

# FIRST AMENDMENT IMPLICATIONS OF RESTRICTING FOOD AND BEVERAGE MARKETING IN SCHOOLS

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The ubiquity on public school campuses of non-nutritious food and drinks, and of messages promoting their consumption, is of grave concern to many parents, teachers, administrators, and nutrition advocates. Schools undoubtedly have a powerful influence on how students eat.<sup>1</sup> By allowing junk food and soda companies to saturate the school atmosphere with their products and messages, schools may be not only undermining their efforts to teach students about good nutrition but also fueling the American childhood obesity epidemic.<sup>2</sup>

Across the country, there is increasing interest in restricting non-nutritious food and beverage marketing on public school campuses. A school district<sup>3</sup> that wants to counteract the pervasiveness of junk food and soda manufacturers at school may be inhibited, however, not only by monetary and political pressures but also by legal questions related to the First Amendment.<sup>4</sup>

This paper seeks to demystify how the First Amendment bears upon efforts to restrict food and beverage marketing in public schools. The paper begins with a brief explanation of why the First Amendment might be implicated in a school district policy to restrict junk food and soda marketing on school grounds. The paper then touches on two actions a school district might take without involving the First Amendment: forbid the sale of non-nutritious products without forbidding advertising for the products; and enter into individual contracts with vendors that proscribe certain sales and advertising practices.

Next, the paper describes the workings of a “forum analysis,” which is the legal test that a court would likely use to evaluate a school district advertising policy that is challenged on First Amendment grounds. The paper determines that there are three types of advertising policies that should

survive judicial review under a forum analysis: (1) a ban on all advertising on campus; (2) a ban on all food and beverage advertising on campus; or (3) a ban on advertising on campus for those food and drinks that are not allowed to be sold on campus.

The paper concludes that public school districts can rest assured that they have a range of policy options to counteract the pervasiveness of junk food and soda manufacturers on campus without violating the First Amendment.

## I. Brief History of the Commercial Speech Doctrine

As recently as the 1970s, the Supreme Court held advertising to be entirely outside the scope of First Amendment protection.<sup>5</sup> The sanctuary of the First Amendment was reserved for the exposition of ideas relating to “truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government.”<sup>6</sup> The Supreme Court had long held that a government ban on such expressive activity due to its content was almost always per se invalid.<sup>7</sup> Between the 1940s—when the question of constitutional protection for advertising first presented itself to the Supreme Court—and the 1970s, the Supreme Court generally analyzed advertising not as a form of free expression but rather as a standard business practice subject to government regulation.<sup>8</sup> The Court saw no First Amendment issue associated with a government body seeking to advance the health, safety, or welfare of the community by restricting advertising on certain topics.

In the 1976 case of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,<sup>9</sup> however, the Supreme Court announced a new “commercial speech doctrine” that welcomed advertising into the protective domain of the First Amendment. The case involved a statewide ban on the advertisement of prescription drug prices.<sup>10</sup> Squarely

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before the Court was the question of whether speech that does “no more than propose a commercial transaction” is entitled to First Amendment protection.<sup>11</sup> The analysis in this case rested on the importance of the free flow of commercial information to the targeted consumer and society at large. The Court noted that a particular consumer’s interest in an advertisement “may be as keen, if not keener by far, than his interest in the day’s most urgent political debate.”<sup>12</sup> It also determined that “[a]dvertising, however tasteless and excessive it sometimes may seem,” is essential to the smooth functioning of a free enterprise economy in a democracy.<sup>13</sup> In striking down the prescription drug price advertising ban, the Court ruled that advertising, or “commercial speech,” is entitled to some degree of protection under the First Amendment.<sup>14</sup>

In the wake of *Virginia Pharmacy*, courts will treat a government advertising regulation as a First Amendment issue. This does not mean that courts will outlaw any government effort to limit advertising on specified topics, but it does mean that when such efforts are challenged, courts will subject them to close scrutiny. Fortunately, even in the *Virginia Pharmacy* era, the Supreme Court has left a lot of room for school districts to pass policies limiting non-nutritious food and beverage marketing on their campuses.

## II. Avoiding First Amendment Scrutiny

Before addressing how a school district might design a policy that is likely to withstand a First Amendment challenge, it is worth noting that there are at least two ways the public schools could attempt to tackle the rampant promotion of unhealthy food and drink on their campuses without invoking First Amendment scrutiny: they could ban products without regulating speech; and they could draft individual contracts with vendors that do not permit certain sales and advertising practices. The downside of these approaches is that they would be significantly less comprehensive than a district-wide policy targeting all aspects of in-school food and beverage marketing.

