

CELL PHONES AND THE FIRST AMENDMENT IN FLIGHT: CAN THE FCC AND
FAA MAINTAIN THE BAN?

By: Christopher Dengler

I. Introduction

The Federal Communications Commission (FCC) and Federal Aviation Administration (FAA) may lift the ban on in-flight cell phone use.¹ If such a barrier falls, this creates an opportunity to increase business productivity, personal communication, and general freedom of expression during flights. Many business hours are spent traveling for work-related activities. The lack of communication with the office negatively impacts productivity; and no type of travel more obviously impedes business productivity than air travel because of the long duration and

¹ See Federal Communications Commission, [FCC Consumer Advisory: Using Your Wireless Phones on Airplanes](http://ftp.fcc.gov/cgb/consumerfacts/cellonplanes.html), Sept. 23, 2005, <http://ftp.fcc.gov/cgb/consumerfacts/cellonplanes.html> (last visited Nov. 27, 2005) (stating that the potentially lifting of the cell phone ban during flight is being explored and is open to public comment); see also Peter Rojas, [FCC Extends Comment Period on In-Flight Cellphone Ban](http://engadget.com/entry/1234000950041666/), **Engadget**, Apr. 28, 2005, <http://engadget.com/entry/1234000950041666/> (last visited Oct. 14, 2005).

lack of connectivity with the office when in flight.² However, lifting the ban is not unopposed.

When the FCC and the FAA presented their proposal to lift the ban, both support³ and concern⁴ quickly surfaced. Moreover,

² See Staffan Algers, Johanna Lindqvist Dillen, Transek Consultancy, Staffan Widlert & The Swedish Institute for Transportation and Communications Analysis, The National Swedish Value of Time Study 13 (1994) (stating that a survey showed that the productivity while traveling aboard a train was approximately 60% of the productivity seen in the office).

³ See Joe Sharkey, Cellphones in Flight: The Story is Data, Not Chatter, **N.Y. Times**, Dec. 21, 2004, at C6 (“[T]here is overwhelming support for changing the rules to allow the use of wireless communications devices in the air . . . [with silent communication -] data, not voice . . .”).

⁴ See Sara Kehaulani Goo & Keith L. Alexander, In-Flight Calls Could Cause Turbulence, Opponents Say, **Washington Post**, Apr. 8, 2005, at E01 (The National Consumers League sponsored a poll that said “63 percent of Americans don’t want the federal government to lift its ban on cell phones in flight.”) available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/04/08/AR2005040800564.html>. The Association of Flight Attendants supports maintaining the regulations banning cell phone use during flight based on both continuing technological safety concerns and passenger

disruptions. The Association of Flight Attendants stated that they were still "concerned with the possibility of random, unpredictable electromagnetic interference events that could interfere with an aircraft's operations." Comments of Association of Flight Attendants-CWA, AFL-CIO, In the Matter of: Amendment of the Commission's Rules to Facilitate the Use of Cellular Telephones and Other Wireless Devices Aboard Airborne Aircraft, Before the FCC, WT Docket No. 04-435 (May 26, 2005) (available at <http://www.house.gov/transportation/aviation/07-15-05/friend.pdf>). However, scientific research, while not yet conclusive, seems to lead to the conclusion that current cell phone technology does not interfere with airplane instrumentation, or current technology - such as pico cells or forced low-power mode for cell phones used in-flight - exists to virtually eliminate safety issues. See Baskar Sridharan & Aditya P. Mathur, Aircraft Safety in the Presence of Portable Electronic Devices 2 (Purdue University, Department of Computer Science). The pico cells are devices that can be used on airplanes as a "mobile" cell phone node and they could also be used to force the cell phones on the aircraft into a low power mode where there should be no interference with either terrestrial communications or on board sensors. See Access Intelligence, LLC, Lifting Ban on Mobile Phone Use in Flight - Do So Carefully Warn Commentators, Air Safety Week, June 13, 2005, http://www.findarticles.com/p/articles/mi_m0UBT/is_2005_June_13/a

recent developments galvanized those opposed to lifting the ban. Playboy Enterprises, Inc. is considering marketing adult material to cell phone Internet users.⁵ In fact, similar material is already available to cell phone users in Europe and Asia.⁶

i_n13831432. Scientific experiments by airlines offer counter-examples, showing that a laptop was unable to cause interference with the aircraft's communication or navigation. Id. Beside potential technological safety, the Association of Flight Attendants cite operational disruptions in the cabin - unruly passengers who fail to follow flight crew instructions - as an additional reason to continue the ban on cell phone use in-flight. Comments of Association of Flight Attendants-CWA, AFL-CIO, In the Matter of: Amendment of the Commission's Rules to Facilitate the Use of Cellular Telephones and Other Wireless Devices Aboard Airborne Aircraft, Before the FCC, WT Docket No. 04-435 (May 26, 2005) (available at <http://www.house.gov/transportation/aviation/07-15-05/friend.pdf>).

