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The Constitutionality of Restricting the Use of Social Media: Flash Mob Protests Warrant First Amendment Protections

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I. Introduction

Flash mobs are a phenomenon that has recently gained significant popularity among entertainers and activists alike. According to the Merriam-Webster Dictionary, a flash mob is comprised of "a group of people summoned (as by e-mail or text message) to a designated location at a specified time to perform an indicated action before dispersing."[1] As its definition suggests, flash mobs are intrinsically linked to social media.[2] This association is primarily a result of flash mobbers' reliance on text messaging and other social-networking technology to both organize and rally support for their particular cause or performance.[3] Additionally, social media technology plays an important role during the commission of a flash mob.[4] Social networks enable flash mobbers to instantaneously communicate with one another, thereby empowering participants to immediately change venue, or, in some instances, evade authorities.[5]

Generally, flash mobs are associated with amusing performance acts that take place in highly public areas such as train stations, parks, or town squares.[6] Such an association is understandable, as flash mobs were initially used almost exclusively for entertainment purposes,

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[1] *Flash Mob Definition*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/flash%20mob (last visited Nov. 6, 2011).

[2] *See id.*

[3] J. David Goodman, *Debate Over Social Media Incitement as Flash Mobs Strike*, N.Y. TIMES, Aug. 17, 2011, http://thelede.blogs.nytimes.com/2011/08/17/debate-over-social-media-incitement-as-flash-mobs-strike/?scp=1&sq=Flash%20Mob&st=cse.

[4] *Id.*

[5] *Id.*

[6] Sheila Shayon, *Flash Mob Trend Spawns A New Social Media Industry, Social Media*, BRANDCHANNEL.COM (Aug. 23, 2011), http://www.brandchannel.com/home/post/2011/08/23/Flash-Mob-Trend-Spawns-A-New-Social-Media-Industry.aspx.

with large groups of performers organizing spontaneous choreographed dances, songs, and other performances in public areas.[7] In reality, however, flash mobs encompass a much broader range of activities.[8] Despite flash mobs' innocuous beginnings, their scope of use has evolved, as flash mobs are now utilized for more substantial purposes.[9] In fact, flash mobs have been linked to acts of crime, violence, and public disorder.[10] For example, in 2011 alone, flash mobs were linked to a protest in San Francisco, riots in both Philadelphia and London, and robberies in Maryland.[11]

As flash mobs are increasingly utilized for more sinister purposes, a debate has emerged regarding how flash mobs should be regulated and whether such regulations unconstitutionally impinge upon participants' First Amendment rights.[12] Perhaps the most controversial issue surrounding this debate concerns governmental regulation of flash mobbers' systematic usage of social media.[13] On the one hand, police forces and other governmental authorities argue that violent flash mobs are a byproduct of flash mobbers' pervasive use of "social media . . . like Twitter and Facebook and instant messaging services . . . [as] organizing tools for mayhem."[14] Because flash mob participants' rely on social media to recruit support and evade authorities,

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[7] *See e.g.*, ShareATT, *AT&T Network TV Commercial -- Flash Mob*, YOUTUBE (May 9, 2011), http://www.youtube.com/watch?v=bd8ppk0UCx8 (showing a television commercial of a planned flash mob dance at a train station. This clip also displays flash mobs' close relationship to social media, albeit in a humorous fashion); CulturePub, *Historic flashmob in Antwerp train station, do re mi*, YOUTUBE (Nov. 16, 2010), http://www.youtube.com/watch?v=bQLCZOG202k (video of a choreographed flash mob dance in an Antwerp train station); ImprovEverywhere, *Improv Everywhere : Frozen Grand Central*, YOUTUBE (Jan. 31, 2008), http://www.youtube.com/watch?v=jwMj3PJDxuo&ob=av3e (showing a flash mob performance where hundreds of people spontaneously froze in Grand Central Station, New York City. This video also shows how flash mobs can disrupt station activities); discoverireland, *St Patrick's Day Flashmob in Sydney by Tourism Ireland*, YOUTUBE (Mar. 16, 2011), http://www.youtube.com/watch?v=jxEB48jY3F8 (depicting a choreographed flash mob dance in Central Station, Sydney, Australia).

[8] Shayon, *supra* note 6.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] Justin Silverman, *BART Phone Blackout: Did the S.F. Transit Agency Violate Free Speech Protections*, SUFFOLK MEDIA LAW (Aug. 27, 2011), http://suffolkmedialaw.com/2011/08/27/bart-phone-blackout-did-the-s-f-transit-agency-violate-free-speech-protections/ (last visited Nov. 6, 2011).

[13] Goodman, *supra* note 3.

[14] *Id.*

authorities maintain that they can more easily suppress flash mobs by restricting mobbers' access to social media.[15] In contrast, proponents of flash mobs and free speech activists believe that "social media doesn't organize riots. People organize riots."[16] Following this logic, violent flash mobs are born out of violent people rather than social media.[17] As a result, activists argue that restricting a flash mob's usage of social media violates the First Amendment by censoring expressive speech in a protected forum.[18]

Possibly the most indicative manifestation of this debate occurred on August 11, 2011 when the Bay Area Rapid Transit (BART), which is the San Franciscan public subway system authority, completely shut down cell phone and wireless service to their train platforms to prevent a planned flash mob protest.[19] This particular flash mob protest was in response to the BART Police Department's (BART PD) July 3, 2011 shooting of Charles Hill, a homeless train passenger.[20] Hill's death sparked a massive public outcry against BART PD, with protestors vigorously demanding that the BART PD be reformed and/or disbanded due to their violent track record.[21] On July 11, 2011, protestors flooded BART's Civic Center Station to voice their displeasure about the shooting.[22] The protest primarily took place on BART's train platforms and resulted in substantial disturbances to BART's train system.[23] Because the protest was

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[15] *Id.*
[16] *Id.*
[17] *See Id.*
[18] Silverman, *supra* note 12.
[19] Patrik Jonsson, *To Defuse 'Flash' Protest, BART Cuts Riders' Cell Service. Is that Legal?*, THE CHRISTIAN SCIENCE MONITOR (Aug. 12, 2011), http://www.csmonitor.com/USA/Justice/2011/0812/To-defuse-flash-protest-BART-cuts-riders-cell-service.-Is-that-legal.
[20] *Id.*; *see also* Maria L. La Ganga & Lee Romney, *Protest Closes 4 BART Stations, Leaving Commuter Crowd Stranded, Local*, LA TIMES, Aug. 15, 2011, http://articles.latimes.com/2011/aug/15/local/la-me-bart-anonymous-protest-20110816.
[21] La Ganga & Romney, *supra* note 20. BART faced a similar public reaction after a BART officer shot an unarmed passenger in 2009. Zusha Elinson & Shoshana Walter, *Latest BART Shooting Prompts New Discussion of Reforms*, N.Y. TIMES, July 16, 2011, www.nytimes.com/2011/07/17/us/17bcbart.html?pagewanted=all.
[22] Silverman, *supra* note 12.
[23] *Id.* (reporting that the July 11 flash mob caused congestion on BART platforms, several train delays, and the partial and complete shutdown of various BART stations).

spontaneous and largely organized and perpetuated through social media, it is characterized as a flash mob protest.[24]

One month later, BART officials learned of a similar flash mob protest scheduled for August 11th.[25] To ensure passenger safety and prevent similar disturbances to the July 11th protest, BART officials preemptively disabled BART's train platforms' wireless-networks.[26] Perhaps due to the integral role that social networking plays in organizing and sustaining flash mob protests, no protest took place on August 11th.[27] This unprecedented tactic in shutting down wireless service provoked an enormous reaction from protestors and free speech activists alike, who believed that the shutdown unconstitutionally violated protestors' First Amendment right to free speech.[28] Consequently, activists promised to continue to protest at BART stations until BART decided to "back away from their policy of cellphone [sic] censorship."[29]

This Comment will investigate the constitutionality of regulating flash mob protests via social media restrictions. This analysis will examine the relevant issues and law associated with such regulations and will demonstrate how the law should be applied practically, using the BART wireless-network shutdown as a case study.

Part II will begin by exploring whether a flash mob can qualify as expressive speech and thereby receive First Amendment protection. This section will analyze both the communicative and non-communicative elements of flash mobs, which are crucial to determining whether a flash mob is within the purview of the First Amendment. Additionally, Part II will investigate the allegation that a flash mob protest's use of social media frequently constitutes incitement,

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[24] *See Flash mob Definition, supra* note 1.
[25] Jonsson, *supra* note 19.
[26] *Id.*
[27] *Id.*
[28] Zusha Elinson, *After Cellphone Action, BART faces Escalating Protests, U.S.*, N.Y. TIMES, Aug. 20, 2011, http://www.nytimes.com/2011/08/21/us/21bcbart.html?_r=1&scp=1&sq=BART&st=cse.
[29] *Id.*

which is defined as unprotected speech that advocates for, and is likely to produce, imminent lawless action.[30] Part III will conduct a forum analysis to determine (1) what forum(s) are implicated by flash mob protests, and (2) what the appropriate level of judicial scrutiny is in such forum(s). This analysis is crucial, as "[e]ven protected speech is not equally permissible in all places and at all times."[31] Part IV will consider whether preemptive access restrictions to social media networks constitute prior restraints on expressive speech, which carry a "heavy presumption against [their] constitutional validity."[32] In *Near v. State of Minnesota*, the Supreme Court held that if speech is to be punished, it may only be punished after the speaker has spoken.[33] Because prior restraints are among the most heinous restrictions on speech, the governmental justification for such a restraint must fulfill a very stringent three-part test.[34]

Immediately following each Part, this comment will apply the relevant issues and law to the BART situation. Ultimately, after thoroughly analyzing all germane factors and circumstances and responding to all relevant counter-arguments these portions will demonstrate that social media regulations are subject to the highest judicial scrutiny, and, as a result, BART's wireless shutdown unconstitutionally censored protected speech.

Finally, Part V will synthesize each Part, concluding that although the constitutionality of flash mob regulations must be reviewed on a case-by-case basis, completely restricting a flash mob's use of social media technology generally results in a First Amendment violation. In sum, this Comment will argue that provided that a flash mob protest intends to communicate a constitutionally protected message that is likely to be understood, preemptive wireless and social media restrictions should be struck down as unconstitutional.

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[30] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).
[31] Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 799 (1985).
[32] Near v. State of Minnesota, 283 U.S. 697, 715 (1931).
[33] *Id.*
[34] Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 558 (1976).

II. When Do Flash Mob Protests Constitute Protected Speech?

In *Texas v. Johnson*, the Supreme Court held that First Amendment protections do not "end at the spoken or written word."[35] Consequently, expressive conduct may receive First Amendment protections.[36] Accordingly, flash mobs that are intended to convey communicative expression meet the first criterion for constitutional protection.

