CONSIDERING THE PUBLIC FORUM STATUS OF GOVERNMENT INTERNET SITES

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I. INTRODUCTION

This Article has its genesis in questions received from members of the local government bar about the legal implications associated with maintaining and operating Internet social networking sites.[1] The past decade has seen a meteoric rise in the use of the Internet by the public[2] and in all facets of government.[3] An unofficial survey found that in Florida, the State,[4] each of its agencies, every county, and all cities with populations over

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1. Carl E. Brody, Senior Assistant Cnty Attorney, Pinellas Cnty, & Maggie Mooney-Portale, Attorney, Persson & Cohen, P.A., Address at the Florida Bar Ass'n 37th Annual Local Gov't Law in Fla: Let's Be "Friends"—Use of Social Media By Local Government (May 9, 2014) (providing a forum for local government officials and attorneys to ask questions on government social networking).

2. Thom File, *Computer and Internet Use in the United States*, U.S. CENSUS BUREAU 1, 2 (May 2013), http://www.census.gov/prod/2013pubs/p20-569.pdf (showing that by 2011, 71.7% of households used the Internet compared to only 50.4% in 2001 and 18% in 1997); *Internet Users by Country (2014)*, INTERNET LIVE STATS (July 1, 2014), http://www.internetlivestats.com/internet-users-by-country (stating that, by some accounts, the percentage is now up to 86.75% penetration of the United States population).

3. Natalie Helbig & Jana Hrdinová, *Exploring Value in Social Media*, CTR. FOR TECH. IN GOV'T (2012), http://www.ctg.albany.edu/publications/issuebriefs/social_media (citing Human Capital Inst. and Saba, Inc., *Social Networking in Government: Opportunities & Challenges*, HUMAN CAPITAL INSTIT. (Jan. 2010), http://www.unapcict.org/ecohub/social-networking-in-government-opportunities-challenges/at_download/attachment1) (suggesting that in 2009, 66% of federal, state and local government workplace were using Internet social networking tools).

4. *See* State of Florida, *The Official Portal of the State of Florida*, MYFLORIDA.COM, www.myflorida.com (last visited Apr. 14, 2015) (This is the official portal for the State of Florida providing basic information to visitors and links to specific sections regarding the interest of the person accessing the site.).

250,000 maintain individual Internet sites.[5] Public bodies maintain these sites to more efficiently provide information to and get feedback from the public,[6] increase transparency in the public body,[7] monitor public sentiment and concerns,[8] save time and money,[9] and provide greater access to government services amongst many other uses.[10] Indeed, early in his presidency, Barack Obama issued a presidential memorandum requiring federal agencies to take prompt steps to expand access to government information through the Internet for the purposes of increasing transparency, participation, and collaboration with the public.[11] Consistent with these benefits, effective use of the Internet promotes good public administration and serves as an instrument of sustainable development through e-government. E-government enables the delivery of quality public services and responds to the public's demands for greater transparency and

5. An unofficial survey using U.S. Census data for the population of Florida cities identified Jacksonville, Miami, Tampa, and Orlando as cities with a population over 250,000. United States Census Bureau, *American FactFinder Results*, CENSUS.GOV, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk (December 2012). Each of these cities maintain a website. *Official Website of the City of Jacksonville, FL*, COJ.NET, http://www.coj.net/ (last visited Apr. 14, 2015); *City of Miami, Florida*, MIAMIGOV.COM, http://www.miamigov.com/home/index.html (last visited Apr. 14, 2015); *City of Orlando: The Official Website of the City Beautiful*, CITYOFORLANDO .NET, http://www.cityoforlando.net/ (last visited Apr. 14, 2015); *City of Tampa, Florida*, TAMPAGOV.NET, http://www.tampagov.net/ (last visited Apr. 14, 2015).

6. GRANICUS, INC. & MEASURED VOICE, THE BENEFITS OF SOCIAL MEDIA MANAGEMENT TOOLS FOR GOVERNMENT AGENCIES 1, 1–2 (2014), *available at* http://icma .org/Documents/Document/Document/306338 (noting that based on its survey, 42% of local government professionals desire to use Internet social networking to "make civic engagement more productive and useful").

7. Scott Schneider, *Government Without Walls: The Use of the Internet by Government Organizations*, THE POLICY TREE (Aug. 2011), http://thepolicytree.com/Government _Without_Walls,_August_2011.pdf.

8. *See* Adam Stone, *Using Social Media to Enhance Situational Awareness*, GOV'T TECH (Jan. 4, 2013), http://www.govtech.com/e-government/Using-Social-Media-to -Enhance-Situational-Awareness.html (referring to the use of social media in disaster situations).

9. Justin Mosebach, *How Local Governments Benefit from Social Media*, ASPA NAT'L WEBLOG (Aug. 23, 2011, 3:50 PM), http://aspanational.wordpress.com/2011/08/23/how -local-governments-benefit-from-social-media/.

10. *See generally* Dep't of Econ. & Soc. Aff., *United Nations E-Government Survey 2014: E-Government for the Future We Want*, UNITED NATIONS (2014), http://unpan3.un .org/egovkb/Portals/egovkb/Documents/un/2014-Survey/E-Gov_Complete_Survey-2014.pdf (explaining how e-government can be used for sustainable development).

11. Memorandum from Barack Obama, President of the United States of America to the Heads of Exec. Dep'ts & Agencies, *Transparency and Open Government* 1 (Jan. 21, 2009), *available at* http://www2.gwu.edu/~nsarchiv/news/20090121/2009_transparency _memo.pdf.

accountability.[12] The broad expansion in use of the Internet raises questions as to the rights of the public to participate in this forum and to the limits governments, generally, and local governments, in particular, can place on interactions occurring through these websites. Be it a promotional web page; a social networking site like Facebook, a blog, or Twitter; or an internal intranet site, because of the public nature of the site, First Amendment free speech principles must be considered. Similarly, restrictions on the limits public bodies may place on speech occurring on these sites must satisfy constitutional standards. Local government practitioners must be familiar with the variable legal criteria that will apply depending on the nature and purpose of the websites operated and maintained by public bodies across the board, be it elected boards, agency, or departmental websites or internal sites.

II. PUBLIC FORUM ANALYSIS

The public forum analysis was created by virtue of the need for courts to allow government regulation of speech based on the distinct characteristics of the place where the speech is being conducted. Courts are required to examine both the protected status of the speech at issue along with the nature of the site of said speech to determine the validity of limitations placed on the speaker. This field of jurisprudence is court-created,[13] and therefore subject to amendment through subsequent court interpretations, which over time have attempted to further define the application of the public forum analysis, resulting in some hard and fast rules.[14] Unfortunately, certain other attempts of the courts' attempts to define the field have broadened the scope of public forum analysis and created confusion as to its proper ap-

12. Dep't of Econ. & Soc. Aff., *supra* note 10, at 2. The United Nations has created a conceptual framework for the purpose of analyzing the development of e-government by member nations. *Id.* The results have shown that high-income nations score higher on the e-government ranking and the level of national development corresponds with the effective use of e-government. *Id.* at 4–5.

13. *See* Lyrissa Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 1975, 1979 (2011) (noting that the Supreme Court first recognized "a right to speak on public property in 1939," and established the "'public forum' as a legal category in 1972'").

14. *Id.* at 1980 ("Since then, the Supreme Court has developed a 'complex maze of categories and subcategories' to determine whether a government restriction on expressive use of a government place or resource is subject to strict or lax constitutional scrutiny.").

plication.[15] The following examines the nature of the distinct fora and the analyses undertaken by the courts.

Initially, be aware that the public forum analysis applies only in the context of protecting the First Amendment right of the public to speak or conduct expressive activities in certain areas of the public domain.[16] As such, the first inquiry a court must make is whether the party complaining about government action limiting speech is engaged in protected speech.[17] Non-First Amendment activity receives no protection in the public forum. Secondarily, the court must determine the nature of the forum.[18] Finally, the court must "assess whether the justifications for exclusion from the relevant forum satisfy the requisite standard."[19] It is also important to note "the First Amendment does not guarantee access to [government] property";[20] "[t]he Government, like any private landowner, 'may preserve the property under its control for the use to which it is lawfully dedicated.'"[21]This limitation demands that courts look more closely at the policy and practice of the government to determine the nature of the forum.[22] Consider for example that the Florida Public Meetings Law[23] historically provides no specific requirement that a public board provide members of the public an opportunity to speak at meetings of the board. Indeed, the Florida Supreme Court and lower District Courts of Appeal specifically acknowledge that the public has no

15. Many commentators have discussed the confusion of applying a consistent standard to the different categories created through the public forum analysis. *See, e.g.*, Aaron H. Caplan, *Invasion of the Public Forum Doctrine*, 46 WILLAMETTE L. REV. 647, 653–54 (2010) (describing the confusion around the phrase "'limited public forum'"); Michael J. Friedman, *Dazed and Confused: Explaining Judicial Determinations of Traditional Public Forum Status*, 82 TUL. L. REV. 929, 930 (2008); Lidsky, *supra* note 13, at 1980 ("[B]lured lines between limited public forums and nonpublic forums and between government speech and private speech create category confusion.").

16. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 797 (1985).

17. *Id.*

18. *Id.*; *see also* United States. v. Frandsen, 212 F.3d 1231, 1237 (11th Cir. 2000) (explaining that "an initial step in analyzing whether the regulation is unconstitutional is determining the nature of the government property involved").

19. *Cornelius*, 473 U.S. at 797.

20. *Id.* at 803 (internal quotations omitted) (quoting USPS v. Council of Greenburgh Civic Ass'ns., 453 U.S. 114, 129 (1981)); Wright v. Incline Vill. Gen. Improvement Dist., 665 F.3d 1128, 1134 (9th Cir. 2011).