⁵ In early 2005, Playboy.com made digital pictures available on electronic handheld devices. Jay Jay Nesheim, Playboy.com Offers Stunning Image Galleries for Hand-Held Digital Photo Devices Like the iPod Photo, Jan. 4, 2005, <http://www.playboyenterprises.com/> (follow "News and Media" hyperlink) (last visited Nov. 27, 2005).

⁶ Matt Richtel, U.S. Providers Turned off by Porn, Violence via Cell Phone, **The San Diego Union-Tribune**, Dec. 27, 2004,

Parental rights groups vocally oppose cell phone pornography because of its accessibility to minors.⁷ They have lobbied the

http://www.signonsandiego.com/uniontrib/20041227/news_mzlb27provid.html; see also Cassell Bryan-Low & David Pringle, Sex Cells: Wireless Operators Find that Racy Cellphone Video Drives Surge in Broadband, **Post-Gazette.com**, May 12, 2005, <http://www.post-gazette.com/pg/05132/503397.stm> (finding that erotic content is available via cell phones in France, Germany, Greece, Portugal, Hong Kong, Taiwan, Singapore and Malaysia).

⁷ See Cassell Bryan-Low & David Pringle, Sex Cells: Wireless Operators Find that Racy Cellphone Video Drives Surge in Broadband, **Post-Gazette.com**, May 12, 2005, <http://www.post-gazette.com/pg/05132/503397.stm> ("The Mississippi-based American Family Association sent an 'action alert' last month about Playboy Enterprises Inc.'s plan to offer content for cell phones [sic] and urged members to ask the FCC to 'set heavy fines for pornographers who send their porn to our children'"); see also James L. Lambert, Former DOJ Prosecutor to Parents: Beware . . . Cell Phone Porn is on the Horizon, **AgapePress**, May 13, 2005, <http://headlines.agapepress.org/archive/5/132005e.asp> (stating that members from pro-family groups - the American Family Association, Morality in Media, and the Family Research Council - met with the FCC to discuss ways to block pornographic material from being accessed via cell phones); see generally **Morality in the Media**, <http://www.moralityinmedia.org/> ("[A] national, not-

government to promulgate regulations restricting minor's accessibility to this material, including maintaining the ban on cell phone use during flight.⁸ For example, Morality in Media, Inc.⁹ sees this gateway to adult material to be especially problematic on an airplane because of the close quarters and the presence of minors.¹⁰

for-profit, interfaith organization established in 1962 to combat obscenity and uphold decency standards in the media.") (last visited Nov. 29, 2005).

⁸ See Communications Decency Act of 1996, 47 U.S.C. § 230 (2005); Child Online Protection Act (COPA), 47 U.S.C. § 231 (2005); Children's Internet Protection Act, 114 Stat. 2763A-335 (2001).

⁹ <http://www.moralityinmedia.org>

¹⁰ See Access Intelligence, LLC, Lifting Ban on Mobile Phone Use in Flight - Do So Carefully Warn Commentators, **Air Safety Week**, June 13, 2005, http://www.findarticles.com/p/articles/mi_m0UBT/is_2005_June_13/a_i_n13831432 ("Combining the captive audience of an airplane, including children, with the ease of passengers to view, send, and receive indecent and obscene material through the very technology that the FCC is considering loosening is a dangerous recipe. This is why if wireless and cellular technologies are allowed on flights, there must be provisions for banning the use of such devices for purposes of viewing, sending, or receiving indecent or profane communications." Morality in Media, Inc.);

Appropriate regulatory responses to these concerns need to consider both constitutional limits and the impact of restricting the use of cell phones on business productivity. The possibility of maintaining the ban on cell phone use during flight raises First Amendment concerns because any future regulations may have to rest upon a government interest other than safety.¹¹

see also Evan Hansen, XXX, on a Small Screen Near You, **CNET**

News.com, Dec. 30, 2004,

http://news.com.com/XXX%2C+on+a+small+screen+near+you/2100-1039_3-5502413.html ("Porn after the digital revolution is like sand after a day at the beach: Pretty soon you're finding it everywhere - including on the cell phone of the guy one seat over during that five-hour flight to New York.").

