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I. INTRODUCTION

During an episode of *The Andy Griffith Show*, bumbling deputy Barney Fife addresses newly incarcerated inmates. His speech to the men includes the following lines:

> Now, men, there are a few things we ought to get straightened out right at the start to avoid any grief later on. Now, here at "The Rock" we have two basic rules. Memorize them so that you can say them in your sleep. The first rule is: "Obey all rules!" Secondly, "Do not write on the walls, as it takes a lot of work to erase writing off of walls."[1]

At least one of the funny aspects of this announcement is the simplicity of the rules: only two rules and one of them is to obey all rules. The first rule indicates that there are even more rules that must be obeyed; Barney, however, had probably not yet thought of those rules. Rules that are not clearly defined give little, if any, guidance to those who are expected to obey them. Further, rules that are not clearly defined give unbridled discretion to those who enforce and interpret them. Sadly though, unclear and undefined rules are exactly what one encounters in cases dealing with speech occurring in a public forum. This article seeks to

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1. *The Andy Griffith Show: The Big House* (CBS television broadcast, May 6, 1963).

discuss the flaws existing in the forum framework developed by the Supreme Court, illustrate how the flaws have created conflicting opinions among the circuit courts, and recommend how to eliminate the difficulties experienced by those courts.

"To determine whether a potential speaker has a right to use public property for expressive purposes, a court must first examine the nature of that property. A potential speaker's rights depend, in part, upon the type of government property that the speaker seeks to access."[2] In *Perry Education Ass'n v. Perry Local Educators' Ass'n*,[3] the Supreme Court constructed the public fora framework that governs cases dealing with restrictions on speech in public places.[4] In *Perry*, the Perry Education Association (PEA) was the "exclusive bargaining representative for the teachers of the Metropolitan School District of Perry Township, Ind[iana]."[5] A rival teachers union, the Perry Local Educators' Association (PLEA), was denied access to the "interschool mail system and teacher mailboxes in the Perry Township schools";[6] under PEA's agreement it was the only union to have such access.[7] In deciding whether PLEA had a right to access the mail system and mailboxes, the Court noted that the "existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue."[8] In looking at the "character of the property at issue," the Court described three types of publicly owned property in the terms of public fora: 1) those "places which by long tradition or by government fiat have been devoted to assembly and debate";[9] 2) a "second category consist[ing] of public property which the State has opened for use by the public as a place for expressive activity";[10]

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2. Air Line Pilots Ass'n, Int'l v. Dep't of Aviation, 45 F.3d 1144, 1151 (7th Cir. 1995).
3. 460 U.S. 37 (1983).
4. *Id.* at 45–49.
5. *Id.* at 38–39.
6. *Id.* at 39.
7. *Id.*
8. *Id.* at 44.
9. *Id.* at 45.
10. *Id.*

and 3) nonpublic fora.[11] The Court also established the level of scrutiny that is to be used by courts when addressing restrictions on speech occurring in each type of fora.[12]

II. TRADITIONAL PUBLIC FORA

Traditional public fora are those places which "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 thoughts between citizens, and discussing public questions."[13] Those places include public parks, sidewalks,[14] and other areas that have "traditionally been available for public expression".[15] These are places where people are free to congregate and discuss any matters they wish. Traditional public fora are not created by government action.[16]

Content-neutral restrictions of speech occurring in traditional public fora are to be "narrowly tailored to serve a significant governmental interest"[17] and must "leave[] open ample alternative channels for communication of the information."[18] Examples of such restrictions are those dealing with time, place, and manner of speech.[19]

"Content-based restrictions on speech in traditional public fora are subject to strict scrutiny."[20] Under a strict scrutiny analysis,

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11. *Id.* at 46.

12. *Id.*

13. *Id.* at 45 (quoting Hague v. CIO, 307 U.S. 496, 515 (1939)).

14. *But see* United States v. Kokinda, 497 U.S. 720, 728–29 (1990) (holding that sidewalk on Postal Service property is not a public forum).

15. Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992).

16. *See, e.g.*, Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677 (1998) (contrasting traditional public fora with designated public fora by noting that the latter are "created by purposeful governmental action.").

17. Wells v. City & County of Denver, 257 F.3d 1132, 1147 (10th Cir. 2001) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1988)).

18. *Id.* at 1147 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1988)).

19. *Id.*

20. Hotel Employees & Rest. Employees Union, Local 100 v. City of

"restrictions must serve a compelling government interest and be narrowly tailored to achieve that interest."[21] "If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative."[22] Not requiring the government to use the least restrictive means of restricting speech would be the equivalent of restricting speech without adequate justification.[23]

Whether content-based or content-neutral, restrictions on speech in traditional public fora must be viewpoint neutral.[24]

III. SECOND CATEGORY OF PUBLIC FORA

The second category of public fora has been called the "more amorphous category."[25] From the first time this type of forum was addressed, the Supreme Court, the courts of appeals, and the district courts have struggled to properly define it. This struggle has lead to conflicting rulings arising in free speech cases that have similar fact patterns. An overview of some of these conflicting rulings is in order.

A. The Second Category of Public Fora under United States Supreme Court Precedent

The Supreme Court has referred to the second category as "designated public forum, whether of a limited or unlimited character,"[26] "designated public fora,"[27] and "the public forum

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New York Dep't of Parks & Recreation, 311 F.3d 534, 545 (2d Cir. 2002).

21. *Id.* at 545.

22. United States v. Playboy Entm't Group, 529 U.S. 803, 813 (2000); *see also* Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) ("The Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.").

23. *Playboy Entm't Group*, 529 U.S. at 813 (citing Reno v. ACLU, 521 U.S. 844, 874 (1997)).