### A. Regulating Products

In envisioning the ways a school district might seek to reduce the promotion of junk food and sodas in schools, it is important to distinguish between policies that regulate products (e.g., by setting nutritional standards that eliminate categories of products) and those that regulate speech about the products. For example, a court will treat a ban on the sale of soda in schools very differently from a ban on soda advertising in schools.

When the government regulates a product directly, say by prohibiting the sale of a product or by restricting how or where a product is sold, the government generally does not

implicate the First Amendment. If the regulation is challenged on constitutional grounds, a court is likely to apply the “rational basis test.”<sup>15</sup> Under this test, a regulation will be upheld so long as it bears a rational relationship to a legitimate governmental purpose.<sup>16</sup> The rational basis test is very deferential to the government, and courts are quite reluctant to overturn regulations subject to the rational basis test.<sup>17</sup> A rational relationship need not be proven by scientific data but instead need only be supported by common sense.<sup>18</sup> Protecting public health and protecting children have long been accepted to be legitimate governmental purposes.<sup>19</sup>

This means that if a school district decides solely to limit the types of food and beverage products that are allowed to be sold on campus, the district can be confident that its policy will survive a constitutional challenge with ease.<sup>20</sup> If, however, the school district also wants to restrict advertising for certain types of food and beverages on campus, the legal landscape becomes somewhat more complicated (though by no means insurmountable) because the First Amendment is drawn in.

Note that sometimes it is difficult to distinguish between a product regulation and an advertising regulation. For example, tobacco companies have alleged that a government prohibition on the distribution of free tobacco samples not only regulates products but also regulates commercial speech protected by the First Amendment.<sup>21</sup> Similarly, a food manufacturer might argue that a school district ban on the distribution of free candy samples is, in part, an advertising regulation subject to a First Amendment analysis. It is beyond the scope of this paper to imagine the range of product-based restrictions a school district might impose that could inadvertently sweep in commercial speech interests. Suffice it to say that when drafting a school district policy limiting the distribution of specified food and beverage company products, it is worth considering whether commercial speech interests might be implicated, and, if so, whether the policy would withstand a First Amendment challenge.

### B. Restricting Advertising Through Individual Contract Provisions

Often, an individual school will negotiate with outside vendors to provide food and food-related services and products to the campus. By limiting advertising through a contract provision with these vendors, a school might be able to immunize itself against a First Amendment challenge.

A party may give up (i.e., “waive”) its constitutional rights—including First Amendment free speech rights—in certain circumstances, including via a contract.<sup>22</sup> In order to be constitutional, the waiver must be done voluntarily and with full awareness of the legal consequences.<sup>23</sup> Courts are

generally satisfied “where the parties to the contract have bargaining equality and have negotiated the terms of the contract, and where the waiving party is advised by competent counsel and has engaged in other contract negotiations.”<sup>24</sup>

This means that during contract negotiations, a school can request that a vendor agree to any type of advertising prohibition envisioned by the school. If the vendor signs the contract with a provision containing an advertising prohibition, the vendor relinquishes any First Amendment rights it might have had to advertise in the school so long as the vendor entered into the contract voluntarily and with full awareness of the legal consequences. Given that competitive food and beverage vendors tend to be large companies with sophisticated business and legal savvy, they will be hard-pressed to argue after-the-fact that they did not sign the contract voluntarily and with full awareness of the legal consequences. Therefore, such a contract is almost certainly enforceable and invulnerable to a subsequent First Amendment challenge by the vendor.

Using contract to restrict junk food and soda advertising on campus is a particularly appealing strategy for a public school principal who cares about the issue and who has the authority to negotiate with vendors, but who cannot convince the governing body to tackle the problem at a district-wide level. If, however, many schools in a district start inserting the same advertising prohibition into their vending contracts, it may begin to appear that the district has a de facto policy (i.e., a policy that exists in fact if not on paper) of limiting food and beverage advertising.<sup>25</sup> As described above, a school district advertising policy will be treated by the courts as a First Amendment issue.

### III. First Amendment Forum Analysis Applied to School Advertising Policies

A limitation or ban on advertising in public schools entails a content-based speech restriction on public property. A content-based speech restriction outlaws speech about a specified topic that the government deems to be inappropriate or offensive to the ears of a particular audience.<sup>26</sup> When a government body is subject to a First Amendment challenge for imposing a content-based speech restriction on public property, courts generally apply a “forum analysis.” Under a forum analysis, the government’s likelihood of victory depends largely on the nature of the public property targeted by the restriction.