21. Sentinel Commc'ns Co. v. Watts, 936 F.2d 1189, 1201 (11th Cir. 1991) (quoting United States v. Gilbert, 920 F.2d 878, 884 (11th Cir. 1991)).

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

23. FLA. STAT. § 286.011 (2014).

right to public participation at public meetings.[24] Applying these interpretations to the public forum analysis will assist in determining how to categorize public meeting halls, but the policy and practice of the public board will also provide direction as to the intended status of the forum.

The Supreme Court created the public forum analysis through caselaw. In *Hague v. Committee for Industrial Organization*,[25] the Court reviewed a challenge to a city ordinance giving a city official discretion to decide whether to allow organizations access to hold meetings in public venues within the city's limits. The Court struck the ordinance as being in violation of the First and Fourth Amendments, specifically stating, "streets and parks . . . have immemorially been held in trust for use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[26] In a contemporary case with *Hague*, the Court struck an ordinance prohibiting leafleting on city streets and sidewalks.[27] In *Schneider v. New Jersey*,[28] the Court began to lay out the common sense basis for regulating in the public forum.[29] Indeed, at this early stage in the development of the public forum doctrine the Court focused on weighing the circumstances of individual challenges and appraising the "substantiality of the reasons advanced in support of the regulation of the free enjoyment of [First Amendment] rights."[30] This is the root of our public forum analysis. As time passed, though, the breadth of defined public space could not stand the weight of this initial determination that all public space could not be held open for any protected speech, therefore, the Court began to fine-tune its analysis by providing distinct categories of public fora based on their historical or intended uses. The result over time is that four public forum categories have been created: two with clear lines of

24. Wood v. Marston, 442 So. 2d 934, 941 (Fla. 1983); Keesler v. Cmty. Maritime Park Assocs., Inc., 32 So. 3d 659, 660–61 (Fla. 1st Dist. Ct. App. 2010).

25. 307 U.S. 496 (1939).

26. *Id.* at 515.

27. Schneider v. New Jersey, 308 U.S. 147, 165 (1939).

28. 308 U.S. 147 (1939).

29. *Id.* at 160 (discussing the balance that must be struck between free speech rights and primary use of public property).

30. *Id.* at 161.

demarcation, providing clear standards to determine the viability of government restriction, and two more, amorphous in nature.

A. Traditional Public Fora

Traditional public fora are areas within a jurisdiction that have historically been held open for political speech and debate.[31] Consider these the public soapboxes of the nineteenth century; these are areas that have a historical basis of being open to the public for discussion of the issues of the day. Common designations include public streets,[32] sidewalks,[33] and parks.[34] Because of the traditional use in these fora, any restriction or regulation placed on speech or expression receives the highest level of scrutiny.[35] The court-created standard looks first to whether the restriction at issue is content-based or content-neutral; second, it examines whether the decision to create the regulation or restriction is based on the words of the speaker or the nature of the expression.[36] Where the nature of the regulation is premised on limiting specific speech or expression, it must: (1) be narrowly tailored; and (2) serve a compelling government interest.[37] This level of strict scrutiny, which places the highest level of scrutiny on laws, rules, or policies that limit use of the public forum, is almost impossible to satisfy.[38] In practice, the government must

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

32. Jamison v. Texas, 318 U.S. 413, 413–14 (1943) (reversing conviction of Jehovah's Witnesses member cited for violating city ordinance prohibiting a list of expressive activities in Dallas city streets); Nationalist Movement v. City of Cummings, 92 F.3d 1135, 1139 (11th Cir. 1996) (noting that the streets in a city are quintessential public fora) (citing *Perry*, 460 U.S. at 45).

33. Boos v. Barry, 485 U.S. 312, 318 (1988) (regarding the First Amendment rights of picketers using sidewalks within five hundred feet of foreign government embassies); United States v. Grace, 461 U.S. 171, 177 (1983), (regarding right to distribute leaflets on sidewalk in front of the United States Supreme Court building); One World One Fam. Now v. City of Miami Beach, 990 F. Supp. 1437, 1441 (S.D. Fla. 1997) (regarding Miami Beach ordinance restricting hours and location of non-profit vending table from sidewalks in Art Deco neighborhood).

34. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (regarding the public forum status of Central Park in New York City).

35. *See* McTernan v. City of York, 564 F.3d 636, 645 (3rd Cir. 2009) (noting that "[s]peech in a traditional public forum is afforded maximum constitutional protection").

36. *See Boos*, 485 U.S. at 321 (analyzing the display clause at issue by determining first, that the clause was "content-based" and second, that it set forth a restriction on "political speech").

37. *Grace*, 461 U.S. at 177.

38. Michael J. Mellis, *Modifications to the Traditional Public Forum Doctrine:* United States v. Kokinda *and Its Aftermath*, 19 HASTINGS CONST. L.Q. 167, 170 (1992) (citing

show the highest level of need in order to impose restrictions directed at a specific group or the nature of speech.[39] Furthermore, limiting speech based on content raises equal protection concerns, thereby heightening the government's standard of proof.[40] For example, in *Police Department of Chicago v. Mosley*,[41] the Court overturned a City of Chicago ordinance that limited picketing in the area surrounding primary or secondary school buildings based on content distinctions.[42]

The challenger in *Mosley* was in the practice of picketing outside of a Chicago public high school.[43] In response, the City passed the ordinance in question, prohibiting pickets or demonstration within 150 feet of school buildings while school was in session.[44] The ordinance provided an exception for "peaceful labor picketing" and it was this exception that created both First Amendment and Equal Protection Clause problems.[45] The Court ostensibly applied an equal protection analysis, which is nearly identical to that of content-based regulations in the public forum context. Specifically, the Court asked "whether there is an appropriate governmental interest suitably furthered by the differential treatment."[46] Applying the equal protection analysis, the Court determined that the distinction for allowing picketing was based on the subject matter of the message.[47] Therefore, the highest strict scrutiny standard was applied to the ordinance, requiring that it be narrowly tailored to serve a legitimate interest.[48] The City failed this test based on equal protection standards, but

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Texas v. Johnson, 491 U.S. 397, 412 (1989) (stating that strict scrutiny is the most exacting form of judicial review)).

39. Mellis, *supra* note 38, at 170 (citing Near v. Minnesota, 283 U.S. 697, 716 (1931) (referencing the "exceptional" circumstances that would allow content-based suppression of speech by government)).

40. Police Dep't of City of Chi. v. Mosley, 408 U.S. 92, 96 (1972).

41. 408 U.S. 92 (1972).

42. *Id.* at 102.

43. *Id.* at 93.

44. *Id.* at 92–93 (citing CHI.ILL. MUN. CODE CHI., ch. 193-1(i)(1968)).

45. *Id.* at 95.

46. *Id.* (citing Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 182 (1972); Dunn v. Blumstein, 405 U.S. 330, 335 (1972); Reed v. Reed, 404 U.S. 71, 75–77(1971)).

47. *Id.* (citing Cohen v. California, 403 U.S. 15, 24 (1971); Street v. New York, 394 U.S. 576, 592 (1969); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269–70 (1964), NAACP v. Button, 371 U.S. 415, 445 (1963); Wood v. Georgia, 370 U.S. 375, 388–89 (1962); Terminiello v. Chicago, 337 U.S. 1, 4 (1949); De Jonge v. Oregon, 299 U.S. 353, 365 (1937) (applying a First Amendment analysis)).

48. *Id.* at 101 (citing Williams v. Rhodes, 393 U.S. 23, 29–30 (1968)).

the language of the opinion clearly explains that the ordinance's distinction based on content would not survive under a forum analysis.[49]

Where the restriction is not based on the content of speech, the courts apply the content-neutral standard, which provides that any regulation: (1) be narrowly tailored; (2) address a significant government interest; and (3) provide ample alternatives for achieving the desired speech.[50] This is commonly referred to as the "time, place, and manner test." A plethora of caselaw exists addressing this doctrine, the most seminal of which may be *Grayned v. City of Rockford*.[51]

Grayned involved a challenge to a conviction for participating in a demonstration outside of a Rockford, Illinois, high school.[52] A Rockford City ordinance almost identical to the Chicago ordinance in *Mosley* was overturned, but its companion noise ordinance was upheld.[53] Unlike the *Mosley* case in Chicago, the Rockford noise ordinance did not factor the nature or content of speech as a distinguishing factor.[54] Based on this distinction, the Court went on to explain that reasonable "'time, place, and manner'" regulations might be used to further significant government interests.[55] The crucial question, as the Court noted, was whether the manner of expression was compatible with the normal activity of the place at a particular time.[56] The time, place, and manner test has not changed since the standard set out in *Grayned*.

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49. *Id.* at 102 ("Chicago's ordinance imposes a selective restriction on expressive conduct far 'greater than is essential to the furtherance of [a substantial governmental] interest.'")(quoting United States v. O'Brien, 391 U.S. 367, 377 (1968)).

50. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (discussing the government's qualified ability to impose reasonable restrictions on public fora on the time, place, and manner of protected speech).

51. 408 U.S. 104 (1972).

52. *Id.* at 104.

53. *Id.* at 107–08. *Compare* ROCKFORD, ILL., CODE OF ORDINANCES, ch. 28, § 18.1(i) (1972) *with id.* § 19.2(a).

54. *Grayned*, 408 U.S. at 113, 120.

55. *Id.* at 115 (citing Shuttlesworth v. Birmingham, 394 U.S. 147, 150 (1969); Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 320–21 (1968); Adderley v. Florida, 385 U.S. 39, 47 n.6 (1966); Cox v. Louisiana, 379 U.S. 559, 554–55 (1965); Poulos v. New Hampshire, 345 U.S. 395, 398 (1953); Kunz v. New York, 340 U.S. 290, 293–94 (1951); Cox v. New Hampshire, 312 U.S. 569, 575–76 (1941)).