24. Perry v. McDonald, 280 F.3d 159, 170 (2d Cir. 2001).

25. Planned Parenthood Ass'n/Chi. Area v. Chi. Transit Auth., 767 F.2d 1225, 1231 (7th Cir. 1985).

26. Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992).

created by government designation."[28]

The Court first addressed the boundaries of the second category of public fora in *Widmar v. Vincent*,[29] a pre-*Perry* decision.[30] In *Widmar*, the University of Missouri at Kansas City had a stated policy of encouraging the "activities of student organizations."[31] The university officially recognized over one hundred student groups and university facilities were provided for meetings held by organizations that had registered with the university.[32] One such organization was Cornerstone, a registered religious group.[33] From 1973 to 1977 it had regularly received permission to meet in university facilities.[34] The university informed Cornerstone in 1977 that, under a regulation prohibiting the use of university buildings or grounds for religious worship or religious teaching, the organization would no longer be allowed to meet in university facilities.[35] The Court classified the program enacted by the university as creating a limited public forum[36] and considered the issue to be whether the university, after opening its facilities for use by student groups, could "exclude groups because of the content of their speech."[37] In analyzing whether the university had engaged in unconstitutional content-based discrimination, the Court used strict scrutiny.[38] While the university argued that allowing Cornerstone to meet in university facilities would violate the Establishment Clause of the First Amendment, the Court held that an "equal access" policy would not violate the

27. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677 (1998).

28. Frisby v. Schultz, 487 U.S. 474, 479–80 (1988) (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985)).

29. 454 U.S. 263 (1981).

30. *Id.* at 265–73.

31. *Id.* at 265.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 272.

37. *Id.* at 273.

38. *Id.* at 270 (confirming that the university had to show that its actions were "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end").

Clause.[39] The scrutiny used by the Court in the case was important because it indicated, prior to the fora framework that would soon be described by the Court, what analysis should be given by courts when addressing a limited public forum.

Two years later, in *Perry*, the Court again discussed the "second category" of public fora.[40] The Court considered this property to be "public property which the State has opened for use by the public as a place for expressive activity."[41] They considered the second type of public fora to be a "forum generally open to the public"[42] and established that this type of fora is one that is created by the State.[43] This description by the Court contains no limitations on who may participate or what topics may be discussed in this type of forum. In a footnote, the Court cited its decision in *Widmar* to support the idea that this type of "public forum may be created for a limited purpose such as use by certain groups . . . or for the discussion of certain subjects."[44] Thus, the rule in *Perry*, when considered with *Widmar*, instructs that the second category of public fora is property the State has opened for use by the public as a place for expressive activity. In some cases, property that is opened for expressive activity may be opened for use by certain groups or for the discussion of certain subjects. The second category of public fora is simply one that, prior to its creation by a government body, does not exist.

A "limited" public forum was, under *Perry* and *Widmar*, one type of the second category of public fora. Under the same decisions, another type of the second category of public fora would have been a created public forum in which no limitations had been placed on either the topics to be discussed or the groups that may participate in that forum.[45] Such a forum would have been a designated public forum. PLEA took the position that its previous

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39. *Id.* at 270–71.

40. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45–46 (1983).

41. *Id.* at 45.

42. *Id.*

43. *Id.*

44. *Id.* at 46 n.7 (citation omitted).

45. *Id.* at 45-46; *Widmar v. Vincent*, 454 U.S. 263, 269–70 (1981).

use of the system, combined with the use of the system by some "non-school-connected"[46] groups, had caused the school mail facilities to become a "limited public forum"[47] in the second category of public fora and that it could not be excluded from periodically using the system.[48] The Court rejected that argument, noting that "[t]his type of selective access does not transform government property into a public forum,"[49] and concluded that "the school mail system is not a public forum."[50]

The Court again addressed the limited public forum in *Cornelius v. NAACP Legal Defense and Educational Fund*.[51] In *Cornelius*, several "legal defense and political advocacy organizations" sought participation in the Combined Federal Campaign (CFC), "a charity drive aimed at federal employees."[52] President Eisenhower established the forerunner of the CFC in 1957.[53] Over twenty years later, President Reagan responded to a district court ruling regarding the CFC, and issued executive orders designed "to restore the CFC to what he determined to be its original purpose."[54] After the modifications by President Reagan, participation in the CFC was limited to "voluntary, charitable, health and welfare agencies that provide or support direct health and welfare services to individuals or their families"[55] and excluded "[a]gencies that seek to influence the outcomes of elections or the determination of public policy through political activity or advocacy, lobbying, or litigation on behalf of parties other than themselves."[56]

The Court discussed the public fora framework constructed in *Perry* and noted, "In addition to traditional public fora, a public

46. *Perry*, 460 U.S. at 47.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* at 48.
51. 473 U.S. 788, 795 (1985).
52. *Id.* at 790.
53. *Id.* at 792.
54. *Id.* at 794.
55. *Id.* at 795 (citation omitted).
56. *Id.* (citation omitted).

forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects."[57] In this passage the Court refers to at least two types of public fora as comprising the second category of public fora, both created by government action. One type is a forum opened for the public at large and the other is one in which the government body has limited the forum to certain groups or topics.[58] The Court examined how, in past cases, it had "looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum."[59]

One of the cases in which it had "looked to the policy and practice of the government" was *Widmar*—noting that in *Widmar* it "found that a state university that had an express policy of making its meeting facilities available to registered student groups had created a public forum for their use."[60] The Court also noted that the policy in *Widmar* "evidenced a clear intent to create a public forum."[61] The Court stated, "Not every instrumentality used for communication, however, is a traditional public forum or a public forum by designation."[62] While it seems at this point in the opinion that the Court will hold that a limited public forum has been created, it does not. The Court noted that the government's policy was to limit participation in the program to "appropriate" agencies and that "selective access, unsupported by evidence of a purposeful designation for public use, does not create a public forum."[63] The CFC was considered by the Court to be a nonpublic forum; the

57. *Id.* at 802 (relying upon Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45–46 n.7).

58. There is, of course, the possibility that both the groups and topics could be limited in a limited public forum. Such a forum should still be a limited public forum.

59. *Cornelius*, 473 U.S. at 802.

60. *Id.* at 802 (citing Widmar v Vincent, 454 U.S. 263, 268 (1981)).

61. *Id.* at 802.

62. *Id.* at 803 (citing United States Postal Serv. v. Greenburgh Civic Ass'ns, 453 U.S. 114, 130 n.6 (1981)).