#### A. Workings of a Forum Analysis

The Supreme Court articulated the forum analysis in the case of *Perry Education Association v. Perry Local Educators’ Association*.<sup>27</sup> *Perry* defines three categories of public

property on which the government might seek to impose a content-based speech restriction:

- A *public forum* is public property, such as a street or park, which by long tradition or government fiat have been devoted to assembly and debate.<sup>28</sup>
- A *limited public forum* is public property that the government has opened for use by the public as a place for expressive activity.<sup>29</sup> Examples include a school board meeting or a municipal theater.<sup>30</sup>
- A *non-public forum* is public property which is neither by tradition or designation a forum for public communication.<sup>31</sup> Post offices and military installations are quintessential non-public forums.<sup>32</sup>

In public and limited public forums, content-based speech restrictions are subject to a heightened standard of review and are likely to be struck down by a court.<sup>33</sup> In non-public forums, however, such restrictions are subject to a much more lenient standard of review and have a good chance of being upheld.<sup>34</sup> Specifically, in a non-public forum, a content-based speech restriction will be upheld so long as it is “reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.”<sup>35</sup>

The Supreme Court presumes that all facilities in elementary, middle, and high school facilities are non-public forums subject to a lenient First Amendment standard of review.<sup>36</sup> For example, in the important case of *Hazelwood School District v. Kuhlmeier*,<sup>37</sup> the Supreme Court held that a high school newspaper published as a part of a journalism class was a non-public forum.<sup>38</sup> The Court recognized that the “special characteristics of the school environment” justify giving school authorities a great deal of leeway to control speech in accord with their “basic educational mission.”<sup>39</sup>

A school facility will be deemed a public forum or limited public forum subject to stricter First Amendment review “only if school authorities have by policy or by practice opened [it] for *indiscriminate use* by the general public or by some segment of the public, such as student organizations.”<sup>40</sup> A court is unlikely to find a school facility to be a public forum even if it has been opened to the speech of select outside groups.<sup>41</sup> Nor will a court be inclined to name a school facility a public forum simply because it has been used for the purpose of raising money.<sup>42</sup> The case law precedent shows that it should be easy for a school district to persuade a court that the facilities targeted by its advertising policy are non-public forums.

#### B. Drafting a Policy to Pass a Forum Analysis

Under the First Amendment test for non-public forums, a school district that wants to implement a policy to limit

or prohibit non-nutritious food and beverage advertising on campus must ensure that its policy is both “reasonable” and “viewpoint neutral.”<sup>43</sup> In order to minimize their susceptibility to a First Amendment challenge, school districts are advised to pass one of three types of advertising policies: (1) a ban on all advertising on campus; (2) a ban on all food and beverage advertising on campus; or (3) or a ban on advertising on campus for those food and drinks that are not allowed to be sold on campus. However, school districts should avoid implementing a policy that forbids advertising on campus for unhealthy food and beverage products (however defined) while concurrently allowing the sale on campus of those same products.

### 1) Ensuring the Policy is Reasonable

A reasonableness determination turns on the question of whether the policy “is wholly consistent with the district’s legitimate interest in preserving the property for the use to which it is lawfully dedicated.”<sup>44</sup> The policy “need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation.”<sup>45</sup>

For example, in the case of *Planned Parenthood v. Clark County School District*,<sup>46</sup> the Ninth Circuit found that it was reasonable for a school district to exclude advertisements for family planning services from school newspapers. It did not matter that the schools accepted other advertisements, such as those for casinos, that might seem inappropriate for a teenage audience.<sup>47</sup> In assessing the reasonableness of the exclusion, the court acknowledged the right of educators to tailor the topics of advertising in public school to the emotional maturity of the audience. Moreover, given that a non-public forum “by definition is not dedicated to general debate or the free exchange of ideas,” the court held that it was reasonable to forbid school newspaper advertisements that are “controversial, offensive to some groups of people, that cause tension and anxiety between teachers and parents, and between competing groups such as [Planned Parenthood] and pro-life forces.”<sup>48</sup>