56. *Id.* at 116.

B. Nonpublic Fora

Nonpublic fora are those areas of public space that are not specifically held aside for First Amendment activity nor considered to be quintessential public fora. These can be areas of government property, which are reserved for the public body's intended purpose.[57] A critical aspect of the public forum analysis explains that the public body must intentionally open a nontraditional forum for public discourse in order to change the character of the forum and thereby make it open to the public.[58] Examples include courthouse lobbies,[59] airports,[60] entryways to government offices,[61] and interstate rest areas.[62] In nonpublic fora, government retains a greater ability to regulate and limit First Amendment activity. Specifically, the Court has determined that the lesser reasonable basis standard of review applies, requiring only that the government regulation be: (1) reasonable, (2) with no attempt to suppress the speaker based on a disagreement with his views.[63] *Arkansas Educational Television Commission v. Forbes*[64] provides an analysis of this distinct forum category with hints towards its application regarding government use of the Internet.

In *Forbes*, the Court examined whether a state owned public television broadcaster sponsoring a political debate could limit the number of candidates participating in its debate.[65] The broadcaster denied the request of an independent candidate, and this

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

58. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985).

59. Sefick v. Gardner, 164 F.3d 370, 373 (7th Cir. 1998) (In prohibiting the display of artwork in the lobby of the Dirksen Courthouse, the court explained that the lobby of a courthouse is not a public forum.); *see also* Schmidter v. State, 103 So. 3d 263, 270 (Fla. 5th Dist. Ct. App. 2012) (upholding a court administrative order prohibiting "jury nullification" leafleting at the Orange County, Florida courthouse).

60. *See* Int'l Soc. for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 680–81 (1992) (explaining that airports are not areas that have been traditionally held open for public discourse).

61. United States v. Kokinda, 497 U.S. 720, 727 (1990) (discussing that a public street leading to a post office is not a forum subject to free speech activity).

62. Sentinel Commc'ns. Co. v. Watts, 936 F.2d 1189, 1204 (11th Cir. 1991) (opining that a state can prohibit newspaper boxes in rest areas because of the character of these public spaces).

63. *See* Helms v. Zubaty, 495 F.3d 252, 257 (6th Cir. 2007) (finding that judges' chambers are nonpublic fora, therefore a person refusing to leave may properly be cited for trespass).

64. 523 U.S. 666 (1998).

65. *Id.* at 669.

decision was challenged on First Amendment public forum grounds.[66] The Court determined in its review that candidate debates subject the broadcaster to the forum analysis.[67] The Court further explained that the traditional public forum analysis did not apply because the "objective characteristics" of the television broadcast were not consistent with the property being open to debate.[68] Similarly the forum was not "designated" because the government took no affirmative step to make the property generally available to a class of speakers.[69] Based on these determinations the broadcast was deemed a nonpublic forum, and therefore, in order to satisfy constitutional requirements, the decision to limit access must be viewpoint-neutral and reasonable.[70] The Court held that this standard was satisfied because the exercise of journalistic judgment regarding participation in the debate satisfied the reasonableness standard regarding government action and the decision was made in a content-neutral manner.[71]

Similarly, in *Hazelwood School District v. Kuhlmeier*,[72] the Court found that a high school newspaper produced as part of a school journalism class was not a public forum.[73] The Court explained that school facilities only become public fora when school officials open them up by policy or practice.[74] Furthermore, the Court opined that because the publication was part of the educational curriculum, it was not open to the public.[75]

C. Designated and Limited Public Fora

Between the two extremes of traditional and nonpublic fora, the Court has carved out two intermediate levels of public fora: designated and limited public forums. Designated public fora are areas of public property that have been opened up for use by the

66. *Id.* at 670–71.
67. *Id.* at 675–76.
68. *Id.* at 677 (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983)).
69. *Id.* at 678 (citing Widmar v. Vincent, 454 U.S. 263, 264 (1981)).
70. *Id.* at 677–78 (citing Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 800 (1985)).
71. *Id.* at 682–83.
72. 484 U.S. 260 (1988).
73. *Id.* at 270 (citing *Perry Educ. Ass'n*, 460 U.S. at 47).
74. *Id.* at 267.
75. *Id.* at 269–70.

public body as a place for expressive activity.[76] This is an intentional act by government; inaction or permitting limited use is not sufficient to create this category of public forum—only policy or practice of the public body creates this designation.[77] Examples include a municipal auditorium;[78] a bulletin board at a state university, which is held open to the public;[79] or government public access channels.[80] Whether intentional or not, the Court's definition referencing expressive activity suggests that not only does the time, place, and manner standard apply, but also the *O'Brien* standard: the letter provides that a law restricting protected expressive activity must: (1) be within the constitutional authority of the government; (2) advance an important government interest; (3) be unrelated to free expression; and (4) any incidental restrictions on the First Amendment must not be greater than necessary to further the government interest.[81] In the context of the Internet, using the *O'Brien* standard could have practical impact on a court's analysis when examining regulations controlling the use of images, video, and other unwritten material.

Assuming the more commonly applied public forum standards are employed, there seems to be a growing consensus that restrictions on speech in a designated public forum receive the same standard of review as they would in a traditional public forum.[82] This trend aside, it is important to be aware of major distinctions between the traditional and designated public forum. Government is not required to indefinitely hold open a designated public forum to the public, whereas a traditional public forum remains open to the public so long as it retains its character.[83] This is a critical distinction, as it will allow a public body to terminate the status of the designated forum resulting in a change to the public's First Amendment right of access and use. Traditional public fora, on the other hand, are designated as such based on their characteristics, and to avoid this characterization

76. *Perry Educ. Ass'n*, 460 U.S. at 45.

77. Bannon v. Sch. Dist. of Palm Beach Cnty., 387 F.3d 1208, 1212–13 (11th Cir. 2004).

78. Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 555 (1975).

79. Giebel v. Sylvester, 244 F.3d 1182, 1188 (9th Cir. 2001).

80. Denver Area Educ. Telecomm. Consortium, Inc., v. FCC, 518 U.S. 727, 791 (1996).

81. United States v. O'Brien, 391 U.S. 367, 377 (1968).

82. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983) (citing Widmar v. Vincent, 454 U.S. 263, 269–70 (1981)).

83. *Id.*

by the courts a public body bears the burden of showing that (1) the physical characteristics; (2) the original purpose of the forum; and (3) the historical and traditional use of the space are not consistent with the nature of a traditional public forum.[84] Practically speaking, it is also very difficult to change the physical characteristics of parks, sidewalks, and public streets.

The limited public forum has been defined to be those areas of public space set aside by government for only a limited purpose or use by certain groups or for certain topics of discussion.[85] Examples include public school meeting rooms,[86] council meetings,[87] or publicly funded publications.[88] Though the limited public forum doctrine has many detractors,[89] the United States Supreme Court has maintained this forum's viability and has attempted to further clarify its application.[90] The consensus regarding these fora is that they will be examined under the more relaxed standard of review requiring government regulation to be reasonable and viewpoint-neutral.[91]

Bloedorn v. Grube[92] provides a good example of a court's analysis that makes the distinction between designated and limited public fora. *Bloedorn* involved a challenge by an evangelical preacher to a Georgia Southern University policy that required speakers to obtain a permit before speaking on campus and lim-

84. Bowman v. White, 444 F.3d 967, 990 (8th Cir. 2006) (citing Frisby v. Schultz, 487 U.S. 474, 481 (1988)) (providing a prima facie test for a traditional public forum and noting that certain venues are presumed traditional public fora).

85. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985).

86. Christian Legal Soc'y v. Martinez, 561 U.S. 661, 679 (2010).

87. White v. City of Norwalk, 900 F.2d 1421, 1425 (9th Cir. 1990); *accord* Steinburg v. Chesterfield Cnty. Planning Comm'n, 527 F.3d 377, 385 (4th Cir. 2008); Eichenlaub v. Twp. of Indiana, 385 F.3d 274, 281 (3d Cir. 2004).

88. Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819, 830 (1995) (The University created a limited public forum by funding the cost of student group publications through a separate fund—therefore it could not deny funding to student organizations whose message they did not agree with; in this case the message was religious in nature.).

89. Matthew D. McGill, *Unleashing the Limited Public Forum: A Modest Revision to a Dysfunctional Doctrine*, 52 STAN. L. REV. 929, 931 (2000); Marc Rohr, *The Ongoing Mystery of the Limited Public Forum*, 33 NOVA L. REV. 299, 300–01 (2009).

90. *See Martinez*, 561 U.S. at 679 (The Court applied a limited public forum analysis to a challenge to state law requiring all registered student associations to allow any student to become a member. The Christian Legal Society required members to "attest" to their belief in God, resulting in it not being recognized as a student group on campus and its proscription from access to University funds and facilities.).

91. Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106–07 (2001).

