹

Hawaii introduced a bill to help prevent childhood obesity.¹²⁰ It aims to establish nutrition standards for food and beverages sold to students in both public and private elementary, middle, and intermediate schools.¹²¹ It also created a school nutrition advisory council to enforce the standards.¹²² There are two challenges programs like this face when implemented in schools.¹²³ The first is that many children are reluctant to eat foods that are foreign to them. This could lead to a reliance on vending machines located in the school or convenience stores located nearby the school.¹²⁴ Another cause for concern is the price of these nutritionally sound lunches.¹²⁵ Will lunch now be more expensive because of the healthier options? Many students in these low income neighborhoods may no longer be able to afford schools lunches. If they are no longer able to afford lunch, this could potentially force them to rely on cheap and unhealthy food options.¹²⁶

b. Legislation Intended for Obese Adult Populations

¹¹⁷ ACR-16, Assemb. Reg. Sess. (CA 2003).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ S.B. 2147, Assemb. Reg. Sess. (HI 2014).

¹²¹ *Id.*

¹²² *Id.*

¹²³ Monica Gagnon, *Slowing Down Fast Food: A Policy Guide for Healthier Kids and Families*, CORPORATE ACCOUNTABILITY INTERNATIONAL (May 3, 2012), https://www.stopcorporateabuse.org/sites/default/files/resources/slowing_down_fast_food_corporateaccountabilityinternational.pdf

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

Many states have narrowed in on the obese adult population. Louisiana passed a bill which mandates that insurance companies must offer optional insurance coverage for treatment of morbid obesity.¹²⁷ Currently many health insurance companies do not consider obesity to be an illness and therefore do not cover a full range of services.¹²⁸ Research shows that obese adults have a 36% higher medical cost average and 77% greater medication cost when compared to normal weight adults.¹²⁹ Implementing this type of legislation is beneficial for overweight and obese individuals and will have long term financial benefits for insurance companies. The assumption being that by adults participating in the services, they are attaining and maintaining a healthy weight range.

The Healthy Foods for Healthy Living Act authorized the Secretary of Agriculture the ability to create grants to encourage consumption of fruits and vegetables.¹³⁰ It also requires Medicare and Medicaid to cover certain services for obesity prevention and treatment.¹³¹ The Menu Education and Labeling (MEAL) Act amends the Federal Food, Drug and Cosmetic Act by requiring restaurants that are part of a chain with 20 or more locations to label calorie information, grams of saturated plus trans fat, and milligrams of sodium adjacent to the food item on the menu.¹³² This federal law preempts states and local menu labeling rules.¹³³

c. Laws that Guide and Protect the Food Industry

¹²⁷ S.B. 409, Assemb. Reg. Sess. (LA 2016).

¹²⁸ *Id.*

¹²⁹ Ross A Hammond, *The Economic Impact of Obesity in the United States*, DIABETES METAB SYNDR OBES., Oct 2010, at 3.

¹³⁰ H.R. 45, Assemb. Reg. Sess. (US 2008).

¹³¹ *Id.*

¹³² H.R. 3895, Assemb. Reg. Sess. (US 2007).

¹³³ National Restaurant Association, <http://www.restaurant.org/advocacy/Menu-Labeling> (last visited Dec 4, 2016).

Washington D.C. passed the Common Sense Nutrition Disclosure Act in 2015.¹³⁴ This Act requires restaurants to inform the consumer through at least one of the three potential avenues: (1) to list calories for the standard preparation of the menu item, (2) list the number of servings, as determined by the restaurant including the number of calories per serving, or (3) list the number of calories per the common unit division of the standard menu item, such as for a multi-serving item that is typically divided before presentation to the consumer.¹³⁵ There are numerous pros and cons for each of these options. Both options two and three are beneficial to consumers because while labels normally list the calories of for example an entire pizza, now restaurants can potentially choose to provide a single serving amount for one slice of pizza.¹³⁶ The downside of these new options are that restaurants could take advantage and provide an unreasonable serving size.¹³⁷ While this may not be possible with a slice of pizza, it is possible to take advantage with a single cheeseburger or an order of fries.¹³⁸ A single cheeseburger could be listed as two servings, which could be confusing to a patron.¹³⁹ Another factor is that restaurants only have to include calorie labels on their “primary menu.”¹⁴⁰ They are not required to include these labels on their advertisements or on social media. This means that restaurants that receive most of their orders by telephone, can easily list their caloric information elsewhere, where consumers are less likely to

¹³⁴ H.R. 2017, Assemb. Reg. Sess. (WA 2015).

