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Jennifer Spencer

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NO SERVICE: FREE SPEECH, THE COMMUNICATIONS ACT, AND BART'S CELL PHONE NETWORK SHUTDOWN

Jennifer Spencer[†]

On August 11, 2011, the Bay Area Rapid Transit ("BART") District officials shut down cell phone service in several BART stations in San Francisco for more than three hours to interfere with and impede political demonstrations against BART police.[1] On July 3, 2011, a BART policeman had fatally shot a homeless man, leading to disruptive demonstrations on July 11. BART claimed it shut down phone service on August 11 to prevent similar violence or disruptions.[2]

The American Civil Liberties Union ("ACLU") of Northern California sent a letter to BART (and copied the letter to the Federal Communications Commission ("FCC" or "Commission")) outlining the First Amendment issues and claiming that BART acted unconstitutionally.[3] Additionally, Public Knowledge and several other public interest groups[4] filed a petition to the FCC on August 29, 2011 seeking a declaratory ruling that disconnection of telecommunications services violates the Communications Act of 1934, 47 U.S.C. § 151 (amended 1996).[5]

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† J.D. Candidate, 2013, University of California, Berkeley School of Law.

1. Bob Franklin, BART Board of Directors President, *A Letter From BART to Our Customers*, BART (Aug. 20, 2011), http://www.bart.gov/news/articles/2011/news20110820.aspx; Letter from Abdi Soltani & Alan Schlosser, American Civil Liberties Union of Northern California, to Kenton Rainey & BART (Aug. 15, 2011), *available at* http://www.aclunc.org/issues/technology/blog/asset_upload_file335_10381.pdf.

2. Casey Miner, *FCC: We're Monitoring BART's Cell Service Shutdown*, THE INFORMANT, KALW NEWS (Aug. 15, 2011, 3:19 PM), http://informant.kalwnews.org/2011/08/fcc-were-monitoring-barts-cell-service-shutdown/.

3. Letter from Abdi Soltani & Alan Schlosser to Kenton Rainey & BART, *supra* note 1.

4. Harold Feld & Sherwin Siy, *Emergency Petition for Declaratory Ruling of Public Knowledge, Broadband Institute of California, Center for Democracy and Technology, Center for Media Justice, Electronic Frontier Foundation, Media Access Project, Minority Media and Telecommunications Council, National Hispanic Media Coalition, and New America Foundation's Open Technology Initiative*, PUBLIC KNOWLEDGE (Aug. 29, 2011), http://www.publicknowledge.org/files/docs/publicinterestpetitionFCCBART.pdf.

5. The Communications Act of 1934, 47 U.S.C. § 151 (2006) ("[Congress enacted the Communications Act] for the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people

BART's actions raise a number of immediate concerns. The fact that what a government deems necessary for safety is ambiguous and undefined makes the possibilities endless. Moreover, by shutting down cell phone service and thus interfering with speech, BART's actions implicate First Amendment issues. Finally, BART's actions possibly constitute violations of the Communications Act and FCC's rules and regulations.

Whether governments have the ability to hinder access to social networking and cell phones has increasingly become not only part of a First Amendment and censorship debate, but also the touchstone of actual controversies, and will likely be at the center of future court cases. Government authorities claim that, when necessary for safety, they should have the ability to interfere with social networking platforms—such as Facebook and Twitter—and mobile phone activity.[6] Until the recent controversial decision to shut down cell phone service by BART officials in San Francisco in August 2011,[7] many Americans may have thought that government interference with social networking and mobile devices is something that takes place in lands of dictatorships and non-democratic nations. For example, former Egyptian President Hosni Mubarak's government notably shut down the Internet entirely in order to interfere with the ability of Facebook and Twitter users to coordinate protests.[8] While democratic nations criticized Egypt for this, United Kingdom Prime Minister David Cameron revealed his desire to resort to similar measures if and when necessary:

> Free flow of information can be used for good. But it can also be used for ill. So we are working with the police, the intelligence services and industry to look at whether it would be right to stop people communicating via these websites and services when we know they are plotting violence, disorder and criminality.[9]

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of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service . . . for the purpose of promoting safety of life and property."); Feld & Siy, *supra* note 4.

6. *See, e.g.*, Alexandra Dunn, *Unplugging a Nation: State Media Strategy during Egypt's January 25 Uprising*, 35 FLETCHER F. WORLD AFF. 15 (2011); *Declan McCullagh, Renewed Push to Give Obama an Internet "Kill Switch,"* CBS NEWS (Jan. 24, 2011, 10:12 AM), http://www.cbsnews.com/8301-501465_162-20029302-501465.html; Dan Nosowitz, *U.K. Prime Minister David Cameron Wants a Master Kill-Switch for Social Networks*, POPULAR SCIENCE (Aug. 11, 2011, 11:55 AM), http://www.popsci.com/technology/article/2011-08/uk-prime-minister-david-cameron-considers-switching-entire-social-networks.

7. Zusha Elinson, *After Cellphone Action, BART Faces Escalating Protests*, N.Y. TIMES (Aug. 20, 2011), http://www.nytimes.com/2011/08/21/us/21bcbart.html?pagewanted=all.

8. Nosowitz, *supra* note 6; *see also* Dunn, *supra* note 6.

9. Nosowitz, *supra* 6.

The major difference between Prime Minister Cameron and BART officials, however, is that Mr. Cameron stated the desire and the need to inquire into the necessity of hindering social networking and cell phone use,[10] while BART blocked the cell tower and Internet access without this preliminary inquiry.[11] Government officials may at times have good reasons to restrict the use of technological devices and networks to protect the safety of its citizens. Because mobile devices are increasingly utilized for protests worldwide, this issue is of current importance and may be adjudicated in the future.

Bob Franklin, the BART board president, declared that he "cannot tolerate a protest on the [BART] platform" because the number of people, speed of trains, and volts of electricity involved with running the train in downtown San Francisco make for too dangerous of a situation.[12] The e-mails exchanged among BART employees obtained by *The Bay Citizen*,[13] however, do not mention safety concerns, and instead discuss ways to get the "upper hand" in inhibiting communication necessary to organize a protest.[14] BART Chief Communications Officer, Linton Johnson, stated that "passengers have a Constitutional right to safety. People are forgetting the fact that there are multiple Constitutional [sic] rights, and we have to protect them all."[15] A plaintiff would argue that BART chose not to protect the freedom of speech on August 11 and deemed safety concerns more important than the constitutional right of free speech.[16] The ACLU argued, in its letter to BART, that restraining free speech was not the proper reaction to safety concerns.[17]

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10. *Id.*

11. *See* Miner, *supra* note 2 (explaining that since BART shutdown its cell phone equipment without making a preliminary inquiry, it consequently shut down access to the Internet since passengers did not have access to the Internet through their cell phone service provider).

12. *Id.*

13. *About the Bay Citizen*, THE BAY CITIZEN, http://www.baycitizen.org/about/ (last visited Feb. 20, 2012). *The Bay Citizen*, which covers civic and cultural news in the San Francisco Bay Area, "was launched as a nonprofit, nonpartisan, member-supported news organization dedicated to promoting innovation in journalism and catalyzing citizen engagement with the news." *Id.*

14. Zusha Elinson, *BART Cut Cell Service on Spur of the Moment, E-mails*, THE BAY CITIZEN (Oct. 11, 2011, 2:58 PM), http://www.baycitizen.org/bart-protests/story/bart-cut-cell-service-spur-moment-e-mails/.

15. *Id.*

16. Letter from Abdi Soltani & Alan Schlosser to Kenton Rainey & BART, *supra* note 1, at 2.

17. *Id.*

FCC spokesman Neil Grace also commented on BART's actions, stating that the FCC "is continuing to collect information about BART's actions and will be taking steps to hear from stakeholders about the important issues those actions raised, including protecting public safety and ensuring the availability of communications networks."[18] Additionally, the Electronic Frontier Foundation ("EFF") has called "cutting off cell phone service in response to a planned protest a shameful attack on free speech."[19]

This Note analyzes the issue through two legal frameworks: (1) the First Amendment and (2) the Communications Act of 1934, as amended. This Note will focus on BART's recent shut down of access to cell phone service, which effectively prevented Internet and social networking communications conducted through cell phones. Part I explains the known logistics of the shutdown, including e-mails exchanged among BART officials planning the shutdown. Part II addresses the First Amendment concerns related to the shutdown, including whether BART's platforms constitute public fora, prior restraint concerns, and explaining that the First Amendment does not protect actual incitement of illegal activity. Part III analyzes possible violations under the Communications Act relating to under which role BART was acting, as well as possible liability for willful interference with communications networks. Additionally, Part III addresses how the shutdown disrupted communication during an emergency and prevented free speech through online communication. Part IV analyzes BART's liability as a state actor under California law.

I. BART'S WIRELESS SHUTDOWN

At the time of this Note, no complaint has been filed, and the FCC has yet to respond to Public Knowledge's Emergency Petition.[20] Although many of the facts remain unclear, e-mails exchanged among BART officials indicate that BART decided to shut down its cell phone equipment for a brief period of time without consulting its board of directors.[21]

According to BART spokesman Linton Johnson's 2:20 a.m. e-mail to several BART officials, he suggested shutting down cell phone service entirely:

18. Miner, *supra* note 2.

19. Eva Galperin, *BART Pulls a Mubarak in San Francisco*, ELECTRONIC FRONTIER FOUNDATION (Aug. 12, 2011), https://www.eff.org/deeplinks/2011/08/bart-pulls-mubarak-san-francisco.

20. *BART Cellphone Shutdown Won't Lead to ACLU Suit*, CBS NEWS (Aug. 16, 2011, 9:39 AM), http://www.cbsnews.com/8301-501465_162-20092903-501465.html.