92. 631 F.3d 1218 (11th Cir. 2011).

ited access to designated zones within the campus.[93] An initial determination of the court rejected consideration of the university campus and its facilities as a traditional public forum because of the educational mission of the University.[94] This left the court with two options: apply the designated public forum standard or the limited. The court examined the nature of the University and determined that more specific categorization of distinct sites within the campus was needed, resulting in a distinction between sidewalks, the pedestrian mall and rotunda of the University, and the Free Speech Area designated as such by the school.[95] This analysis found that the sidewalks and other areas not specifically designated for free speech were limited public fora because their use was limited to a discrete group of people who use the campus for its educational purpose.[96] Conversely, the Free Speech Area fell into the designated public forum category because the University's Speech Policy opened that area up for public discourse with no restrictions on the content.[97]

In a similar case, the courts examined a City of Pasco, Washington, decision to exclude certain artwork from the City Hall Gallery.[98] The City of Pasco invited local artists to display their work in the hallways of City Hall.[99] A not-for-profit Arts Council was created to review submitted artwork with a mandate to avoid controversial pieces, but in practice, no pre-screening process was undertaken and the City provided no definitions of what would be considered inappropriate.[100] The plaintiff, Hopper, submitted a piece, which was initially displayed, but was removed after the City received complaints; others of the plaintiff's works were subsequently not displayed because the City feared they would be controversial.[101] Hopper challenged on First Amendment grounds.[102] The court, in its examination, determined that the City had converted a limited public forum into a designated public forum because, in practice, it opened the hallways of City Hall

93. *Id.* at 1225.
94. *Id.* at 1230 (citing Widmar v. Vincent, 454 U.S. 263, 267 n.5 (1981)).
95. *Id.* at 1232.
96. *Id.*
97. *Id.* at 1234.
98. Hopper v. City of Pasco, 241 F.3d 1067, 1069–70 (9th Cir. 2001).
99. *Id.* at 1070.
100. *Id.* at 1070–71.
101. *Id.* at 1073.
102. *Id.* at 1070.

without limiting the nature or character of the artwork.[103] Indeed, even though a policy existed, in the public forum analysis it is critical that the government consistently enforce any limits desired to be maintained.[104] The *Hopper* court also explained that courts are reluctant to accept policies based on subjective criteria because these place too much discretion in the hands of the decision-making public official.[105] Selectivity in opening the forum to different forms of expression is also a factor that favors applying strict limits of access to maintain a limited public forum.[106] Lastly, courts consider the consistency of use with the principle function of the forum.[107] The result of the *Hopper* court's analysis was that the court applied a strict scrutiny standard that the City could not satisfy.[108]

D. Government Speech

A final category to consider is the application of the government speech doctrine. Whereas the Free Speech Clause severely limits the ability of government to regulate the speech rights of the public, there is no limitation placed on the government's own speech.[109] This is a common sense approach, but its impacts are supported by the distinction between government and private speech. Most recently in *Pleasant Grove v. Summum*,[110] the Court examined a Free Speech Clause challenge by Summum[111] against Pleasant Grove based on the city's refusal to allow Summum to erect a monument in a public park wherein other monuments

103. *Id.* at 1079.

104. *See* Christ's Bride Ministries, Inc. v. SEPTA, 148 F.3d 242, 252 (3d Cir. 1998), *cert. denied*, 525 U.S. 1068 (1999) (opining that a government most consistently enforces policies that are in place).

105. *Hopper*, 241 F.3d at 1077 (citing Putnam Pit, Inc. v. City of Cookeville, 221 F.3d 834, 845–46 (6th Cir. 2000)) (noting that broad discretion given to city officials may lead to discriminatory application of policy based on the viewpoint of the speaker).

106. *Id.* at 1078 (citing Ark. Educ. Television Comm'n. v. Forbes, 523 U.S. 666, 679 (1997)).

107. *Id.* at 1075.

108. *Id.* at 1081.

109. NEA v. Finley, 524 U.S. 569, 598 (1998) (Scalia, J., concurring); Rust v. Sullivan, 500 U.S. 173, 194 (1991).

110. 555 U.S. 460 (2009).

111. Summum is a 501(c)(3) tax exempt organization with philosophical and religious undertones. *See About Summum*, SUMMUM, http://www.summum.us/about/ (last visited Apr. 14, 2015) (showing that Summum is based on Seven Summum Aphorisms, or Principles).

were displayed.[112] The Court, in its analysis of this distinction, determined that the nature of the monuments allowed to be displayed in the park constituted government speech, and as such, the forum analysis promoted by the respondent, Summum, did not apply.[113] The Court explained that, under the government speech doctrine, the government is "entitled to say what it wishes"[114] and "select the views that it wants to express."[115] Based on this analysis, government speech is limited only by conflicts with the Constitution, laws, or regulations, and, of course, public sentiment.[116] Furthermore, the Summum court's interpretation avoids the need to consider First Amendment questions, including the public forum analysis, because the government is speaking on its own behalf, rather than limiting private speech. A caveat in this instance exists though because the challenger did not avail itself of a potential First Amendment argument by not raising an Establishment Clause[117] claim.[118] Indeed, had the Establishment Clause claim been raised the result may have been different.[119] Though the Court questioned the viability of the government speech analysis,[120] it is a useful doctrine to apply in the context of government Internet use because it eliminates public forum considerations and allows the government to select the views that it wants to express. This interpretation provides public bodies a great deal of discretion so long as their statements remain in the realm of government speech.

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112. *Pleasant Grove*, 555 U.S. at 464–65.

113. *Id.* at 478, 481.

114. *Id.* at 467–68 (citing Rosenberger v. Univ. of Virginia, 515 U.S. 819, 833 (1995)).

115. *Id.* (citing Rust v. Sullivan, 500 U.S. 173, 194 (1991); NEA v. Finley, 524 U.S. 569, 598 (1998) (Scalia, J., concurring)).

116. *Id.* at 468–69 (quoting in part Bd. of Regents of Univ. of Wis. System v. Southworth, 529 U.S. 217, 235 (2000)) (stating that a governmental entity has the right to "speak for itself").

117. The Establishment Clause of the First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I. In order for a statute to pass constitutional muster under the Establishment Clause, "[it] must have a secular legislative purpose[,] . . . its principal or primary effect must be one that neither advances nor inhibits religion, . . . [and it] must not foster 'an excessive government entanglement with religion.'" Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1970) (internal citations omitted).

118. *Pleasant Grove*, 555 U.S. at 485–86 (Souter, J., concurring).

119. *Id.* at 468–69.

120. *Id.* at 481 (Stevens, J., concurring).

III. GOVERNMENT INTERNET USE

Government websites are created for many purposes—the most popular of which are to: engage and educate the public, efficiently disseminate information, support the public body's operations, promote better communication with the public, and more efficiently provide access to government services.[121] As the Internet has grown exponentially over the past decade, so too has public use of government websites.[122] The result is that designating the different government approaches to Internet site use is required in order to accurately apply the appropriate public forum analysis. For our purposes, Internet use by public bodies can be categorized into four distinct groups: (1) public-facing; (2) e-government; (3) social networking; and (4) intranet.

A. Public-Facing

For the purposes of this Article, public-facing websites (PFW) will be defined as those sites controlled by governmental bodies that are primarily used as the government's introduction to the public.[123] These are the web pages that introduce the public body to the wider audience searching for information about the government generally or specifically.[124] These web pages are commonplace for all public bodies including the courts,[125] elected boards,[126] constitutional officers,[127] special districts,[128] and law

121. *See* Ali Rokhman, *E-Government Adoption in Developing Countries; The Case of Indonesia*; 2 J. EMERGING TRENDS COMPUTING AND INFO. SERVICES 228, 229 (2011) (discussing the implementation of e-government in Indonesia and other Southeast Asian countries).

122. Lee Rainie, *Future of the Internet: Role of the Web and New Media in the Public Sector*, PEW RESEARCH INTERNET PROJECT (Dec. 13, 2011), http://www.pewInternet.org/2011/12/13/future-of-the-Internet-role-of-the-web-and-new-media-in-the-public-sector/.

123. *Definition of Public Facing*, PC MAG. ENCYCLOPEDIA, http://www.pcmag.com/encyclopedia/term/66440/public-facing (last visited Apr. 14, 2015).

124. *E.g.*, *Homepage*, PINELLAS COUNTY FLA., http://www.pinellascounty.org (last visited Apr. 14, 2015).

125. *E.g.*, *Homepage*, FLA FIRST DISTRICT COURT OF APPEAL, http://www.1dca.org (last visited Apr. 14, 2015).

126. *E.g.*, *Homepage*, HILLSBOROUGH COUNTY FLA, http://www.hillsboroughcounty.org/index.aspx?nid=118 (last visited Apr. 14, 2015).

127. *E.g.*, *Homepage*, PINELLAS COUNTY PROPERTY APPRAISER, http://www.pcpao.org (last visited Apr. 14, 2015); *Homepage*, PINELLAS COUNTY CLERK OF THE CIRCUIT COURT, http://www.pinellasclerk.org (last visited Apr. 14, 2015); *Homepage*, PINELLAS COUNTY TAX COLLECTOR, http://www.taxcollect.com (last visited Apr. 14, 2015); *Homepage*,

enforcement[129] at the federal, state, and local levels.[130] The public bodies create, monitor, and maintain these sites and, as such, become responsible and potentially liable for copyright infringement and other torts that may occur through content provided or created on the sites.[131] These sites may also be interactive in nature allowing members of the public to ask questions and make statements through posts and comments, which are visible to the public at large.

B. E-Government

The United Nations (U.N.) commissioned a bi-annual study on the development of e-government world-wide and determined that e-government is becoming the standard approach for providing service delivery to the public in the context of citizens as customers under the public service model.[132] A goal of e-government is to provide service to the public in a more consolidated manner, thereby increasing efficiency and effectiveness in the public sector.[133] To that end, the UN is encouraging greater use of e-government by all nations under the theory that e-government can provide significant opportunities to promote "sustainable" development.[134] Using the E-Government Development Index as a conceptual tool, the UN quantified the relationship between the level of government and nation development status.[135] Not surprisingly, the more developed a nation, the higher it scores in relation to its "sustainability."[136] Domestically, e-government is

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PINELLAS COUNTY SUPERVISOR OF ELECTIONS, http://www.votepinellas.com (last visited Apr. 14, 2015).