63. *Id.* at 805.

standard used in reviewing the policy was whether the distinctions drawn were reasonable and viewpoint neutral.[64]

In *Lamb's Chapel v. Center Moriches Union Free School District*,[65] the issue before the Supreme Court was whether, under a state law allowing local school boards to permit outside groups to use school property after hours, it was constitutional "to deny a church access to school premises to exhibit for public viewing and for assertedly religious purposes, a film series dealing with family and child-rearing issues."[66] In that case, the court of appeals had held that the school property, when used by outside groups under the state law, was neither a traditional nor designated public forum; rather, the lower court held that the property was "a limited public forum open only for designated purposes."[67] The appellate court, in this statement, combined the two types of public fora comprising the second category. By thoroughly analyzing the Church's argument that, because the school property had been used for a "wide variety of communicative uses,"[68] it should be granted the same constitutional considerations as property in a traditional public forum, the Court could have clarified the second category of public fora and corrected the lower court's error. The Court, instead, merely "assume[d]"[69] that the lower courts were correct on the issue of the nature of the forum,[70] and then further clouded the issue of public fora.

Referring to "public property that is not a designated public forum open for indiscriminate public use for communicative purposes,"[71] the Court remarked, "Control over access to a *nonpublic* forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of

64. *Id.* at 805-06.

65. 508 U.S. 384 (1993).

66. *Id.* at 387.

67. *Id.* at 390 (quoting Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 959 F.2d 381, 386 (2d Cir. 1992)).

68. *Id.* at 391.

69. *Id.* at 392.

70. *Id.* at 391–92.

71. *Id.* at 392.

the purpose served by the forum and are viewpoint neutral."[72] The Court here is quoting *Cornelius*, in which a forum having the characteristics of a limited public forum is categorized as nonpublic in nature. While the Court could have used *Lamb's Chapel* as an opportunity to return to the original forum framework, it instead created more confusion for the lower courts. While there may be "public property that is not a designated public forum open for indiscriminate public use for communicative purposes"[73] but is open for certain groups or the discussion of certain topics, such property is not *nonpublic* fora.

Under *Widmar* and *Perry,* the Court had established that such public property opened for the limited uses mentioned by the Court would be limited public fora; public fora separate and distinct from traditional, designated, and nonpublic fora. It would be governed by different standards and a completely different analysis would need to be done to determine whether restrictions on speech occurring in such a forum would be constitutional. Should the property be analyzed under the second category of public fora, courts would use a higher level of scrutiny, giving more protection to those who seek to access the forum.[74] After classifying the forum in *Lamb's Chapel* as nonpublic, the Court resolved the issue on the basis of viewpoint discrimination,[75] the one form of discrimination unconstitutional in any forum.[76] The opportunity both to correct the lower court's misinterpretation of *Perry* and to discuss the

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72. *Id.* at 392–93 (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985)) (emphasis added).

73. *Id.* at 392.

74. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983). Considering the second category of public fora, the Court noted, "Reasonable time, place, and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest." *Id.*

75. *Lamb's Chapel*, 508 U.S. at 393.

76. *See* Putnam Pit, Inc. v. City of Cookeville, Tenn., 221 F.3d 834, 845 (6th Cir. 2000) ("In both designated public fora and nonpublic fora, the government may not discriminate based upon the viewpoint of the speaker."); *see also* Perry v. McDonald, 280 F.3d 159, 167 (2d Cir. 2001) ("Government restrictions on speech in a traditional public forum are subject to strict scrutiny.").

proper analysis to be done when addressing restrictions on speech occurring in a limited public forum was lost.

In *Rosenberger v. Rector and Visitors of the University of Virginia.*[77] the Court further added confusion to the second category of public fora. In *Rosenberger*, Wide Awake Productions (WAP), a student group that had qualified under a program of the University of Virginia to become a "Contracted Independent Organization" (CIO), sought reimbursement from the Student Activities Fund (SAF) for printing charges submitted by a third-party contractor.[78] The SAF denied the request on the grounds that WAP was participating in a "religious activity," a violation of the guidelines of the program.[79] While the Court would later characterize its decision as holding that the forum in *Rosenberger* was a limited public forum in the second category of public forum,[80] the decision itself does not support that conclusion. It is so difficult, in fact, to read from the decision that the forum was of the second category that circuit courts have characterized the limited public forum in *Rosenberger* as a nonpublic forum.[81]

In *Rosenberger*, after acknowledging that the "State must respect the lawful boundaries it has itself set,"[82] the Court noted that government may regulate speech only in a way that is

77. 515 U.S 819 (1995).

78. *Id.* at 823–25.

79. *Id.* at 827.

80. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 302 (2000). "We have held, for example, that an individual's contribution to a *government-created forum* was not government speech." *Id.* (referencing *Rosenberger*, 515 U.S. 819) (emphasis added).

81. *See* Chiu v. Plano Indep. Sch. Dist., 260 F.3d 330, 345 n.10 (5th Cir. 2001) (citing *Rosenberger* to support the statement that "[i]n more recent cases, . . . the Court has used the phrase 'limited public forum' to describe a type of nonpublic forum of limited open access"); *see also* DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ., 196 F.3d 958, 965 (9th Cir. 1999) ("The Supreme Court has used the term 'limited public forum' to refer to a type of nonpublic forum that the government intentionally has opened to certain groups or to certain topics . . . ." (quoting *Rosenberger*, 515 U.S. at 829)); *but c.f.* Christ's Bride Ministries, Inc. v. S.E. Pa. Transp. Auth., 148 F.3d 242, 248-49 (3d Cir. 1998) (citing *Rosenberger* as an example of a limited public forum which is a type of the designated public forum).

82. *Rosenberger,* 515 U.S. at 829.

reasonable and viewpoint neutral.[83] These two limitations constitute the scrutiny applicable in nonpublic forum cases.[84] Not only did the Court not analyze whether the SAF engaged in content-based discrimination; it emphasized a distinction between content-based discrimination, which may be permissible, and viewpoint discrimination, which is presumably impermissible.[85] Thus, the Court's analysis and holding that WAP's denial for funding was based upon viewpoint discrimination[86] indicate that it considered the forum to be a limited forum but that such a forum is nonpublic in nature.

In *Good News Club v. Milford Central School,*[87] the Court directly addressed speech restrictions occurring in a limited public forum. The parties in that case, however, had agreed that Milford Central School (Milford) had created a limited public forum and the Court simply "assume[d]" that Milford operated one.[88] Because the Court assumed that a limited public forum had been created, no analysis was done to determine what public forum, if any, existed. Without the analysis, no guidance was given to lower courts on how to recognize a limited public forum or where it falls in the public forum framework. Although the Court did not conduct an analysis to determine what public forum, if any, had been created by Milford, we can, once again, determine where the Court placed a limited public forum in the framework by the standard of review it used in the case.