21. Elinson, *supra* note 14.

> A whole heck of a lot their ability to carry out this exercise is predicated on being able to communicate with each other. Can't we just shut off wireless mobile phone and Wifi communication in the downtown stations? It's not like it's a constitutional right for BART to provide mobile phone and Wifi service. Additionally, the wireless phone companies and Wifi Rail rent space from us. We have radios—seems to me have the upper hand communication wise. Yes, it's a small inconvenience for our customers, but heck if they were on Muni just above BART downtown SF, they'd have no wireless signal.[22]

BART Deputy Police Chief Benson Fairow approved of the suggestion in a 5:00 a.m. e-mail, at which time he asked if anyone could think of a downside to the plan.[23] BART Police Chief Kenton Rainey approved of the idea in an e-mail to Fairow and Johnson at 6:38 a.m., stating: "I think this is a great ideal [sic] especially if it will prevent them from texting as well. However, our media release regarding the protest states we will update passengers via texting and e-mails."[24]

The shutdown began at 7:45 a.m. when acting manager of BART police, Lieutenant Kevin Franklin, asked the telecommunications staff how to shut off BART's cell phone equipment.[25] BART employee Dirk Peters—who communicated with the cell carriers renting the use of BART's cell tower—then questioned the shutdown of the cell phone carriers in an 8:18 a.m. e-mail: "Its [sic] common courtesy in the wireless industry to notify all carriers at least 24 hours in advance. Can this be scheduled at a later date?"[26] In response to Peters' questioning of the hastiness of the shut down and the logistics with telephone carriers, Franklin stated at 8:24 a.m. that they could not wait that long: "This is a last minute event and we can't schedule what the bad guys do. We appreciate your help and this is important for BART. Thanks."[27]

At 8:45 a.m., Peters then e-mailed Forza Telecom, the contractor that runs BART's cell phone network: "Gentlemen, [t]he BART Police require the M-Line wireless from the Trans Bay Tube Portal to the Balboa Park Station, to be shut down today between 4 pm & 8 [sic] Steve, please help notify all the carriers."[28]

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22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*

According to Johnson's statement obtained by the *Bay Citizen*, BART's lawyer Sherwood Wakeman consulted the Supreme Court case *Brandenburg v. Ohio*[29] before signing off on the shutdown.[30] Thus, from the current record, it appears that the only legal analysis came when BART lawyer Wakeman considered *Brandenburg* and how imminent danger may affect free speech. Wakeman stated at a public hearing, "[t]his is an issue which, from my own experience, when there is an imminent danger or threat of violation of law, there is legal authority, um, to curtail free speech."[31]

Although spokesman Johnson proposed the hastily implemented idea, during a press conference on August 16, 2011, he declared it a "gut-wrenching decision" and stated that BART "struggled" with making the decision.[32] In the weeks following the shutdown, BART drafted a proposed policy with the help of the ACLU that would allow BART to shut down cell phone access only during times of terrorist threats.[33] However, the Board delayed the scheduled vote on the policy on October 27.[34] BART announced its new policy for cell phone interruptions on December 1, 2011, allowing for a shut down only during "extraordinary circumstances."[35] The new policy allows for a temporary interruption only when BART "determines that there is strong evidence of imminent unlawful activity that threatens the safety of District passengers, employees and other members of the public."[36] The policy explicitly mentions examples of "extraordinary circumstances" that may result in a temporary interruption, including "evidence of use of cell phones as instrumentalities in explosives; to facilitate criminal activity or endanger District passengers[; or] . . . to facilitate specific plans or attempts to destroy District property or substantially disrupt public transit services."[37] Additionally, the new policy states that the BART general manager must approve the operational procedure used to temporarily interrupt service and that the interruption "shall be promptly reported to first responders and the

29. Brandenburg v. Ohio, 395 U.S. 444 (1969).

30. Elinson, *supra* note 14.

31. *Id.*

32. *Id.*

33. *Id.*

34. Michael Krasny, *BART's New General Manager*, KQED RADIO (Sep. 29, 2001, 9:00 AM), http://www.kqed.org/a/forum/R201109290900; Will Reisman, *BART Board Delays Vote on Cellphone Shutdown Policy*, SF EXAMINER (Oct. 27, 2011, 1:04 PM), http://www.sfexaminer.com/local/bay-area/2011/10/bart-board-delays-vote-cellphone-shutdown-policy.

35. *Extraordinary Circumstances Only for Cell Phone Interruptions*, BART.ORG (Dec. 1, 2011), http://www.bart.gov/news/articles/2011/news20111201.aspx.

36. *BART Cell Service Interruption Policy*, BAY AREA RAPID TRANSIT (Feb. 1, 2012), http://www.bart.gov/docs/final_CSIP.pdf.

37. *Id.*

Board of Directors."[38] BART Board President Bob Franklin stated that BART developed the policy with input from the FCC and ACLU and that he hopes it will serve as a model for U.S. government agencies in the future.[39]

The FCC is continuing to investigate and review the August 11 shutdown, as FCC Chairman Julius Genachowski wrote that he has "asked Commission staff to review these critical issues and consider the constraints that the Communications Act, First Amendment, and other laws and policies place upon potential service interruptions. The FCC will soon announce an open, public process to provide guidance on these issues."[40] The FCC has the power and duty to enact the necessary rules and regulations and to issue orders necessary to carry out the Communications Act.[41] Therefore, the FCC's guidelines and opinions are authoritative in this area of law.

II. FIRST AMENDMENT

The Supreme Court examines First Amendment issues against the backdrop of the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[42] The Supreme Court has held that the First Amendment protects speech made through the telephone[43] and the Internet.[44] The First Amendment analysis in this Note stems from the ACLU's letter to BART discussing the constitutionality of the shutdown, as it represents the arguments a plaintiff would bring.[45]

First, Section II.A explains the differences between public and non-public fora. If BART's stations and platforms are public fora, BART can only restrict speech in a content-neutral way, and such regulation is subject to a "time, place, and manner" restriction, which "serves an important government interest and leaves open adequate alternative places for speech."[46] Next, Section II.B discusses whether or not BART's shutdown

38. *Id.*

39. *Extraordinary Circumstances Only for Cell Phone Interruptions*, *supra* note 35.

40. FCC *To Review BART Cell Service Shutdown Policy*, CBS NEWS (Dec. 2, 2011, 10:34 PM), http://www.cbsnws.com/8301-205_162-57336077/fcc-to-review-bart-cell-service-shutdown-policy.

41. 47 U.S.C. § 154(i) (2006).

42. New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

43. Sable Commc'n of California, Inc. v. FCC, 425 U.S. 115 (1989).

44. Reno v. ACLU, 521 U.S. 844 (1997).

45. Letter from Abdi Soltani & Alan Schlosser to Kenton Rainey & BART, *supra* note 1.

46. Ovadal v. City of Madison, 416 F.3d 531, 536 (7th Cir. 2005) ("When speech takes place in a traditional public forum, it receives heightened constitutional protection. The

constitutes a prior restraint on free speech, explaining that government action should only come after a protest occurs because it is impossible to know the nature of a protest before it takes place. A court must determine whether a restriction qualifies as a prior restraint because prior restraints are presumed to be unconstitutional.[47] Finally, Section II.C explains that speech that may cause disruptions is still protected as long as it does not incite illegal activity. However, the First Amendment does not protect actual threats.

A. WHETHER BART'S PLATFORMS AND STATIONS CONSTITUTE PUBLIC FORA AFFECTS BART'S POWER TO RESTRICT SPEECH IN THESE AREAS

The First Amendment does not give people "a constitutional right to [engage in public protest] whenever and however and wherever they please."[48] To regulate speech in a public forum, the regulation must be both content-neutral and "be a reasonable time, place, or manner restriction."[49] Free speech protects protests only in "traditional" and "designated" public fora, whereas "nonpublic" fora "are not appropriate platforms for unrestrained communication."[50]

Whether the government can impose speech restrictions depends on what type of forum the affected property is.[51] When the government regulates a nonpublic forum, it has "maximum control over communicative behavior,"[52] as it needs only a reasonable rationale to impose restrictions on

government may restrict the time, place, and manner of the speech, but only if the restrictions are content-neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative means of communication. If a restriction is based on the content of the speech, it is unconstitutional unless the state can prove that the regulation is necessary to serve a compelling state interest and that the regulation is narrowly drawn to achieve that end."). There are also restrictions on licensing and permit systems. Additionally, the government does not have to use the least restrictive alternative when regulating. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1167 (4th ed. 2011).

47. *See* Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

48. Greer v. Spock, 424 U.S. 828, 836 (1976) (quoting Adderley v. Florida, 385 U.S. 39, 48 (1966)); *see* Kevin Francis O'Neill, *Disentangling The Law of Public Protest*, 45 LOY. L. REV. 411 (1999).

49. CHEMERINSKY, *supra* note 46, at 1167.

50. O'Neill, *supra* note 48, at 421.

51. *Id.* at 411; *see* Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678–79 (1992).

52. Paulsen v. City of Nassau, 925 F.2d 65, 69 (2d Cir. 1991).

that forum. However, the government cannot "suppress expression merely because public officials oppose the speaker's view."[53]

BART issued a letter after the shutdown incident stating:

> BART's temporary interruption of cell phone service was not intended to and did not affect any First Amendment rights of any person to protest in a lawful manner in areas at BART stations that are open for expressive activity. The interruption did prevent the planned coordination of illegal activity on the BART platforms, and the resulting threat to public safety.[54]

BART contends that its platforms are not open as public fora, but people are free to protest at other areas designated by BART.[55]

1. If BART's Stations and Platforms Constitute Public Fora, BART Must Meet Higher Standards To Restrict Free Speech in These Areas

A court must first determine whether BART's property constitutes a public forum.[56] The Supreme Court analyzes government property under three categories, as articulated in *Christian Legal Society v. Martinez*:[57]

> Government entities create designated public forums when "government property that has not traditionally been regarded as a public forum is intentionally opened up for the purpose"; speech restrictions in such a forum "are subject the same strict scrutiny as restrictions in a traditional public forum." Third, governmental entities establish limited public forums by opening property "limited to use by certain groups or dedicated solely to the discussion of certain subjects." As noted in text, "[i]n such a forum, a governmental entity may impose restrictions on speech that are reasonable and view-point neutral."[58]

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53. *Lee*, 505 U.S. at 679; United States v. Kokinda, 497 U.S. 720, 730 (1990); Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 800 (1985); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983).

54. Franklin, *supra* note 1.

55. *BART Special Board Meeting*, BAY AREA RAPID TRANSIT (Aug. 24, 2011), http://www.bart.gov/about/bod/multimedia.aspx.

56. *See* CHEMERINSKY, *supra* note 46, at 1167.

57. Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971 (2010); Tim Newcomb, *Quote: Free Speech on BART Platforms*, TIME NEWS FEED (Aug. 17, 2011) (quoting BART spokesperson Linton Johnson as stating that "[o]utside the fare gates, that's the public forum area. Inside fare gates is a non-public forum and by law, by the Constitution, the U.S. Supreme Court, there is no right to free speech there"), http://newsfeed.time.com/2011/08/17/quote-free-speech-on-bart-platforms.