128. *E.g.*, *Homepage*, JUVENILE WELFARE BOARD OF PINELLAS COUNTY, http://www.jwbpinellas.org (last visited Apr. 14, 2015).

129. *E.g.*, *Homepage*, PINELLAS COUNTY SHERIFF'S OFFICE, http://www.pcsoweb.com (last visited Apr. 14, 2015).

130. *E.g.*, *Homepage*, THE WHITE HOUSE, http://www.whitehouse.gov (last visited Apr. 14, 2015); *Homepage*, THE STATE OF FLA, http://www.myflorida.com (last visited Apr. 14, 2015); *Homepage*, THE CITY OF ST. PETERSBURG, FLA, http://www.stpete.org. (last visited Apr. 14, 2015).

131. *See* Cohen v. United States, 98 Fed. Cl. 156, 167 (2011) (holding that copyright holder has standing to sue the government under copyright for displaying copyright holder's images on the government agency's website).

132. Dep't of Econ. & Soc. Aff., *supra* note 10, at 9.

133. *Id.* at 171.

134. *Id.* at 2.

135. *Id.* at 38.

136. *Id.* at 17, 34 (providing the scorecard for e-government sustainability).

prevalent. Examples include filing applications to receive government services or applying for permits online,[137] paying online bills through governmental bodies,[138] filing complaints through agency websites,[139] and filing legal pleadings online,[140] amongst other electronic filing options that make government more accessible and efficient through the use of the Internet.

C. Social Networking

Facebook, Twitter, Instagram, and Flckr are but a few of the many social networking sites used by public bodies to interact more efficiently with the public. Governmental use of social networking is used primarily for the purpose of engaging local citizens, local and international businesses, and individuals outside of the community. Public bodies use social networking to directly interact with the public through person-to-person interactive conversations.[141] Local residents are given the opportunity to ask questions of their government regarding issues of the day and debate their fellow citizens on such topics through the public body's blog or social networking site.[142] Public staff can promote their communities and programs, and address questions raised by potential clients and business partners. Elected officials take advantage of the direct interaction with the public through social networking by polling their constituents and reviewing posts to better understand the public's interests and concerns. These

137. *E.g.*, *Connect General Information*, FLA. DEP'T OF ECON. OPPORTUNITY, http://www.floridajobs.org/job-seekers-community-services/reemployment-assistance-center/connect-general-information (last visited Apr. 14, 2015) (providing electronic filing for unemployment coverage and job opportunities).

138. *E.g.*, *Utility Bill Payment Options*, MYCLEARWATER.COM, http://www.myclearwater.com/services/bill_presentment/index.asp (last visited Apr. 14, 2015).

139. *E.g.*, *OSHA Online Complaint Form*, U.S. DEP'T OF LABOR, https://www.osha.gov/pls/osha7/ecomplaintform.redoform (last visited Apr. 14, 2015) (providing a federal complaint form via the U.S. Department of Labor, Occupational Safety & Health Administration).

140. *E.g.*, *Case Management: Electronic Case Filing*, U.S. DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLA., http://www.flmd.uscourts.gov/CMECF/default.htm (last visited Apr. 14, 2015) (providing a portal for filing in the United States District Court for the Middle District of Florida).

141. Missy Graham & Elizabeth Johnson Avery, *Government Public Relations and Social Media: An Analysis of the Perceptions and Trends of Social Media Use at the Local Government Level*, 7 PUB. REL. J., no.4, 2013, at 1–2.

142. *Id.* at 14.

characteristics compel public bodies to maximize their use of these tools, and that use is increasing.[143]

A distinguishing factor of Internet social networking, as compared to e-government or PFW, is that the vehicle for use is not controlled directly by the public body or elected official. Instead, the Internet social networking service being used retains control over the web site, which exempts the public from liability for the statements of others.[144]

D. Intranet

This platform is used for internal communications of public bodies.[145] There is no intent to include outside voices unless specifically allowed by the body.[146] The conversation created is internal as between staff, elected or appointed officials, and others who are members of the public body.[147] The main controls over internal use are the prevalence of state and federal laws requiring that such communications be open to the public.[148]

IV. APPLICABLE STANDARDS FOR GOVERNMENT INTERNET SITES

A. Public-Facing Websites (PFW)

Government PFW provide a global view of the public body and serve as a portal to provide specific information desired by those persons visiting the site.[149] Those visitors are known in the

143. *Social Networking Fact Sheet*, PEW RESEARCH INTERNET PROJECT, http://www.pewInternet.org/fact-sheets/social-networking-fact-sheet/ (last visited Apr. 14, 2015) (Between February 2005 and September 2013, social networking site use increased from 9% to 90% for users aged 18–29; 8% to 78% for users aged 30–49; 6% to 65% for users 50–64 and 1% to 46% for those over 65.).

144. *See* Klayman v. Zuckerberg, 753 F.3d 1354, 1357 (D.C. Cir. 2014) (noting that the Communications Decency Act protects a user of social networking sites from liability so long as the party is: (1) a user of the social networking site; (2) content subjecting the party to liability was provided by a third party; and (3) the complainant seeks to hold the party liable as a speaker or publisher of the offending material).

145. *Intranet Definition*, THE LINUX INFO. PROJECT, http://www.linfo.org/intranet.html (last visited Apr. 14, 2015).

146. *Id.*

147. *Id.*

148. *E.g.*, Freedom of Information Act, 5 U.S.C. § 552 (2010); FLA. STAT. ch. 119 (2013) (Florida's public records law).

149. *E.g.*, *United States Department of Labor*, U.S. DEP'T OF LAB., https://www.dol.gov/# (last visited Apr. 14, 2015).

context of the Internet as users. Its status as a portal distinguishes the PFW from the specific web pages and sites found within the site.[150] Consider the PFW as the cover to a book: the illustration and title provides a sense of the impending story, but the pages provide the substance. The PFW is maintained and monitored by the public body, and it often provides users an opportunity to comment or ask questions online in public view.[151] Finally, the PFW provides links that users can click to obtain more specific information from the pubic body. Considering these factors, the PFW most closely aligns with an information desk, the intent of which is to provide and receive information as a service to the public. Similarly, the PFW is only intended to provide information and serves as a portal for the public to obtain more specific information or services. This is a governmental proprietary function, and the sites have not been specifically set aside for public speech. Consistent with such an interpretation, a PFW is not a traditional public forum.[152] As such, it is necessary to consider other public forum options that may apply.

The purpose of the main page of a PFW is not to open a discussion or provide an outlet for public speech; therefore, considering the limited caselaw on the subject, two potential interpretations could apply: (1) the PFW could be considered a limited public forum based on the argument that the intent of the site is only to provide discussion of certain subjects specifically provided for on the webpage; or (2) the PFW could be considered government speech in which case the public forum analysis would not apply. For a local government attorney, it is critical to examine the individual PFW closely. Some PFW do not provide direct access to comment. These sites simply provide users with information only with links that provide more specific information

150. *E.g.*, *id.* (providing links to various federal government agencies, such as the Office of Federal Compliance Programs, the Bureau of International Labor Affairs, the Office of Disability Employment Policy, and many more).

151. *E.g.*, *Public Comments*, MEDICAID.GOV, https://public.medicaid.gov/connect.ti/public.comments/grouphome (last visited Apr. 14, 2015) (allowing for public comments from all states on Section 1115 demonstrations and their effect on Medicaid and CHIP beneficiaries).

152. *See* Preminger v. Sec'y of Veterans' Aff., 517 F.3d 1299, 1310 (Fed. Cir. 2008) (holding that the Veteran's Affairs Department could properly prohibit partisan political activity in its medical centers because these sites were interpreted as being deemed non-public fora based on the purpose of their use).

regarding the topics presented on the web page.[153] At this introductory level, the public has no right to speak, which suggests that these pages are quintessential examples of government speech. The result is that in this circumstance, no public forum is created and no such analysis is necessary.[154] Indeed, the courts have noted that public bodies have a right to say what they wish and select views that they want to express, subject to compliance with applicable laws and rules.[155] Generally, a PFW provides benign information that is non-controversial, but even if the information provided seems controversial or advocates a particular position, the government has a right, pursuant to the government speech doctrine, to make such statements.

Websites that link to the main page of a PFW and provide more specific information on the topic of interest to the member of the public navigating the site align more closely with a public forum because the interest of these sites is to create a conversation or direct interaction with the public. The nature of the interaction may properly be conscribed by the topic at issue though, for example, when linking to a site regarding roadways within the jurisdiction, the public body may limit discussion to issues regarding roadways and not adult use licensing. So long as the limitation on speech is reasonable and viewpoint-neutral, policy or rules limiting the scope of discussion will not violate the Free Speech Clause.[156] This interpretation would reasonably apply in all contexts wherein the governmental body opens a forum through the Internet for discussion of specific discrete topics to be discussed, such as department or agency sites. Furthermore, such an interpretation is consistent with the goal of government efficiency because failure to limit a discussion to the topic at issue may result in unrelated topics disrupting the continuity of the discourse. The result of such disruption will doubtless reduce both the consideration of the issues of concern to those members

153. *E.g.*, *Top 20 Requested Items*, U.S. DEP'T OF LAB., https://www.dol.gov/dol/top-requested.htm (last visited Apr. 14, 2015) (providing links to the most requested sources on the site).

154. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 560–62 (2005) (noting that where the public body sets the overall message and approves its dissemination, the government speech doctrine applies even when assistance is received from nongovernmental sources in developing the message).

155. Pleasant Grove City v. Summum, 555 U.S. 460, 467–69 (2009).

156. Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106–07 (2001).

of the public interested in the subject and the response of the public body.