A school district policy most likely would be reasonable if it prohibited (1) all advertising on campus, (2) all food and beverage advertising on campus, or (3) all advertising on campus for those food and drinks that are not allowed to be sold on campus. The district could assert a range of legitimate pedagogical interests backing each policy. For instance, the district could defend a total advertising ban by pointing to its efforts to promote an educational rather than a commercial atmosphere and to prevent corporate exploitation of students. The district could defend a ban on all food and beverage advertising on campus by showing it wants to avoid confusion by limiting messages about nutrition-related topics to the classroom. And the district could

defend a ban on advertising for food and drinks that it does not allow to be sold on campus by declaring a desire to be consistent in its wellness policy and to avoid the appearance of endorsing junk food and soda.<sup>49</sup>

If, however, a school district forbids advertising on campus for a category of food and drink products while simultaneously allowing the sale on campus of those same products, the district may be vulnerable to a reasonableness challenge. Common sense dictates that the district would greatly undercut its rationale for the advertising restriction if it concurrently allowed students to purchase products subject to the restriction. Moreover, the Supreme Court is more protective of commercial speech than it is of commercial sales, so courts will look very suspiciously on any prohibition that applies to speech about a product but not to the product itself.<sup>50</sup>

### 2) Ensuring the Policy is Viewpoint Neutral<sup>51</sup>

A government body may impose reasonable content-based restrictions on third party speech in a non-public forum so long as the restrictions are not “an effort to suppress the speaker’s activity due to disagreement with the speaker’s view.”<sup>52</sup> A policy is “viewpoint neutral” if it restricts all third party speech relating to a given subject matter, including speech in favor of and against the subject matter.<sup>53</sup> In other words, if the government body allows third parties into the forum to speak on a topic that is deemed permissible, then it cannot exclude certain speakers on the topic just because it opposes their viewpoint.<sup>54</sup>

In the *Planned Parenthood* example, the Ninth Circuit found the school district’s decision to exclude advertisements for family planning services from school newspapers to be viewpoint neutral. The court recognized that the advertisements “were rejected, and schools enacted guidelines excluding advertising that pertains to ‘birth control products and information,’ in order to maintain a position of neutrality on the sensitive and controversial issue of family planning and avoid being forced to open up their publications for advertisements on both sides of the ‘pro-life’-‘pro-choice’ debate.”<sup>55</sup>

A school district should succeed in arguing that its policy is viewpoint neutral if the policy prohibits (1) all advertising on campus, (2) all food and beverage advertising on campus, or (3) all advertising on campus for those food and drinks that are not allowed to be sold on campus. In each case, the policy would draw a clear line around an entire subject of impermissible speech for third parties in the forum. By forbidding all advertising on campus, the district would remain neutral with regard to the messages of all advertisers. By forbidding all food and beverage advertising on campus, the district would remain neutral with regard to the mes-

sages of all food and beverage advertisers. Or by forbidding all advertising on campus for those food and drinks that are not allowed to be sold on campus, the district would remain neutral with regard to the messages of all advertisers who want to promote or oppose the consumption of the food and drinks that are not allowed to be sold on campus.

On initial glance, a ban on advertising on campus for those food and beverage products that are not allowed to be sold on campus may seem to express a viewpoint by showing a preference for advertising about those products that are allowed to be sold on campus. However, such a ban should be considered viewpoint neutral so long as it allows in advertising that promotes and criticizes the products that are allowed to be sold on campus. The viewpoint neutrality analysis first asks what topic of speech is permissible (e.g., advertising for food and beverage products that are allowed to be sold on campus) and second asks whether third party speakers who espouse differing views of the permissible topic are given an opportunity to speak.<sup>56</sup>

Note that the viewpoint neutrality requirement applies only where a government body seeks to regulate the speech of third parties in a non-public forum. When a district or a school itself speaks, it is free to express its own views and has no obligation to provide a forum for others with differing views.<sup>57</sup> So a district can implement a health curriculum or a teacher can use soda advertisements in a media studies class without any requirement that food and beverage companies be given a platform to communicate their views on nutrition or marketing principles to students.

### 3) Other Drafting Considerations

It is beyond the scope of this paper to recommend exact policy language. This paper merely offers general guidance on how to avoid First Amendment problems when drafting an advertising policy targeted at junk food and soda on public school campuses. In that spirit, it is worth noting two additional considerations a school district should take into account when creating such an advertising policy.