58. Christian Legal Soc'y, 130 S.Ct. at 2984, n.11 (citations omitted).

Because BART's platforms differ from parks and public sidewalks, a court will likely determine that they do not constitute traditional public fora. It is also unlikely that they fall into the second or third categories of public fora, as BART did not open these areas up to anyone for protests. Nevertheless, if a court found that BART's platforms constitute public fora, BART's restrictions on free speech must be content-neutral, and "time, place, and manner" restrictions apply.

a) Restrictions on Free Speech and Protests Must Be Content-Neutral

If BART platforms are public fora, any restriction must be content-neutral.[59] Even if BART's shutdown was "on its face . . . neutral as to the content and speaker," a court will likely find that BART's "purpose to suppress speech and its unjustified burdens on expression would render it unconstitutional."[60] BART claims it disrupted wireless service due to safety concerns for its customers, rather than to prevent people from speaking out against and protesting BART's actions.[61] However, despite BART's alleged safety concerns, a court might believe that its true intentions were to prevent criticism of BART, which it could find constitutes a content-based restriction. [62]

In *Police Department of Chicago v. Mosley*, in which a public forum was at issue, the Supreme Court found that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[63] In *Mosley*, a Chicago ordinance defined permissible picketing on the basis of subject matter, specifically, in regard to the messages on picket signs.[64] The ordinance allowed peaceful picketing on a school's labor-management dispute, but prohibited all other peaceful picketing.[65] Mosley claimed that the ordinance violated the First Amendment and the Equal Protection Clause of the

59. Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95–96 (1972).

60. Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2664 (2011). The Court found that Vermont designed a statute to specifically impose content-based burdens on protected expression, which the Court found were not justified. The statute restricted the sale, disclosure, and use of pharmacy records that revealed the prescribing practices of individual doctors. The law was subject to heightened scrutiny because the First Amendment protects speech in the aid of pharmaceutical marketing. *Id.*

61. Elinson, *supra* note 14.

62. *See id.*

63. *Mosley*, 408 U.S. at 95–96.

64. *Id.* at 95.

65. *Id.*

Fourteenth Amendment.[66] Prior to the ordinance, Mosley peacefully and quietly protested on the sidewalk by a high school, holding signs stating the school discriminated against African Americans.[67] The Court found that the ordinance violated the Equal Protection Clause because of its impermissible distinction between labor picketing and other peaceful picketing.[68] However, the Court also discussed the First Amendment issues involved in this controversy:

> To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and [wide]-open."[69]
>
> Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.[70]

Because the prevented demonstrators planned to protest against BART and its officers, BART arguably had a desire to prevent that protest. BART maintains that it acted purely in the interest of safety concerns and was not trying to restrict the content of speech.[71] Nonetheless, a court will likely find that BART "restrict[ed] expression because of its message, its ideas, its subject matter, or its content," which is impermissible under *Mosley*.[72] In *Mosley*, the government allowed some speech and prohibited other speech on the picket signs,[73] while BART prohibited all speech communications made through text messages, only some of which would have been related to the looming protest.[74] On the other hand, BART may argue that it did not prevent speech based on content because it prohibited all communication.

66. *Id.* at 94.
67. *Id.* at 93.
68. *Id.* at 100.
69. *Id.* at 95–96 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).
70. *Id.* at 96.
71. *BART Special Board Meeting*, *supra* note 55.
72. *Mosley*, 408 U.S. at 95.
73. *Id.* at 92.
74. *See* Franklin, *supra* note 1 ("[T]here was no cellular service on the platform level.").

However, a court may nevertheless find that BART violated the First Amendment because it restricted speech "because of its message."[75] Despite the limited nature of the speech restriction in *Mosley*, the Supreme Court found that the government unconstitutionally prohibited Mosley's speech.[76] According to the Court, "[*a*]*ny* restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wise-open [sic] (emphasis added).' "[77] BART restricted expressive activity because of its content, as illustrated by the numerous e-mails exchanged the morning of the shut down.[78] A plaintiff could argue that a restriction motivated by content violates the First Amendment, regardless of the amount of speech restricted.

BART may have been looking for ways to prevent protesting in its e-mail correspondence, as evidenced by the fact that the chain of e-mails began by stating "[the customers'] ability to carry out this exercise is predicated on being able to communicate with each other," which evidences BART's intent to prevent the "exercise" by interfering with their means of communicating.[79] After identifying the problem as "[the] exercise," the BART official suggested shutting off phone service as a solution to the problem.[80] BART purportedly had "the upper hand communication wise" to prevent the protest.[81] The e-mail indicates that the intent was to prevent criticism of BART through a demonstration or protest, characterized as an "exercise," not to prevent danger or violence. In fact, in all of the e-mail communications made available by the *Bay Citizen*, BART never considered the safety of its customers when making its decision to shut down service.[82] Prior to August 11, BART provided all passengers with access to its wireless equipment, allowing all customers to communicate through cell phones without regard to the contents of these communications.[83] A court will likely hold, as indicated above, that the motive was to restrict certain content, despite the restriction's seemingly content-neutral implementation.

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75. *Id.*
76. *Id.* at 95–96.
77. *Id.*
78. *See* Elinson, *supra* note 14.
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *See* Michael Cabanatuan, *BART Admits Halting Cell Service to Stop Protests*, SAN FRANCISCO CHRONICLE (Aug. 13, 2011), http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2011/08/12/baeu1kms8u.dtl.

In light of BART's correspondence prior to the shutdown of wireless communication, a court will likely find that BART suppressed speech based on content, that is, communications related to protesting BART. Accordingly, a court will likely find the decision neither content-neutral nor constitutional.

b) If BART's Stations and Platforms Constitute Public Fora, BART Restrictions May Be Subject to Limits on "Time, Place, and Manner"

Because BART maintains that it acted out of safety concerns, it will likely take the position that the "time, place, and manner restriction" was necessary to minimize disruption on the platform, and that it still protected free speech because protesters could go to the designated areas for expressions,[84] which were not on the platforms.[85] Time, place, and manner restrictions must be " 'justified without reference to the content of the regulated speech, . . . narrowly tailored to serve a significant government interest, . . . [and] leave open ample alternative channels for communication of the information.' "[86] "The concept of 'time, place, and manner restrictions' . . . refers to the ability of the government to regulate speech in a public forum in a manner that minimizes disruption of a public place while still protecting freedom of speech."[87]

The analysis of the interaction between a cell phone and a forum raises the question of whether the government could restrict cell phone use because the government believed a protest would develop in an unprotected forum.

c) If BART's Stations and Platforms are Non-Public Fora, BART Has a Stronger Argument for Restricting Speech

BART will likely claim its stations and platforms are not public fora because while they are government property, the government created them for transportation purposes.[88] If BART's stations are not public fora, BART

84. Franklin, *supra* note 1.

85. However, in *United States v. Grace*, 461 U.S. 171 (1983) the Court found a total ban on all speech unnecessary to prevent disruption in that case. Therefore, strong arguments could be made in opposition of the necessity of a total ban.

86. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

87. *See* CHEMERINSKY, *supra* note 46, at 1171.

88. *See* Justin Silverman, *BART Phone Blackout: Did the S.F. Transit Agency Violate Free Speech Protections? Part 2*, CIT MEDIA LAW (Aug. 26, 2011), http://www.citmedialaw.org/blog/2011/bart-phone-blackout-did-sf-transit-agency-violate-free-speech-protections-part-2.

can impose broader restrictions.[89] Even though BART's platforms constitute public facilities, they may not constitute public fora. A court will likely determine that BART stations are similar to airport terminals, which the Supreme Court has deemed non-public fora because they are "among those publicly owned facilities that could be closed to all except those who have legitimate business there."[90] The government can legally regulate and discriminate between messages in non-public fora, provided that the regulations remain viewpoint neutral. Moreover, viewpoint neutral restrictions are not subject to the strict scrutiny test mentioned above.[91] If BART can show that its stations are not public fora, it will likely be able to successfully argue that it did not violate the First Amendment because a court will likely find that BART's wholesale prohibition of speech did not discriminate among messages or speakers.

B. IF THE GOVERNMENT SUPPRESSES FREE SPEECH BEFORE THE COMMUNICATION OCCURS, ITS ACTIONS CONSTITUTE UNCONSTITUTIONAL PRIOR RESTRAINTS

Regardless of whether or not BART's platform is a public forum, the Supreme Court has long held that prior restraints on speech infringe on First Amendment rights.[92] "The special vice of a prior restraint is that communication will be suppressed either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment."[93] According to Thomas Emerson, a prominent First Amendment scholar, "[a] system of prior restraint is in many ways more inhibiting than a system of subsequent punishment: It is likely to bring under government scrutiny a far wider range of expression; it shuts off communication before it takes place."[94] BART's claim that its restraint on speech was necessary in order to prevent speech that might have resulted in violence is probably not an acceptable justification in light of the Supreme Court's holding that speech cannot be banned simply because it might disturb the public peace.[95] Moreover, federal appellate courts have held that the government cannot impede free speech because of potential violence

89. *See* CHEMERINSKY, *supra* note 46, at 1181.

90. Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672 (1992) (ruling that airports constitute nonpublic fora); United States v. Grace, 461 U.S. 171, 178 (1983).

91. CHEMERINSKY, *supra* note 46, at 1181.

92. Nebraska Press Ass'n. v. Stuart, 427 U.S. 539, 559 (1976).

93. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 390 (1973).

94. CHEMERINSKY, *supra* note 46, at 982 (citing THOMAS EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 506 (1970)).

95. Near v. Minnesota, 283 U.S. 697, 721–22 (1931).

resulting from protests and public demonstrations.[96] Moreover, a "heavy presumption" of unconstitutionality exists for prior restraints on speech.[97]

In *Near v. Minnesota*,[98] the Supreme Court held that court orders preventing speech constitute prior restraints.[99] The Minnesota law at issue in *Near* declared a "malicious, scandalous, and defamatory newspaper, magazine or other periodical" to be a public nuisance that the state could ban.[100] A district court issued an injunction enjoining the Saturday Press from publishing or circulating publications "whatsoever containing a malicious, scandalous and defamatory matter" after the Saturday Press published anti-Semitic and defamatory articles.[101] The Court held the injunction unconstitutional, noting "almost an entire absence of attempts to impose previous restraints upon publications."[102] The Court stated that unprotected speech should be punished after it occurs, rather than utilizing prior restraints.[103] The Court further found that injunctions preventing speech should only be used in "exceptional cases."[104] The Court listed several situations where the law allows prior restraints, and stated that "[t]he security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government."[105]

Although the facts of the BART incident differ from those in *Near*, as the possible prior restraint did not come in the form of a court order and press publications were not at issue, *Near* is nevertheless instructive. Like in *Near*, BART prevented speech it thought would be illegal, rather than allowing the speech that would have been punished after it took place if it was in fact illegal.[106] BART will likely argue that this incident fell within the exception mentioned in *Near* for incitements to acts of violence, an argument which is discussed in Section II.C, *infra*.