A. Expressive Conduct and the *O'Brien* Test

In *United States v. O'Brien,* the Supreme Court stated that "[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[37] As a result, even when conduct expresses an idea or opinion, it does not automatically receive the full protection of the First Amendment.[38] Moreover, to receive any First Amendment protection, the expressive conduct must be "sufficiently imbued with elements of communication . . . ."[39] To determine whether conduct is sufficiently communicative, the Supreme Court has asked whether "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it."[40] Therefore, expressive conduct must be analyzed on a case-by-case basis.[41]

Using this rationale, the Supreme Court has acknowledged that the following conduct is sufficiently expressive and qualifies for First Amendment protection: the wearing of black

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[35] Texas v. Johnson, 491 U.S. 397, 404 (1989).
[36] *See id.*
[37] U.S. v. O'Brien, 391 U.S. 367, 376 (1968); *see generally* James M. McGoldrick, Jr., *Symbolic Speech: A Message from Mind to Mind*, 61 OKLA. L. REV. 1 (2008).
[38] *See id.*
[39] *Johnson*, 491 U.S. at 404 (quoting Spence v. State of Wash., 418 U.S. 405, 409 (1974)).
[40] *Johnson*, 491 U.S. at 404 (quoting *Spence*, 418 U.S. at 410).
[41] This is an important consideration. Although one flash mob may be deemed protected expressive conduct, this does not mean that all flash mobs are protected expressive conduct. For example, a flash mob protesting for a particular cause will more than likely be deemed communicative in nature. In contrast, a flash mob robbery, where the participants spontaneously loot a shop or store in an effort to steal and evade police, certainly is not communicative in any way. Therefore, regardless of what conclusions are drawn about the BART flash mob protest, such conclusions are not indicative of how all flash mob protests should be treated.

armbands to protest the Vietnam War,[42] sit-ins against segregation,[43] and "picketing about a wide variety of causes."[44]

In contrast to protected spoken and written speech, the Government has more freedom to restrict protected expressive conduct.[45] A less stringent standard is justified because expressive conduct is usually comprised of both "speech and nonspeech" elements.[46] Accordingly, the Supreme Court has held that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech can justify incidental limitations on First Amendment freedoms."[47] As a result, to restrict expressive conduct the Government must prove that: (1) its regulation is within the Government's constitutional powers; (2) the regulation serves an "important or substantial governmental interest;" (3) the governmental interest is unrelated to the suppression of a particular idea or opinion; and (4) the regulation is not "greater than is essential" to further such an interest.[48] In *Johnson*, the Supreme Court emphasized that a restriction or regulation may not "proscribe particular conduct *because* it has expressive elements."[49]

The *O'Brien* case effectively illustrates how to apply this test. In *O'Brien*, the Supreme Court held that a statute that punished the defendant for destroying his draft card did not violate the First Amendment because the statute merely condemned the "noncommunicative aspect of

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[42] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505 (1969).
[43] Brown v. Louisiana, 383 U.S. 131, 141 – 142 (1966).
[44] *See e.g.*, Amalgamated Food Emp. Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968) (holding that picketing, which carries both elements of speech and conduct, that is "carried on in a location open generally to the public is, absent other factors involving the purpose or manner of the picketing, protected by the First Amendment"); U.S. v. Grace, 461 U.S. 171, 176 (1983) (finding that "[t]here is no doubt that as a general matter peaceful picketing and leafleting are expressing activities involving 'speech' protected by the First Amendment.").
[45] *Johnson*, 491 U.S. at 406.
[46] U.S. v. O'Brien, 391 U.S. 367, 376 (1968).
[47] *Id.*
[48] *Id.* at 377 ("[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.").
[49] *Johnson*, 491 U.S. at 406.

[his] conduct."[50] The defendant, who set his draft card on fire to display his anti-war sentiment, argued that the statute unconstitutionally infringed upon his right to freely express his opposition to the war and the draft.[51] The Supreme Court rejected this argument, concluding that the government had a substantial interest in preventing harm to "the smooth and efficient functioning of the Selective Service System," which required each draftee to have and preserve their draft certificates.[52] Thus, when the defendant destroyed his certificate, he frustrated a substantial governmental interest.[53] As a result, the defendant was held accountable for the noncommunicative impact of his conduct—frustrating the Selective Service System—rather than his display of anti-war sentiment.[54] Ultimately, the Supreme Court concluded that (1) the government had a "substantial interest in assuring the continuing availability of issued Selective Service certificates," (2) the statute narrowly protected this interest by only condemning the noncomunicative elements of divergent conduct, (3) the defendant frustrated the Government's interest by burning his draft card, and (4) the statute only incidentally limited the defendant's expression.[55]

In the context of flash mobs, the *O'Brien* test reveals an important consideration: flash mobs must be considered on a case-by-case basis. For instance, a flash mob robbery, which entails numerous people spontaneously looting a particular store or neighborhood, certainly is not imbued with any communicative elements.[56] Flash mob protests, on the other hand, almost always intend to communicate a message. Despite this, each flash mob protest must be individually analyzed to ascertain whether the protest's message is likely to be understood,

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[50] *O'Brien*, 391 U.S. at 381 – 82.
[51] *Id.* at 381.
[52] *Id.* at 382.
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] Shayon, *supra* note 6.

whether the government has a significant interest in regulating the noncommunicative elements of the protest, and whether the government furthers that interest in a fashion that only incidentally limits the protesters' expression.

B. Incitement

Many opponents to flash mobs argue that flash mobbers use social media to incite imminent lawless action.[57] To explore this issue, it is essential to understand that the right to free speech "is not absolute at all times and under all circumstances."[58] In *Chaplinsky v. State of New Hampshire*, the Supreme Court stated, "there are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problems."[59] Among these unprotected classes of speech are incitement,[60] fighting words,[61] libel,[62] and obscenity.[63] Thus, by arguing that flash mob protests constitute incitement, opponents are espousing the belief that flash mobs, and their use of social media, may be freely restricted and regulated by governmental authorities.[64]

The seminal case regarding incitement is *Schenck v. United States*.[65] In *Schenck*, the Supreme Court considered the constitutionality of the Espionage Act—a World War I statute that proscribed speech attempting to obstruct the wartime draft and "cause insubordination in the military and naval forces of the United States."[66] Charles Schenck and Elizabeth Baer were

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[57] Silverman, *supra* note 12.
[58] Chaplinsky v. N.H., 315 U.S. 568, 571 (1942).
[59] *Id.* at 371 – 72.
[60] Brandenburg v. Ohio, 395 U.S. 444 (1969).
[61] Cohen v. Cal., 403 U.S. 15, 20 (1971) (ruling fighting words, or "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke a violent reaction," may be freely banned without "a demonstration of additional justifying circumstances").
[62] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 268 (1964) (finding that printing a libelous publication about a citizen, who is not a public official, is not protected by the Constitution).
[63] FCC v. Pacifica Found., 438 U.S. 726, 743 (holding that patently offensive sexual and excretory speech is not protected by the First Amendment).
[64] Silverman, *supra* note 12.
[65] Schenck v. U.S., 249 U.S. 47 (1919).
[66] *Id.* at 48 – 49.

indicted under the Espionage Act for printing and distributing a pamphlet that advocated for enlisted men and drafted men to forsake their duty to the United States Army.[67] Schenck and Baer argued that the Espionage Act unconstitutionally violated the First Amendment because the Act discriminately punished actions based on their viewpoint.[68]

The Supreme Court dismissed this argument, holding that "the character of every act depends upon the circumstances in which it is done."[69] As a result, the Supreme Court concluded that when words create a "clear and present danger" to the public, those words are not afforded constitutional protection.[70] Furthermore, the Supreme Court stated in dicta that wartime speech is much more likely to create a clear and present danger; therefore, such speech is not afforded as much protection as speech during peacetime.[71] Consequently, the Supreme Court concluded that the Espionage Act did not violate the First Amendment because speech that advocates for the obstruction of military recruitment is likely to create a clear and present danger to military conscription.[72]

Although the clear and present danger doctrine was progressively weakened over time, it governed incitement for nearly fifty years.[73] In 1969, however, the Supreme Court abrogated clear and present danger with the *Brandenburg v. Ohio* ruling.[74] In *Brandenburg*, the Supreme Court considered whether the leader of the Ku Klux Klan's (KKK) First Amendment rights were unconstitutionally infringed when he was convicted under the Ohio Criminal Syndicalism

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[67] *Id.* at 49, 51.
[68] *Id.* at 51.
[69] *Id.* at 52.
[70] *Id.* (emphasis added).
[71] *Schenck*, 249 U.S. at 52.
[72] *Id.* at 53.
[73] *See e.g.*, Yates v. U.S., 354 U.S. 298, 319 (1957) (holding that mere advocacy of a forcible overthrow of the government as an abstract principle does not violate the clear and present danger test); *see also* Andrianna D. Kastanek, *From Hit Man to a Military Takeover of New York city: The Evolving Effects of Rice Paladin Enterprises on Internet Censorship*, 99 NW. U. L. REV. 383, 386 – 394 (2004).
[74] Brandenburg v. Ohio, 354 U.S. 444, 444 (1969).

statute.[75] This statute restricted speech that advocated for "the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform."[76] The KKK leader's conviction was based on him delivering a fanatical speech that lobbied for the KKK to take "revengent" action against the government and for KKK sympathizers to march upon Congress.[77] In addition, numerous members of the audience held firearms and burned crosses.[78]

Rather than apply the clear and present danger standard, the Supreme Court adopted a new test, concluding that the "constitutional guarantees of free speech and free press do not permit a State to proscribe advocacy of the use of force or law violation except where such advocacy is directed to inciting or producing *imminent lawless action* and it is *likely* to incite or produce such action."[79] Consequently, the Supreme Court introduced a much stricter, two-pronged standard.[80] Under the *Brandenburg* test, inciting speech must advocate for lawless action that is (1) imminent and (2) likely to occur.[81] Applying this standard to the facts, the Supreme Court found that the Ohio Criminal Syndicalism Act was unconstitutional because the statute punished "mere advocacy."[82]

This standard draws a distinction between mere advocacy and preparation.[83] In *Noto v. United States*, the Supreme Court distinguished "preparing a group for violent action" from

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[75] *Id.*
[76] *Id.* at 444 – 45
[77] *Id.* at 445 – 47
[78] *Id.*
[79] *Id.* at 447 (emphasis added); *see also Brandenburg*, 395 U.S. at 452 (Black, J., concurring) (finding that the clear and present danger test should be abrogated because it has been "manipulated to crush what [Justice] Brandeis called '[t]he fundamental right of free men to strive for better conditions through new legislation and new institutions' by argument and discourse even in times of war") (quoting Pierce v. U.S., 252 U.S. 239, 273 (1947) (Brandeis, J., dissenting)).
[80] *See id.*
[81] *Brandenburg*, 354 U.S. at 447.
[82] *Id.* at 449.
[83] Noto v. U.S., 367 U.S. 290, 297 – 98 (1960).