¹¹ See Marguerite Reardon & Ben Charny, Feds Move on Wireless Web, Cell Phones in Flight, **CNET News.com**, Dec. 15, 2004,

http://news.zdnet.com/2100-1035_22-5491802.html (last visited Nov. 27, 2005) (stating that a NASA engineer said in a 2000 interview that the airplane cell phone ban would be lifted once earlier generations of cell phones were no longer in use); see also Nicholas A. Sabatini, Associate Administrator for Aviation Safety, FAA, before the Subcommittee on Aviation, Committee on Transportation and Infrastructure, U.S. House of Representatives, on Cell Phones on Aircraft: Nuisance or Necessity (July 14, 2005) (transcript available at <http://testimony.ost.dot.gov/test/Sabatini2.htm>) (last visited on

This analysis addresses the government's potential ability to maintain its current ban on in-flight cell phone use based on decency and privacy interests if the government determines that technological safety issues do not continue to preclude their use.¹² The analysis centers on cell phone Internet browsing, as

Nov. 27, 2005) ("This potential to provide passengers with new communication technologies also raises the issue of what FCC Commissioner Copps refers to as the 'annoying-seatmate issue.' . . . [I]t's not hard to imagine a scenario where use of cell phones by several passengers in the confined space of an aircraft cabin could lead to conflicts.").

¹² See generally Access Intelligence, LLC, Lifting Ban on Mobile Phone Use in Flight - Do So Carefully Warn Commentators, **Air Safety Week**, June 13, 2005, http://www.findarticles.com/p/articles/mi_m0UBT/is_2005_June_13/a_i_n13831432 (summarizing many safety concerns with in-flight cell phone use, but also quoting aviation and cell phone industry experts as saying that pico cell technology has the potential, if properly applied, of eliminating the technological safety issues of cell phone use during flight); see also Sara Kehaulani Goo & Keith L. Alexander, In-Flight Calls Could Cause Turbulence, Opponents Say, **Washington Post**, Apr. 8, 2005, at E01 ("The FAA is awaiting results of a study, due in December 2006, on whether the phones interfere with navigational equipment.") available at

opposed to the use of laptops or other personal electronic devices. The analysis concludes that the government cannot justify maintaining a total ban on cell phone use during flight based purely on decency or privacy concerns.

Part II provides a brief background on the basic right to speech in settings similar to an airplane. Part III discusses possible government justifications for maintaining a ban absent safety concerns and examines issues of privacy and the ability to avoid unwanted speech encapsulated in the captive audience doctrine. Then Part IV considers the potential applicability of a time, place, and manner regulation on in-flight cell phone Internet browsing. Part V concludes with a discussion of the extent of permissible regulation in an airplane setting, and what regulations would constitute a good compromise between competing interests.

II. Background: A Doctrinal Primer for Cell Phones, Speech, and Public Transportation

A. Cell Phones are Part of Both Modern Life and Government Regulation

<http://www.washingtonpost.com/wp-dyn/content/article/2005/04/08/AR2005040800564.html>.

The next time you are waiting in an airport for a flight, stop and take a look around. More than 163 million Americans own cell phones.¹³ Chances are, as an airline passenger, you may encounter people on their cell phones as they wait for their flight. Cell phones and their widespread adoption are recent developments.¹⁴ Today, cell phones are smaller than the palm of your hand and they allow you to make phone calls from virtually anywhere, send text messages, take digital pictures, record video, send email, and browse the Internet.¹⁵

¹³ Jay Cline, Cell Phone Directory Rings True, **ComputerWorld**, Sept. 2, 2004, <http://www.computerworld.com/mobiletopics/mobile/story/0,10801,95650,00.html>.

¹⁴ Motorola introduced DynaTAC, considered the first mobile telephone, in 1983. Christine Rosen, Our Cell Phones, Ourselves, **The New Atlantis**, 26, 27 (2004) available at <http://www.thenewatlantis.com/archive/6/TNA06-CRosen.pdf> ("There were approximately 340,000 wireless subscribers in the United States in 1985, according to the Cellular Telecommunications and Internet Associate (CTIA); by 1995, that number had increased to more than 33 million, and by 2003, more than 158 million people in the country had gone wireless.").