First, for both practical and legal reasons, a policy should be written as clearly as possible. It should contain definitions of key terms and should be specific about the types of advertising it does and does not cover. A school district may want to include persuasive findings that could bolster the argument that the policy is both reasonable and viewpoint neutral. For consistency, a school district should consider making its advertising policy a subsection of its federally-mandated wellness policy.<sup>58</sup>

Second, it would be somewhat risky for the policy to go so far as to prohibit students and teachers from wearing or

possessing materials promoting non-nutritious food and beverage products. The Supreme Court precedent relating to this issue is in flux. On the one hand, the Court traditionally has been much more protective of the personal expression of students and teachers that incidentally takes place at school than of the expression of students, teachers, and others that occurs with the sanction, or under the guise, of school authorities.<sup>59</sup> For example, in *Tinker v. Des Moines Independent Community School District*,<sup>60</sup> the Court struck down a public high school policy prohibiting students from wearing black armbands to protest the Vietnam War.<sup>61</sup> The Court held school officials to an exacting standard: Student expression may not be suppressed unless it will “materially and substantially disrupt the work and discipline of the school.”<sup>62</sup> On the other hand, the recent case of *Morse v. Frederick*<sup>63</sup> signals a departure from tradition, or at least carves out an exception.. In *Morse*, the Court ruled that a high school principal did not violate the First Amendment when she suspended a student for displaying a banner reading “Bong Hits 4 Jesus” at a school-supervised event.<sup>64</sup> The Court declined to follow *Tinker* and instead crafted a more lenient and fact-specific standard: Student expression that reasonably appears to promote illegal drug use may be suppressed in light of the special characteristics of the school environment and the principal’s interest in preventing illegal drug use by students.<sup>65</sup> It remains unclear what standard of review would apply to a case involving a public school campus ban on another kind of expression, such as wearing T-shirts decorated with soda brands. But in this type of case, school officials are unlikely to receive the level of sympathy that the principal did in *Morse* because *Morse* addressed expression about illegal activity.<sup>66</sup>

## IV. Conclusion

Although the First Amendment case law keeps a tight rein on government entities that want to restrict advertising intended for adult consumers, it gives public school districts a lot of leeway to curb advertising directed at their student bodies. A school district that wants to pass a policy limiting junk food and soda marketing on its campuses has a good chance of avoiding First Amendment problems by selecting one of three options: (1) a ban on all advertising on campus; (2) a ban on all food and beverage advertising on campus; or (3) or a ban on advertising on campus for those food and drinks that are not allowed to be sold on campus. A school district will stand on shakier First Amendment ground, however, if it restricts advertising for products that are allowed to be sold on campus or if it forbids students and teachers from wearing or possessing materials promoting junk food and soda products.