abstractly teaching that violence is a moral propriety or necessity.[84] As a result, a speaker's advocacy or encouragement of violent tactics does not constitute imminent lawless action unless such advocacy can be considered preparation, which arises when it is reasonably certain that lawless or violent action will occur.[85] According to the Supreme Court, "to rule otherwise would ignore the 'profound national commitment' that 'debate on public issues should be uninhibited, robust, and wide-open.'"[86]

Proper application of the *Brandenburg* doctrine requires an understanding of the term "lawless action." According to the Ninth Circuit, "lawless action" under the *Brandenburg* doctrine is distinguishable from "civil disobedience."[87] In *White v. Lee*, the Ninth Circuit held that

> "[i]mminent lawless action," as used in *Brandenburg*, means violence or physical disorder in the nature of a riot. Peaceful speech, even speech that urges civil disobedience, is fully protected by the First Amendment. Were this not the case, the right of Americans to speak out peacefully on issues and to petition their government would be sharply circumscribed.[88]

Although *White* draws a distinction between lawless action and civil disobedience, the difference between "physical disorder in the nature of a riot" and civil disobedience remains unclear. Black's Law Dictionary clarifies, defining civil disobedience as "a deliberate but nonviolent act of lawbreaking to call attention to a particular law or set of laws believed by the actor to be of questionable legitimacy or morality."[89] Therefore, civil disobedience does not

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[84] *Id.*
[85] *Id.*
[86] N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 886, 928 (1982).
[87] White v. Lee, 227 F.3d 1214, 1228 (9th Cir. 2000).
[88] *Id.*
[89] BLACK'S LAW DICTIONARY, *Civil Disobedience* (9th ed. 2009); *see also* ARCHIBALD COX, JR. ET AL., CIVIL RIGHTS, THE CONSTITUTION, AND THE COURTS 169 (1968) ("Social protests and even civil disobedience serve the law's need for growth.").

qualify as lawless action merely because violations of law occur.[90] Rather, the crux of civil disobedience is the existence of a nonviolent act that calls attention to some alleged immorality.[91] In contrast, Black's defines the term riot—the nature of lawless action—as "[a]n unlawful disturbance of the peace by an assemblage of three or more persons acting with a common purpose in a violent or tumultuous manner that threatens or terrorizes the public or an institution."[92] Thus, the primary difference between civil disobedience and a riot is violence and tumultuousness rather than illegality.

As a result, under *Brandenburg*, inciting speech is speech that (1) is directed toward producing imminent lawless, or riotous, action that (2) is likely to produce such action. Thus, when applied to flash mob protests' use of social media, the most important inquiries are (1) what conduct or measures the speech is advocating for, and (2) whether such actions constitute lawless action or civil disobedience.

C. Application to BART

1.) Did the Planned BART Flash Mob Protest Constitute Expressive Speech?

To receive constitutional protection, the August 11th planned flash mob protest must be "sufficiently imbued with elements of communication . . . ."[93] As such, the planned protest must be a vehicle for communicating a particular message.[94] Additionally, it must be likely that this message will be "understood by those who viewed it."[95]

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[90] *Id.*
[91] *Id.*
[92] BLACK'S LAW DICTIONARY, *Riot* (9th ed. 2009).
[93] Tex. v. Johnson, 491 U.S. 397, 404 (1989).
[94] *Id.*
[95] *Id.*

Applying these principles to BART, the BART flash mobbers intended to use the flash mob as a vehicle for expressing their opposition to BART PD's violent reputation.[96] In fact, the planned protest was part of a massive movement known as "No Justice, No BART," which was organized to call the public's attention to BART PD's heinous and violent actions.[97] Therefore, the flash mob protest was aimed at communicating a particularized message. Furthermore, this message was likely to be understood by those who viewed it. This is evident through the July 11th protest, which featured flash mobbers wearing bloody T-shirts to convey BART PD's violent track record, numerous chants calling for the BART PD's disbandment, and countless signs opposing violence against BART passengers like Charles Hill.[98] Moreover, the Supreme Court has recognized picketing as sufficiently expressive conduct.[99] As a result, the planned flash mob protest qualifies as expressive conduct that may receive First Amendment protection.

Although the planned flash mob protest qualifies as protected expressive conduct, the government may nevertheless be entitled to restrict it.[100] To begin this examination, it is important to note that the planned protest had both speech and nonspeech elements.[101] The speech elements encapsulated the protestors' opposition to BART PD. These elements were disseminated via the protestors picketing on train platforms as well as their posts on social networking forums like Facebook, Twitter, and even through text messaging and email.[102] The nonspeech elements, on the other hand, included causing delays to the BART system, causing

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[96] Vivian Ho, *BART: Next time, 'zero tolerance' for disruptions*, SAN FRANCISCO CHRONICLE, July 13, 2011, http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2011/07/13/BAP51K9JQR.DTL.
[97] *Id.*
[98] La Ganga & Romney, *supra* note 20.
[99] *See generally* Amalgamated Food Emp. Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968).
[100] Tex. v. Johnson, 491 U.S. 397, 406 (1989).
[101] U.S. v. O'Brien, 391 U.S. 367, 376 (1968).
[102] *See Flash Mob Definition, supra* note 1 (as its definition suggests, flash mobs are intrinsically linked to social media. Social media is crucial to flash mobs in that they allow flash mobbers to organize and publicize their cause to enormous amounts of people).

temporary station closures, and, most importantly, endangering BART passengers' and employees' safety.[103]

The next step for determining whether the BART protest constitutes expressive speech requires application of the *O'Brien* test. The *O'Brien* test is comprised of four parts: (1) the government regulation "is within the constitutional power of the Government"; (2) "it furthers an important or substantial government interest"; (3) "the government interest is unrelated to the suppression of free expression"; and (4) the incidental restriction on "First Amendment freedoms is no greater than is essential to the furtherance of that interest."[104] If all four elements are satisfied then the government may regulate the flash mob protest. BART likely fails the first prong of the *O'Brien* test because the regulation unconstitutionally restricts access to a traditional public forum—BART's wireless and the social networks.[105] This point, however, will be analyzed in greater detail in Part III.E.3 below.[106]

Next, it is questionable whether BART satisfies the second prong of the *O'Brien* test. While BART certainly has an important and substantial governmental interest in preserving the safety of its passengers, it is arguable whether that interest is furthered by BART shutting down the wireless-network. According to BART, the wireless-network shutdown prevented congestion on the train platforms, thereby preserving passenger and personnel safety.[107] In addition, BART was concerned that the flash mob would cause substantial train delays and station closures.[108] As seen through the July 11th protest, these concerns were legitimate, and

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[103] *See* Elinson, *supra* note 28; Silverman, *supra* note 12; Ho, *supra* note 96.
[104] *O'Brien*, 391 U.S. at 381 – 82.
[105] *See* Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788, 799 (1985).
[106] *See infra* Part III.E.3.
[107] Letter from Bob Franklin, President, BART Bd. of Dirs., & Sherwood Wakeman, Interim Gen. Manager, to BART Customers (Aug. 20, 2011), *available at* http://www.bart.gov/news/articles/2011/news20110820.aspx [hereinafter *BART Letter*].
[108] *Id.*

BART had an important interest in ensuring that they did not occur again.[109] Despite this, the wireless shutdown only marginally furthered that interest, if at all.

According to an August 20, 2011 letter from BART officials to their passengers, BART dismantled wireless service because it received the following information:

> [Protestors] would be giving and receiving instructions to coordinate their activities via cell phone after their arrival on the train platforms at more than one station. Individuals were instructed to text the location of police officers so that the organizers would be aware of officer locations and response times. The overall information about the planned protest led BART to conclude that the planned action constituted a serious and imminent threat to the safety of BART passengers and personnel . . .[110]

As a result, the wireless shutdown would not be effective until *after* the protest had begun—after the BART patrons and personnel were supposedly in danger. Notwithstanding, a court would likely rule that the wireless shutdown alone adequately advanced the government's interest in public safety. However, in addition to the wireless shutdown, BART assigned over 120 extra uniformed police officers and operations personnel to their train stations in preparation of the flash mob."[111] Consequently, BART provided ample security to quickly and efficiently suppress the planned flash mob without the wireless shutdown. Ultimately, the shutdown was a superfluous restriction that was not needed to further the government's interest in public safety. As a result, the wireless restriction is vulnerable to the *O'Brien* test's second prong.

BART easily satisfies the third prong of the *O'Brien* test as the shutdown was entirely unrelated to the suppression of free expression. If BART's letter is accepted as true, its sole motivation for the wireless shutdown was to preserve passenger and personnel safety.[112]

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[109] *See* Elinson, *supra* note 21; Ho, *supra* note 96.
[110] *See BART Letter*, *supra* note 107.
[111] *Id.*
[112] *Id.*

Consequently, BART implied that they would take similar preemptive action against any planned protest that could potentially endanger passenger or personnel safety regardless of its message.[113] Presumably, BART would have taken the same or similar actions if it learned of a planned flash mob defending BART PD. As a result, BART's wireless shutdown was likely unrelated to the suppression of free speech.

As to *O'Brien*'s fourth and final prong, BART likely cannot carry its burden. To satisfy the last prong of the *O'Brien* test, an incidental restriction on First Amendment freedoms may not be "greater than is essential" to further the Government's interest.[114] In the instant situation, the amount of expression that is censored by BART's wireless shutdown substantially outweighs the extent that BART's interest in public safety is furthered. To illustrate, every individual on BART's platforms, regardless of whether he or she intended to participate in the protest, was denied access to BART's wireless and social networks.[115] As a result, an enormous amount of expression was censored as passengers were prevented from calling, texting, tweeting, posting, or communicating in any way with people outside the platform areas. Furthermore, BART's bolstered security diluted the wireless shutdown's safety benefits.[116] As a result, the shutdown censored a massive amount of expression while only marginally furthering BART's safety interest. Thus, the restriction had more than an incidental effect on protected expression, thereby failing *O'Brien*'s final prong.

Ultimately, BART does not have a very good chance of passing the *O'Brien* test. Thus, the planned flash mob likely constitutes protected expressive conduct under the First Amendment.

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[113] *See id.*
[114] U.S. v. O'Brien, 391 U.S. 367, 381-82 (1968).
[115] *See BART Letter*, *supra* note 107.
[116] *Id.*

2.) Can the Planned Protest be Characterized as Incitement?

Under the *Brandenburg* test, the BART flash mob protest and, more specifically, the protestors' use of social media, did not constitute inciting speech. In BART's August 20th letter to its passengers, BART officials claimed that they had obtained information that the protestors would be using their cell phones to coordinate the protest once on BART's train platforms.[117] Moreover, BART believed that such individuals had been instructed to communicate the location of police officers and their response times to perpetuate the demonstration.[118] This information led BART to conclude that the planned protest constituted a "serious and imminent threat to the safety of BART passengers and personnel and the safe operation of the BART system . . . ."[119] This explanation, however, does not satisfy the *Brandenburg* test because the protestors' speech advocated for civil disobedience as opposed to imminent lawless action.