This above position is supported by the First Circuit Court of Appeals. In *Sutliffe v. Epping School District*,[157] the First Circuit upheld a town's refusal to add a hyperlink to its website based on an interpretation that the webpage constituted government speech.[158] The court explained that the town's decision to establish a website and select the hyperlinks to place on the site communicated an important message about the town to the public.[159] Furthermore, the court rebuffed the argument that the town created a designated public forum by adding a link to a state sponsored university event but not to its advocacy site.[160] The court explained that the website was not a traditional public forum based on its lack of historical character as such,[161] and it was not a designated public forum because no evidence supported the position that the town intentionally opened the forum for public discourse.[162] Finally, the *Sutliffe* court applied a common sense approach, explaining that requiring the town to include all requested private links would potentially flood the website, thereby stripping the site of its intended purpose.[163]

Similarly, in *Page v. Lexington County School District One*,[164] the Fourth Circuit Court of Appeals, relying on the government speech doctrine, determined that a county school district did not have to provide the public access to its website for the purpose of promoting legislation opposed by the district.[165] The *Page* court's analysis explained that government's ownership and control over the message determines whether the doctrine applies and specifically it considered two Supreme Court approved factors: "(1) the government's *establishment* of the message, and (2) [the govern-

157. 584 F.3d 314 (1st Cir. 2009).
158. *Id.* at 329.
159. *Id.* at 331.
160. *Id.*
161. *Id.* at 333.
162. *Id.* (citing Del Gallo v. Parent, 557 F.3d 58, 72 (1st Cir. 2009) (quoting Ridley v. Mass. Bay Transp. Auth., 390 F.3d 65, 76 (1st Cir. 2004))).
163. *Id.* at 334; *see* Mary Jean Dolan, *The Special Public Purpose Forum and Endorsement Relationships: New Extensions of Government Speech*, 31 HASTINGS CONST. L.Q. 71, 133–34 (2004) (explaining that links on government websites are uncontrollable, and if a city were forced to regulate links, government sites would be discouraged from having a large number of links).
164. 531 F.3d 275 (4th Cir. 2008).
165. *Id.* at 288.

ment]'s *effective control* over the content and dissemination of the message."[166]

The resulting analysis suggests that a PFW will become a public forum only when there is intent to create a direct discussion regarding a specific topic. That part of the site that provides information is government speech only; therefore, it does not require a public forum analysis so long as it remains closed to comment.[167] Counsel in their consideration and advise should distinguish between comments and questions because questions are more consistent with the information desk comparison. So long as responses are limited to providing direction, the government is acting in its ministerial capacity and not creating a forum for speech. Similarly, where the public body is using the PFW for self-promotion or to otherwise speak directly to the public, there is no forum analysis required, as this is government speech, which does not require a forum analysis. Conversely, allowing comments alters the nature of the PFW by relinquishing control of the message, thereby creating a more open forum. As the court noted in *Page*, according to the *Johanns* factors, where the public body establishes the message and retains effective control over its content and dissemination, it exercises its government speech rights.[168] This interpretation also allows links to outside websites, so long as the body maintains sufficient control over deciding which links to include on the website.[169] Under these circumstances, the PFW should be interpreted as government speech and not subject to the forum analysis. Otherwise, where a conversation is created regarding a specific topic under the control and direction of a public body, a limited public forum is created and compliance with the legal standards for that doctrine should be applied. This scenario is consistent with agency or departmental

166. *Id.* at 281 (emphasis in original) (quoting Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 560–62 (2005)). Prior to *Johanns*, the Fourth Circuit considered: (1) the purpose of the program in which the speech occurs; (2) the "editorial control exercised by the government" over the message; (3) the identity of the person actually delivering the message; and (4) the person "bear[ing] the ultimate responsibility for the content of the speech." Planned Parenthood of S.C., Inc. v. Rose, 361 F.3d 786, 792–93 (4th Cir. 2004) (quoting Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles, 288 F.3d 610, 618 (4th Cir. 2002)).

167. *See Sutliffe*, 584 F.3d at 331 (concluding that a town was engaged in government speech when it created a town website used to "convey information about the [t]own to its citizens and the outside world").

168. *Page*, 531 F.3d at 281.

169. *Id.* at 284–85.

websites interacting with the public on issues specific to their responsibility.[170]

B. E-Government

E-government is normally a subset of the PFW that is specifically designated for providing service to the public. It includes the sites that allow the public to apply for permits, file complaints, or pay for services, among many other government functions.[171] These sites are used for providing ministerial services that were previously provided on site physically at governmental facilities.[172] The creation and expansion of e-government is not intended to create public space for debate, and in most cases, these sites or web pages do not provide an opportunity for comment outside of the context for which the user is accessing the site.[173] The courts have been clear in explaining that public offices are not public fora.[174] When public bodies are acting in their ministerial capacity, the public receives no right to enforce First Amendment protections.[175] Based on these factors and considering the historical context of the use of these sites, the weight of support suggests that these are nonpublic fora comparable to the business offices of public bodies. As such, the lower reasonableness standard applies allowing government to control access to the forum so long as any rules are reasonable and viewpoint-neutral.[176]

170. *E.g.*, *Contact Us*, FLA. DEP'T OF AGRIC & CONSUMER SERVS., http://www.freshfromflorida.com/Divisions-Offices/Licensing/Contact-Us (last visited Apr. 14, 2015) (demonstrating that a conversation with Florida Department of Agriculture must be topic specific).

171. *E.g.*, *Welcome to GoRenew.com*, FLORIDA HIGHWAY SAFETY & MOTOR VEHICLES, https://services.flhsmv.gov/VirtualOffice/ (last visited Apr. 14, 2015) (allowing users to renew driver's licenses, renew vehicle, mobile home or vessel registration or obtain a paper title).

172. *E.g.*, *id.*

173. *See Welcome to DHSMV Answers*, FLORIDA HIGHWAY SAFETY & MOTOR VEHICLES, http://fdhsmv.rapidinsites.com/ (last visited Apr. 14, 2015) (providing an avenue for users to submit questions as a word search to yield previously answered questions).

174. Helms v. Zubaty, 495 F.3d 252, 253 (6th Cir. 2007) (denying a Section 1983 claim against law enforcement for removing Petitioner from the office of a public official based on a trespass charge).

175. United States v. Kokinda, 497 U.S. 720, 725–26 (1990).

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

C. Intranet

Similar to e-government sites, intranet sites are not intended to be public fora as they are not open to the public.[177] The purpose of these sites is to provide information to the staff and members of the public body. As public employees, their free speech rights can be constrained;[178] for example, where sanctioned by his or her government employer for speech, the public employee must show that: "(1) his [or her] expression involve[s] matters of public concern; (2) his [or her] interest in commenting upon those matters outweigh[s] the [government employer's] interests in the efficient performance of its public services; and (3) his[or her] protected speech [i]s a substantial or motivating factor in [an] . . . adverse employment [action],"[179] in order to successfully challenge the government decision. These factors must weigh in favor of the public employee in order for his or her speech to be protected.

The concerns that arise in this context come about based on decisions of the public body to allow certain non-governmental access to its internal portal. The seminal example of this problem can be seen in *Cornelius v. NAACP Legal Defense and Educational Fund*[180] where the federal government allowed not-for-profit charitable organizations access to its employees through the Combined Federal Campaign (CFC).[181] The CFC made a distinction between health and welfare not-for-profits versus legal defense funds and political advocacy groups.[182] This decision was challenged by the NAACP and other groups that were not provided access to the government employees.[183] The NAACP argued that they and other non-profits should have the same access as the participating charities.[184] This argument failed based on the Courts interpretation that the CFC was actually a nonpublic fo-

177. Peter S. Jenkins, *Leafleting and Picketing on the "Cydewalk"—Four Models of the Role of the Internet in Labour Disputes*, UCLA J.L. & TECH. 1, 67 (2003).

178. *See* Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) (noting that the First Amendment does not protect public employees for statements made pursuant to their official duties).

179. Curran v. Cousins, 482 F. Supp. 2d 36, 42–43 (D. Mass. 2007) (quoting Baron v. Suffolk Cnty. Sheriff's Dep't, 402 F.3d 225, 233 (1st Cir. 2005) (quoting Lewis v. City of Boston, 321 F.3d 207, 218 (1st Cir. 2003))).

180. 473 U.S. 788 (1985).

181. *Id.*

182. *Id.*

183. *Id.* at 795–96.

184. *Id.*

rum, and therefore the distinction for access needed only to be reasonable and viewpoint-neutral.[185]

Overall, based on the nature of the intranet, the public forum analysis would not apply where no access to this portal is allowed and to the extent that limited access is provided, the decision to allow access must only satisfy the limited *Cornelius* standard.

D. Social Networking

As discussed in the previous Part, the intent of government participation in social media is to create a conversation between the government and the public. Social networking sites all have this conversation as a primary goal; government blogs and other forms of open communication between the government and public also retain this flavor. For example, where elected bodies provide members of the public to make live comments during their meetings through Twitter, blogs or any other social media format, the public is tacitly being invited in to speak freely on any and all matters being discussed. The above scenario is amplified where the forum is opened and not moderated or otherwise limited by the public body. This act of opening a previously more limited forum seems to be decisive. In this example, a limited public forum is transformed into a designated public forum based on the changed nature of the forum.[186] Whereas, prior to allowing blogs and Twitter, live board meetings could be limited to the subject of the meeting,[187] providing comment, blog, or Twitter access creates a distinct forum because the nature of tweets and blogs is that they are not controlled and limited by the specific topic being discussed. Both forms of social networking are intended to create free flowing discussions, and public bodies will rationally be presumed to understand that nature and therefore agree to the resulting consequences of allowing speech not necessarily specific to the topic of discussion. This may be a topic worthy of further con-

185. *Id.* at 806.