¹⁵ See Christine Rosen, Our Cell Phones, Ourselves, **The New Atlantis**, 26, 30 (2004) available at <http://www.thenewatlantis.com/archive/6/TNA06-CRosen.pdf>; see

The FCC has regulated cell phones since their inception while the FAA controls the airlines. Title 1 of the Communications Act of 1934 grants the FCC power to create bureaus.¹⁶ One of those bureaus is Wireless Telecommunications Bureaus which "handles nearly all FCC domestic wireless telecommunications programs, policies, and outreach initiatives. Wireless communications services include . . . [c]ellular [and p]ublic [s]afety" ¹⁷ The Department of Transportation created the FAA.¹⁸

Together, each of these two agencies banned cell phone use during flight. "FCC rules currently ban cell phone use after a plane has taken off because of potential interference to cellular phone networks on the ground. In addition, the Federal Aviation

also Despina Afentouli, New Heights for In-Flight Internet, **CNN.com**, Mar. 31, 2005, <http://www.cnn.com/2005/TRAVEL/03/31/bt.internet.flight/> (stating that German airline carrier Lufthansa installed in-flight Internet access last May. The article goes on to explain that in-flight Internet access "works by sending electronic signals from planes to orbiting satellites, which are then relayed to ground stations.").

¹⁶ Communications Act of 1934, 47 U.S.C. § 151 (2005).

¹⁷ See generally <http://wireless.fcc.gov> (last visited Nov. 27, 2005).

¹⁸ 49 U.S.C. § 106 (2005).

Administration has rules prohibiting in-flight cell phone use because of potential interference to navigation and aircraft systems."¹⁹ The FCC instituted its ban on airborne cell phone use in 1991.²⁰ While, the FAA currently prohibits the use of cell phones, wireless communication devices and other portable electronic devices with radio transmitters (like BlackBerry handhelds) during flight because of concerns of interference with aircraft communications and navigation.²¹ However, the FAA does allow passengers to use personal electronic devices that do not have radio transmitters (like portable video games, laptops, and

¹⁹ Federal Communications Commission, FCC Consumer Advisory: Using Your Wireless Phones on Airplanes, Sept. 23, 2005, <http://ftp.fcc.gov/cgb/consumerfacts/cellonplanes.html> (last visited Nov. 27, 2005).

²⁰ See Comments of Association of Flight Attendants-CWA, AFL-CIO, In the Matter of: Amendment of the Commission's Rules to Facilitate the Use of Cellular Telephones and Other Wireless Devices Aboard Airborne Aircraft, Before the FCC, WT Docket No. 04-435 (May 26, 2005) (available at <http://www.house.gov/transportation/aviation/07-15-05/friend.pdf>).

²¹ See Subcommittee on Aviation, Hearing on Cell Phones on Aircraft: Nuisance or Necessity? (July 15, 2005) available at <http://www.house.gov/transportation/aviation/07-15-05/07-15-05memo.html>.

CD/MP3 players) above 10,000 feet.²² All this regulation is evidence of how involved the government is in the regulation of both cell phones and the airlines.

B. State Action

The First Amendment only restricts state action.²³ This means that the First Amendment restricts the government but not private actors. The present analysis focuses on government regulation and not private action by the airlines. Any action taking by the private airlines remains to be seen. This focus is appropriate because the airline industry is a highly government-regulated industry where almost any private airline action must first meet with government approval. This means that should the airlines choose to take action on their own, this pervasive government oversight is important in determining whether the

²² See id.

²³ The Constitution prohibits only government from abridging the rights of free speech. The First Amendment provides, in relevant part, "Congress shall make no law . . . abridging the freedom of speech" **U.S. Const.** amend. I. (emphasis added). And the First Amendment applies to the states by virtue of incorporation through the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

First Amendment also applies to private action by the airlines.²⁴ Given the competitiveness of the airline industry, an analysis of private regulation by the airlines may end up being moot. Many airlines are considering allowing wireless Internet access to attract business travelers and increase profitability.²⁵

C. Internet Browsing as Speech

Speech protected by the First Amendment is not limited to a person audibly speaking. Protected speech includes the written word as well; books, magazines, newspapers, and writing on a

²⁴ In dicta, previous cases have commented that private action in highly regulated industries may constitute state action. "When authority derives in part from Government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by Government itself." *Public Utilities Comm'n v. Pollak*, 343 U.S. 451, 462 note 8 (1952) (citations omitted).