The BART flash mobbers used social media such as Facebook to organize and advocate for the August 11th planned protest at BART's train stations.[120] In fact, a group known as "No Justice, No Bart" created a Facebook page to recruit and organize support for the August 11th flash mob protest.[121] Additionally, it is reasonable to assume that this advocacy was likely to result in a protest on August 11th. Despite this, the message that the protestors disseminated and the actions that they advocated for were neither directed at nor likely to produce imminent lawless action as defined by the *Brandenburg* doctrine and the Ninth Circuit.

First, BART protestors were advocating for the reform and/or the disbandment of BART PD and not for imminent lawless action.[122] The protestors' speech was directed at affecting

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[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] Andrew Dalton, *Group Demanding BART Police Be Disbanded Might Be Disbanded by BART Police, News*, SFIST.COM (July 11, 2011), http://sfist.com/2011/07/11/group_demanding_bart_police_be_disb.php.
[121] *Id.*
[122] *See id.*; La Ganga & Romney, *supra* note 20.

change by calling the public's attention to BART PD's questionable tactics and unrestrained use of deadly force.[123] In response, BART will likely argue that the protestors encouraged the use of illegal means to accomplish this goal, thereby bringing the speech within the ambit of lawless action. This argument, however, is without merit because, as the Ninth Circuit held in *White*, illegality does not necessarily imply lawless action.[124] BART's trepidations about the August 11th planned protest were largely based on the previous July 11th flash mob protest.[125] Although the July 11th flash mob protest was extremely disruptive, the protest itself did not rise to the level of tumultuous or violent.[126] In fact, when asked about this protest, BART's spokesman Linton Johnson acknowledged, "Nobody was hurt."[127] In addition, news reports indicate that the protestors employed nonviolent tactics such as picketing, chanting, and blocking access to trains.[128] As a result, although the protestors' tactics can be appropriately characterized as law breaking, breaking the law—albeit in a peaceful manner—is a key characteristic of civil disobedience.[129] Therefore, the planned August 11th flash mob protest likely would have resulted in civil disobedience as opposed to lawless action.

Ultimately, based on the previous flash mob protest, BART had no reason to believe that the August 11th protest would become tumultuous or violent. Consequently, the August 11 planned protest was comparable to civil disobedience and was not likely to incite or produce imminent lawless action as is required by the *Brandenburg* Doctrine.

III. Forum Analysis

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[123] *See* La Ganga & Romney, *supra* note 20 (reporting that protestors chanted, "No justice, no peace! Disband the BART police" in response to the BART police shooting of Charles Hill).
[124] White v. Lee, 227 F.3d 1214, 1228 (9th Cir. 2000); *see also Civil Disobedience*, *supra* note 89.
[125] *See BART Letter*, *supra* note 107.
[126] *See* Ho, *supra* note 96.
[127] *Id.*
[128] *See* La Ganga & Romney, *supra* note 20.
[129] *See Civil Disobedience*, *supra* note 89.

Although certain flash mob protests are considered protected speech under the First Amendment, the Supreme Court has held that "[e]ven protected speech is not equally permissible in all places and at all times."[130] As a result, to decide whether protected speech is permissible, a court must determine the type of forum that the speaker is attempting to access.[131] This determination establishes whether "the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes."[132] This evaluation is crucial because depending on a property's character, the Government is entitled to impose various limitations upon a speaker.[133] To facilitate this analysis, the Supreme Court has divided property into three distinct forums: (1) the traditional public forum; (2) the Government-designated public forum; and (3) the nonpublic forum.[134]

A. The Traditional Public Forum

Traditional public forums include streets, parks, and all other types of property that "have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thought between citizens, and discussing public questions."[135] As a result, the principal purpose of traditional public forums is the free exchange of ideas.[136] Due to traditional public forums' historical commitment to free expression, the Government may not exclude speakers from these forums unless the exclusion serves a

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[130] Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 799 (1985).
[131] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44 (1983).
[132] *Cornelius*, 473 U.S. at 800.
[133] *Perry*, 460 U.S. at 799; *see also Cornelius*, 473 U.S. at 799 ("Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities.").
[134] *Cornelius*, 473 U.S. at 800.
[135] *Perry*, 460 U.S. at 44 (quoting Hague v. CIO, 307 U.S. 496, 515 (1939)); *see also Cornelius*, 473 U.S. at 802 (ruling that "[t]raditional public fora are those places which by long tradition or by government fiat have been devoted to assembly and debate").
[136] *Perry*, 460 U.S. at 44.

"compelling state interest and the exclusion is narrowly drawn to achieve that interest."[137] Despite this stringent standard, the Government is entitled to enforce content-neutral time, place, and manner regulations on speech, provided those regulations are "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."[138]

In *Arkansas Education Television Commission v. Forbes*, the Supreme Court clarified what property qualifies as a traditional public forum by rejecting "the view that [the] traditional public forum status extends beyond [a property's] historical confines."[139] As a result, the Supreme Court held that one must examine the history of a property to determine whether it has been held open for expressive activity.[140] An example of the Court's application of the historical confines standard is seen in *United States v. American Library Association Inc.*, where the Supreme Court considered whether the Internet constitutes a traditional public forum.[141] In *American Library*, the plaintiff challenged the constitutionality of implementing an internet website filter in a public library.[142] Applying the historical confines standard, the Court ruled that because Internet access did not exist until recently, it had not "immemorially been held in trust for the public" for purposes of free expression.[143] As a result, Internet access within a public library does not meet the historical confines standard and is thereby not a traditional public forum.[144]

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[137] *Cornelius*, 473 U.S. at 800.
[138] *Perry*, 460 U.S. at 45.
[139] Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666, 678 (1998) (finding that public forums are those places that by definition are "open for expressive activity regardless of the government's intent." The Court also used the phrase "unfettered access" in describing the nature of a traditional public forum).
[140] *Id.*
[141] U.S. v. Am. Library Ass'n, Inc., 539 U.S. 194, 205-06 (2003).
[142] *Id.*
[143] *Id.* (concluding that "doctrines surrounding traditional public forums may not be extended to situations where such history is lacking").
[144] *Id.*

Similar to *American Library*, in *Putnam Pit, Inc. v. City of Cookeville.*, the Sixth Circuit held that although certain aspects of the Internet conform to the definition of a traditional public forum, it has not "time out of mind . . . [been] used for purposes of . . . communicating thoughts between citizens, and discussing public questions."[145] Consequently, despite its conforming characteristics, the Internet is not a public forum solely because of the historical confines standard. As a result, the Internet illustrates the pitfalls associated with a rigid historical confines standard.

B. The Government-designated Public Forum

The second category of forums—the Government-designated public forum—consists of property that the Government explicitly opens to the public for expressive activity.[146] Similar to traditional public forums, speakers may not be excluded from Government-designated public forums unless the exclusion is narrowly tailored to serve a compelling governmental interest.[147] Furthermore, Government-designated public forums are afforded the same protections regardless of whether the Government voluntarily created the forum or was compelled to create the forum.[148] Despite this, the Government is not obligated to indefinitely maintain the public character of such forums.[149]

A Government-designated public forum is not formed by mere inaction or by the allowance of "limited discourse" in a particular area.[150] "Only by intentionally opening a

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[145] Putnam Pit, Inc. v. City of Cookeville, 221 F.3d 834, 843 (6th Cir. 2000) (quoting Hague v. CIO, 307 U.S. 496, 515 (1939)); *see also* Reno v. Am. Civil Liberties Union, 521 U.S. 844, 851 (1997) (finding that "[a]nyone with access to the Internet may take advantage of a wide variety of communication and informational methods" and such discourse may be conducted with anyone in the world who has access to the internet).
[146] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).
[147] Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 800 (1985).
[148] *Perry*, 460 U.S. at 45 (1983) (citing Widmar v. Vincent, 454 U.S. 263 (1981)).
[149] *Id.* at 46.
[150] *Cornelius*, 473 U.S. at 802 – 03 (holding "the First Amendment does not guarantee access to property simply because it is owned or controlled by the government.") (quoting U.S. Postal Serv. v. Council of Greenburgh Civic Ass'n., 453 U.S. 114, 129 (1981)).

nontraditional forum for public discourse" is a Government-designated public forum created.[151] Thus, in contrast to a traditional public forum, which is automatically open for public discourse regardless of governmental intent, a Government-designated forum is only created through a clear governmental intent to open property for public discourse. Moreover, to ascertain whether a Governmental authority specifically opened property for free expression, a court will look to the "policy and practice" of the particular agency or body.[152] In addition, courts will also look to the nature of the property in question and its "compatibility with expressive activity to discern the government's intent."[153]

An example of a Government-designated public forum is seen in *Widmar v. Vincent*, where the Supreme Court held that a state university created a public forum when it made certain campus facilities available to registered student groups.[154] In *Widmar*, the university unconstitutionally violated a student religious group's First Amendment rights by denying them access to the university's facilities based on their desire to engage in religious worship and discussion.[155] The Supreme Court held that the university's policy in accommodating registered student group meetings evidenced a governmental intent to create a public forum.[156] As such, the University was required to justify their exclusion of the religious group by proving that the exclusion was narrowly tailored to serve a compelling governmental interest.[157] Ultimately, the University was unable to produce a compelling justification to carry this heavy burden.[158]

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[151] *Id.*
[152] *Id.*
[153] *Id.* (holding that "the nature of the property is inconsistent with expressive activity," a court is particularly reluctant to rule the Government intended to create a public forum).
[154] Widmar v. Vincent, 454 U.S. 263 (1981).
[155] *Id.* at 269.
[156] *Id.* at 268.
[157] *Id.* at 270.
[158] *Id.*

In contrast, in *American Library*, the Supreme Court held that Internet access in a public library is not a designated public forum because a "public library does not acquire Internet terminals in order to create a public forum for Web publishers to express themselves . . . ."[159] Rather, libraries provide "Internet access, not to 'encourage a diversity of views from private speakers,' but for the same reasons it offers other library resources: to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality."[160] Thus, because the Supreme Court found that the library provided Internet access solely for information gathering, the library did not intend to designate its Internet access for expression.[161] *American Library* is an example of the Court investigating the policy and practices of a Governmental agency to ascertain an intent to create a public forum. Ultimately, absent clear evidence of a governmental intent to create a public forum, courts will rule that the forum is nonpublic under the First Amendment.[162]

C. The Nonpublic Forum

When property does not qualify as a traditional public forum or a Government-designated public forum, the property is considered a nonpublic forum.[163] Speech within nonpublic forums receives the least amount of First Amendment protection and "[a]cess . . . can be restricted as long as the restrictions are 'reasonable and [are] not an effort to suppress expression merely because officials oppose the speaker's view.'"[164] In addition, an access restriction to nonpublic forums "need only be reasonable; it need not be the most reasonable or the only reasonable limitation."[165] Furthermore, such restrictions may be based on "subject matter and speaker

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[159] U.S. v. Am. Library Ass'n, Inc., 539 U.S. 194, 206 (2003).
[160] *Id.* at 206 – 07.
[161] *Id.*
[162] Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 803 (1985).
[163] *Id.* at 800.
[164] *Id.*
[165] Int'l Soc. for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 683 (1992).

identity" so long as the restriction is reasonable with respect to the character of the forum and the restriction is viewpoint neutral.[166] Thus, a speaker may not be excluded from a nonpublic forum merely because the Government disagrees with his or her viewpoint on a subject that otherwise is appropriate within the forum.[167]

Additionally, courts will look to the nature of the property in question to determine if it is a nonpublic forum.[168] Where "the nature of the property is inconsistent with expressive activity," a court is particularly reluctant to rule that the Government intended to create a public forum.[169] This rule is consistent with the idea that the Government, like private property owners, has the right to "preserve the property under its control for the use to which it is lawfully dedicated."[170] Despite this, even when property is characterized as nonpublic "it can still serve as a forum for First Amendment expression if the expression is appropriate for the property and is not incompatible with the normal activity of a particular place at a particular time."[171] This rule implies that excluding expressive activity that is consistent with the nature and activity of a forum is unreasonable.