The Court's analysis in this area was whether the restriction was based upon viewpoint discrimination[89] and whether the restriction was "reasonable in light of the purpose served by the forum."[90] This analysis is the scrutiny that is to be given when

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83. *Id.*

84. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983).

85. *Rosenberger,* 515 U.S. at 829–30.

86. *Id.* at 832.

87. 533 U.S. 98 (2001).

88. *Id.* at 106.

89. *Id.*

90. *Id.* (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985)).

courts are examining nonpublic fora.[91] Further, the Court cites *Rosenberger* and *Cornelius* in support of this analysis. As we have seen, *Cornelius* classified a limited public forum as nonpublic in nature and *Rosenberger* failed to clarify the issue by using only reasonableness and viewpoint discrimination in analyzing a limited public forum. Thus, in *Good News Club* the Court once again rejected the guidance of *Perry* and indicated that a limited public forum is a type of nonpublic forum.

B. The Second Category of Public Fora under the Circuit Courts of Appeal

The inability of the Supreme Court to accurately and consistently define the second category of public fora has created problems for the circuit courts when trying to interpret Supreme Court precedent. A brief overview of the problems encountered by the circuits is in order.

When the Second Circuit considered *Good News Club*,[92] the court drew no distinction between designated and limited public fora and held that the restrictions on these public fora must be "reasonable and viewpoint neutral."[93] The Second Circuit has also referred to a "sub-category of the designated public forum called the 'limited public forum' " and defined it as a forum, the use of which "is limited to particular purposes or speakers."[94]

The Third Circuit has also expressed confusion over where the limited public forum falls in the public forum framework. In *Whiteland Woods v. Township of West Whiteland*,[95] the court noted, "Although there is some uncertainty whether limited public fora are a subset of designated public fora or a type of nonpublic fora . . .

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91. While viewpoint discrimination is not allowed in any category of public fora, the Court did not look at whether content-based discrimination occurred, indicating the scrutiny for nonpublic fora.

92. 202 F.3d 502 (2d Cir. 2000).

93. *Id.* at 508–09.

94. Perry v. McDonald, 280 F.3d 159, 167 n.4 (2d Cir. 2001) (quoting Gen. Media Communications, Inc. v. Cohen, 131 F.3d 273, 278 n.6 (2d Cir. 1997)).

95. 193 F.3d 177 (3d Cir. 1999).

we have generally applied to limited public fora the constitutional requirements applicable to designated public fora."[96] Not only does the circuit generally apply the same constitutional requirements to both the designated public forum and the limited public forum, it must consider them to be one and the same. In *Christ's Bride Ministries, Inc. v. SEPTA*,[97] the court noted "that SEPTA has created a designated public forum"[98] while on the same page referring to the "limited public forum created by SEPTA."[99]

The Fifth Circuit has also struggled with the second category of public fora. In *Chiu v. Plano Independent School District*,[100] the court expressed its confusion this way:

> Despite the acceptance of a middle category between traditional and nonpublic forums, there is some confusion over the terminology used to describe this category. Two terms—"designated public forum" and "limited public forum"—have been utilized by the Supreme Court, our sister circuits, and this court, yet there has not been agreement on their meaning. Specifically, it has not been clear whether the terms could be used interchangeably to describe the middle tier of forum, or in fact describe different types of forums subject to different levels of First Amendment scrutiny.[101]

The court went on to note that its more recent cases "seem to accept the concept of a limited public forum as being a subcategory of the designated public forum, the regulation of which is subject to less rigorous scrutiny."[102] It noted that when the Fifth Circuit considered *Doe v. Santa Fe Independent School District*[103]

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96. *Id.* at 182 n.2 (citation omitted).
97. 148 F.3d 242 (3d Cir. 1998).
98. *Id.* at 255.
99. *Id.*
100. 260 F.3d 330 (5th Cir. 2001).
101. *Id.* at 345–46.
102. *Id.* at 346 n.10.
103. 168 F.3d 806 (5th Cir. 1999). While this case was overturned by

both the majority and dissent "*seemingly accepted* that limited public forums fell within some part of the designated public forum category."[104] In addressing Supreme Court cases, the Fifth Circuit noted that "the Supreme Court now clearly distinguishes designated public forums subject to strict scrutiny from limited public forums that are not."[105] Prior to that statement, however, the court had noted that, while in some recent cases the Court had referred to a limited public forum as "a type of nonpublic forum of limited open access,"[106] in an even more recent case it "used the phrase limited public forum to designate the intermediate forum category, as opposed to a nonpublic forum."[107] The Fifth Circuit in this case indicates that its problem in deciding what the different terms mean and its struggle to apply the proper standard, arises from the Supreme Court's lack of clear and unequivocal guidance on the rules regarding public fora. Circuit courts should not "seemingly accept" matters critical to First Amendment analysis.

In *DeBoer v. Village of Oak Park,*[108] the Seventh Circuit referred to the second category as "designated public forum,"[109] but also noted that the Supreme Court has used the term "limited public forum" to describe a forum that is open "for certain groups or for the discussion of certain topics."[110] The court expressed its confusion over which term and which level of scrutiny to use in the case, noting that the Supreme Court's previous uses of the term "limited public forum" had created "analytical ambiguity" and "confusion over the proper terminology."[111]

In *Summum v. Callaghan,*[112] the Tenth Circuit addressed the

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Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000), it is used here to illustrate how the Fifth Circuit struggles in interpreting its own precedent involving the second category of public fora.

104. *Chiu,* 260 F.3d at 346 n.12 (emphasis added).

105. *Id.* at 346.

106. *Id.* at 346 n.10 (citing Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S 819, 829 (1995)).

107. *Id.* (citing *Santa Fe Indep. Sch. Dist.,* 530 U.S. at 304).

108. 267 F.3d 558 (7th Cir. 2001).

109. *Id.* at 565.

110. *Id.* at 566.

111. *Id.* at 566–67.