- <sup>1</sup> See, e.g., Kubik M. “The Association of the School Food Environment with Dietary Behaviors of Young Adolescents.” *American Journal of Public Health*, 93: 1168, 2003.
- <sup>2</sup> See Molnar A. *Commercialism in Education Research Unit 6 School Commercialism, Student Health, and the Pressure To Do More with Less*, 2003. Available at: <http://epsf.asu.edu/ceru/Documents/EPFL-0307-105-CERU.doc>
- <sup>3</sup> This paper presumes that a school district will be the level of government targeted for policy intervention, but the analysis would apply equally to laws and regulations adopted at the state level.
- <sup>4</sup> This paper focuses on First Amendment issues and does not analyze all of the causes of action that might be brought against a school district for attempting to control food and beverage marketing in schools.
- <sup>5</sup> See *Valentine v. Chrestensen*, 316 U.S. 52 (1942) (setting a 30-year precedent for the principle that the First Amendment does not protect commercial advertising).
- <sup>6</sup> *Roth v. United States*, 354 U.S. 476, 484 (1957). The Court had allowed clear and narrow content-based restrictions on specified categories of speech that are considered to trigger immediate danger or to be of a low social value. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (announcing a test for judging laws that restrict speech inciting imminent lawless action); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (setting forth a standard for recovery for an alleged defamatory falsehood relating to a public official); *Roth v. United States*, 354 U.S. 476 (1957) (finding obscenity to be outside the arena of constitutionally protected speech); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (upholding a statute banning words that trigger an automatic violent response).
- <sup>7</sup> See, e.g., *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984) (“Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.”); *Street v. New York*, 394 U.S. 576, 592 (1969) (“It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.”).
- <sup>8</sup> See Kozinski A and Banner S. “The Anti-History and Pre-History of Commercial Speech.” *Tex. Law Review*, 71: 747, 1993 (arguing that prior to 1975, the Court construed advertising as a form of economic activity and did not consider or reject the notion that advertising might be speech subject to First Amendment protection). For example, the Court found that the profit motive driving advertising was trumped by a range of government interests, including enforcing a sanitary code provision forbidding the distribution of advertising leaflets in the street, *Valentine v. Chrestensen*, 316 U.S. 52 (1942), and freeing the optical profession from the taints of commercialism associated with advertisements for eyeglass frames. *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).
- <sup>9</sup> *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).
- <sup>10</sup> The Court first considered whether the plaintiffs had the right to assert a First Amendment claim when they were mere consumers seeking access to drug price information. The Court granted the plaintiffs standing, holding that “if there is a right to advertise, there is a reciprocal right to receive the advertising.” *Id.* at 757.
- <sup>11</sup> *Id.* at 762 (quoting *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 385 (1973)).
- <sup>12</sup> *Id.* at 763.
- <sup>13</sup> *Id.* at 765.
- <sup>14</sup> *Id.* at 770.
- <sup>15</sup> See Kline R et al. “Beyond Advertising Controls: Influencing un-k-Food Marketing and Consumption with Policy Innovations Developed in Tobacco Control.” *Loyola L.A. Law Review*, 39: 603, 608-612, 2006.
- <sup>16</sup> See, e.g., *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461 (1981).
- <sup>17</sup> See *Gregory v. Ashcroft*, 501 U.S. 452, 471 (1991).
- <sup>18</sup> See *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993).
- <sup>19</sup> See *Jacobson v. Massachusetts*, 197 U.S. 11, 29, 38 (1905); *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944).
- <sup>20</sup> Note that this paper does not consider how to write language drawing the line around the foods and beverages that would be targeted by a particular policy. This issue probably will have to be resolved with the assistance of experts in the field of nutrition science. That said, courts will likely accept whatever line is drawn so long as the line is based on “rational speculation.” *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993).
- <sup>21</sup> See *Lorillard v. Reilly*, 533 U.S. 525, 570 (2001). In another example of the murky distinction between product and advertising regulation, the Supreme Court recognized in *Lorillard* that a regulation of the way products are displayed may involve a speech interest that triggers First Amendment review. See *id.* at 569-70.
- <sup>22</sup> See *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 145 (1967) (addressing the waiver of First Amendment rights); *Erie Telecomm. Inc. v. City of Erie*, 853 F.2d 1084, 1094 (3d Cir. 1988) (listing Supreme Court cases recognizing that constitutional rights may be waived under particular circumstances); *Leonard v. Clark*, 12 F.3d 885 (9th Cir. 1993) (recognizing that First Amendment rights may be waived via contract).
- <sup>23</sup> *D.H. Overmyer Co., Inc. v. Frick Co.*, 405 U.S. 174, 187 (1972) (discussing requirements for waiver); *Fuentes v. Shevin*, 407 U.S. 67, 95 (1972) (discussing requirements for waiver).
- <sup>24</sup> *Erie Telecomm.*, *supra* note 33, at 1096.
- <sup>25</sup> See, e.g., *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978) (describing when individual government actions, taken together, become a government policy subject in and of itself to legal challenge); *Menotti v. City of Seattle*, 409 F.3d 1113, 1147 (9th Cir. 2005) (same).
- <sup>26</sup> *Boos v. Barry*, 485 U.S. 312, 321 (1988) (noting that a content-based speech restriction “focuses only on the content of the speech and the direct impact that speech has on its listeners.”)
- <sup>27</sup> *Perry Education Association v. Perry Local Educators’ Association*, 460 U.S. 37 (1983).
- <sup>28</sup> *Id.* at 45.
- <sup>29</sup> *Id.*
- <sup>30</sup> *Id.* (citing *City of Madison Joint School District v. Wisconsin Public Employment Relations Comm’n*, 429 U.S. 167 (1976); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975)).
- <sup>31</sup> *Perry*, *supra* note 27, at 46.
- <sup>32</sup> See *U.S. v. Kokinda*, 497 U.S. 720, 730 (1990) (holding that a post office is a non-public forum); *Greer v. Spock*, 424 U.S. 828, 838 (1976) (finding an army post to be a non-public forum).
- <sup>33</sup> *Perry*, *supra* note 27, at 45. Note that the Supreme Court has allowed clear and narrow content-based restrictions on specified categories of speech that are considered to trigger immediate danger or to be of a low social value. See *supra* note 5, for examples of such cases.
- <sup>34</sup> *Perry*, *supra* note 27, at 46.
- <sup>35</sup> *Id.*
- <sup>36</sup> *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988). Note that from a First Amendment perspective, a limitation or ban on advertising non-nutritious food and beverages in public schools has two important attributes: it involves a content-based government regulation on *public property of advertising*. As a result, if the regulation is challenged in court, one of two discrete First Amendment tests theoretically could apply. The first test focuses on the location of the speech regulation. Courts generally use a *forum analysis* when considering government restrictions on speech on *public property*. The second test focuses on the type of speech being regulated. Courts generally use a *commercial speech analysis* when considering government restrictions on *advertising*. The commercial speech analysis is easier for the government to pass than a public forum analysis but harder to pass than a non-public forum analysis. See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N.Y.*, 447 U.S. 557, 564 (1980) (setting forth the commercial speech test as an intermediate standard of review). The Supreme Court has applied a commercial speech analysis in place of a forum analysis in a case regarding the regulation of advertising on public university property. See *Board of Trustees of State Univ. v. Fox*, 492 U.S. 469, 478-79 (1989) (applying a commercial speech analysis to a public university restriction on product demonstrations in campus dormitories). However, the commercial speech analysis is specifically designed to protect adult access to information. See *Lorillard v. Reilly*, 533 U.S. 525, 565 (2001) (discussing the importance of advertising to adults for retailers). Case law precedent points toward the use of a more lenient non-public forum analysis in a potential case involving the regulation of advertising on K-12 school property. See, e.g., *Ginsberg v. State of N.Y.*, 390 U.S. 629, 636 (1968) (distinguishing between the rights of adults and children to receive information and noting that “material which is protected for distribution to adults is not