One example of a nonpublic forum is an airport terminal.[172] In *International Society for Krishna Consciousness, Inc. v. Lee*, the Supreme Court held that airport terminals do not constitute public forums because (1) "the tradition of airport activity does not demonstrate that airports have historically been made available for speech activity," and (2) airports have not been

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[166] *Cornelius*, 473 U.S. at 806 (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 37 (1983)).
[167] *Id.* ("Although a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum, or if he is not a member of the class of speakers for whose especial benefit the forum was created, the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includable subject.").
[168] *Id.*
[169] *Id.*
[170] *Krishna*, 505 U.S. at 679 – 80.
[171] Gannett v. Metro. Transp. Auth., 745 F.2d 767, 773 (2d Cir. 1984) (holding that although a Mass Transit Authority station is a nonpublic forum, selling newspapers through news racks is consistent with the normal activity of the forum and thus it is unreasonable to completely exclude them).
[172] *Krishna*, 505 U.S. at 681.

"intentionally opened by their operators" for speech activity.[173] Furthermore, the distribution of religious materials in airplane terminals, which was the challenged speech activity, was inconsistent with the nature of the property as such distributions were likely to disrupt business by causing passengers an unwanted inconvenience.[174] As a result, the Supreme Court concluded that the terminals were nonpublic forums, and the challenged access restrictions were subject to a reasonableness test.[175] Applying this reasonableness test, the Supreme Court held that because solicitation has a disruptive effect on airport activities and causes unwanted passenger inconvenience, excluding solicitation from the forum was reasonable, and thus constitutional.[176]

In essence, the nonpublic forum operates as a catchall forum because all types of property that do not qualify as traditional public forums or Government-designated public forums necessarily fall into this category.

D. Beginning the Forum Analysis

To conduct a forum analysis, the most logical starting point is determining what the relative forums are. In *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, the Supreme Court held that a forum does not have to be tangible property.[177] Rather, a forum is "defined in terms of the access sought by the speaker," and, as a result, a "particular channel of communication [can] constitute [a] forum for First Amendment purposes."[178] Moreover, the Supreme Court held that there are two types of access that speakers can seek—general access or limited access.[179] A speaker seeks general access to public property when he or she attempts to

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[173] *Id.* at 680 – 81.
[174] *Id.* at 683.
[175] *Id.* at 684.
[176] *Id.* at 685.
[177] Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 801 (1985).
[178] *Id.*
[179] *Id.*

utilize the entire property for speech purposes.[180] As a result, the forum encompasses the entire property.[181] In contrast, "[i]n cases in which limited access is sought, [the Supreme Court has] taken a more tailored approach to ascertaining the perimeters of a forum within the confines of the government property."[182]

For example, in *Perry Education Association v. Perry Local Educators' Association*, the speaker attempted to gain access to a public school's internal mail system and the teachers' mailboxes.[183] As a result, the Supreme Court held that despite its lack of tangibility, the internal mailing system, rather than the school, was the relevant forum.[184] This is an instance where a speaker sought limited access.[185] Comparably, in *Cornelius*, the Supreme Court ruled that the Combined Federal Campaign (CFC), which was a charity drive aimed at federal employees, was the relevant forum despite the CFC's designation as "a particular means of communication."[186] Similar to *Perry*, the Court took a more tailored, limited-access approach to identifying the CFC as the relevant forum.[187]

Therefore, a court identifies a forum by determining where a speaker is attempting to gain access.[188] In addition, it is inconsequential whether the speaker is attempting to gain access

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[180] *Id.*
[181] *Id.*
[182] *Id.* (internal citations omitted).
[183] *See generally* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) (holding that the internal mail system was the relevant forum notwithstanding the fact that an internal mail system lacks physicality).
[184] *Id.* (holding that the internal mail system was a nonpublic forum because the mailing system was only intended for use by the school's faculty and staff. Thus, the plaintiffs were not among the group for whose especial benefit the forum was created).
[185] Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 801 (1985).
[186] *Id.* (finding that the CFC was a nonpublic forum because it did not meet the criteria for a traditional public forum or a Government-designated public forum. The Supreme Court ruled that neither the history nor he nature of the CFC supported respondents' contention that the CFC was a Government-designated public forum); *see also* U.S. v. Am. Library Ass'n, Inc., 539 U.S. 194 (2003) (holding that Internet access in a public library is a nonpublic forum despite the Internet's intangibleness).
[187] *Cornelius*, 473 U.S. at 801.
[188] *Id.*

to something that is tangible or intangible.[189] Finally, the scope of the forum ultimately depends on whether the speaker is attempting to gain general or limited access to the property.[190] However, where a speaker attempts to access a means of communication, such as a social network, a court should employ a limited access approach to identifying the forum.[191]

E. Application to BART

1.) Identifying the Forum(s)

With respect to the August 11th planned protest, it is clear that the flash mobbers were attempting to gain access to BART's train platforms.[192] This can be inferred by examining the July 11th protest, which used BART's train platforms as the primary location for the demonstration.[193] While the train platforms were an obvious forum, BART flash mobbers also attempted to gain access to a particular channel of communication: BART's wireless-network and, more specifically, the social media networks that it enables.

As is evident by its definition, flash mobs are intrinsically linked with social media.[194] Thus, the success of a flash mob protest is contingent upon how well flash mobbers can utilize social media to organize and disseminate information to additional supporters. Consequently, BART protestors likely relied on having the ability to access BART's wireless-network during the planned protest.[195] Although the wireless-network is not tangible property like a park or a sidewalk, the Supreme Court has held that a means of communication can be a forum for First

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[189] *Id.*
[190] *Id.*
[191] Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 801 (1985).
[192] *See BART Letter, supra* note 107.
[193] *See* Silverman, *supra* note 12.
[194] *Flash Mob Definition, supra* note 1 (a flash mob is comprised of "a group of people summoned (*as by e-mail or text message*) to a designated location at a specified time to perform an indicated action before dispersing") (emphasis added).
[195] *Id.*

Amendment purposes.[196] As a result, the BART situation is comparable to *Cornelius* and *Perry*, where the relevant forums were also intangible means of communication.[197] As such, BART's wireless-network qualifies as a forum.[198]

Once the forums are identified, a court must determine what type of access is sought: general or limited.[199] BART will likely argue that the protestors sought general access to the property, and therefore, the forum encompassed BART's train stations as a whole. This argument, however, is unjustified as the July 11th protest merely took place on BART's train platforms.[200] According to the Supreme Court, when a speaker seeks such limited access a court may take a more tailored, piecemeal approach to determining the appropriate forum.[201] In contrast, when a speaker attempts to access a property in its entirety, the forum encompasses the whole property.[202] Additionally, a court should take a tailored, limited access approach when a means of communication—such as BART's wireless-network—is implicated.[203] In the instant matter, the BART protestors merely attempted to access a specific location and network within BART's train stations.[204] Consequently, the access sought was limited, and a court should take a tailored approach to determining the scope of the forum.

Using a tailored approach, a court will certainly find that BART's platform areas constitute a forum. As for the second possible forum—BART's wireless-network—free speech activists may be argue that under a limited access approach, this analysis must be tailored even further. During flash mobs, protestors only seek access to social media networks, such as instant

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[196] Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 801 (1985).
[197] *Id.*; Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 37 (1983).; *see also* U.S. v. Am. Library Ass'n, Inc., 539 U.S. 194 (2003) (examining whether the internet is a public or nonpublic forum).
[198] *Cornelius*, 473 U.S. at 801.
[199] *Id.*
[200] *See BART Letter*, *supra* note 107; Silverman, *supra* note 12.
[201] *See BART Letter*, *supra* note 107.
[202] *Id.*
[203] *Id.*
[204] *Id.*; Silverman, *supra* note 12.

messaging, Twitter, and Facebook, to disseminate information, communicate with one another, and recruit new supporters.[205] Consequently, flash mobbers do not attempt to utilize most of the other functions and capabilities that wireless-networks offer. Thus, it is not unreasonable for flash mobbers to contend that the relevant forum is the social media networks within BART's wireless-network rather than BART's wireless-network as a whole. Although this is a logical argument, a court may dismiss it for being overly narrow.

In sum, there are likely two forums in this situation: (1) BART's train platforms and (2) BART's wireless-network and/or the social media networks that it provides.

2.) BART's Train Platforms are Nonpublic Forums

BART's train platforms are likely nonpublic forums and, as a result, restrictions on speech in these areas are subject to a reasonableness test. First, BART's train platforms are not traditional public forums because the platforms' principal purpose is to provide for convenient and cheap public transportation rather than the free exchange of ideas.[206]

Moreover, BART's train platforms are comparable to the forums in both *Gannett v. Metropolitan Transport Authority* and *Krishna*. In *Gannett*, the Second Circuit ruled that the New York Mass Transit Authority (MTA) subway platforms were not traditional public forums because they were not primarily "used for purposes of assembly, communicating thought between citizens, and discussing public questions."[207] Similarly, in *Krishna*, the Supreme Court held that airplane terminals are not traditional public forums because they are not traditionally made available for speech activity.[208] Thus, because BART's train platforms are analogous to

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[205] Goodman, *supra* note 3; *see also Flash Mob Definition*, *supra* note 1.
[206] Gannett v. Metro. Transp. Auth., 745 F.2d. 697, 733 (1931).
[207] *Id.*
[208] Int'l Soc. for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 680 (1992).

both the MTA platforms in *Gannett* and the airport terminal in *Krishna*, BART's train platforms will likely be denied the status of traditional public forum.

In addition, there is no evidence that BART officials opened or designed their platforms for expression or discourse, which is required to establish a Government-designated public forum.[209] This is evident in BART's explicit rules governing the time, place, and manner of expressive activities in their stations:

> For more than 25 years, BART has had a policy regarding the exercise of First Amendment free speech rights in areas of its stations where it can be done safely and without interference with BART's primary mission of providing safe, efficient and reliable public transportation services. To implement this policy, BART has designated the areas of its stations that are accessible to the general public without the purchase of tickets as unpaid areas that are open for expressive activity upon issuance of a permit subject to BART's rules. To protect public safety and provide safe and efficient public transportation, BART has restricted access to the "Paid" and "Platform" areas of its stations to BART station employees and ticketed passengers who are boarding, exiting or waiting for BART trains.[210]

Thus, BART did not intentionally open its paid and platform areas for free expression.