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96. Ovadal v. City of Madison, 416 F.3d 531, 537 (7th Cir. 2005); Collins v. Jordan, 110 F. 3d 1363, 1372 (9th Cir. 1997); *see also* Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175, 180–81 (1968); Letter from Abdi Soltani & Alan Schlosser to Kenton Rainey & BART, *supra* note 1, at 2.

97. *See* Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

98. *Near*, 283 U.S. 697.

99. *See id.*

100. *Id.* at 701–02.

101. *Id.* at 705.

102. *Id.* at 718.

103. *Id.* at 720 ("Subsequent punishment for such abuses as may exist is the appropriate remedy.").

104. *Id.* at 716.

105. *Id.*

106. *See id.* at 720.

Furthermore, BART defends its actions by asserting that free speech rights are not recognized on BART platforms.[107] However, whether BART decides to recognize free speech rights may not matter. While cell phone service in BART stations has not always been available, EFF claims that once BART made this service available to patrons, shutting the service down to prevent demonstrations "constitutes a prior restraint on the free speech rights of every person in the station, whether they're a protester or a commuter."[108] EFF seemingly takes the position that because BART gave its customers access to mobile communication, taking away this access constitutes a prior restraint.

1. Government Action Should Come After the Protest Takes Place

The government presumptively violates the First Amendment if it prevents free speech activities prior to any illegal action by demonstrators or before a demonstration poses a clear and present danger.[109] In its letter, the ACLU reminded BART that claiming a restraint on speech was necessary in order to prevent speech that may "disturb public peace" does not adequately justify its actions under Supreme Court precedent.[110] Rather, the government needs to ensure that police are present in case such violence does occur, at which point the police can take control of the situation.[111] The government cannot interfere with First Amendment rights based on the mere possibility of violence resulting.[112] While *Near* provided exceptions to this rule precluding government interference on possibilities, including "incitements to acts of violence," the government must still wait to interfere until after the protesters have incited violence under *Brandenburg*, as discussed in Section II.C, *infra*.[113] The ACLU further argued that "it would *undermine* BART's safety rationale by precluding riders from reporting unlawful activity or communicating with family members about their whereabouts."[114] Passengers

107. *Statement on Temporary Wireless Service Interruption in Select BART Stations on Aug. 11*, BART.GOV (Aug. 12, 2011, 1:08 PM), http://www.bart.gov/news/articles/2011/news20110812.aspx.

108. Galperin, *supra* note 19.

109. Carroll v. President and Comm'rs of Princess Anne, 393 U.S. 175, 180–81 (1968); Collins v. Jordan, 110 F.3d 1363, 1371 (9th Cir. 1997).

110. *Near*, 283 U.S. 697, 721–22.

111. Ovadal v. City of Madison, 416 F.3d 531, 537 (7th Cir. 2005); *Collins*, 110 F. 3d at 1372.

112. *Collins*, 110 F.3d at 1372.

113. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969); *Near*, 283 U.S. at 716.

114. Letter from Abdi Soltani & Alan Schlosser to Kenton Rainey & BART, *supra* note 1, at 3.

could have used social networking and cell phones to promote safety during the demonstrations, but BART's shutdown eliminated that possibility.

In *Collins v. Jordan*, the Ninth Circuit held that the police and the mayor acted unconstitutionally when restricting speech based on violence that occurred at previous protests.[115] In *Collins*, the court considered whether the arrests of demonstrators following the verdict of the Rodney King case in San Francisco were unconstitutional.[116] Many demonstrated in San Francisco the day after the verdict was announced.[117] Peaceful demonstrations in San Francisco, as well as demonstrations involving violence in the downtown Civic Center area, occurred the day after the verdict was announced.[118] The following day, the mayor presented an Emergency Order to the Board of Supervisors that authorized custodial arrests and directed officers to discontinue any public gatherings in San Francisco whenever the officer "[had] reason to believe that the gatherings endanger[ed] or [was] likely to endanger persons or property."[119]

That day the mayor and police learned of a protest that was to take place at the BART plaza (at 24th and Mission Street) at 7:00 p.m.[120] The record was unclear as to how the authorities learned of the protest and whether or not there was reason to expect violent or illegal activities. However, the court found that this was not dispositive to its analysis.[121] Police were present at the BART plaza and the surrounding areas when people began gathering at around 6:30 p.m.[122] Some police members testified that there were around thirty people present and no violent activities, while others testified that there were hundreds of people present and displays of aggressive and hostile behavior.[123] Around 6:45 p.m. police gave dispersal orders.[124] A videotape showed that "prior to the dispersal order, there were few people on the plaza and almost no activity."[125] People then left the BART plaza and headed to the other areas occupied by crowds.[126] The parties to the case disagreed as to "whether these were organized groups that were refusing to obey the dispersal orders or simply individual people trying to leave an area they had

115. *Collins*, 110 F. 3d 1363.
116. *Id.* at 1367.
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*

been ordered to leave."[127] Officers subsequently arrested a number of these people as well as several groups of people at other locations, who were then held in jail for one to two nights.[128] Following these events, the Board of Supervisors rescinded the Emergency Order that had authorized such arrests.[129]

The plaintiffs in *Collins* claimed that the then-mayor and the then-police chief violated their First Amendment rights when they "individually and acting together decided to ban all demonstrations, peaceful and otherwise, effective May 1, 1992, and to arrest all demonstrators who refused to obey dispersal orders."[130] The district court held that evidence supported an inference that the police chief and mayor decided to "ban all demonstrations, peaceful or otherwise," and the police chief intended to "prevent all demonstrations relating to the Rodney King verdicts."[131] The court found that material issues of fact existed as to whether the assembled crowds were engaging in any illegal activity and whether a threat of imminent danger existed.[132] The court found that the police could have reasonably believed that the crowds constituted illegal assemblies and could have arrested them.[133] However, the police could not have reasonably believed that a number of the arrested passersby had violated any laws.[134] The police chief defended his actions based on the fact that violence occurred during demonstrations the day before and claimed that the First Amendment allows the banning of all protests when a continuing threat of past misconduct is inferred.[135] The court disagreed, holding that "[a]s a matter of law . . . that the occurrence of limited violence and disorder on one day is not a justification for banning all demonstrations, peaceful and otherwise, on the immediately following day (or for an indefinite period thereafter)."[136] Essentially, the government improperly inferred future violence from past violence when deciding to restrict speech.

As the police in *Collins* acted to restrict speech prior to any violent activity, BART officials in the August 2011 communication network shutdown acted prematurely when shutting down its equipment before any

127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.* at 1369.
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.* at 1372.
136. *Id.*

violent activity occurred on the platform.[137] BART acted similarly to the government officials in *Collins* when it attempted to prevent protests on August 11 that it assumed could turn violent as the protests on July 11 had.[138] Because the Ninth Circuit held that the officials in *Collins* could not prevent free speech because they expected violence would result as it had before, a court will likely find that BART impermissibly based its decision on the fact that violence had previously occurred during a protest of the same nature.[139] BART may argue that its decision on August 11 is distinguishable from *Collins* because the expected activity in *Collins* occurred on the BART Plaza, rather than on the actual platform. The *Collins* court, however, did not restrict its holding or analysis to the location of the protesters; thus, BART's actions should still fall under the precedent of *Collins*.[140]

C. THE FIRST AMENDMENT PROTECTS POSSIBLY DISRUPTIVE SPEECH, ALTHOUGH IT DOES NOT PROTECT SPEECH INCITING ILLEGAL ACTIVITY

Case law relating to the protection against indirect disruption and incitement of illegal activity only includes cases where the speech actually occurred and a court subsequently analyzed whether the First Amendment protected it.[141] Accordingly, the following doctrines and cases—specifically *Terminiello v. Chicago* and *Brandenburg v. Ohio*—may not even apply to the BART issue, as BART suppressed speech on the speculation of illegal activity occurring.

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137. *Id.*

138. *Id.*

139. *See id.*

140. *Id.*; *see also* Ovadal v. City of Madison, 416 F.3d 531 (7th Cir. 2005). In *Ovadal*, the Seventh Circuit found a statute preventing free speech unconstitutional even after the speech threatened divers' safety on a highway. The court held that a Wisconsin disorderly conduct statute, which prohibited the petitioner from protesting on highway overpasses was not unconstitutionally vague. After the protester displayed a message against homosexuality on a pedestrian overpass above a busy highway in Madison that caused erratic driving and congestion, police threatened to arrest him, and subsequently banned him from such activity on the overpass. The district court found the restriction on free speech was justified, but the Seventh Circuit found genuine issues of material fact existed; therefore, it remanded the case. *Id.*

141. At the time of this Note, the author could not find any cases that discussed these doctrines when the government prevented the activity or speech before considering it illegal activity.

1. Protection for Indirect Disruption

Speech is not protected when it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[142] However, the First Amendment does protect speech that may indirectly lead to disruption.[143] It follows that to lawfully restrict free speech rights, BART will need to prove that the use of mobile devices likely would have "produce[d] a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."[144] It would not be enough to prove that the protesters would have advocated for illegal activities,[145] as BART cannot legally deny free speech "unless there is a substantial likelihood of imminent harm."[146]

In *Terminiello v. Chicago*, the Supreme Court focused on whether the petitioner's speech composed of fighting words and was therefore unprotected.[147] In *Terminiello*, the trial court found the defendant petitioner guilty of violating a Chicago ordinance that deemed "[a]ll persons who shall make, aid, countenance, or assist in making any improper noise, riot, disturbance, breach of the peace, or diversion tending to a breach of the peace, within the limits of the city" guilty of disorderly conduct.[148] The defendant delivered a speech in which he criticized various racial and political groups to a large audience in an auditorium while condemning a crowd of about one thousand protesting outside of the auditorium.[149] The Court held that the trial court misconstrued the First Amendment because it allowed for a conviction if the petitioner's speech "stirred people to anger, invited public dispute, or brought about a condition of unrest."[150] According to the Court, "[free speech] may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."[151]

142. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

143. *Id.*

144. Terminiello v. Chicago, 337 U.S. 1, 4 (1949).

145. Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring); CHEMERINSKY, *supra* note 46, at 1019.