²⁵ United Airlines received regulatory approval to be the first U.S. airline to install Wi-Fi Internet service on its airplanes. See Roger Yu, Wi-Fi Net Access Could Soon Land on United Flights, **USAToday.com**, June 6, 2005, http://www.usatoday.com/money/biztravel/2005-06-06-united-wi-fi_x.htm. "United hopes the service will generate profit and attract more passengers." Id.

jacket are speech potentially protected by the First Amendment.²⁶ The Internet is a medium where both written and audible speech is available to anyone with an electronic device capable of accessing it. This ability to access such material - e.g. browsing the Internet - is closely tied to the First Amendment's protection of speech.²⁷ In a case involving a school board's decision to remove particular books from the library, a plurality found that the right to receive information is an "inherent corollary" of the First Amendment.²⁸ These Justices also said "the Constitution protects the right to receive information and ideas."²⁹ This close constitutional correlation between a person's right to speak and another person's right to hear that

²⁶ See generally *Cohen v. California*, 403 U.S. 15 (1971) (finding that writing on a jacket is speech for First Amendment considerations).

²⁷ See Glenn Kubota, Public School Usage of Internet Filtering Software: Book Banning Reincarnated?, 17 **Loy. L.A. Ent. L.J.** 687, 708-09 (1997).

²⁸ See *Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982) ("[T]he right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech") (plurality opinion).

²⁹ See id. at 867 (plurality opinion) (quoting *Stanley v. Georgia*, 394 U.S. 557, 564 (1969)).

speech is why Internet browsing falls under the First Amendment's protection of speech.³⁰

An example of Internet browsing of speech is evident in United States v. Am. Library Ass'n, Inc.³¹. The Court specifically used a free speech analysis. In this case the constitutionality of a library's decision to use Internet filter software on their publicly accessible computers was challenged.³² The Court analyzed the library's Internet access using a freedom of speech analysis and held that "Internet access in public libraries is neither a 'traditional' nor a 'designated' public forum."³³

D. Free Speech and Public Transportation

³⁰ See id. at 867 ("The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.") (plurality opinion) (quoting *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (BRENNAN, J., concurring)).

³¹ 539 U.S. 194 (2003).

³² See generally *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194 (2003).

³³ Id. at 205 (citing *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 802 (1985)).

The First Amendment of the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech" ³⁴ While this text put restraints upon the government's ability to restrict speech, the Supreme Court does not interpret this provision as barring all regulation of speech. ³⁵ The Supreme Court allows great protection for certain categories of speech and specifies that other categories of speech, such as obscene speech, fall outside of the safeguards of the First Amendment. ³⁶ However, even indecent speech receives First Amendment protection. ³⁷ "[T]he government may not prohibit

³⁴ **U.S. Const.** amend. I.

³⁵ See Roth v. United States, 354 U.S. 476, 483-85 (1957) ("[T]he unconditional phrasing of the First Amendment was not intended to protect every utterance. . . . There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.") (citation omitted).

³⁶ See Miller v. California, 413 U.S. 15, 23 (1973) ("[O]bscene material is unprotected by the First Amendment"); see also Roth v. United States, 354 U.S. 476, 485 (1957).

³⁷ See United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 811 (2000) (stating that even sexual explicit, but not obscene, material receives First Amendment protection).

or punish speech simply because others might find it offensive,"³⁸ but the government may regulate it.

Freedom to engage in expressive activity in all forms on public transportation is not a given. And neither is a total ban on expressive activity in a public transportation setting obviously in accordance with the protections of the First Amendment. The degree of permissible expressive activity, or its regulation, on public transportation involves an analysis of (i) the power of Congress to regulate the activity, (ii) the type of forum, and (iii) whether the regulation is appropriate given the type of forum.

1. Congressional Power to Regulate

Congress's power to regulate any activity, including expressive activity, dealing with the functioning of public transportation would likely rest on the Commerce Clause.³⁹ The Court's current interpretation of the Commerce Clause is broad. The Commerce Clause allows the federal government to regulate not only the transportation of interstate goods, but also any

³⁸ **Erwin Chemerinsky, Constitutional Law: Principles and Policies** 999 (Aspen Law & Business 2002).