Furthermore, the character and nature of BART's train platforms is not conducive to expressive activity.[211] BART's train platforms are intended for fast and convenient public transportation.[212] Such objectives require that the platforms remain uncluttered and easily navigable so as to enable passengers to easily board and exit trains.[213] As a result, allowing an expressive activity—such as a flash mob protest—in these areas would likely frustrate BART's purpose by creating platform congestion and unwanted inconveniences for BART passengers.[214] Moreover, congested train platforms expose BART passengers and personnel to certain safety

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[209] Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 800 (1985).
[210] *See BART Letter*, *supra* note 107.
[211] *Gannett*, 745 F.2d. at 733.
[212] *Id.*; *see also BART Letter*, *supra* note 107.
[213] *See BART Letter*, *supra* note 107.
[214] *Id.*

risks.[215] Consequently, as the Supreme Court held in *Cornelius*, where "the nature of the property is inconsistent with expressive activity," the court is particularly reluctant to rule that the Government intended to create a public forum.[216] Accordingly, BART's train platforms do not constitute Government-designated public forums.

Thus, the platform areas fall into the catch-all category: nonpublic forums. As a result, any speech exclusion that BART places on their platform areas is subject to a reasonableness test.[217] Under the particular circumstances that BART officials were presented with, their shutdown of wireless service to disrupt the effectiveness of the planned flash mob protest was reasonable as to their train platforms.[218]

BART officials were concerned that the planned August 11th flash mob protest would have detrimentally affected its commuters.[219] Using the July 11th flash mob protest as their guidepost, BART officials believed that the planned protest would result in partial and complete station closures, significant train delays, and the blocking of commuter access to trains.[220] Comparable to *Krishna*, where the Supreme Court ruled that it was reasonable for airport officials to exclude solicitors from its terminals due to the unwanted inconvenience that solicitors created, BART officials were reasonable in attempting to minimize inconveniences on their train platforms.[221] In addition, this case is distinguishable from *Gannett*.[222] Unlike the solicitation of newspapers on train platforms, which is considered consistent with the normal activity of train platforms, a flash mob protest is inconsistent with the intended purpose of a train platform: the

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[215] *Id.*
[216] Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 803 (1985).
[217] *Id.* at 800.
[218] Int'l Soc. for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 680 (1992).
[219] *See BART Letter*, *supra* note 107.
[220] *Id.*
[221] Int'l Soc. for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 679 – 80 (1992).
[222] Gannett v. Metro. Transp. Auth., 745 F.2d 767, 773 (2d Cir. 1984).

fast and efficient transportation of passengers.[223] Therefore, because BART's restriction was intended to facilitate the suppression of the planned flash mob, which was clearly inconsistent with the nature of its train platforms, the wireless shutdown was a reasonable tactic.

Although shutting down wireless service is not the only alternative or even the most reasonable alternative to ensuring passenger and personnel safety, the Supreme Court does not require as much.[224] Under the reasonableness standard for nonpublic forums, a restriction "need only be reasonable; it need not be the most reasonable or the only reasonable limitation."[225] Additionally, the exclusions must be viewpoint neutral.[226] In this situation, passenger and personnel safety and convenience motivated BART's wireless shutdown.[227] As a result, the exclusion was not based upon censoring the flash mob protestors' viewpoint. Ultimately, BART's wireless shutdown was a reasonable limitation on flash mobbers' access to their train platforms, thereby making the restriction constitutional in this context.

3.) BART's Wireless and Social Media Networks are Traditional Public Forums

In contrast to BART's train platforms, BART's wireless-network and the social media networks that it enables are traditional public forums for First Amendment purposes. The most notable counter-argument against this categorization is that wireless technology, including Internet access and cell phone service, is a relatively recent development.[228] As a result, BART will argue that wireless technology is not sufficiently entrenched in history to be considered a traditional public forum.[229]

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[223] *Id.*
[224] *Krishna*, 505 U.S. at 683.
[225] *Id.*
[226] *Id.*
[227] *See BART Letter, supra* note 107.
[228] Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666, 678 (1998) (rejecting "the view that traditional public forum status extends beyond its historic confines").
[229] *Id.*

Although it is questionable whether BART's wireless-network passes the historical confines standard, it is important to note that the standard is extremely unworkable and should not be treated as dispositive. Since the creation of the historical confines standard in *Forbes*, the Supreme Court has applied the standard rigidly, maintaining that traditional public forum status will not be extended to those forums where such history is lacking.[230] Recent developments in technology such as mobile social media networks, however, have exposed the need to abrogate this rigid and untenable historical confines standard. First, the historical confines standard is unworkable because no case law has addressed when a forum has been around long enough to be considered "immemorially . . . held in trust for the use of the public . . . for purposes of assembly, communicating thought between citizens, and discussing public questions."[231] Consequently, it is extremely difficult, if not impossible, to determine when or how a forum satisfies this test. Thus, the indefiniteness of the historical confines standard effectively creates an exclusive and unchanging category of traditional public forums—public streets and parks.[232]

Additionally, the shortcomings of the historical confines standard are exposed when applied to forums such as interactive social media networks. Social media networks such as Facebook, Twitter, interactive Wikis, blogs, and instant messaging are almost entirely devoted to "communicating thought between citizens," "discussing public questions," and free expression in general, which are the primary purposes of traditional public forums.[233] These social media networks foster an essential principle of the First Amendment as they strengthen public discourse by creating a generally accessible forum for individuals from different backgrounds and

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[230] U.S. v. Am. Library Ass'n Inc., 539 U.S. 194, 205-06 (concluding that "doctrines surrounding traditional public forums may not be extended to situations where such history is lacking").
[231] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44 (quoting Hague v. CIO, 307 U.S. 496, 515 (1939)).
[232] *Id.*
[233] *Id.*

geographic locations to exchange their thoughts, opinions, and ideologies. Furthermore, with the development of 3G and 4G wireless data technology, which enables Internet access and social networking almost anywhere, individuals can perpetually access this forum and take part in an ongoing dialogue.[234] In *Putnam*, the Sixth Circuit acknowledged these benefits, finding that "[a]spects of cyberspace may, in fact, fit into the public forum category."[235] Over the eleven years since the *Putnam* decision, cyberspace has advanced to the point where these aspects have increased exponentially.

The benefits to free speech that social networking technology engenders is not diminished merely because the technology was recently developed. It is nearly impossible to rationalize why social networking technology should not be considered a public forum when it squarely fits into the Supreme Court's definition of a traditional public forum: "traditional public fora are open for expressive activity regardless of the government's intent."[236] Thus, the rapid development of social networks exposes the arbitrariness of the historical confines standard. Ultimately, the historical confines standard frustrates the central function of the forum analysis—to ensure that constitutionally protected speech within forums devoted to public discourse is adequately protected.[237] As a result, technological innovations in communication and expression like social networking are not adequately protected under the current interpretation of the law.[238]

Regardless of whether a court chooses to treat the historical confines standard as dispositive, there is a possibility that BART's wireless-network will be considered a traditional public forum nonetheless. It has been nearly a decade since the Supreme Court last considered

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[234] AT&T, *What is 4G?*, ATT.COM, http://www.att.com/esupport/article.jsp?sid=KB115943#fbid=fx5pT69BE9H (last visited Apr. 24, 2012).
[235] Putnam Pit, Inc. v. City of Cookeville, 221 F.3d 834, 843 (6th Cir. 2000).
[236] Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666, 678 (1998).
[237] *Perry*, 460 U.S. at 44.
[238] Stacey D. Schesser, *A New Domain for Public Speech: Opening Public Spaces Online*, 94 CAL. L. REV. 1791 (2006).

whether the Internet constitutes a traditional public form.[239] Over this time, the Internet has played an increasingly important role in free expression and public discourse.[240] Furthermore, the Internet was first created in 1969, and became widely used for personal telecommunication by the mid-1990s.[241] Thus, the Internet has now been in existence for over forty years and has been used for discourse and expression for nearly twenty years.[242] As a result, it is not unreasonable to conclude that the Internet now has a sufficiently long history and association with free expression to satisfy the historical confines standard.

Provided the wireless-network is found to be a traditional public forum, the next step is to determine whether BART's wireless shutdown was sufficiently justified.[243] Usually, a restriction on traditional public forums must serve a "compelling state interest [that] . . . is narrowly drawn to achieve that interest."[244] If the restriction is content neutral and only regulates the time, place, and manner of the expression, however, the appropriate inquiry is whether the restriction was "narrowly tailored to serve a significant government interest, and [left] open ample alternative channels of communication."[245]

"To determine if a restriction is content neutral, 'the principal inquiry in speech cases . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.'"[246] Under this test, "[t]he government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not

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[239] U.S. v. Am. Library Ass'n, Inc., 539 U.S. 194 (2003).
[240] *See generally* William Fisher, *Freedom of Expression on the Internet*, THE BERKMAN CENTER FOR INTERNET & SOCIETY AT HARVARD UNIVERSITY (June 14, 2001), http://cyber.law.harvard.edu/ilaw/Speech/.
[241] *Internet*, West's Encyclopedia of American Law, ENCYCLOPEDIA.COM (2005) http://www.encyclopedia.com/topic/the_Internet.aspx.
[242] *Id.*
[243] Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 800 (1985).
[244] *Id.*
[245] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).
[246] Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

others."[247] Thus, a restriction is content-based when something points "decisively to a motivation based on the subject matter, or content, of the speaker's message."[248]

For example, in *Ward v. Rock Against Racism*, the Supreme Court held that a city's "sound-amplification guideline" was not targeted at the message or content of an anti-racism concert.[249] Rather, the regulation was justified because the city merely wanted to control noise levels and maintain the tranquil character of the city.[250] The Supreme Court concluded that this justification was entirely unrelated to the content of the concert, and, as a result, was a content-neutral restriction.[251]

Applying this to BART's restriction, the wireless shut down was likely content neutral. BART's principal motivation for shutting down service was to facilitate its security force's ability to suppress the planned flash mob to ensure the convenience and safety of BART passengers.[252] As a result, BART's restriction was "justified without reference to the content of the regulated speech" because there are no indications that BART was attempting to censor the flash mobbers' message.[253] Presumably, BART would have employed similar tactics had they been notified of a comparable protest expressing the opposite view.[254] Moreover, the wireless shutdown constitutes a time, place, and manner restriction because BART only shut down wireless service to its train platforms for a temporary period of time.[255] For instance, in many other areas of BART's train stations, such as "the street level and at all above-ground . . . stations

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[247] *Id.* at 791 – 92 (holding that the "[g]overnment regulation of expressive activity is content neutral so long as it is *justified* without reference to the content of the regulated speech").
[248] U.S. v. Marcavage, 609 F.3d 264, 279-80 (3d Cir. 2010).
[249] *Ward*, 491 U.S. at 792.
[250] *Id.*
[251] *Id.* at 661.
[252] *See BART Letter*, *supra* note 107.
[253] *Ward*, 491 U.S. at 791 – 92.
[254] *See BART Letter*, *supra* note 107.
[255] *Id.*

and trackways," wireless service was fully available.[256] Therefore, the wireless shutdown was likely a content-neutral time, place, and manner restriction on expression.