146. CHEMERINSKY, *supra* note 46, at 1019.

147. *Terminiello*, 337 U.S. at 1, 3; *see* Aviva O. Wertheimer, *The First Amendment Distinction Between Conduct and Content: A Conceptual Frameworks for Understanding Fighting Words Jurisprudence*, 63 FORDHAM L. REV. 793 (1994).

148. *Terminiello*, 337 U.S. at 1, 2.

149. *Id.* at 3.

150. *Id.* at 5.

151. *Id.* at 4.

Because BART prevented the protesters on August 11 from speaking, it is unclear as to what the nature of their speech would have been. If the speech would have caused only anger and unrest, or even "invited public dispute," the First Amendment would have still protected such speech, as in *Terminiello*.[152] However, the First Amendment would not have protected this speech if it would have directly incited illegal activity.[153]

2. Inciting Illegal Activity

Incitement of illegal activity constitutes unprotected speech under *Brandenburg v. Ohio*.[154] BART reportedly consulted *Brandenburg v. Ohio*[155] prior to shutting down its equipment.[156] Some consider *Brandenburg* to be "the most speech-protective standard yet evolved by the Supreme Court."[157] The *Brandenburg* test for constitutionally constraining free speech due to incitement requires "imminent harm, a likelihood of producing illegal action, and an intent to cause imminent illegality."[158] Although, the *Brandenburg* test requires imminence, likelihood, and intent, it fell short of defining and explaining how courts should analyze these factors.[159]

In *Brandenburg*, a jury convicted a Ku Klux Klan leader for syndicalism[160] based on a video recording of a rally that served as evidence of incitement.[161] The film showed racist and anti-Semitic speech, as well as items that appeared to be firearms.[162] The statute at issue in the case punished "persons who 'advocate or teach the duty, necessity, or propriety' of violence 'as a means of accomplishing industrial or political reform.' "[163] The First Amendment protects actions that lead to violence or even advocate force as long as the speech does not direct or incite imminent illegal activity.[164] The Court held that:

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152. *See id.* at 4–5.

153. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969).

154. *Id.*

155. *See* Susan M. Giles, *Brandenburg v. State of Ohio: An Accidental, Too Easy, and Incomplete Landmark Case*, 38 CAP. U. L. REV. 517 (2010).

156. Elinson, *supra* note 14.

157. *E.g.*, Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 755 (1975).

158. CHEMERINSKY, *supra* note 46, at 1029.

159. *Id.* at 1030.

160. Syndicalism is an economic system contrary to industrial capitalism. *See* Ahmed A. White, *The Crime of Economic Radicalism: Criminal Syndicalism Laws and the Industrial Workers of The World, 1917–1927*, 85 OR. L. REV. 649 (2006).

161. Brandenburg v. Ohio, 395 U.S. 444, 445–46 (1969).

162. *Id.*

163. *Id.* at 449.

164. *Id.* at 447.

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[165]

After *Brandenburg* and subsequent cases, such as *Hess v. Indiana* and *NAACP v. Claiborne Hardware Co.*, the government must prove (1) a likelihood of imminent illegal conduct and (2) that the speech was made to cause imminent illegal conduct.[166] The First Amendment protects advocating force or violence without the desire to cause it.[167] The Court in *NAACP* held that the free speech protected the statement, "[i]f we catch any of you going in any of them racist stores, we're gonna break your damn neck," made by an NACCP official before a boycott of white-owned businesses.[168] In *NAACP*, the Court explained:

> In the passionate atmosphere in which the speeches were delivered, they might have been understood as inviting an unlawful form of discipline or, at least, intending to create a fear of violence whether or not improper discipline was specifically intended . . . . This court has made clear, however, that mere advocacy of the use of force or violence does not remove speech from the protection of the First Amendment . . . . The emotionally charged rhetoric of Charles Evers' speeches did not transcend the bounds of protected speech set forth in Brandenburg.[169]

The Court decided these cases during "times where there were strong pressures to suppress speech."[170] Therefore, it appears that the current social climate and context of the protest may affect whether a court would find BART's actions unconstitutional.

BART will likely argue that its actions were permissible because cell phones would have been used to incite illegal activity. However, this would require a factual determination of whether or not illegal activity was imminent.[171] Because BART prevented the speech that may or may not have incited illegal activity, incitement analysis under *Brandenburg* relates to prior restraints discussed in Section II.B, *supra*.

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165. *Id.*

166. NAACP v. Clairborne Hardware Co., 458 U.S. 886 (1982); Hess v. Indiana, 313 U.S. 105 (1973); CHEMERINSKY, *supra* note 46, at 1031.

167. *Brandenburg*, 395 U.S. at 447.

168. *Clairborne*, 458 U.S. at 902.

169. *Id.* at 927–28.

170. CHEMERINSKY, *supra* note 46, at 1031.

171. *See Brandenburg*, 395 U.S. at 447.

With respect to protests and demonstrations in particular, federal appellate courts have held that the government cannot impede free speech in these contexts merely because of potential violence.[172] Rather, the government needs to ensure that the police are present in case such violence does occur, at which point the police should take control of the situation.[173] Just as the government cannot interfere with First Amendment rights based on the mere possibility of violence under *Collins*,[174] it follows that the government cannot prevent free speech because it may incite illegal activity. Because *Brandenburg* requires that (1) illegal conduct is likely (2) and the speech causes the illegal conduct to prove incitement,[175] this Note claims that the speech would need to first take place before a determination as to whether the speech is protected under *Brandenburg*. BART likely cannot rely on *Brandenburg* because it cannot show that the prevented protest would have caused illegal conduct.

Nonetheless, BART may argue that the Supreme Court's current tests should not apply to this situation due to advancements in technology and the way protesters would have communicated. Critics have argued that the Internet—which may have been accessed through cell phones by the expected protesters—changes the traditional framework for determining incitement of illegal activity.[176] Because the Supreme Court has stated that the person must direct the speech at a specific person and the speech must likely provoke a violent response for the First Amendment to not protect it,[177] some have argued that online speech would be overly protected because it would not be directed at a specific person.[178] Additionally, critics argue that courts should not require imminence on internet communication, as those inciting illegal activity on the Internet would too easily pass that test.[179] Speech may remain on the Internet for a long period of time, and illegal activity stemming from it may not occur right after the posting of the

172. Ovadal v. City of Madison, 416 F.3d 531, 537 (7th Cir. 2005); Collins v. Jordan, 110 F. 3d 1363, 1372 (9th Cir. 1997); *see also* Letter from Abdi Soltani & Alan Schlosser to Kenton Rainey & BART, *supra* note 1, at 2.

173. *Ovadal*, 416 F.3d at 537; *Collins*, 110 F. 3d at 1372.

174. *Collins*, 110 F. 3d at 1372.

175. CHEMERINSKY, *supra* note 46, at 1031.

176. *See* John P. Cronan, *The Next Challenge for the First Amendment: The Framework for an Internet Incitement Standard*, 51 CATH. U. L. REV. 425 (2002); Tiffany Komasara, *Planting the Seeds of Hatred: Why Imminence Should No Longer Be Required to Impose Liability on Internet Communications*, 29 CAP. U. L. REV. 835 (2002).

177. Cohen v. California, 403 U.S. 15, 21–22 (1971).

178. Cronan, *supra* note 176.

179. Komasara, *supra* note 176.

content.[180] However, these are merely criticisms and suggestions; a court would need to apply the current standards until the Supreme Court declares otherwise.

3. True Threats

This analysis would be incomplete without mentioning that the First Amendment protects speech that incites illegal activity, provided it does not meet the *Brandenburg* test. However, "true" threats are not protected.[181] *Brandenburg* covers incitement, while threatening speech ("true" threats) differs. "The issue is related to *Brandenburg* because it involves speech that threatens violence, yet it is a distinct issue because the focus is not on the likely consequences but on the need to protect people from the adverse effects of feeling threatened."[182] Circuit courts are split on what constitutes a "true" threat. The Ninth Circuit has held that the perspective of a reasonable listener should be determinative,[183] while the Second Circuit found the perspective of the reasonable speaker to be determinative.[184]

An actual threat, such as speech that materially assists a foreign terrorist organization, is not protected by the Constitution.[185] The proposed plan by BART states that it would not shut down cell phone equipment in the future, except in cases of imminent harm, such as terrorist threats.[186] The new policy would likely pass constitutional muster, as the Supreme Court has held that the Constitution does not protect speech expressed in concert with terrorist organizations in *Holder v. Humanitarian Law Project*.[187] However, the new policy also contains provisions for imminent situations other than terrorist activities, which the Court has not specifically held unprotected by the First Amendment.[188] The dissent in *Holder*, however, found that "cases [have] permit[ed] pure advocacy of even the most unlawful activity—as long as that

180. *Id.*

181. *See* Madsen v. Women's Health Ctr., 512 U.S. 753, 773 (1994); United States v. Watts, 394 U.S. 705, 708 (1969).

182. CHEMERINSKY, *supra* note 46, at 1031.

183. *See, e.g.*, Lovell v. Poway Unified School Dist., 90 F.3d 367 (9th Cir. 1996); United States v. Orozco-Santillian, 903 F.2d 1262 (9th Cir. 1990); United States v. Gilbert, 884 F.2d 454 (9th Cir. 1989).

184. United States v. Kelner, 534 F.2d 1020 (2d Cir. 1976).

185. Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010).

186. Rina Palta, *Draft BART Policy on Cell Phone Shutdown*, THE INFORMANT, KALW NEWS (Sept. 7, 2011, 3:57 PM), http://informant.kalwnews.org/2011/09/draft-bart-policy-on-cell-phone-shutdown.

187. *Holder*, 130 S. Ct. 2705.

188. *See BART Cell Service Interruption Policy*, *supra* note 36.

advocacy is not directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action."[189]

III. THE COMMUNICATIONS ACT

In addition to a First Amendment claim, a plaintiff could also sue BART under the Communications Act of 1934 (as amended), 47 U.S.C. § 154. A claim under the Communications Act would differ from a First Amendment claim, as it would rely more heavily on statutes and the FCC's authority.[190] Claims under the Communications Act would relate much less to freedom of expression and instead would rely on the fact that BART cut off federally regulated channels of communication.

The Communications Act provides the FCC with broad authority to regulate[191] interstate and foreign communication by wire or radio to make available nation-wide communication services.[192] This Part analyzes whether BART violated the Communications Act by deliberately interfering with public access to Commercial Mobile Radio Service ("CMRS"),[193] the term of art for cell phones as Title II telecommunications carriers.[194] "Commercial mobile service" means "any mobile service . . . that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public."[195] As the Communications Act treats cell phones as telephones, the disruption of a cell phone node is akin to interfering with a telephone system.[196] The legal theories discussed in this Part are largely derived from the emergency petition submitted to the FCC by Public Knowledge in which Public Knowledge outlined how BART's actions may have violated the Communications Act.[197] Because BART provides interstate

189. *Holder*, 130 S. Ct. at 2737.