necessarily constitutionally protected from restriction upon its dissemination to children”); *DiLoreto v. Downey Unified School Dist. Bd. of Educ.*, 196 F.3d 958, 964-65 (9th Cir. 1999) (applying a non-public forum analysis to a district’s refusal to post a religious advertisement on the high school’s baseball field); *Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist.*, 941 F.2d 817, 828 (9th Cir. 1991) (en banc) (applying a non-public forum analysis to a high school’s decision to exclude advertisements for family planning services from the school newspaper).

<sup>37</sup> 484 U.S. 260 (1988).

<sup>38</sup> *Hazelwood*, *supra* note 36, at 267.

<sup>39</sup> *Hazelwood*, *supra* note 36, at 266 (internal quotations marks, citations omitted).

<sup>40</sup> *Hazelwood*, *supra* note 36, at 267 (internal quotations marks, citations omitted; emphasis added). *See also*, *DiLoreto v. Downey Unified School Dist. Bd. of Educ.*, 196 F.3d 958, 968 (9th Cir. 1999) (holding that advertising space on school’s baseball field fence was a non-public forum); *Williams v. Vidmar*, 367 F. Supp. 2d 1265, 1273 (N.D. Cal. 2005) (“a K-12 classroom in a public elementary school is a nonpublic forum”); *Hedges v. Wauconda Cmty. Unit Sch. Dist.*, 9 F.3d 1295, 1302 (7th Cir.1993) (“[a] junior high school is a nonpublic forum, which may forbid or regulate many kinds of speech”).

<sup>41</sup> *See Perry Education Association v. Perry Local Educators’ Association*, 460 U.S. 37 (1983), at 47 (holding that teacher mailboxes in an Indiana public school district were a non-public forum even though outside civic groups were allowed to place flyers in the boxes, since the school required permission to place the flyers and did not allow the public indiscriminate access to the boxes); *Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist.*, 941 F.2d 817, 824 (9th Cir.1991) (en banc) (finding that a school-sponsored publication was not a public forum even though the school solicited advertisements from certain businesses, including casinos, bars, churches, and political candidates, because the school did not open its publications, including advertising space, to “indiscriminate use”).

<sup>42</sup> *See Lehman v. City of Shaker Heights*, 418 U.S. 298, 303 (1974) (holding advertising space on a public transit system to be a non-public forum); *DiLoreto v. Downey Unified School Dist. Bd. of Educ.*, 196 F.3d 958, 966 (9th Cir. 1999) (“where the government acts in a proprietary capacity to raise money or to facilitate the conduct of its internal business, the Supreme Court generally has found a nonpublic forum, subject only to the requirements of reasonableness and viewpoint neutrality”).

<sup>43</sup> *Perry*, *supra* 41, at 46.