To justify a content-neutral time, place, and manner restriction, the restriction must be "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."[257] BART's interest in disabling its wireless-network was primarily the safety and convenience of its passengers.[258] In N*ational Treasury Employees Union v. Von Raab*, the Supreme Court held that the government has a compelling interest in preserving public safety.[259] Because the "significant government interest" standard is less stringent than the compelling interest standard, BART has a significant Government interest in ensuring the safety of its passengers and personnel.[260]

Next, it must be determined whether BART's wireless shut down was narrowly tailored to serve its significant Government interest in the safety of its passengers and personnel. For content neutral regulations, "[a] statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy."[261] "A complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil."[262] For example, in *Members of City Council v. Taxpayers for Vincent*, the Supreme Court upheld a regulation that proscribed all signs on public property because the Government had a significant interest in maintaining the aesthetic nature of such property.[263] As a result, the

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[256] *Id.*
[257] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).
[258] *See supra* Part II.C.1.
[259] Nat'l Treasury Emp. Union v. Von Raab, 489 U.S. 656, 677 (1989).
[260] *Id.*
[261] Frisby v. Schultz, 487 U.S. 474, 485 (1988).
[262] *Id.* at 486.
[263] Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 808 (1984).

proscription was justified because it only restricted the type of speech that it was designed to prevent.[264]

Applying this to BART, BART's wireless shutdown was a complete proscription as it completely excluded all speech in the wireless-network forum.[265] Thus, for BART to adequately justify its actions, the shutdown cannot restrict more speech than it was designed to prevent.[266] Once again, BART's motive for instituting the wireless shutdown is crucial to this analysis. BART's motive for shutting down its wireless-network was to disrupt communication between flash mobbers once they were on the train platforms.[267] Specifically, BART attempted to restrict speech relaying information regarding police locations and response time as well as speech aimed at recruiting and bolstering support for the flash mob.[268] BART's restriction's scope, however, was far more expansive, as it proscribed *any and all* speech within the wireless-network forum. Thus, the wireless shutdown fails the narrowly tailored prong of the test because the restriction's scope limited considerably more expression than it was meant to preclude.

In addition, BART's restriction did not leave ample alternative channels of communication open. The constitutionality of a regulation or restriction depends on whether it allows for alternate avenues of communication.[269] In the instant case, BART's wholesale wireless shutdown completely prevented all avenues of communication within the wireless-network forum.[270] BART will likely argue that it provided other avenues of communication, including access to passenger courtesy phones, which are located in the platform area.[271] These

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[264] *Id.*
[265] *See BART Letter*, *supra* note 107.
[266] *Id.*
[267] *Id.*
[268] *Id.*
[269] Ward v. Rock Against Racism, 491 U.S. 781, 802 – 803 (1989).
[270] *See BART Letter*, *supra* note 107.
[271] *Id.*

phones provide "direct communication with Station Agents."[272] In addition, BART will likely assert that it provided for two intercoms on each car, which allow passengers to contact BART personnel for assistance while on trains.[273] Although the courtesy phones and train intercoms constitute mediums for communication, they are not suitable avenues for expressive speech. As a result, these substitutes are not an adequate alternative to the wireless-network, which provides access to an everlasting dialogue committed to the free flow of ideas and expression.

Ultimately, although BART's wireless shutdown served a significant government interest (public safety), the complete proscription on speech within the wireless-network forum was not narrowly tailored and did not provide for ample alternative means of communication.[274] As a result, the wireless shutdown will likely be ruled unconstitutional.

If a court refuses to extend traditional public forum status to BART's wireless-network, it will probably be considered a nonpublic forum. Although the wireless-network enables public discourse and allows for free expression, there is no evidence that BART intentionally opened its wireless-network for expressive speech. Similar to *American Library*, where the Supreme Court found that a public library's Internet access was intended to facilitate information gathering rather than free expression, BART provides wireless service to its platform areas for passenger convenience and safety.[275] Thus, comparable to *American Library*, a court will most likely rule that BART's wireless-network is a nonpublic forum. Despite this, if BART intended for their wireless-network to ensure passenger safety, there is a peculiar contradiction: BART both provided and shut down its wireless-network for safety purposes. Such a glaring inconsistency may cut against the reasonableness of BART's actions. Nonetheless, a court will likely follow

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[272] *Id.*
[273] *Id.*
[274] *Id.*
[275] *Id.*; *see also* United States v. American Library Ass'n, Inc., 539 U.S. 194 (2003).

the same reasoning outlined in This Comment in Part III.E.2 and hold that the wireless shutdown was a reasonable restriction on expression.

Nevertheless, wireless and social media networks should be considered traditional public forums. If the Supreme Court decides to espouse this view, speech within these forums will receive the utmost protection under the First Amendment. Consequently, flash mob protests will reap the benefits of such a designation.

IV. Prior Restraints Analysis

Courts must also consider unconstitutional prior restraints on speech when analyzing social media restrictions during flash mob protests. The Supreme Court has defined a prior restraint as an "administrative and judicial order *forbidding* certain communications when issued in advance of the time that such communications are to occur."[276] Because prior restraints punish speech before the speech has occurred, they are greatly disfavored by the courts, and are thereby presumptively unconstitutional.[277] In fact, in *Nebraska Press Ass'n v. Stuart*, the Supreme Court stated, "The thread running through all [prior restraint] cases is that prior restraints on speech are the most serious and least tolerable infringement on First Amendment

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[276] Alexander v. U.S., 509 U.S. 544, 550 (1993) (emphasis added); *see also* Bradburn v. N. Cent. Reg'l Library Dist., 231 P.3d 166, 173 (2010) (defining a prior restraint as a restriction imposed on speech or another form expression before its occurrence. Prior restraints prevent future speech rather than punishing speech that has already occurred).

[277] Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 558 – 59 (1976); *see also* Bantum Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) ("Any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity."). *See generally*, N.Y. Times Co. v. U.S., 403 U.S. 713 (1971) (finding that the government did not adequately justify preemptively enjoining a new paper publication of classified historical study on Vietnam policy); Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53 (1984).

rights."[278] In addition, the temporary nature of a prior restraint does not make the restraint any less offensive to the First Amendment.[279]

Before conducting a prior restraints analysis, it is important to understand the difference between a prior restraint and a subsequent punishment. For example, in *Alexander v. United States*, the Supreme Court ruled that a court-ordered forfeiture of funds was not a prior restraint on speech because the order constituted a punishment for the defendant's past illegal acts.[280] In response to this, the defendant argued that the court order operated as a prior restraint because it precluded his entry into the adult entertainment business.[281] The Supreme Court dismissed this claim, holding that the order did not prevent the defendant from using untainted assets to finance his entry into the prospective field. [282] Thus, because the order merely called for the seizure of the defendant's tainted assets, it operated as a subsequent punishment for the defendant's past wrongful acts rather than a prior restraint on his forthcoming speech.[283] Moreover, the Supreme Court ruled that it was irrelevant that nearly all of the defendant's assets were seized under the order.[284]

Once it is determined that a speech restriction operates as a prior restraint, a court must determine whether the restraint is justified.[285] Governments may justify a prior restraint by demonstrating that the First Amendment does not protect the restricted speech.[286] To meet this

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[278] *Id.* at 562; *see also* Gannett Co. v. DePasquale, 443 U.S. 368, 393 n.25 (1931) (holding that eliminating prior restraints is a "chief purpose" of the First Amendment); *see also* Michael I. Meyerson, *Rewriting Near v. Minnesota: Creating a Complete Definition of Prior Restraint*, 52 MERCER L. REV. 1087, 1097 – 98 (2001).
[279] *Alexander*, 509 U.S. at 550; *see also Nebraska Press*, 427 U.S. at 559 (ruling that "the burden on the Government is not reduced by the temporary nature of a restraint").
[280] *Alexander*, 509 U.S. at 551.
[281] *Id.*
[282] *Id.* (holding that the statute did not deprive the defendant from engaging in expressive activities. The order only restricted which assets the defendant could use to fund his entry into the adult entertainment industry).
[283] *Id.*
[284] *Id.*
[285] Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 558 (1976) (holding that the Government "carries a heavy burden of showing justification for the imposition of such a restraint").
[286] U.S. v. Quattrone, 402 F.3d 304, 310 (2d Cir. 2005).

exception, a flash mob protest must fail to convey a message that is likely to be understood by the audience.[287] An example of such a flash mob is a flash robbery.[288] If the Government fails to prove that the speech falls outside the protections of the First Amendment, then the Supreme Court applies the following three-prong test to determine whether the prior restraint is justified: (1) the nature of the speech in question must be likely to impair the rights of others; (2) there cannot be alternative measures that may mitigate the anticipated harm associated with allowing the speech; and (3) the prior restraint must be an effective recourse to preventing the threatened danger.[289] Although originally tailored to address prior restraints on news publications, the court can easily apply the test to flash mob protests.

The first prong of this test may be satisfied even if it is speculative whether the rights of others will be impaired by the speech.[290] However, the conclusion that the rights of others may be impaired must be reasonable.[291] For example, in *Nebraska Press*, the Supreme Court ruled that it was reasonable for the judge to conclude that "pervasive pretrial publicity" of an impending case may impair the defendant's right to a fair trial.[292] Although such harm was speculative, the Supreme Court held that the judge's "conclusion as to the impact of such publicity on prospective jurors was of necessity speculative, dealing as he was with factors unknown and unknowable."[293] Therefore, the judge's temporary injunction on pretrial news coverage satisfied the first prong of the test.[294]

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[287] *See supra* Part II.A.
[288] Shayon, *supra* note 6.
[289] *Quattrone*, 402 F.3d at 310 – 11 (2d Cir. 2005) (citing *Nebraska Press*, 427 U.S. 539).
[290] *Nebraska Press*, 427 U.S. at 562 – 63.
[291] *Id.*
[292] *Id.*
[293] *Id.*
[294] *Id.*

The second prong of the test asks whether there were any alternatives that could have mitigated the harm associated with the particular speech.[295] In *Nebraska Press*, the Supreme Court found that there were numerous viable alternatives to altogether enjoining pretrial news coverage.[296] Such alternatives included postponing the trial, moving the trial to a less exposed venue, and clearly and emphatically instructing the jurors of their duties.[297] The Supreme Court ruled that the Government did not adequately refute these alternatives because there was no finding that the alternatives "would not have protected [the defendant's] rights."[298] This analysis illustrates that the party seeking to enforce the prior restraint bears the burden of disproving the efficacy of possible alternative measures.[299]

The last prong of the *Nebraska Press* test examines whether the prior restraint will effectively prevent the threatened danger.[300] In analyzing the third prong in *Nebraska Press*, the Supreme Court examined the location of the trial, most notably the small size of the community (850 people).[301] Due to the community's small size, the Supreme Court concluded that rumors and information concerning the defendant's trial likely would have permeated the town regardless of whether there were any news accounts being printed or broadcast.[302] Thus, because certain facts of the case would likely surface irrespective of the pretrial news coverage, the restriction on news publication was not an effective means of restraining a community from discussing the facts of the trial.[303] Ultimately, *Nebraska Press* embodies how much courts

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[295] *Id.*
[296] *Nebraska Press*, 427 U.S. at 562 – 63.
[297] *Id.*
[298] *Id.*
[299] *Id.* at 562 – 63.
[300] U.S. v. Quattrone, 402 F.3d 304, 311 (2d Cir. 2005).
[301] *Nebraksa Press*, 427 U.S. at 567.
[302] *Id.*
[303] *Id.*

disfavor anticipatory restraints on speech. As a result, authorities that preemptively restrict flash mob protests will likely have an extremely difficult time justifying their actions.