190. *See* 47 U.S.C. § 154(i) (2006).

191. "The Commission may perform any and all acts, make such rules and regulations, and issue such orders . . . as may be necessary in the execution of its functions." 47 U.S.C. § 154(i).

192. 47 U.S.C. §§ 151, 154(i).

193. *See* 47 C.F.R. § 20.15(a) (2011). CMRS providers must comply with §§ 201, 202, 206–209, 216, 217, 223, and 225–228 of the Communications Act. *Id.*

194. Aside from violations of federal communications laws, speech through telephones and the Internet is also protected by the First Amendment, as declared by the Supreme Court in *Sable Commc'n of California, Inc. v. FCC*, 425 U.S. 115 (1989) and *Reno v. ACLU*, 521 U.S. 844 (1997).

195. 47 U.S.C. § 332(d)(1).

196. *See* 47 U.S.C. § 332(c) (defining commercial mobile services as Title II telecommunications common carriers); *see also* 47 C.F.R. § 20.9.

197. Feld & Siy, *supra* note 4.

telecommunication access,[198] shutting down such access arguably violates Title II and the Communications Act.[199] Additionally, the California Public Utilities Commission ("CPUC") claims that it—and not BART—has exclusive authority to shut down phone service.[200] The FCC has authority over wireless communication, and restrictions that impair reception signals are prohibited.[201] The FCC prohibits "any restriction . . . that impairs the installation, maintenance, or use of an antenna . . . ."[202] A "restriction impairs . . . use of an antenna if it . . . precludes reception or transmission of an acceptable quality signal."[203]

Public Knowledge's petition suggests that when BART shut down the cell service equipment, it was acting in one of three possible capacities: "as a network operator or agent of a network operator, as an agent of state or local government exercising police power, or as a private actor."[204] While the FCC has yet to promulgate a rule or issue an order in response to Public Knowledge's petition, on March 1, 2012, it released a public notice seeking "comment on concerns and issues related to the intentional interruptions of [CMRS] by government authorities for the purpose of ensuring public safety."[205] Section III.A addresses BART's liability if it acted as a common carrier (network operator) or agent. The following section, Section III.B,

198. The Communications Act defines "interstate communication" (or interstate transmission) as

> communication or transmission (A) from any State, Territory, or possession of the United States . . . to any other State, Territory, or possession of the United States . . . from or to the United States . . . insofar as such communication or transmission takes place within the United States or (C) between points within the United States but through a foreign country; but shall not . . . include wire or radio communication between points in the same State . . . if such communication is regulated by a State commission.

47 U.S.C. § 153(28).

199. Feld & Siy, *supra* note 4, at 12.

200. People v. Brophy, 120 P.2d 946 (Cal. App. 1942).

201. 47 C.F.R. § 1.4000.

202. *Id.* § 1.4000(a)(1).

203. *Id.* § 1.4000(a)(3)(iii).

204. Feld & Siy, *supra* note 4, at 4.

205. FCC Public Notice, *Commission Seeks Comment on Certain Wireless Service Interruptions*, DA 12-311 (Mar. 1, 2012), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0301/DA-12-311A1.pdf. This Public Notice was the most recent issuance by the FCC at the time of this Note's publication. In the Public Notice, the Commission sought comments to be submitted by April 30, 2012 and replies submitted by May 30, 2012. Specifically, the Commission raised the following issues (1) past practices and precedents for interrupting wireless service for public safety concerns, (2) bases for interrupting wireless service, (3) risks in interrupting wireless service, (4) scope of interruption, (5) authority to interrupt service, and (6) legal constraints on interrupting wireless service. *Id.*

analyzes BART's liability if it acted as an agent of a common carrier. Section III.C analyzes BART's liability if it acted as a private party willfully interfering with communication access. Section III.D explains the Commission's prohibition on disrupting emergency services, with which BART's shutdown is in tension. Section III.E discusses the Commission's recent order to preserve "free expression on the Internet." Part IV analyzes BART's liability as an agent of the state government.

A. BART ACTING AS A COMMON CARRIER

Whether BART is considered a CMRS carrier or an agent of a CMRS carrier is a factual question that requires consideration of the details of the arrangement between BART and the wireless carriers providing service in the BART stations. If BART is considered a carrier,[206] §§ 214(a)(3) and 202 of the Communications Act—which require the FCC's approval to interrupt

206. "Common carrier" or "carrier" is defined as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy . . . but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier." 47 U.S.C. § 153(11) (2006). The primary *sine qua non* is that it will "carry for all people indifferently," which does not require the carrier's services be made available to the entire public. "A specialized carrier whose services is of possible use to only a fraction of the population may nonetheless be a common carrier if he holds himself out to serve indifferently to all potential users." National Ass'n of Regulatory Utility Comm'rs v. FCC, 533 F.2d 601, 608 (D.C. Cir. 1976). It is not a common carrier if "its practice is to make individualized decisions in particular cases whether and on what terms to serve." *Id.* at 609. A telecommunications carrier is considered a common carrier "only to the extent that it is engaged in providing telecommunication services." 47 U.S.C. § 153(51). A "telecommunication carrier" is "any provider of telecommunications services, except that such term does not include aggregators of telecommunications services." *Id.* § 153(51). The Communications Act defines "telecommunications equipment" as "equipment, other than customer premises equipment, used by a carrier to provide telecommunications services." *Id.* § 153(52). The Communications Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." *Id.* § 153(53). The Communications Act defines "telephone exchange service" as

> (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunication service.

Id. § 153(54). The Communication Act defines "electronic messaging service" as "a service that provides real-time or near real-time non-voice messages in text form between individuals over communication networks." *Id.* § 153(19).

service and do not allow carriers to discriminate in its access—would apply. Section 216 provides for liability if BART acted as an agent of a CMRS carrier, while § 217 provides for employee liability.

1. Section 214 of the Communications Act

Section 214(a) allows for temporary, emergency, or permanent discontinuance of service as well as changes in operation or equipment.[207] However,

> no carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby; except that the Commission may, upon appropriate request being made, authorize temporary or emergency discontinuance, reduction, or impairment of service, or partial discontinuance, reduction, or impairment of service.[208]

The Communications Act requires the FCC's authorization prior to discontinuance of service to prevent the community[209] or part of a community's loss or impairment of service "without adequate public interest safeguards."[210] The FCC primarily cares about the customers' loss of service, even in disputes between carriers where a carrier-to-carrier connection was disrupted.[211] Because the Commission's authorization for a disruption of communication stems from its concern for the public's access to communication networks, it is likely that a court and the Commission would disfavor BART's shutdown because of the impact it had on the community.[212]

Unless the Commission authorized BART to turn off its underground equipment, BART would seemingly be in violation of § 214.[213] However, the Commission can only authorize restrictions pursuant to § 214(c), which requires that the Commission affirmatively determine whether "the public

207. 47 U.S.C. § 214(a).

208. *Id.* § 214(a)(3).

209. The concept of "community" in section 214 is considered to be the public interest. ITT World Commc'n, Inc. v. New York Tel. Co., 381 F. Supp. 113, 121 (S.D.N.Y. 1974).

210. Total Telecomm. Servs., Inc. v. Am. Tel. & Tel. Co., 919 F. Supp. 472, 480 (D.D.C. 1996) (quoting Memorandum Opinion and Order, Western Union Telegraph Co. Petition for Order to Require the Bell Sys. to Continue to Provide Group/Supergroup Facilities, 74 F.C.C.2d 293, 295 (1979)).

211. *Id.* at 480. This case involved the relationship between two carriers (carrier-to-carrier connection), Total Telecommunications Services and AT&T. *Id.*

212. *See id.*

213. *See* 47 U.S.C. § 214(a).

convenience and necessity require [the restrictions]."[214] Nonetheless, BART may argue that "the primary purpose of 214(a) is prevention of unnecessary duplication of facilities, not regulation of services," as the D.C. Circuit declared in *MCI Telecommunications Corp. v. FCC*.[215] However, the D.C. Circuit explicitly stated that § 214 "also applies to abandonment of service," which was not at issue in that case.[216] Therefore, if the Commission were to authorize restrictions and interruptions of service in the future by virtue of § 214, a court will still require it to prove that the "the public convenience and necessity [so] require[d] [it]."[217]

2. Emergency Shutdowns by Network Providers Without FCC Permission May Be Permissible

BART will likely argue it did not have time to contact the FCC for authorization due to the emergency situation. The Commission may not require authorization in times of emergency, as it has dispensed with the authorization requirement with respect to similar provisions of the Communications Act.[218]

For example, § 202 prohibits "unjust and unreasonable discrimination in . . . charges, practices . . . facilities, or services . . . directly or indirectly, by any means or device."[219] "Services" is defined as those "in connection with . . . the use of common carrier lines of communication, whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communication of any kind."[220] In order for a plaintiff to prove discrimination under § 202, she must meet a three-part test.[221] First, the plaintiff must show that the services in question are "like" services and that the defendant provided them under different terms and conditions.[222] The

214. *Id.* § 214(c); MCI Telecomm. Corp. v. FCC, 561 F.2d 365 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1040; *see also* W.U. Div., Commercial Telegraphers' Union v. United States, 87 F. Supp. 324, 335 (D.D.C. 1949) (explaining that the "public convenience and necessity" standard for discontinuance of service should be construed to secure the broad aims of the Communication Act for the public).

215. *MCI Telecomm.*, 561 F.2d at 375; *see* 78 CONG. REC. 10,314 (1934) ("The section [§ 214] is designed to prevent useless duplication of facilities, with consequent higher charges upon the users of services.").

216. *MCI Telecomm.*, 561 F.2d at 375 n.51.

217. *See* 47 U.S.C. § 214(c); *MCI Telecomm. Corp.*, 561 F.2d at 377.

218. *See In re* Total Telecomm. Servs., Inc. v. AT&T Corp., 16 FCC Rcd. 5726, 5741 (F.C.C. 2001).

219. 47 U.S.C. § 202(a). Carriers who knowingly violate § 202 must pay a penalty of $6,000 for each such offense to the United States. *Id.* § 202(c).

220. *Id.* §202(b).