¹³⁵ *Id.*

¹³⁶ Liz Thatcher, *Common Sense for Restaurant Labeling*, WASHINGTON TIMES (Jan. 30, 2014), <http://www.washingtontimes.com/news/2014/jan/30/thatcher-common-sense-for-menu-labeling/>

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ H.R. 2017, *supra* note 129.

see it.¹⁴¹ For meals that are listed on their “combo menu” the bill allows for more options to label calories such as ranges, averages, and even individual labeling of flavors or components.¹⁴²

Commonsense Consumption Acts have been adopted by 25 states in the last decade.¹⁴³ These Acts help to shield the food industry against claims deriving from obesity related health harms.¹⁴⁴ For example, the Illinois Commonsense Consumption Act provides that “no person shall bring a qualified civil action in State court against any manufacturer, seller, or trade associated of a qualified product.”¹⁴⁵ It defines a qualified civil action to mean any civil action brought by a person against a manufacturer for damages or injunctive relief “based on a claim of injury resulting from a person’s weight gain, obesity, or any health condition that is related to weight gain or obesity.”¹⁴⁶ It should be noted that there are exceptions to the limited liability.¹⁴⁷ The two exceptions to this act are “(1) when a fast food company violates local or federal food adulteration or branding laws, and (2) when a fast food company violates state or federal consumer protection laws.”¹⁴⁸ The exemption requires that the plaintiff prove a knowing and willful violation and plead both the facts and elements underlying the violation with particularity.¹⁴⁹ This legislation poses to

¹⁴¹ Liz, *supra* note 131.

¹⁴² *Id.*

¹⁴³ CL Wilking and RA Daynard, *Beyond Cheeseburgers: The Impact of Commonsense Consumption Acts on Future Obesity-Related Lawsuits*, 68 FOOD DRUG LAW J. 229, 230 (2013).

¹⁴⁴ *Id.*

¹⁴⁵ 745 ILCS 43, Gen. Assemb., Reg. Sess. (IL 2005).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

be fairly unsuccessful for plaintiff's pursuing claims regarding personal injury.¹⁵⁰ Responsibility for obesity related health issues are commonly placed on the fast food plaintiff.¹⁵¹

IV. **RECOMMENDATIONS FOR CHANGE**

a. Solutions to Close the Food Access Gap

The New York City Health Department started the Green Carts Program.¹⁵² Green Carts are mobile food carts that offer fresh products in neighborhoods all across New York City that have limited access to health foods.¹⁵³ These Green Carts sell only fresh fruits and vegetables.¹⁵⁴ Adopting a program like Green Carts allows for communities to become more aware of the benefits of incorporating fresh produce into their diet.¹⁵⁵ A common challenge amongst these populations is that even with access to fresh fruits and vegetables, many times there is a lack of knowledge as to how to convert these nutritious foods into actual meals.¹⁵⁶

Improving existing neighborhood stores is a viable option for increasing access to healthy food.¹⁵⁷ This option requires much less time and money than building brand new grocery stores, which means a sooner likelihood of seeing results.¹⁵⁸ Another benefit of this option is that this requires no new land, which again will allow quicker results.¹⁵⁹ In fact, there is a national network known as the Healthy Corner Store Network that was created to support efforts to bring healthier

¹⁵⁰ Norah L. Jones, *The Illinois Commonsense Consumption Act: End of the Road for Fast Food Litigation in Illinois*, 36 Loy. U. Chi. L. J. 983, 985 (2005).

¹⁵¹ *Id.*

¹⁵² *NYC Green Carts*, NYC HEALTH, <http://www1.nyc.gov/site/doh/health/health-topics/green-carts.page> (last visited Nov 4, 2016).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ Margot, *supra* note 19.

¹⁵⁷ Policy Link, *Healthy Food, Healthy Communities* (Mar 15, 2011), https://www.policylink.org/sites/default/files/HFHC_FULL_FINAL_20120110.PDF

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

foods into small scale stores in low income and underserved communities.¹⁶⁰ This option poses a challenge because smaller stores are not always highly valued by community residents, because many view them to be inferior to large chain supermarkets.¹⁶¹ In order to implement this option, there must be clear demonstration of customer demand.¹⁶²