112. 130 F.3d 906 (10th Cir. 1997).

problems it had in trying to interpret Supreme Court precedent dealing with public fora. In *Summum*, a church sought to have a stone monolith engraved with its religious tenets placed on county property near a stone monolith engraved with the Ten Commandments.[113] The monolith on which the Ten Commandments had been engraved had been placed on the county's property by a private fraternal order some years earlier.[114] Summum argued that its Free Speech Rights had been violated because the county property had become a public forum and it had been denied access to that forum.[115]

In addressing Summum's contention that the courthouse lawn was a "limited public forum,"[116] the court noted:

> [T]here is some confusion over this term in the case law. It is not clear whether Summum uses "limited public forum" to refer to a designated public forum that is subject to heightened scrutiny, or to a nonpublic forum that is subject to a reasonableness standard. Summum's (and the district court's) confusion is readily understandable in light of the inconsistent manner in which the Supreme Court itself has used this term.[117]

The court's opinion illustrates that Summum and the district court were not the only ones confused over how to identify the public forum in the case. In addressing the second category of public fora, the court cites *Perry* for the proposition that a "designated public forum may be created for a 'limited purpose' for use 'by certain speakers, or for the discussion of certain subjects.' "[118] The *Perry* decision, however, does not directly indicate that a limited public forum is a type of a designated public forum. In *Perry*, the Court referred to a "second category

113. *Id.* at 910.
114. *Id.*
115. *Id.* at 911.
116. *Id.* at 914.
117. *Id.*
118. *Id.*

consist[ing] of public property which the State has opened for use by the public as a place for expressive activity"[119] and, in a footnote, included the idea that "a public forum may be created for a limited purpose such as use by certain groups . . . or for the discussion of certain subjects."[120] That section of *Perry* should be read to indicate that the second category of public fora is property that the State has opened for use by the public as a place for expressive activity; in some cases property that is opened for expressive activity may be opened for use by certain groups or for the discussion of certain subjects.

The Tenth Circuit traced the idea of the limited public forum to *Widmar* and categorized that decision as indicating that a limited public forum was a subcategory of the designated public forum and that strict scrutiny should be used when analyzing such cases.[121] In examining the more recent Supreme Court cases, the court noted that the term "limited public forum" had been used "to describe a type of nonpublic forum."[122] The court was unable to determine whether Summum used the term "limited public forum" to refer to a type of the second category of public fora or as nonpublic fora.[123] The trouble the court had with clarifying the forum framework was summarized in a footnote:

> We recognize that the boundary between a designated public forum for a limited purpose and a limited public forum is far from clear. Because we conclude that Summum is not alleging that a designated public forum has

119. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

120. *Id.* at 46 n.7 (citation omitted).

121. Summum v. Callaghan, 130 F.3d 906, 914 (10th Cir. 1997).

122. *Id.*

123. *Id.* ("It is not clear whether Summum uses 'limited public forum' to refer to a designated public forum that is subject to heightened scrutiny, or to a nonpublic forum that is subject to a reasonableness standard."); *Id.* at 915 ("Our review of the record and briefs persuades us that Summum does not use 'limited public forum' to mean property which falls within the category of a designated public forum."). It is unclear from the opinion why the court did not schedule oral arguments where Summum could have simply been asked what it meant by its use of the term.

> been created, we do not have to clarify the precise distinctions between the two. We simply note that a designated public forum for a limited purpose and a limited public forum are not interchangeable terms. We use the term "limited public forum" here to denote a particular species of nonpublic forum, in accordance with the manner in which Summum, the Supreme Court in *Rosenberger* and *Lamb's Chapel*, and some commentators define that term.[124]

The court held that the installation of the Ten Commandments monument was "enough to transform the property into a *limited* public forum as it has more recently been defined by the Supreme Court";[125] the property "cannot be characterized as a purely nonpublic forum reserved for official uses."[126]

In *Putnam Pit, Inc. v. City of Cookeville, Tennessee*,[127] the Sixth Circuit noted that three categories of public fora are recognized in that circuit.[128] Those categories are: 1) traditional public forum; 2) designated public forum; and 3) nonpublic forum.[129] In a footnote, however, the court noted "that there has been some uncertainty among the circuits as to whether there are one or two categories of fora other than 'public' and 'nonpublic.' "[130]

Other circuits have also had trouble correctly classifying the types of fora. While noting in a parenthetical that it is "sometimes called a limited public forum," the First Circuit has referred to the second category as a "designated public forum."[131] The Fourth

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124. *Id.* at 916 (citation omitted).

125. *Id.* at 919.

126. *Id.*

127. Putnam Pit, Inc. v. City of Cookeville, Tenn., 221 F.3d 834 (6th Cir. 2000).

128. *Id.* at 842.

129. *Id.*

130. *Id.* at 842 n.5.

131. New Eng. Reg'l Council of Carpenters v. Kinton, 284 F.3d 9, 20 (1st Cir. 2002).

Circuit has referred to "[a] designated public forum, whether limited or unlimited in scope."[132] The Ninth Circuit refers to the second category as "designated public forum."[133] The Federal Circuit has referred to the second category as "designated public fora."[134] In *Children of the Rosary v. City of Phoenix,* the Ninth Circuit opined: "A designated public forum is a nontraditional forum that the government has opened for expressive activity by part or all of the public."[135]

C. Correcting the Problem

The forum framework used by courts allows citizens to know whether they have "a right of access to public property"[136] and, if so, how limitations upon the exercise of the right will be evaluated by courts.[137] Citizens cannot know if they have a right of access to a particular piece of government property if courts do not consistently instruct them on how to identify the types of property. Further, government bodies will be unable to constitutionally apply limitations if they are not given clear instructions on when and where particular limitations can be applied. Courts should not confuse a designated public forum with a limited public forum because the two are easily distinguishable from each other. Courts should revert back to the forum framework as it was originally constructed in *Perry*.

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132. Sons of the Confederate Veterans v. Comm'r of the Va. Dep't of Motor Vehicles, 288 F.3d 610, 622 n.10 (4th Cir. 2002).

133. *See, e.g.*, DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ., 196 F.3d 958, 964 (9th Cir. 1999); *see also* Children of the Rosary v. City of Phoenix, 154 F.3d 972, 977 (9th Cir. 1998).

134. Griffin v. Sec'y of Veterans Affairs, 288 F.3d 1309, 1321 (Fed. Cir. 2002).

135. *Children of the Rosary*, 154 F.3d at 977.

136. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44 (1983).

137. *Id.*

1. Designated Public Fora

When courts revert back to the original forum framework, they will hold that a designated public forum exists when government creates a public forum in an area that, before its designation as public fora, had been off-limits to free speech. In other words, a designated public forum should be considered an area that, prior to its designation as a public forum, was neither a public park, sidewalk, or another type of area that has "traditionally been available for public expression."[138] Once opened, however, it would have the constitutional characteristics of a traditional public forum.[139] Designated public fora, courts should hold, are limited only in a sense of time and space. Regardless of whether a forum is limited to a geographical boundary or a time frame, the boundary must have been established by government action. A designated public forum would differ from a traditional public forum in that it must be created by a government body and, once created, may be destroyed by that same governing body.[140] A designated public forum would differ from a limited public forum in that there would be no limitation on either the groups that may participate in the forum or in the topics that could be discussed. A designated public forum would differ from a nonpublic forum in that it is open to the public for speech activities.

Content-neutral restrictions in a designated public forum, such as time, place, and manner regulations are permissible as long as they are reasonable.[141] This is true now and would be true under a return to the original forum framework.

Content-based restrictions on speech in a designated public forum would pass constitutional muster only if, as with traditional public fora, they are: (1) "necessary to serve a compelling state interest" and (2) "narrowly drawn to achieve that interest."[142] As in

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138. Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678–80 (1992).

139. *Perry*, 460 U.S. at 46.

140. Hawkins v. City and County of Denver, 170 F.3d 1281, 1286–87 (10th Cir. 1999).

141. DeBoer v. Village of Oak Park, 267 F.3d 558, 566 (7th Cir. 2001).

142. Hotel Employees & Rest. Employees Union, Local 100 v. City of

a traditional public forum, the government must use any less restrictive alternatives it may have available.[143] Further, the governing body establishing the restrictions "must leave open adequate alternative channels of communication."[144]

Regardless of whether the restrictions on speech in a designated public forum are content-based or content-neutral, they must be viewpoint neutral.[145]

2. Limited Public Fora

If courts were to return to the original forum framework, a limited public forum would be found whenever government opens public property that has traditionally been off-limits to public speech, but limits the topics that may be discussed or the groups that may participate in the forum.[146] A limited public forum would also be created if both the topics that may be discussed and the groups that may participate in the forum are limited. A limited public forum is property that has been opened for public expression but "that is not a designated public forum open for indiscriminate public use."[147] The limitation to which "limited public forum" refers is a limitation on who may speak and what topics may be discussed.[148]

New York Dep't. of Parks and Recreation, 311 F.3d 534, 545 (2d Cir. 2002) (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 800 (1985)).

143. United States v. Playboy Entm't Group, 529 U.S. 803, 813 (2000); *See also* Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) ("The Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.").

144. New Eng. Reg'l Council of Carpenters v. Kinton, 284 F.3d 9, 20 (1st Cir. 2002).

145. *See* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 392, 393–94 (1993).

146. *See* Chiu v. Plano Indep. Sch. Dist., 260 F.3d 330, 346 (5th Cir. 2001) (noting that the Supreme Court has "used the term 'limited public forum' to describe forums opened for public expression of particular kinds or by particular groups.").

147. *Lamb's Chapel*, 508 U.S. at 384.

148. *See* Rosenberger v. Rector & Visitors of the Univ. of Va., U.S 819,

It is important that courts begin to recognize and discuss the proper classification of limited public fora. The importance lies in the level of protection that speech in the forum would be afforded under a proper analysis. As we have seen, when a limited public forum is incorrectly classified as a nonpublic forum, the only inquiry courts make is whether the restriction on speech is reasonable and viewpoint neutral. This does not give as much constitutional protection as does strict scrutiny, the level of review used when courts are analyzing restrictions on speech in a traditional or designated public forum. Due to the possibility that certain groups and topics could be lawfully excluded at the time a limited public forum was created, it would be necessary for courts to use two levels of review in such cases. While, like other circuits, it has misidentified the nature of limited public fora,[149] in *Hotel Employees & Restaurant Employees Union, Local 100 v. City of New York Department of Parks & Recreation*, the Second Circuit properly explained how restrictions in a limited public forum should be analyzed. For restrictions on speech activities that fall inside a category for which the limited public forum had been opened, courts should apply strict scrutiny.[150] This is because "in a limited public forum, government is free to impose a blanket exclusion on certain types of speech, but once it allows expressive activities of a certain genre, it may not selectively deny access for other activities of that genre."[151] Limitations on speech activities falling outside a topic or group category for which the limited forum had been opened are not to be subjected to a strict scrutiny analysis. Rather, such limitations are constitutional if they are reasonable and viewpoint neutral.[152] If the limitation is one as to which groups may participate in expressive behavior at the location,

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829 (1995).

149. *See* Hotel Employees & Rest. Employees Union, Local 100 v. City of New York Dep't. of Parks & Recreation, 311 F.3d 534, 545 (2d Cir. 2002) (referring to a limited public forum as a "subset of the designated public forum").

150. *Id.*

151. *Id.* at 545–46 (quoting Travis v. Owego-Appalachian Sch. Dist., 729 F.2d 688, 692 (2d Cir. 1991).

152. *Id.* at 546.

any content-based regulation would be subject to a strict scrutiny analysis. The regulation would have to be narrowly tailored to serve a compelling governmental interest. Regulations on speech in this type of limited public forum would have to be content neutral. This would provide the same protection as a traditional or designated public forum.

IV. NON-PUBLIC FORA

Public property that has neither by tradition nor designation been open to public discourse is a non-public forum.[153] One court has stated, "A forum may be considered nonpublic where there is clear evidence that the state did not intend to create a public forum or where the nature of the property at issue is inconsistent with the expressive activity, indicating that the government did not intend to create a public forum."[154] Examples of non-public fora include military reservations,[155] jailhouse grounds,[156] and school newspapers.[157] While a forum may be considered non-public, that status does not allow the government to restrict speech in any way it likes.[158] Restrictions in nonpublic fora must be reasonable in light of the government body's interest and must be viewpoint neutral.[159] While content-based restrictions are allowed,[160] restrictions on speech must not be drawn in an effort to suppress expression because officials disagree with a specific viewpoint.[161] "The reasonableness of the Government's restriction of access to a nonpublic forum must be assessed in the light of the purpose of the

153. *See* Chiu v. Plano Indep. Sch. Dist., 260 F.3d 330, 347 (5th Cir. 2001).