221. Union Tel. Co. v. Qwest Corp., 495 F.3d 1187, 1195 (2007).

222. *Id.*

burden then shifts to the defendant to justify the difference as reasonable.[223] Therefore, BART cannot shut down cell services if it were discriminating against the free speech that the protesters planned.

a) The Commission's Prohibition on Self-Help

The FCC prohibits telecommunication carriers from engaging in self-help by blocking calls or disconnecting service, even if that carrier believes that the calls violate FCC rules.[224] In its *Call Blocking Order*, the FCC held that the CMRS carriers and interexchange did not have the right to block or refuse to carry calls because they thought the calls were generated or engineered by local exchange carriers in order to support unjust and unreasonable call termination rates.[225]

Public Knowledge's Emergency Petition argues that BART's shutdown exemplifies a government engaging in self-help because it cut off telecommunications access without first consulting the FCC and waiting to respond to dangerous activity, had it occurred.[226]

While call blocking on the basis of unreasonable call termination rates differs from BART's blocking access to telecommunications, the fact that the FCC has previously ruled on call blocking is relevant to this Note's analysis. In its *Call Blocking Order*, the FCC specifically stated, "Commission precedent provides that no carriers, including interexchange carriers, may block, choke, reduce, or restrict traffic in any way."[227] In that case, the FCC found the practices unjust and unreasonable under § 201(b) of the Communications Act and that the carriers violated their Title II duties, even though the FCC itself was considering proposed rules on the same subject.[228] The FCC has allowed call blocking only under "rare and limited circumstances."[229] For instance, the FCC found it reasonable for AT&T to block its customers from calling a chat line that was set up as a sham.[230] In that case, the chat line

223. *Id.*

224. Declaratory Ruling and Order, *In re* Call Blocking by Carriers, WC Docket No.07-135 (F.C.C. June 28, 2007), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-07-2863A1.pdf.

225. *Id.* at 1.

226. *See* Feld & Siy, *supra* note 4 at 7.

227. Declaratory Ruling and Order, *In re* Call Blocking by Carriers, WC Docket No.07-135.

228. *Id.*

229. *Id.* at 3, n.20.

230. *See In re* Total Telecomm. Servs., Inc. v. AT&T Corp., 16 FCC Rcd. 5726, 5741 (F.C.C. 2001).

service provider and competitive access providers set up the chat line to avoid customers and did not provide local exchange access[231] services.[232]

Because BART's equipment provides interstate communication by wire or radio, public interest organizations have urged the FCC to declare that BART contravened its obligations under Title II and the Communications Act when it cut off access to the interstate communication by shutting down its equipment.[233]

B. IF BART WAS ACTING AS AN AGENT, SECTIONS 216 AND 217 OF THE COMMUNICATIONS ACT APPLY

If BART is deemed an "operating trustee" of a common carrier, § 216 of the Communications Act states that the same provisions apply to carriers.[234] Section 217 provides for the liability of the carrier if an agent's or employee's actions are in violation of the Communications Act.[235] Section 217 "is, in essence, a provision codifying the common law respondeat superior doctrine."[236] Therefore, if BART itself is not a common carrier, but is an agent of a common carrier, it would still be liable for violating the Act if the Act prohibits common carriers from turning off access to communications in the BART context.

However, at least one technology think tank, TechFreedom, argues that the FCC should find that BART did not violate the Communications Act by virtue of acting as an agent of a carrier. TechFreedom's founder and president, Berin Szoka, claimed that:

> BART simply turned off equipment it doesn't own—a likely violation of its contractual obligations to the carriers. But BART did nothing that violated FCC rules governing network operators. To declare the local government an 'agent' of the carriers would set

231. "Exchange access" means "offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services." 47 U.S.C. § 153(2) (2006).

232. *See In re* Total Telecomm. Servs., Inc., 16 FCC Rcd. 5726.

233. Feld & Siy, *supra* note 4, at 8.

234. 47 U.S.C. § 216; see also § 20.1(a), providing that CMRS providers must comply with §§ 202, 216, and 217. *Id.* § 20.15(a).

235. *Id.* § 217 (stating that "the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier or user, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or user as well as that of the person").

236. Hammann v. 1800Ideas.com, Inc., 455 F. Supp. 2d 942 (D. Minn. 2006).

> an extremely dangerous precedent for an agency with a long track record of regulatory creep.[237]

C. BART MIGHT HAVE VIOLATED THE COMMUNICATIONS ACT BY ACTING AS A PRIVATE PARTY

Section 333 of the Communications Act provides:

> [n]o person shall willfully or maliciously interfere with or cause interference to any radio communications or any station licensed or authorized by or under this chapter or operated by the United States Government.[238]

Accordingly, Public Knowledge argued that even if BART is not considered a common carrier or government agent for purposes of operating its cellular service equipment, it may nevertheless violate § 333 as a private party.[239] Under a plain reading of § 333, it seems that BART interfered with every wireless carrier's network communications.[240] Moreover, the language indicates that Congress intended to protect the exchange of ideas through § 333;[241] therefore, Congress likely wanted to prevent the interference of free speech through radio communication. The legislative history shows that the House of Representatives was specifically concerned with personal communications when enacting § 333.[242]

In the aftermath of the shutdown, BART stated that passengers did not always have access to cell phone service and that BART had only recently provided this service through its equipment.[243] Regardless of the fact that BART now provides a service that was not provided in the past, it still interfered with and cut off that service on August 11. It may be true that the Communications Act and the First Amendment do not require BART to provide cell phone service in its tunnels and stations.[244] However, under

237. Katy Bachman, *FCC Opens Inquiry Into BART Mobile Shutdown*, ADWEEK (Mar. 2, 2012), http://www.adweek.com/news/communications-act/fcc-opens-inquiry-bart-mobile-shutdown-138737

238. 47 U.S.C. § 333.

239. Feld & Siy, *supra* note 4.

240. *See* H.R. REP. NO. 101-316, at 13 (1990).

241. *See id.* at 13; *see also* Andrew Kowalewski, *Placing a Ban on Police Radar Jammers, Rocky Mountain Radar v. F.C.C.*, 19 TEMP. ENVTL. L. & TECH. J. 137, 149 (2000) ("The very language indicates that the issue the Congress was taking up was the protection of the exchange of ideas.").

242. *See* H.R. REP. NO. 101-316, at 13. The House noted increased deliberative and malicious interference in services, including public safety and private land mobile. *Id.*

243. *See* Cabanatuan, *supra* note 83.

244. Feld & Siy, *supra* note 4.

§ 333, BART cannot interfere with the wireless service of the licensed CMRS providers with which it contracts.

BART may argue that it is not liable under § 333 because BART informed the wireless providers prior to shutting down its equipment.[245] Even though the CMRS providers may have known that BART planned to shut down the service, BART still willfully interfered with that service. Section 333 does not require that the provider be ignorant of the willful interference.[246] Furthermore, BART's willful interference disrupted personal communications and the exchange of ideas through the network, which Congress intended to protect with § 333.[247]

D. THE COMMISSION PROHIBITS THE DISRUPTION OF EMERGENCY SERVICES

In addition to potentially violating the Communications Act, BART also acted against the Commission's position on ensuring access to CMRS networks during emergencies.[248] Authorities use telecommunications to administer emergency alerts during times of crises, and CMRS users use their phones to call for help during emergencies.[249] The Communications Act requires the FCC to "encourage and support . . . comprehensive end-to-end emergency communications infrastructure and programs, based on coordinated statewide plans, including seamless, ubiquitous, reliable wireless telecommunications networks and enhanced wireless 9-1-1 service . . . ."[250]

BART claims that it acted for the safety of passengers during what might have become a dangerous situation.[251] However, BART prevented its passengers from receiving emergency information.[252] The FCC has repeatedly acknowledged the importance of CMRS networks during emergency situations.[253] After a cell phone carrier failed to connect over 8,000 911 calls,

245. Elinson, *supra* note 14.

246. *See* 47 U.S.C. § 333 (2006).

247. *See* H.R. REP. No. 101-316, at 13.

248. *See* 47 U.S.C. § 615.

249. *See In re* Matter of Amending the Definition of Interconnected VoIP Service in Section 9.3 of the Commission's Rules, 25 FCC Rcd. 10074 (F.C.C. 2011), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db0713/FCC-11-107A1.pdf.

250. *Id.*

251. Miner, *supra* note 2.

252. *See* Zusha Elinson, *BART: 'We Were Within Our Legal Right' To Shut Down Cell Service,'* THE BAY CITIZEN (Aug. 12, 2011, 6:24 PM), http://www.baycitizen.org/bart-police-shooting/story/bart-cell-phone-service-legal/.

253. *See* Proposed Extension of Part 4 of the Commission's Rules Regarding Outage Reporting to Interconnected Voice Over Internet Protocol and Broadband Service Providers, Notice of Proposed Rulemaking, 26 FCC Rcd. 7166 (F.C.C. 2011); Jamie Barnett,

the Bureau of Public Safety, a bureau within the FCC, declared "any 911 call that is not connected can have serious consequences."[254] BART even acknowledged how its actions would prevent it from contacting passengers with updates during emergencies.[255] Had BART been concerned primarily with the safety of its passengers and bystanders, it likely would have worked to ensure that it could use its alert system to communicate with its passengers and that they had the ability to call 911 or their loved ones. Instead, Public Knowledge argues that BART intended to prevent a protest against itself by shutting down communication.[256]

E. THE COMMISSION PRESERVES "FREE EXPRESSION ON THE OPEN INTERNET"

The FCC recently issued an order to "preserve the Internet as an open platform for . . . free speech."[257] The Commission adopted three rules to provide clarity on how to keep the Internet open and free:

> Transparency: Fixed and mobile broadband providers must disclose the network management practices, performance characteristics, and terms and conditions of their broadband services.
>
> No blocking: Fixed broadband providers may not block lawful content, applications, services, or non-harmful devices; mobile broadband providers may not block lawful Web sites, or block applications that compete with their voice or video telephony services; and
>
> No unreasonable discrimination: Fixed broadband providers may not unreasonably discriminate in transmitting lawful network traffic.[258]

Tips for Communicating in an Emergency, FCC.GOV (Aug. 27, 2011), http://www.fcc.gov/blog/tips-communicating-emergency; Dugald McConnell & Brian Todd, *FCC to Investigate Cell Phone Network After Earthquake*, CNN.COM (Aug. 25, 2011), http://articles.cnn.com/2011-08-25/us/earthquake.cell.phones_1_cell-phone-phone-bills-wirelessservice; *see also* Shayne Adamski, *New Digital Tools: FEMA APP and Text Message Updates*, FEMA BLOG (Aug. 26, 2011), http://blog.fema.gov/2011/08/new-digital-tools-femaapp-and-text.html.