A. BART's Wireless-network Shutdown Qualifies as an Unjustified Prior Restraint

BART's wireless-network shutdown strongly resembles a prior restraint because, on its face, the shutdown appears to restrict speech "in advance of the time that such communications were to occur."[304]

BART could argue that the wireless shutdown is comparable to *Alexander*, where the Supreme Court found no prior restraint because the injunction did not restrict the defendant from engaging in the expressive activity he desired.[305] Rather, the Supreme Court ruled that the order was a subsequent punishment that limited the type of funds that the defendant could use to finance his entry into the adult entertainment industry.[306]

BART's wireless shutdown is distinguishable from *Alexander*. First, BART's wireless shutdown did not constitute a subsequent punishment for the July 11th protest. To begin, there was never an official finding that the July 11th protest required or deserved reprisal.[307] Although BART publically condemned the July 11th protest, no arrests or judicial determinations were ever made regarding whether the protest warranted punishment.[308] In addition, the wireless shutdown does not fit the characteristics of a punishment. Foremost, the shutdown was grossly overbroad as it "punished" numerous people who fall outside the class of alleged transgressors.[309] To illustrate, the shutdown punished everyone on BART's train platforms regardless of whether they participated in the July 11th protest.[310] Secondly, BART's alleged

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[304] Alexander v. U.S., 509 U.S. 544, 550 (1993).
[305] *Id.*
[306] *Id.*
[307] *See* La Ganga & Romney, *supra* note 20.
[308] Ho, *supra* note 96.
[309] *See BART Letter*, *supra* note 107.
[310] *Id.*

punishment sought to reprimand an unidentifiable group of individuals. Because BART did not possess a definitive list of people who participated in the July 11th protest, it was impossible to direct a punishment strictly toward flash mobbers. Moreover, the wireless shutdown was not an effective punishment because it did not prevent or deter the type of behavior it sought to punish—the endangerment of BART passengers.[311] Although a wireless shutdown can limit the effectiveness of perpetuating a flash mob protest, it is not meant to prevent a protest from occurring. Although the August 11th planned protest did not occur, it is unreasonable to believe the shutdown was the sole reason. As a result, the wireless shutdown does not constitute a subsequent punishment because (1) there was never a determination that the July 11th protest warranted retribution, and (2) the shutdown does not meet the criteria of a punishment.[312]

In addition, BART will may contend that the wireless shutdown was similar to *Alexander* in that it did not restrain the flash mobbers from speaking out against BART; it merely restricted where they could protest. This argument fails because the primary purpose of the wireless shutdown was to restrict flash mobbers' access to BART's wireless-networks rather than the train platforms.[313] This is evidenced through BART's letter of explanation to its passengers on August 20, 2011:

> The August 10 intelligence revealed that the individuals would be giving and receiving instructions to coordinate their activities via cell phone after their arrival on the train platforms at more than one station. Individuals were instructed to text the location of police officers so that the organizers would be aware of officer locations and response times. The overall information about the planned protest led BART to conclude that the planned action constituted a serious and imminent threat to the safety of BART passengers and personnel . . . .[314]

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[311] *Id.*
[312] *Id.*
[313] *Id.*
[314] *Id.*

As a result, BART fully expected the August 11th flash mob to take place. Thus, the primary purpose for the wireless shutdown was to disrupt the communication of protestors once they were on the platform, not to restrict the protestors' access to the platform.[315] Consequently, this case is distinguishable from *Alexander* because BART, motivated by speculative "intelligence," attempted to restrict speech that had not yet occurred through disabling its wireless-network.

Since the wireless shutdown constituted a prior restraint and the August 11th flash mob protest qualifies as protected expressive conduct, a court should apply the *Nebraska Press* three-pronged test.[316] The first prong of the *Nebraska Press* test asks whether the nature of the speech in question is likely to impair the rights of others.[317] BART likely satisfies this prong as it is reasonable to believe that the August 11th protest would cause significant congestion on BART's train platforms.[318] Additionally, such congestion could lead to possible safety problems.[319] Although this fear is speculative, the Supreme Court has ruled that reasonable speculation does not defeat the first prong of the *Nebraska Press* test.[320]

The second prong of the *Nebraska Press* test inquires whether there are any other measures that may mitigate the harm associated with allowing the speech.[321] As applied to the BART situation, BART would have the burden of proving that there are no less restrictive alternatives to ensuring passenger safety.[322] One possible alternative to the wireless shutdown was to increase security in the platform areas. In response to this, BART will likely assert that

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[315] *See BART Letter, supra* note 107.
[316] U.S. v. Quattrone, 402 F.3d 304, 310 – 11 (2d. Cir. 2005) (citing Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976)).
[317] *Id.*
[318] *See* Elinson, *supra* note 28.
[319] *Id.*
[320] *See Nebraska Press*, 427 U.S. at 562 – 63.
[321] *Id.*
[322] *Id.*

they increased security by 120 extra uniformed officers.[323] To carry their burden, BART will have to demonstrate that an increase in security alone was inadequate to protect their passengers and personnel.[324] This is not easy to prove because it is reasonable to believe that employing ample security would mitigate the detrimental effects of protestors using social media to perpetuate the flash mob.[325] As a result, a wireless shutdown would only marginally help BART officers suppress the flash mob, making the tactic largely unnecessary.

Though extreme, a second possible alternative would be to temporarily restrict all passengers from the platform areas. A court would likely hold that this tactic is unreasonable because the flash mob was meant to occur during afternoon rush hour. Ultimately, however, BART will encounter much difficulty in attempting to carry its burden and will likely fail the second prong.

Furthermore, BART will also have trouble satisfying the third prong of the *Nebraska Press* test, which questions "the likely efficacy of a prior restraint to prevent the threatened danger."[326] Shutting down wireless service is not an effective way of ensuring public safety because it does not adequately safeguard against a flash mob protest actually occurring. As a result, the safety of BART passengers and personnel would be endangered notwithstanding the wireless shutdown. Although a court now has the benefit of hindsight and knows that the August 11th planned protest did not take place, it would be unreasonable to conclude that the wireless shutdown was the only reason for this. As mentioned above, disabling wireless service was primarily intended to disrupt the protestors' communication *during* the protest.[327] This restriction in no way effects the organization or planning of the flash mob. Thus, a wireless

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[323] *See BART Letter*, *supra* note 107.
[324] *Nebraska Press*, 427 U.S. at 563.
[325] *See BART Letter*, *supra* note 107.
[326] *Nebraska Press*, 427 U.S. at 562 – 63.
[327] *See BART Letter*, *supra* note 107.

shutdown merely disturbs how effectively a protest is carried out. As a result, irrespective of the wireless shutdown, BART's train platforms were likely to be extremely congested, thereby manifesting the danger BART sought to avoid. BART will contend that the wireless-network mitigated these dangers by aiding security's ability to suppress the flash mob. Despite this, a wireless shutdown does not adequately "prevent the threatened danger" because passenger safety is no less vulnerable as a result.

Ultimately, BART will most likely fail to carry its burden, rendering the wireless shutdown unconstitutional under the *Nebraska Press* test. Therefore, the BART situation demonstrates that Governmental agencies that institute anticipatory restrictions on flash mob protests, most notably restrictions on social media access, have an extremely difficult time justifying their actions.

V. Conclusion

Not all flash mobs receive First Amendment protections.[328] To receive constitutional protection, a flash mob must attempt to express a message that is likely to be understood by those who view it.[329] As a result, flash mobs such as flash robberies will not receive constitutional protection because they do not convey a message. Flash mob protests, on the other hand, almost always aim to convey a message, and, thus, will generally be entitled to receive some First Amendment protections.[330]

Despite this, the government has more leeway in restricting expressive conduct.[331] Therefore, in examining the constitutionality of restrictions on flash mob protests, one must

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[328] Tex. v. Johnson, 491 U.S. 397, 406 (1989).
[329] *Id.* at 404 (quoting Spence v. State of Wash., 418 U.S. 405, 410 (1974)).
[330] *See* Elinson, *supra* note 28.
[331] *Id.* at 406.

determine the flash mob's speech and "nonspeech" elements.[332] Once these are determined, courts will examine whether the governmental restriction on the flash mob is intended to regulate the protest's communicative elements.[333] In the event that the restriction is intended to restrain the nonspeech elements of the flash mob, the Government's interest in restraining those elements must outweigh any incidental impingements on the speaker's protected expressive message.[334] Ultimately, because the *O'Brien* test is extremely fact sensitive, there is no bright line rule stating whether a restriction on a flash mob protest violates the First Amendment.[335] Thus, flash mob protests must be examined on a case-by-case basis.

Furthermore, because flash mob protests almost always attempt to access wireless and social media networks,[336] flash mob protests should receive the protections of traditional public forums. Although a court has yet to rule that wireless-networks constitute traditional public forums,[337] the BART situation embodies why wireless and social media networks deserve the utmost protection under the First Amendment. Thus, this Comment recommends that the historical confines doctrine[338] be downgraded from a dispositive standard to a merely persuasive factor. Ultimately, under this proposed construction, limitations on a flash mob protests' access to social media networks should only be permissible in the most extraordinary of circumstances.

Lastly, prior restraints on flash mob protests must rebut an extremely heavy presumption of unconstitutionality, especially when that restriction attempts to limit a flash mob protests' access to social media.[339] As a result, unless the prior restraint is associated with an important governmental interest and is used as an absolute last resort, a court will likely find that the

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[332] U.S. v. O'Brien, 391 U.S. 367, 376 (1968).
[333] *Id.*
[334] *Id.* at 377.
[335] *Id.*
[336] *See Flash Mob Definition, supra* note 1.
[337] Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666, 678 (1998).
[338] *Id.*
[339] Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 558 (1976).

restriction is unconstitutional.[340] Ultimately, if a flash mob protest is entitled to First Amendment protection, its fundamental relationship to social media is its greatest defense against Governmental restrictions.

[340] *Id.*