While access is crucial, there have been significant attempts to bring larger scale supermarkets into these food desert environments, through government funding.¹⁶³ The supermarkets placed in these neighborhoods failed.¹⁶⁴ These efforts were unsuccessful because residents of the area did not want what the supermarkets were selling.¹⁶⁵ Residents wanted more ethnic food, the supermarkets did not accept food stamps, and at times the appeal of fast food surpassed that of nutritious food.¹⁶⁶ Additionally, the issue of SNAP benefits exacerbating the food desert problem requires improvement.¹⁶⁷ The government should stagger the distribution of SNAP benefits as a bi-monthly payout, similar to bi-monthly wage payments.¹⁶⁸ This can help to eliminate the problems that grocers face on a monthly basis, while giving SNAP users a more manageable time frame to budget their benefits.¹⁶⁹

¹⁶⁰The Food Trust, *The National Healthy Corner Stores Network*, <http://thefoodtrust.org/what-we-do/administrative/healthy-corner-stores-network>, (last visited Oct 3, 2016).

¹⁶¹ Policy, *supra* note 162 at 7.

¹⁶² *Id.* at 10.

¹⁶³ Policy, *supra* note 21 at 7.

¹⁶⁴ Kameshwari Pothukuchi, *Attractive Supermarkets to Inner City Neighborhoods: Economic Development Outside the Box*, Wayne St. Univ. 232, 233 (2016).

¹⁶⁵ *Id.* at 238.

¹⁶⁶ *Id.*

¹⁶⁷ Food, *supra* note 166.

¹⁶⁸ Jessica E. Todd, *Revisiting the SNAP Cycle of Food Intake: Investigating Heterogeneity and Diet Quality*, US DEPT. OF AGRIC. (June 2013).

¹⁶⁹ *Id.* at 7.

Opening a farmer's market in many of these low income neighborhoods could be a possible option.¹⁷⁰ It is far less complex than building a new grocery store or improving an existing grocery store in the area.¹⁷¹ These types of markets only require a public space such as a parking lot for a short period of time.¹⁷² This option provides access to fresh produce at low prices.¹⁷³ A recent example includes the State of New York's Healthy Food/Healthy Communities Initiative, which formed a \$10 million revolving loan fund that provides grants for farmer's market infrastructure and other incentives.¹⁷⁴ Incorporating Electronic Benefit Transfer ("EBT") access at farmer's markets would help to attract residents within the community.¹⁷⁵ The challenge with this option is the customer base.¹⁷⁶ The market would need enough customers and the customers in these neighborhoods would need to be open and accepting of this non-traditional option.¹⁷⁷

Developing a new grocery store is an option, but it may be complex and time consuming.¹⁷⁸ This process would involve a purchase of land, financing, and grocers would need to be assured that they will get enough business to make the investment worthwhile.¹⁷⁹ The difference between supermarkets and smaller grocery stores is the pure volume and customer base.¹⁸⁰ Supermarkets need to bring in customers from beyond a single neighborhood, which is possible especially in heavily trafficked areas, dissimilarly the smaller grocery stores can rely more on the customer base

¹⁷⁰ Policy, *supra* note 21 at 8.

¹⁷¹ *Id.* at 10.

¹⁷² Project for Public Spaces, Farmers Market as a Strategy to Improve Access to Healthy Food for Low Income Families and Communities (Apr. 2, 2013) <http://www.pps.org/wp-content/uploads/2013/02/RWJF-Report.pdf>

¹⁷³ Policy, *supra* note 21 at 21.

¹⁷⁴ Policy, *supra* note 162 at 10.

¹⁷⁵ Project, *supra* note 177.

¹⁷⁶ *Id.* at 11.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 9.

¹⁷⁹ Policy, *supra* note 162 at 10.

¹⁸⁰ *Id.*

within the specific neighborhood.¹⁸¹ Building a new grocery store in a low income area would also bring needed jobs to many of these communities.¹⁸² The Illinois Fresh Food Fund recently provided “\$10 million in state funding to be leveraged with private matching funds to provide loans and grants to encourage grocers to build and expand stores in underserved communities statewide.”¹⁸³

b. Regulating the Fast Food Industry

The Center for Disease Control and Protection identifies four (4) core elements necessary to use legislation effectively.¹⁸⁴ In order to address a broad range of public health issues it requires the following: (1) identifying and comprehending essential laws and legal authorities dealing with the issue; (2) identifying and developing the competency of professionals in the public health realm who can appropriately apply those laws; (3) coordinating actions across jurisdictions; and (4) identifying and distributing information on public health laws’ best practices.¹⁸⁵ This framework can similarly impact a population’s health by creating environmental and policy changes.¹⁸⁶ The Federal Communications Commission’s strategy of using the Fairness Doctrine for cigarette counter-advertising on television is a perfect example.¹⁸⁷ The Federal Communication Commission required that tobacco companies emphasize the adverse effects of their products

¹⁸¹ *Id.*

¹⁸² Policy, *supra* note 21 at 9.