<sup>44</sup> *Id.* at 50-51 (internal quotations omitted). In assessing the reasonableness prong in non-public forum cases, the Supreme Court has also considered whether the policy leaves open alternative channels of communication to the target audience. *See id.* at 53-54; *Greer v. Spock*, 424 U.S. 828, 839 (1976); *Pell v. Procanier*, 417 U.S. 817, 827-28 (1974). However, it is questionable whether courts would apply this consideration when the target audience is children, who have lesser First Amendment rights to receive information than adults. *See, e.g.*, *Ginsberg*, 390 U.S. 636 (1968).

<sup>45</sup> *International Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 683 (1992) (internal quotations, citations omitted; emphasis in original).

<sup>46</sup> *Planned Parenthood v. Clark County School District*, 941 F.2d 817 (9th Cir. 1991) (en banc).

<sup>47</sup> *Id.* at 825-26.

<sup>48</sup> *Id.* at 829.

<sup>49</sup> Compare *id.* at 827 (finding a school district’s decision to exclude particular advertisements to be reasonable in light of the school’s pedagogical interests in “dissociating itself from speech inconsistent with its educational mission and avoiding the appearance of endorsing views”); but cf. *Fox*, 492 U.S. 468, 475 (1989) (applying the more rigorous commercial speech analysis and noting that a university has a substantial interest in “promoting an educational rather than commercial atmosphere” and “preventing commercial exploitation of students”).

<sup>50</sup> *See, e.g.*, *Lorillard*, 533 U.S. 525, 567-70 (2001) (upholding a government regulation requiring a vendor to place tobacco products behind the counter while presuming that the vendor still may communicate about the product by placing empty tobacco packaging on open display).

<sup>51</sup> Note that in *Hazelwood*, the Supreme Court arguably dropped the viewpoint neutrality requirement for speech “that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.” 484 U.S. 260, 271, 273 (1988). The *Hazelwood* Court upheld a school’s decision to censor certain newspaper articles, determining that “educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.” *Id.* at 273. The Court did not address whether the decision was viewpoint neutral. In the wake of *Hazelwood*, the circuits are divided on whether a restriction on third-party speech that bears a school’s “imprimatur” in a non-public forum must be viewpoint neutral. *See Fleming v. Jefferson County Sch. Dist.*, 298 F.3d 918 (10th Cir. 2002) (noting that the Third and Tenth Circuits interpret *Hazelwood* to eliminate the viewpoint neutrality requirement for “imprimatur” speech while the Ninth and Eleventh Circuits continue to apply requirement of viewpoint neutrality for such speech).

<sup>52</sup> *Int’l Soc. for Krishna Consciousness, Inc.*, 505 U.S. at 672, 679 (1992).

<sup>53</sup> *See Perry*, *supra* note 41.

<sup>54</sup> *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 (2001).

<sup>55</sup> *See Planned Parenthood of S. Nev., Inc.*, 941 F.2d 817, 829 (1991).

<sup>56</sup> *See, e.g.*, *Hills v. Scottsdale Unified Sch. Dist.*, 329 F.3d 1044, 1053 (9th Cir. 2003) (finding that a school violated the viewpoint neutrality standard when it distributed literature about summer programs but excluded a brochure for a religious summer camp); *PMG Intern. Div. L.L.C. v. Rumsfeld*, 303 F.3d 1163, 1171 (9th Cir. 2002) (holding that a military base’s ban on the sale of sexually explicit material was viewpoint neutral because it would eviscerate the line between content and viewpoint to characterize the ban as targeting the viewpoint that the human sexual response is positive and healthy).

<sup>57</sup> *See, e.g.*, *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1011-13 (9th Cir. 2000) (upholding the decision of school officials to remove a teacher’s bulletin board that posted objections to the school’s Gay and Lesbian Awareness Month bulletin board and listing cases holding that when the government is the speaker, it may advance a particular viewpoint).

<sup>58</sup> Child Nutrition and WIC Reauthorization Act of 2004 (PL 108-265).

<sup>59</sup> *Compare Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969) with *Hazelwood*, 484 U.S. at 270.

<sup>60</sup> *Tinker v. Des Moines Independent Community School District*, 383 U.S. 503 (1969).

<sup>61</sup> *Id.* at 514.

<sup>62</sup> *Id.* at 513.

<sup>63</sup> *Morse v. Frederick*, No. 06-278 (U.S. June 25, 2007).

<sup>64</sup> *Id.* at 15.

<sup>65</sup> *Id.* at 14.

<sup>66</sup> *See id.* (differentiating between student speech that is merely offensive and student speech that appears to promote illegal drug use).