154. *Id.* (quoting Estiverne v. La. State Bar Ass'n, 863 F.2d 371, 376 (5th Cir. 1989)).

155. *See* Greer v. Spock, 424 U.S. 828, 838 (1976).

156. *See* Adderley v. Florida, 385 U.S. 39, *passim* (1966).

157. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270–71 (1988).

158. Ark. Educ. Television v. Forbes, 523 U.S. 666, 682 (1998).

159. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985).

160. *Id.*

161. Griffin v. Sec'y of Veterans Affairs, 288 F.3d 1309, 1321 (Fed. Cir. 2002).

forum and all the surrounding circumstances."[162] That reasonableness "is determined by a fact-intensive test that takes into account such factors as the uses to which the forum is typically put, the particular risks associated with the speech activity at issue, and the proffered rationale for the restriction."[163]

Consider, for example, the concerns that a state would have for presentations given in a state prison. A prison system may have a non-public forum at which inmates listen to presentations on topics aimed at increasing their chance of finding a good job upon release. The system would not, for obvious reasons, allow presentations on how to be a professional locksmith or how to improve one's shooting skills. Such regulations would be reasonable in light of the state prison system's interest in keeping inmates incarcerated and in an appropriate rehabilitation program.

Another problem that exists with the forum framework is found in a specific type of nonpublic forum. When government bodies, functioning in a proprietary role, regulate their property, courts will generally find that a non-public forum exists.[164] In the past, courts have recognized areas such as advertising space on buses,[165] a fence at a high school baseball field,[166] and vanity plates issued for automobiles[167] as being among those areas in which government bodies were acting as proprietors. When this is done, courts have held restrictions on speech to be constitutional. A proper analysis of these cases indicates that a limited public forum, and not a type of non-public forum, is created when government acts as a proprietor. Some restrictions on speech that have been allowed in these cases may not have survived the heightened scrutiny used by courts when a limited forum is found to have been

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162. *Cornelius*, 473 U.S. at 809.

163. New Eng. Reg'l Council of Carpenters v. Kinton, 284 F.3d 9, 20 (1st Cir. 2002).

164. *See, e.g.*, Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992); *see also* Lehman v. Shaker Heights, 418 U.S. 298 (1974).

165. *Lehman*, 418 U.S. at 303–04.

166. DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ., 196 F.3d 958, 967 (9th Cir. 1999).

167. Perry v. McDonald, 280 F.3d 159, 167 (2d Cir. 2001) (referring to the "revenue-raising aim of the vanity-plate regime").

created.

The idea that a non-public forum exists when government acts as a proprietor has its roots in *Lehman v. Shaker Heights*,[168] a case pre-dating the forum framework first described in *Perry*. In *Lehman*, a candidate for political office attempted to buy advertising space on the Shaker Heights (Ohio) Rapid Transit System to promote his campaign.[169] The city sold advertising space on the vehicles in its public transportation system through Metromedia, a company that contracted with the city to sell the advertising space.[170] Under the contract Metromedia had with the city, the selling of political advertising was strictly banned.[171] When he attempted to purchase advertising space, the political candidate was informed that political advertising was not permitted.[172] The Supreme Court disagreed with the candidate's argument that the advertising space at issue was a public forum.[173] The Court summarized the difference it saw between traditional public fora and the advertising space in question:

> Here, we have no open spaces, no meeting hall, park, street corner, or other public thoroughfare. Instead, the city is engaged in commerce. It must provide rapid, convenient, pleasant, and inexpensive service to the commuters of Shaker Heights. The car card space, although incidental to the provision of public transportation, is a part of the commercial venture. In much the same way that a newspaper or periodical, or even a radio or television station, need not accept every proffer of advertising from the general public, a city transit system has discretion to develop and make reasonable choices concerning the type of

168. 418 U.S. 298 (1974).
169. *Id.* at 299.
170. *Id.*
171. *Id.* at 299–300.
172. *Id.* at 300.
173. *Id.* at 300–01.

> advertising that may be displayed in its vehicles.[174]

The Court further stressed the economic nature of the ban on political advertising by comparing it to a decision by the city to raise the fares or locations of the bus stops.[175] The Court noted that the city's actions could not be "arbitrary, capricious, or invidious."[176] Courts have used *Lehman* to suggest that, when analyzing a free speech case in which a government body is acting as a proprietor, raising money or facilitating the conduct of its business, a bright-line rule dictates that a non-public forum is at issue.[177] However, in light of the date of the *Lehman* decision, it need not be read to indicate such a bright-line rule. As *Lehman* preceded *Perry*, the idea of a second category of public fora had not yet been fully addressed by the Court. The discussion of fora in *Lehman* is limited to traditional public and non-public fora. The "open spaces, . . . meeting hall, park, street corner, or other public thoroughfare" litany provided by the Court[178] would certainly be classified as traditional public fora.[179] The Court did not discuss whether the advertising space in question might have been classified as belonging to the second category of public fora. This may be due to the fact that the case preceded the *Perry* decision, in which the Court would more fully address the idea of a second category of public fora. Had *Lehman* been decided after *Perry*, the Court may have decided that the advertising space at issue was a limited public forum belonging to the second category of public fora. In *Lehman*, the Court noted that Shaker Heights had "*limited* access to its transit system advertising space"[180] and that the

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174. *Id.* at 303.

175. *Id.* at 303–04.

176. *Id.* at 303.

177. *See* DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ., 196 F.3d 958, 958 (9th Cir. 1999).

178. *Lehman*, 418 U.S. at 303.

179. Further, the Court acknowledges Lord Dunedin's comment of "open spaces and public places." *Id.* at 302 (quoting M'Ara v. Magistrates of Edinburgh, 1913 Sess. Cas. 1059, 1073).

180. *Lehman*, 418 U.S. at 304 (emphasis added).

limitation was one not permitting political advertising.[181] Courts viewing *Lehman* in this manner may view certain economic activities by governments creating limited public fora.