186. *See* Scroggins v. City of Topeka, 2 F. Supp. 2d 1362, 1369–70 (D. Kan. 1998) (explaining that "highly structured . . . board meetings . . . fit more neatly into non-public forum niche") (citing Kindt v. Santa Monica Rent Control Bd., 67 F.3d 266, 270–71 (9th Cir. 1995)).

187. *See* Stone, *supra* note 8 (describing social media systems that monitor the public's mentions of "relevant keywords and hashtags").

sideration for Florida practitioners based on the public forum status of public board meetings.[188]

Social networking sites should receive a similar analysis. Twitter and blogs represent the most open forms of discussion. Facebook, LinkedIn, and other interactive open discussion sites[189] created by public bodies are similarly created for the purpose of public discussion. The result of this government intent may properly be interpreted as creating designated public fora thereby subjecting the public body to a higher level of scrutiny for any limitation placed on the speaker.

Distinctions are available in the social networking context as many sites retain a blocking function that allows the site host to avoid any comments. Utilizing such an option will convert the social networking site into a PFW because the public discussion is now foreclosed. Though this option is not preferred by the public information or communications wings of public bodies,[190] it is an option for controlling potential concerns that may arise from creating a designated public forum.

V. APPROPRIATE LIMITATIONS

Public bodies still retain the ability to protect their constituents and communities by limiting discussions through their portals via the Internet, consistent with the context and character of the public forum used via the Internet. Though the courts have not settled on a standard for setting policy on public comments,[191]

188. *See* Helbig & Hrdinová, *supra* note 3 ("Social media channels offer more control over the type and timing of government-issued messages, provide a new platform to reach different audiences, and direct citizens to agencies' Web sites in new ways.").

189. For the purposes of this Article, the phrasal term "open discussion sites" distinguishes Facebook and other similar sites from more specialized sites such as Pinterest, Picasa and Technorati, which are not created to discuss issues of the day but are more focused on craft work and image sharing, and are designed to serve as personalized search engines.

190. *See, e.g.*, Graham & Avery, *supra* note 141, at 6 (citing Laura C. Hand & Brandon D. Ching, *"You Have One Friend Request": An Exploration of Power and Citizen Engagement in Local Governments' Use of Social Media*, 33 ADMIN. THEORY AND PRAXIS 362, 362 (2011)). *See also* NORTH CAROLINA DEPARTMENT OF CULTURAL RESOURCES, BEST PRACTICES FOR LOCAL GOVERNMENT SOCIAL MEDIA USAGE IN NORTH CAROLINA at 6 (April 2010) *available at* http://www.ncdcr.gov/Portals/26/PDF/guidelines/bestpractices_socialmedia_local.pdf (encouraging governmental use of social media to interact with the public).

191. Terri Day & Erin Bradford, *Civility in Government Meetings: Balancing First Amendment, Reputational Interests, and Efficiency*, 10 FIRST AMENDMENT L. REV. 57, 77

a practitioner should be aware of the protective measures available and the breadth of their proper applications.

A. Florida Public Meetings Law

Florida practitioners should bear in mind that the State Public Meetings Law provides a limited right for the public to speak at public board meetings.[192]Though the legislature recently amended the Public Meetings Law to add a provision granting the public "reasonable opportunity" to be heard, this change specifically notes that this new "right" is limited to being heard on a proposition before the board or commission.[193] Furthermore, the right to speak does not have to occur at the same meeting where the decision regarding the proposition at issue is being made.[194] Therefore, consistent with caselaw in Florida regarding a speaker's rights at public meetings and public forum analysis, it seems that both the legislature and the courts agree that public board meetings are either nonpublic or limited public fora based on the level of control the government is authorized to maintain over speech at their meetings.[195] Specifically, the new legislation is consistent with a public body limiting discussions in its meetings to the subject matter of propositions being considered and not in a broader manner. This limitation on the scope of the speaker's right, suggests that the legislature did not intend to transform board rooms into designated public fora.

This analysis applies directly when considering the forum status of government websites broadcasting public meetings over the Internet. The level of control retained over speech will help determine the applicable forum status. Particularly in the context of live meetings discussing specific issues, government bodies will retain the ability to remove or not post non-compliant material so

(2011) (citing the different circuit court approaches to applying the public forum analysis in the context of public comments and noting that the Supreme Court has yet to weigh in).

192. FLA. STAT. § 286.0114 (2014).

193. *Id.*

194. *Id.*

195. *See id.* § 286.0114(4) (authorizing a public body to provide guidelines and procedures for public comment); Wood v. Marston, 442 So. 2d 934, 940–41 (Fla. 1983) (explaining that a public body can be shielded from public scrutiny when it does not exert control over individuals discussing the pertinent issue); Law & Info. Servs. v. City of Riviera Beach, 670 So. 2d 1014, 1016 (Fla. 4th Dist. Ct. App. 1996) (declaring that there is no requirement for a public body to give notice about its agenda).

long as it does so consistently with the limited public forum standard.[196]

B. Decency Statutes

The federal government provides specific protections allowing Internet service providers to protect the public from viewing inappropriate material on their websites. The "Good Samaritan Law" of the Communications Decency Act (CDA) provides general liability protection for service providers publishing material to the web.[197] The Good Samaritan provision exempts service providers from liability for information posted on their sites by users or for any action taken in good faith to restrict access to obscene, lewd, or otherwise objectionable postings.[198] These exemptions extend to preempt all state and local laws that may be in conflict with the CDA.[199] In order to retain the level of control required for civil debate, government sites may use the language of the CDA as support when removing objectionable material from their websites.[200] This statutory protection would seem to trump any requirement to apply the forum analysis, but assuming the free speech claim survives and the forum analysis is applied, the character of the forum will determine the operative analysis. To that end, it is important to distinguish between "publisher" and "speaker" status.

A public body will be a "speaker" where it controls a website, but a "publisher" where it does not.[201] Practically, this distinction

196. *Cf.* Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 676 (2001) (extending the Court's holding that a public television broadcaster-sponsored debate can be constitutionally limited to major party participants based on the interpretation that the broadcast was a nonpublic forum).

197. 47 U.S.C. § 230 (2014). In *Reno v. ACLU*, 521 U.S. 844, 849, 858–59 (1997), the United States Supreme Court held that portions of the Communications Decency Act (CDA), 47 U.S.C. § 223(a)–(d) (2012), violated the First Amendment right to free speech. However, the lesser known Section 230, which provides general liability protection for service providers, was not challenged, and it remains in effect today. *See* 47 U.S.C. § 230.

198. 47 U.S.C. § 230(c)(2)(A) provides, "No provider . . . of an interactive computer service shall be held liable [for] any action voluntarily taken in good faith to restrict access to or availability of material that the provider . . . considers to be obscene, lewd, . . . whether or not such material is constitutionally protected."

199. 47 U.S.C. § 230(e)(3).

200. *See id.* § 230(a)–(c) (describing the need, purpose, and restrictions on "interactive computer services and other interactive media").

201. Carl E. Brody, Jr., *Catch the Tiger by the Tail: Counseling the Burgeoning Government Use of Internet Media*, 83 FLA. B. J. Dec. 2010, at 52, 54–55 (discussing the

creates a dynamic that should benefit the public body in the forum analysis. As a speaker, the government is subject to a greater liability for the content of its website;[202] a benefit exists, though, because higher level of control will weigh in favor of an analysis that the character of the forum more closely resembles a limited or nonpublic status. This circumstance applies under the PFW, intranet, and e-government categories. Alternatively, in the social networking context, the lack of direct control over the website should reduce the potential liability of the public body because the government will be acting in the role of a "publisher." Publisher status limits government authority to censor a site and therefore, the courts may consider this lack of control to be evidence that the government intended to create a more open forum more resembling designated status. There is no direct caselaw regarding a public body's authority to edit its webpages that are deemed designated public fora, but the CDA seems to provide support for removing lewd or obscene material.[203] Similarly, under the more relaxed reasonableness test,[204] removal of inappropriate content is consistent with the status of the forum.

Florida law is also applicable regarding removal of offensive posts as any action taken in this context would fall within government's responsibility to protect the safety, health, and welfare of its citizens.[205]

Consistent with this analysis, Florida courts have upheld the application of the State's obscenity law, which prohibits certain use of the Internet. In *Simmons v. State*,[206] the Florida Supreme Court considered a challenge to Florida Statutes Sections

"speaker" versus "publisher" distinction and the different rights and protections incumbent in both).

202. *Id.*

203. *See id.* § 230(c)(2)(A) (providing that no provider or user be held liable for restricting access to "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable" material).

204. *See supra* Part II(B) (The reasonableness rule states that a government conducts a nonpublic forum as long as the restriction on speech is reasonable and does not suppress speech based on a disagreement of views.).

205. *See, e.g.*, FLA. STAT. §§ 125.69(4)(a) (2014), 166.0415(2) (2014) (providing an exemption to the requirement that a code enforcement officer issue a warning prior to citing a person for a local ordinance violation where the violation presents a serious threat to the safety, health, or welfare of the public).

206. 944 So. 2d 317 (Fla. 2006).

847.0135 and 847.0138 on First Amendment grounds.[207] Applying a strict scrutiny standard because the nature of the statutes at issue was content-based, the court upheld the obscenity laws because each provision restricts its applicability to e-mails sent knowingly to minors.[208] While the narrowing standards in Section 847.0138 would not specifically encompass a posting on a public website,[209] properly drawn policy should allow the public body to remove offensive posts.