¹⁸³ Press Release, United States Department of Health and Human Services, \$10 Million in Grants Targets Community Based Efforts to Combat Chronic Diseases in the Delta Region (Aug. 11, 2016)

¹⁸⁴ William H. Dietz, *Public Health Law and the Prevention and Control of Obesity*, 87 MILBANK Q. 215, 223 (2008).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ Forrest Lee Andrews, *Small Bites: Obesity Lawsuits Prepare to Take on the Fast Food Industry*, 15 ALB. L.J. SCI & TECH. 153, 170 (2004).

within the advertisements.¹⁸⁸ This eventually forced the tobacco industry to withdraw from television advertisements all together.¹⁸⁹ As this was going on, local and state legislation pushed for the implementation of smoke free public buildings, which led to the social norms of cigarette smoking.¹⁹⁰ The legislation also focused on restriction of tobacco sales to minors as a means to reduce their access.¹⁹¹ The combined governmental efforts allowed for such changes to occur. The fast food industry can be regulated in a similar manner. The Federal Communication Commission can require that nutritional information be included during television commercials. Legislation can prevent fast food restaurants from being available in certain areas such as schools. Unfortunately, it is well known that the fast food industry has great influence over Congress.¹⁹² Due to their strong influence, it creates a roadblock for productive meaningful legislation from being enacted.

Even if law suits and policy implementation are not effective in regulating the fast food industry, at a minimum they can support a change in the climate of public opinion. Over the last few years, the public perception of the obesity epidemic has shifted.¹⁹³ What was once viewed as lack of self discipline is now seen as an addiction.¹⁹⁴ Marion Nestle, the Nutrition Department Chairwoman at New York University explains that major food company are “worried that at some point their products are going to be demonized and that will be the end of them.”¹⁹⁵ McDonald’s fear of negative publicity has long been evidenced throughout its’ history. In the 1960’s, African

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* at 171.

¹⁹³ Ctr. For Sci. in the Pub. Interest, *Anyone's Guess: The Need for Nutrition Labeling at Fast Food and Other Chain Restaurants* 1-2 (2003).

¹⁹⁴ *Id.* at 14.

¹⁹⁵ Forrest Lee Andrews, *Small Bites: Obesity Lawsuits Prepare to Take on the Fast Food Industry*, 15 Alb. L. J. Sci. & Tech. 153, 154 (2005).

American groups criticized the corporation for refusing to give minorities the opportunity to become franchisees.¹⁹⁶ In response, McDonald's actively recruited African American franchisees.¹⁹⁷ When they were attacked in the 1990's by environmental groups for packaging their food in plastic, they responded by announcing that they would no longer do so.¹⁹⁸ Although the current obesity epidemic is different from the previous scenarios, there is a clear showing of the willingness to appropriately respond to public criticism.¹⁹⁹ In order to keep track of public opinion, fast food companies now conduct extensive research to understand consumer attitudes and use the data to develop healthier options for their customers.²⁰⁰ The steady movement, is likely not the result of policymakers taking action or within the reach of the courts, but rather consumer power. Consumers must advocate and take advantage of fast food companies' growing fear of demonization.

c. Recommendations to Provide Safe Places in Low Income Communities

Schools offer an almost population wide setting for promoting physical activities to young people... Recreation officials recognize the potential for promoting human health through physical activity. Yet physical education is being squeezed out of the school day, and park and recreation budgets are among the first cut during fiscal crises.²⁰¹

Leaders within these communities should add parks and open spaces to urban communities to help increase levels of physical activity.²⁰² These parks can provide open, safe places for

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id. at 156.*

¹⁹⁹ *Id.*

²⁰⁰ Margaret Webb Pressler, *Burger King Will Offer Healthier Food; Lighter Meals Part of Industry Trend*, Wash. Post, Sept. 19, 2003, at E2, at 2003 WL 62216588.