In *Children of the Rosary v. City of Phoenix*,[182] the Ninth Circuit addressed "whether there is a likelihood that limiting advertising on municipal buses to 'speech which proposes a commercial transaction' violates the First Amendment."[183] *Children of the Rosary* dealt with advertising space the City of Phoenix sold on the exterior panels of its buses.[184] Prior to November 1, 1996, advertising "supporting or opposing a candidate, issue or cause, or which advocates or opposes a religion, . . . or belief" was prohibited by the city's standards.[185] While this regulation was in effect, the city rejected an advertisement[186] from the group Children of the Rosary (COR).[187] COR obtained an injunction that required the city to display the ad.[188] Advertising standards that "limited the subject matter of bus advertising to 'speech which proposes a commercial transaction' " took effect on November 1, 1996.[189] After being informed that its advertisement would no longer be

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181. *Id.* at 300.

182. Children of the Rosary v. City of Phoenix, 154 F.3d 972, 974 (9th Cir. 1998).

183. *Id.* at 974.

184. *Id.* at 975.

185. *Id.*

186. "The proposed advertisement stated:

'Before I formed you in the womb, I knew you'—God
Jeremiah 1:5
CHOOSE LIFE!
[COR Logo] Children of the Rosary

The COR logo is a fetus surrounded by a rosary, which is connected to a cross at the top." *Id.*

187. *Id.*

188. "The revised advertisement stated:

'Before I formed you in the womb, I knew you'—God
Jeremiah 1:5
Purchase this message as a bumpersticker for your vehicle!
Contact [phone number]
[COR Logo] Children of the Rosary CHOOSE LIFE!"

Id.

189. *Id.*

displayed because it did not propose a commercial transaction, COR submitted a new ad to be displayed.[190] The city rejected this ad because it viewed the advertisement's primary purpose as being "not to propose a commercial transaction, but instead promote a noncommercial message."[191] An advertisement proposed by the Arizona Civil Liberties Union (ACLU) was also rejected by the city.[192] The court was persuaded by the city's policy of rejecting political and religious advertisements that it never intended to create a public forum.[193] Referring to *Lehman*, the Ninth Circuit cited that case as "strongly support[ing] our conclusion that the advertising panels are nonpublic fora."[194] The court dismissed the appellants' argument that, because *Lehman* was decided prior to *Perry* and is inconsistent with subsequent Supreme Court decisions, it should not be used to find that the advertising panels are a non-public forum.[195] In doing so, the court briefly summarized Supreme Court cases in which *Lehman* had been mentioned and the proposition for which the Court had cited the case.[196] These cites did not go to what should have been viewed by the court as the heart of the case: whether the city's policy of selling advertising while limiting the sales to advertisements that "propose[] a commercial transaction"[197] created a limited public forum.

It is important to note that if a government body engaging in a proprietary function does not appropriately use "discretion to develop and make reasonable choices concerning the type of advertising,"[198] courts may find that a public forum has been created. When addressing whether the selling of advertising has created a public forum, courts often examine whether the

190. *Id.*
191. *Id.*
192. "Their advertisement stated:

The ACLU Supports Free Speech for Everyone
To purchase this bumper sticker please call [phone number]."

Id.
193. *Id.* at 976.
194. *Id.* at 977.
195. *Id.* at 977–78.
196. *Id.*
197. *Id.* at 975.
198. Lehman v. Shaker Heights, 418 U.S. 298, 303 (1974).

government has used discretion to refuse noncommercial advertisements.[199] In *Planned Parenthood Ass'n/Chicago Area v. Chicago Transit Authority*,[200] Winston Network, Inc. ("Winston") had an exclusive contract with the Chicago Transit Authority ("CTA") "to accept and place cards, signs, and other forms of advertising" on advertising space on property owned by CTA.[201] Other than not accepting "immoral, vulgar, or disreputable advertisements," Winston was not restricted in accepting messages.[202] Planned Parenthood Association/Chicago Area ("PPA") repeatedly sought advertising space in CTA buses and transit cars; their requests were denied by CTA.[203] The Seventh Circuit agreed with the district court that the CTA had created a public forum.[204] Although CTA maintained that it had a policy of declining controversial public-issue advertising,[205] the court noted that CTA's "lais-sez-faire [sic] policy" virtually guaranteed access to anyone willing to pay the fee.[206] "CTA's willingness to accommodate all advertisers" distinguished this case from *Lehman*, in which there had been a longstanding ban on political advertising.[207] Because CTA had allowed "a wide variety of commercial, public-service, public-issue, and political ads"[208] to be displayed in its advertising space, it could not argue that such displays were "incompatible with the primary use of the

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199. *See, e.g.*, Planned Parenthood Ass'n/Chi. Area v. Chi. Transit Auth., 767 F.2d 1225 (7th Cir. 1985); *see also* Lebron v. Wash. Metro. Area Transit Auth., 749 F.2d 893, 896 n.6 (D.C. Cir. 1984); *see also Children of the Rosary*, 154 F.3d at 975.

200. 767 F.2d 1225 (7th Cir. 1985)

201. *Planned Parenthood Ass'n/Chi. Area*, 767 F.2d at 1227.

202. *Id.*

203. *Id.*

204. The Seventh Circuit did not address whether the public forum was designated or limited in nature, finding that it was just a "public forum." *Id.* at 1232.

205. *Id.* at 1229.

206. *Id.* at 1232.

207. Air Line Pilots Ass'n, Int'l v. Dep't of Aviation, 45 F.3d 1144, 1153 (7th Cir. 1995).

208. *Planned Parenthood Ass'n/Chi. Area*, 767 F.2d at 1232.

facilities."[209]

V. CONCLUSION

Our First Amendment right to free speech is too precious to be treated in a haphazard fashion. For too long, federal courts have created and then ignored confusion over public fora. There is no reason for this confusion to exist. The rules by which one determines what type of public forum has been created by a government body should be clearly defined and consistently used by federal courts.

Courts should immediately begin to clarify public fora by consistently using the designations of "traditional," "designated," "limited," and "non-public" in an appropriate fashion. Those designations, when used with careful precision, will strengthen the protections the First Amendment affords us. Until those designations are consistently used correctly, conflicting rulings will continue to emerge from the courts of appeal and the United States Supreme Court.

209. *Id.*