Similar to the CDA and Florida obscenity laws, the federal Children's Internet Protection Act (CIPA)[210] requires public libraries receiving federal assistance to install filters on their systems in order to block obscene or pornographic material.[211] Applying a content-based public forum strict scrutiny standard to the Act, a lower court held that CIPA was not drawn narrowly enough to pass constitutional muster; on review, though, the Supreme Court reversed.[212] As the plurality explained in *United States v. American Library Association*,[213] Internet access in public libraries is neither a traditional nor designated public forum because libraries do not provide Internet access for the purpose of creating a public forum; the library's primary function is to facilitate research, learning, and recreational pursuits.[214] Based on this determination, four of the Court's justices specifically objected to applying a public forum analysis, resulting in the presumption that such computer access falls entirely outside of the forum analysis because neither the nonpublic nor the limited public forum standards apply.[215]

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207. *Id.* at 321 (Section 847.0135 makes it a crime for a person to participate in the dissemination of child pornography, and Section 847.0138 makes it a crime to transmit harmful material to a minor.).

208. *Id.* at 334–35.

209. *Id.* at 325 (citing Simmons v. State, 886 So. 2d 399, 404 (Fla. Dist. Ct. App. 2004); Richard H. Martin, *State Regulation of Pornographic Internet Transmissions: The Constitutional Questions Raised by Senate Bill 144*, 29 FLA. ST. U. L. REV. 1109, 1117 (2002)).

210. Children's Internet Protection Act, Pub. L. No. 106–554, § 1(a)(4), 114 Stat. 2763, 2763A–335 (2000).

211. United States. v. Am. Library Ass'n Inc., 539 U.S. 194, 202–03 (2003) (plurality).

212. *Id.* at 203.

213. 539 U.S. 194 (2003) (plurality).

214. *Id.* at 206–07 (citing Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985)).

215. *Id.* at 205.

C. Commercial Limitations: The *Central Hudson* Test

Though the courts have yet to specifically rule on the issue, public bodies should retain the authority to limit the posts on their websites by prohibiting commercial activity. The courts have long held that commercial speech receives a separate test as compared to non-commercial speech and, in determining the viability of government regulations limiting such speech, the *Central Hudson*[216] intermediate scrutiny standard applies.[217] In *Central Hudson*, the Court struck down a New York regulation that completely banned promotional advertising by an electrical utility.[218] The State argued that the ban was necessary to promote energy conservation, which was an important government interest, but as noted by the Court, the First Amendment protects commercial speech from unwarranted governmental regulation.[219] This level of protection received by commercial speech does not rise to the level provided to more traditional speech, therefore, in applying the *Central Hudson* standard, courts must look to the nature of the expression and government interests served by the regulation.[220]

After further refining, the final outcome is that in order to burden commercial speech, (1) the government must assert a substantial interest; (2) the restriction must materially advance that interest; and (3) the restriction must be narrowly tailored.[221] Applying this standard in the context of government Internet sites should result in a positive outcome supporting the prohibition of such speech. Specifically, government sites that are public fora are intended for public debate of issues or information maintained by the public body: as such, the government has a substantial interest in receiving public input without disruption created by commercial messages. This interest is advanced by removing all such distractions and allowing uninterrupted public discus-

216. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557 (1980).
217. *Id.* at 561–66.
218. *Id.* at 561.
219. *Id.* (citing Va. State Pharmacy Bd. v. Va. Citizens Consumer Council, 425 U.S. 748, 761–62 (1976)).
220. *Id.* at 563–64.
221. RJ Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1212 (D.C. Cir. 2011) (citing *Central Hudson*, 447 U.S. at 566); *see also* United States. v. Caronia, 703 F.3d 149, 164 (2d Cir. 2012) (including a threshold question requiring that the speech in question not be misleading and concern lawful activity).

sion. Finally, limits on Internet access to public discussion are narrowly tailored if the government website is restricting only the commercial promotions that invade the public discussion; all other forms of advertising are allowed. Limiting commercial access in Florida is also supported by constitutional and statutory requirements.

The Florida Constitution prohibits the State, counties, municipalities, or any agency thereof from using, giving, or lending its taxing power or credit to aid any private interest or individual.[222] "The purpose of this constitutional provision is 'to protect public funds and resources from being exploited by assisting or promoting private ventures when the public would be at most only incidentally benefited.'"[223] Government Internet sites are of course funded by the public body; therefore, allowing commercial entities to self-promote through these publicly funded fora could violate this constitutional provision. No caselaw exists directly on point regarding this issue, but incorporating this constitutional limitation into an explanation for prohibiting commercial speech on government websites should be persuasive for a reviewing court.

D. Policy Guidelines

The above mechanisms provide a foundation for the use of policy guidelines to maintain government Internet sites and provide a vehicle for properly managing activity on the various sites. As noted previously, consideration of government policy, practice, and procedure are critical as they can change the character of a forum.[224]

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222. FLA. CONST. art. VII, § 10.

223. *See* Fla. Att'y Gen. Op. 84-103, 1894 WL 182551, at *1 (Dec. 19, 1984) (citing Bannon v. Port of Palm Beach Dist., 246 So. 2d 737, 741 (Fla. 1971); State v. Town of North Miami, 59 So. 2d 779, 787 (Fla. 1952); Bailey v. City of Tampa, 111 So. 119, 120–21 (Fla. 1926); Markham v. State Dept. of Revenue, 298 So. 2d 210, 212–14 (Fla. 1st Dist. Ct. App. 1974)).

224. *See, e.g.*, Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 267–70 (1988) (noting that school facilities are deemed public forums if school administrators have adopted policies or practices that allow for unrestricted use by the public); Bannon v. Sch. Dist. of Palm Beach Cnty., 387 F.3d 1208, 1212–13 (11th Cir. 2004) (deciding that a mural project was a nonpublic forum because it merely solicited participation in the project, rather than "evinc[ing] an *intention*, 'by policy or practice,' to designate the . . . project as a public forum in which students or anyone else could freely express their political, religious, or other views") (emphasis in original).

Policy guidelines will come in two forms: first, regarding government social networking sites, the public body can take advantage of rules and limits placed on users by Facebook, LinkedIn, or Twitter, which in this context, are the Internet service providers or "speakers."[225] These terms are stricter than those a government may impose in the public forum, but because they are required for participation by the provider, the public body is not responsible for the limits placed on speech. For example, Facebook monitors its sites and authorizes itself to remove certain commercial communications, harassing comments, and hate speech, among other prohibitions that allow the termination of the user from the website.[226] Option two, which is nonexclusive, is for the public body to create its own set of participation policies. This option requires government to examine the nature of each individual use of the Internet and set a policy consistent with the purpose.

As discussed previously, the public forum status of a web page is controlled by the nature and characteristics of its intended use.[227] Specifically, regarding social networking, government blogs, or other websites created to provide an open public discussion of issues, a designated public forum is created and, as such, any policy guidelines must satisfy the time, place, and manner doctrine. Under the circumstance where the public body creates a limited public forum, stricter rules setting standards for user participation on the web activity may be applied. Under this scenario, the policy need only satisfy the rational relationship test, which provides that the rules be rationally related to a legitimate government interest. Limiting discussion to topics or matters considered part of the limited forum is consistent with the intent of creating the web access that provides public participation for a specific purpose. This would also be the case where the use of the

225. *See Statement of Rights and Responsibilities*, FACEBOOK, https://www.facebook.com/legal/terms (last visited Apr. 14, 2015); *User Agreement*, LINKEDIN CORP., http://www.linkedin.com/legal/user-agreement (last visited Apr. 14, 2015); *The Twitter Rules*, TWITTER, INC., https://support.twitter.com/articles/18311-the-twitter-rules (last visited Apr. 14, 2015).

226. *Statement of Rights and Responsibilities*, *supra* note 225.

227. *See supra* Part IV (describing the applicable standards for government Internet sites).

Internet is considered a nonpublic forum.[228] Similarly, the rational relationship test allows wide discretion to the government when setting policy within its own intranet, as this is a nonpublic forum and the reasonableness of the policy will control. So long as the policy does not discriminate as between employees or favor one set of outside vendors over another it will be constitutionally valid.

Finally, under a government speech standard, government policy would not be subject to a forum analysis, as such, the government policy will be valid so long as it does not discriminate between users and comports with the law.[229] Policy guidelines may be set strictly limiting any public participation not consistent with the purpose of the intended use of the Internet. For example, a public body may properly set extensive guidelines through policy for members of the public accessing a closed convention and visitor's bureau website by prohibiting comments that include bad language, promote non-sponsored commercial activity, or discuss topics or ask questions unrelated to the purpose of the site.

VI. CONCLUSION

The final result of this analysis suggests that the PFW is currently considered and should continue to be considered government speech. Department and agency sites that interact with the public on issues relating to their mandates create limited public fora, while intranets and e-government sites are nonpublic fora. Social networking sites that do not employ a blocking mechanism, on the other hand, seem to fall within the designated forum category, and as such, a heightened standard of review will be applied to any government regulations of speech on these sites.

As Internet use continues to develop, government attorneys will need to remain aware of the implications of the public forum analysis and free speech rights of the public. Undoubtedly a body of caselaw will emerge, but similarly so will new forms of com-

228. *See* Uptown Pawn & Jewelry Inc. v. City of Hollywood, 337 F.3d 1275, 1280 (11th Cir. 2003) (determining that once a forum is deemed a nonpublic forum, the court must then assess whether the policy is reasonable).

229. *See* Pleasant Grove City v. Summum, 555 U.S. 460, 468 (2009) (acknowledging that there are some restraints on government speech, including the requirement that it comports with the Establishment Clause).

munication through the Internet. Until the courts consolidate their analyses, it will be necessary to distinguish the nature and character of the websites that various agencies, committees, and boards use when participating on the web. Making this determination accurately will provide direction regarding the applicable limits, controls, and use that your government client will be allowed on the Internet.