254. *FCC's Public Safety Bureau and Homeland Security Bureau Requests Verizon To Take Action To Prevent Future Blocking of 911 Calls*, FCC.GOV (Feb. 18, 2011), http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-304751A1.pdf.

255. Elinson, *supra* note 14.

256. *Id.*

257. Preserving the Open Internet, 76 Fed. Reg. 185 (Sept. 23, 2011) (codified at 47 C.F.R. pts. 0 & 8 (2011)).

258. 47 C.F.R. §§ 8.3, 8.5, 8.7 (2011).

The newly adopted rules include a prohibition on blocking. In particular, "mobile broadband providers may not block lawful Web sites, or block applications that compete with their voice or video telephony services."[259] While most of the analyses and arguments put forth by the ACLU and Public Knowledge relate to telephone communications, BART also prevented internet access on mobile phones.[260] Because online communication, particularly through mobile devices, is so prevalent, and because protesters throughout the world have relied on the Internet,[261] this Note calls for an exploration on the Commission's latest ruling on this matter.

The FCC Order protects freedom of expression on the Internet via mobile broadband.[262] The FCC passed these rules on September 23, 2011, and they became effective November 20, 2011.[263] As these rules were not in effect at the time BART shut down cell phone equipment on August 11, they have no binding effect on BART's actions that day.[264] However, analyzing their effects with respect to BART's actions will be helpful for the broader analysis of this debate.

According to these rules, "[a] person engaged in the provision of mobile broadband Internet access service, insofar as such person is engaged, shall not block consumers from accessing lawful Web sites."[265] The FCC will closely monitor "any conduct by mobile broadband providers that harms innovation, investment, competition, free expression or the achievement of national broadband goals."[266] The FCC does not intend for the Open Internet rules to expand or contract a broadband provider's rights under other laws or safety and security regulations, such as "emergency communications and law enforcement, public safety, and national security authorities."[267] The Open Internet rules state:

> The purpose of the safety and security provision is first to ensure that open Internet rules do not restrict broadband providers in addressing the needs of law enforcement authorities, and second to ensure that broadband providers do not use the safety and security

259. Preserving the Open Internet, 76 Fed. Reg. 185, 59192-01, 59192.

260. The shutdown prevented all cell phone access and communication, including the ability to communicate on the Internet through mobile devices.

261. *See* Dunn, *supra* note 6.

262. 47 C.F.R. § 8.5.

263. *Id.* pts. 0 & 8.

264. 47 U.S.C. § 154(g)(2)(i) (2006) ("The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary for the execution of its functions.").

265. 47 C.F.R. § 8.5.

266. *Id.*

267. *Id.*

> provision without the imprimatur of the law enforcement authority, as a loophole to the rules. As such, application of the safety and security rule should be tied to invocation by relevant authorities rather than to a broadband provider's independent notion of law enforcement.[268]

Commentators have argued that the scope of this safety and security rule should be limited so that broadband providers do not abuse the rule by voluntarily using it in ways that are inconsistent with Open Internet principles.[269] If the FCC does not limit the safety and security rule, mobile broadband providers may hinder freedom of expression via web sites accessed through mobile networks on cell phones and other devices.

Whether or not BART constitutes a broadband provider, in light of its equipment providing passengers access to the Internet through a cell phone carrier's broadband network, is a factual question. Even if BART is not a broadband provider for the purposes of these rules, the same worries exist because BART may direct the cell phone carrier to turn off the broadband network so as to impede access to certain websites "under the guise of protecting safety and security."[270] Because broadband providers would have the ability to avoid the Open Internet rules during times of emergency—or presumably any time it considers preventing access to certain websites necessary to protect safety and security—this rule, which at first glance appears to be protect First Amendment rights, may instead be used to defend hindering access to websites, including social networking sites during times of protests.

BART claims that it turned off its equipment to prevent cell phone communication—which may be done through text messaging or social media websites—due to safety concerns.[271] Regardless of whether or not BART decided to hinder access to social networking because of safety concerns, it nevertheless discriminated because its goal was to prevent specific speech that would facilitate a protest. If BART or government officials operating broadband networks in the future can claim they prevented users from accessing the Internet because of safety and security reasons, the FCC may consequently be authorizing the squelching of free speech with this carve-out to the rule that purports to prevent the use of broadband networks to hinder free expression.

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268. Preserving the Open Internet, 76 Fed. Reg. 185, 59213 (Sept. 23, 2011) (codified at 47 C.F.R. pts. 0 & 8 (2011)) (emphasis added).

269. *Id.*

270. *Id.*

271. Franklin, *supra* note 1.

The FCC has declined to limit the safety exception rule, stating that "it would be a mistake to limit the rule to situations in which broadband providers have an obligation to assist safety and security personnel."[272] The FCC has also declined to require a review process prior to the execution of the broadband provider's decision because "time may be of the essence in meeting safety and security needs."[273]

IV. IF BART WAS A STATE ACTOR, IT LIKELY VIOLATED CALIFORNIA LAW

California case law prohibits government agencies from disrupting telecommunication networks due to suspicion of illegal activity, as in *People v. Brophy*.[274] The court in *Brophy* held that the California Attorney General could not prevent telephone service because the service was used for illegal activity (bookkeeping related to horse races).[275]A government agency does not have the authority to disconnect telecommunications service based on its governmental status.[276] While the court found that the Attorney General lacked authority to disconnect the telephone because alleging illegal activity is not enough, it also held that the Attorney General did not even have the power to disconnect under its police powers.[277] Rather, the court found that this authority belonged to the Railroad Commission, while the power to disconnect telecommunications resides in the California Public Utilities Commission.[278]

In *Brophy*, the court determined that the government could not legally prevent communications relating to the illegal activity of bookkeeping for horse races.[279] BART prevented a wide array of communications, including some that would have allowed some passengers to coordinate a protest together.[280] Arguably the protest would have been legal, unless it acted to cause illegal or threatening activity, which is analyzed in Part II, *supra*. Even assuming that a court would have found the protest illegal, under *Brophy*, BART had no authority to disconnect telecommunications.[281]

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272. *Id.*
273. *Id.*
274. People v. Brophy, 120 P.2d 946, 953–54 (Cal. Ct. App. 1942).
275. *Id.*
276. *See id.*
277. *Id.*
278. *Id.*
279. *Id.*
280. *See* Franklin, *supra* note 1.
281. *Brophy*, 120 P.2d at 953–54.

While a court would analyze the BART incident under the *Brophy* precedent of California law, other jurisdictions similarly hold that the government cannot disconnect telephones due to suspicion that crimes are taking place over the telephone. For example, under *Shillitani v. Valentine*, New York law provides that telephone companies cannot deny service because of "a mere suspicion or mere belief that they may be or are being used for an illegitimate end."[282] The court in *Shillitani* held that the company "[was] obliged by law to furnish its service and equipment to the public in general, and impartially."[283]

Alabama case law stands for a similar proposition.[284] In *Pike v. Southern Bell*, the Supreme Court of Alabama held that telephone companies "ha[d] a duty to serve the general public impartially, and without arbitrary discrimination. [The] right of service extend[ed] to every individual who complie[d] with the reasonable rules of the [Telephone] Company."[285] In *Pike*, the Commissioner of Public Safety of Birmingham wanted the telephone company to disconnect a customer's phone because it was allegedly operating a lottery.[286] The court found that this attempt to exercise police power was not justified because the Commissioner attempted to penalize a person for a crime without undergoing the correct judicial proceedings.[287] "The unconstitutional and extra-judicial enlargement of coercive governmental power is a frightening and cancerous growth on our body politic."[288]

The fact that Congress's only explicit authorization for denying telecommunications services relates to alleged gambling implies that government entities do not have the authority to deny services for other reasons.[289]

BART's shutting down its cell phone equipment to prevent communication differs from these cases because BART did not target specific individuals who were committing a crime.[290] BART sought to

282. *In re* Shillitani v. Valentine, 184 Misc. 77, 81 (N.Y. Sup. Ct. 1945).
283. *Id.* at 80.
284. Pike v. S. Bell, 81 So. 2d 254 (Ala. 1955).
285. *Id.*
286. *Id.*
287. *Id.*
288. *Id.* at 258.
289. 18 U.S.C. § 1084 (2006).
290. Public Knowledge, Broadband Institute of California, Center for Democracy and Technology, Center for Media Justice, Electronic Frontier Foundation, Media Access Project, Minority Media and Telecommunications Council, National Hispanic Media Coalition, and New America Foundation's Open Technology Initiative.
290. Feld & Siy, *supra* note 4.

prevent passengers from coordinating protests and demonstrations through messages through the use of cell phones because it assumed there would be safety risks and train delays.[291] BART's decision prevented any and all passengers from communicating using wireless phones, rather than preventing only communications of those committing a crime. While BART stopped communication between potential protesters, it also prevented passengers from calling family members to explain delays and confirm their whereabouts and impeded emergency service calls.

V. CONCLUSION

BART and subsequent government agencies attempting to hinder access to cell phones will need to overcome many potential violations of the First Amendment and Communications Act to justify its actions. If the regulated forum is not public, it seems the government will have wider latitude to restrict speech. Additionally, § 214(a)(3) of the Communications Act—outlining the acceptable procedure for discontinuing service—may become critical in this debate. If the government, or a government agency, such as BART, can convince the FCC to authorize a shutdown, it may be able to clear one legal hurdle. Similarly, the Commission's new Open Internet rules, although not applicable to all of the restricted services at issue in the BART incident, may result in restrictions of mobile internet use and social networking, despite the fact that these rules are intended to protect freedom of expression.

Despite a history of courts finding that the First Amendment prohibits free speech restrictions and that the Commission prohibits the disconnecting of telecommunication services, the government will likely be able to prevent access to cell phones and social networking without penalties to the extent that it can point to a sufficient threat or emergency. When the FCC publishes its "order" on the BART situation and its subsequent policy for shutting down wireless phone service, Americans may have a better idea of their rights.

In light of the rise of protests throughout the world in 2011 and 2012, specifically the 2011 Arab Spring uprisings and Wall Street protests, the actions that a government may legally undertake to control these movements represent a question that needs answering. The FCC ruling should provide some clarity. However, until a court adjudicates this matter, Americans will not know the true extent of the government's ability to regulate and interfere with technology that may or may not be used in the pursuit of protests.

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291. *See* Franklin, *supra* note 1.