²⁰¹ U.S. Dept. of Health and Human Servs., *Physical Activity and Health: A Report of the Surgeon General* 236 (1997), <http://www.cdc.gov/nccdphp/sgr/pdf/sgrfull.pdf>

²⁰² Robert, *supra* note 88 at 1268.

purposes of recreation that are currently unavailable in urban cities.²⁰³ The common complaint is that building a park or open space is costly and many of these lower income communities do not have the resources for such measures.²⁰⁴ Yes, it can get costly but there are many different options available. For example, California in 2010 passed Proposition 84.²⁰⁵ The Latino Health Access as a part of the proposition received \$3.5 million in funding to build parks in underserved areas.²⁰⁶ Another program known as Learning for Landscapes operated by the University of Colorado renovates old school yards into new multi use school yards for the community to use.²⁰⁷ There are many different avenues that can be adopted with proper aligned interests and leadership.²⁰⁸

While there are physical education campaigns in existence at many public schools, these school districts need to enforce their own policies.²⁰⁹ The goal for these school districts should be to reduce their class size. This is important because it would allow each child to get the proper attention within the class and all students would be participating. The most obvious way to decrease a class size is by hiring more teachers. In a circumstance where the school is unable to afford to pay new teachers, existing teachers could get paid slightly more to teach or even supervise physical education classes within the school. This way the school is not paying for additional health coverage and benefits and the teachers are being compensated for taking on an extra class and workload.

²⁰³ *Id.* at 1267.

²⁰⁴ Paul M. Sherer, *Why America Needs More City Parks and Open Space*, THE TRUST FOR PUB. LAND. 1, 6 (2003).

²⁰⁵ Press Release, Townsend Public Affairs, Latino Health Access Receives \$4.4 Million Grant and Opens Parks Project (Nov. 12, 2010)

²⁰⁶ *Id.*

²⁰⁷ Learning Landscapes, *Active Environments*, UNIVERSITY OF COLORADO, <http://www.learninglandscapes.org>. (last visited Nov 4, 2016).

²⁰⁸ Paul, *supra* note 201.

²⁰⁹ HW KOHL III, *supra* note 97.

More emphasis should be placed on media campaigns to encourage people to be involved and physically active.²¹⁰ Social media is one of the most powerful tools that we have in 2016.²¹¹ Both children and adults are members of Facebook, Instagram, Twitter, etc. Social media provides an endless stream of information.²¹² When a user joins a niche group on Facebook, they have access to like minded people.²¹³ On Facebook you'll learn that a coworker lost 20 pounds as of last week. A child's idol ran a charity race over the weekend. A neighbor went to a town hall meeting to voice their concerns about the lack of parks in their city. These updates can remind, encourage, and even inspire others to get involved and even get active. Services like twitter can help align a group's goals. Members within a local community can tweet their mayor, their governor, legislature and truly call attention to issues the community is facing.

V. CONCLUSION

The obesity epidemic that we are witnessing in low income communities throughout the United States is not a mere coincidence. There are numerous factors that have created this clear distinction among low income communities, primarily Latino and African American populations, in comparison to White middle to upper class neighborhoods. Deliberate placing of fast food establishments near schools and low income neighborhoods poses a significant problem for

²¹⁰Centers for Disease Control and Prevention. *Strategies to Prevent Obesity and Other Chronic Diseases: CDC Guide to Strategies to Increase Physical Activity in the Community*, (2011), http://www.cdc.gov/obesity/downloads/pa_2011_web.pdf

²¹¹ Sharon Black, *Is Social Media Marketing Your Most Powerful Tool?*, RIVALIQ, (Nov. 29, 2016, 7:28PM), <https://www.rivaliq.com/blog/is-social-media-marketing-your-most-powerful-tool/>

²¹² Christine Elgersma, *16 Apps and Websites Kids Are Heading to After Facebook*, COMMON SENSE MEDIA, (Mar. 1, 2016, 6:42AM), <https://www.commonsensemedia.org/blog/16-apps-and-websites-kids-are-heading-to-after-facebook#>

²¹³ Tony Peacock, *Join a Niche Group on Facebook: Here's 10 Reasons Why.*, STEEM IT, (Sept. 6, 2016, 2:34PM), <https://steemit.com/groups/@tonypeacock/join-a-niche-online-community-here-s-10-reasons-why>

members of these populations. Inaccessibility to affordable grocery stores in these communities due to either a lack of success or interest continues to perpetuate the issue at hand. Safety concerns in urban environments to allow for the opportunity to engage in more physical activity and mere safety for their own residents is crucial.

Existing and recently proposed legislation indicates that leaders within our communities realize that obesity is in fact a cause for concern. While this is a step in the right direction, many of these policymakers must identify and address the issue of obesity in specific pockets of the country.