³⁹ "Congress shall have power . . . [t]o regulate Commerce . . . among the several States. . . ." **U.S. Const.** art. I, § 8, cl. 3.

intrastate activity that has an effect on those interstate goods.⁴⁰

Interstate public transportation is subject to federal regulation. And airlines are the prototypical example of interstate public transportation because the majority of airline passengers travel from one state to another. Other major forms of public transportation - trains, automobiles, and buses - may not have a similarly high percentage of interstate travel as airplanes, but because of the broad constitutional interpretation of the Commerce Clause and the effect that intrastate public transportation has on interstate commerce, there is little issue with the federal government's power to pass regulations concerning public transportation.

2. The Public Transportation Forum

The next step in a general free speech on public transportation analysis by the courts is determining the type of forum of the location. The Court has identified three types of fora - the traditional public forum, the government-designated

⁴⁰ See Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); see also Wickard v. Filburn, 317 U.S. 111 (1942).

forum, and the nonpublic forum.⁴¹ Traditional public fora are typically public streets and parks; the places which “by long tradition or by government fiat have been devoted to assembly and debate.”⁴² In contrast to traditional public fora, which by their very nature are open to speech, the government can also designate a place for use by the public for assembly and speech.⁴³ A government-designated forum is one that is open for use by certain speakers or for certain subjects.⁴⁴ Importantly though, “[t]he government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.”⁴⁵ The Court looks at the policy and practice of the government regarding the

⁴¹ See *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 802 (1985); see also *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 44-46 (1983).

⁴² See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

⁴³ See *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 802 (1985).

⁴⁴ See id. An example of a government-designated public forum is an outdoor concert theater for music. The government could limit the speakers and subject to music only, banning political or religious speakers from using the theater.

⁴⁵ Id. (citing *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983)).

location in question or the nature of the property and its compatibility with the expressive activity o determine whether the government created a forum.⁴⁶

In Leman v. City of Shaker Heights⁴⁷ the Court addressed speech on city transit buses. Leman concerned the city denying a politician access to advertising space on the city's buses even though there was space available.⁴⁸ The city had denied advertising to politicians for 26 years.⁴⁹ But the Court did not see this as a violation of the First Amendment because the advertising space on the bus was not a public forum. The Court found that the city's use of the property as a commercial enterprise, i.e. raising revenue dollars through advertising, was inconsistent with an intent to designate that space on the city buses as a public forum.⁵⁰ This holding agreed with the Supreme

⁴⁶ Id.

⁴⁷ 418 U.S. 298 (1974).

⁴⁸ See generally Lehman v. City of Shaker Heights, 418 U.S. 298 (1974).

⁴⁹ See id. at 299-300.

⁵⁰ See id. at 303; cf. Public Utilities Comm'n v. Pollak, 343 U.S. 451 (1952) (applying the First and Fifth Amendments to a private company operating a street railway and bus system in the District of Columbia and piping music, announcements, and commercial advertising over a speaker system in the cars. However, the Court did not directly classify the forum of the railcars or

Court of Ohio's holding in the case which concluded that "the constitutionally protected right of free speech with respect to forums for oral speech, or the dissemination of literature on a city's street, does not extend to commercial or political advertising on rapid transit vehicles."⁵¹

The Court has been reluctant to expand traditional public fora beyond streets and public parks, often due to the historical or time component needed to establish something as a public forum.⁵² Following this rationale and the cases above, the courts would likely conclude that an airplane is not a traditional public forum. Therefore, airplanes are either a government-designated forum or, more likely, a nonpublic forum and are then potentially subject to greater government regulation of speech.

buses, but in applying Constitutional limitations it suggests that the Court viewed the forum as either a public forum or a designated forum.).

⁵¹ *Lehman v. City of Shaker Heights*, 418 U.S. 298, 301 (1974) (citing 296 N.E.2d 683 (1973)) (emphasis added).

⁵² See *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 817 (1985); see also *Haque v. Comm. for Idus. Org.*, 307 U.S. 496, 515 (1939) (stating that traditional public fora are those that "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions").

3. Constitutional Regulations Given the Forum

Upon determining the type of forum, it is necessary to address whether the government regulation is constitutional according to the appropriate forum-specific test.⁵³ Since an airplane is not a traditional public forum, the two potentially relevant analyses are those for a government-designated forum and a nonpublic forum.

In a government-designated forum it is necessary for a regulation to be content-neutral⁵⁴ and for the government to have a compelling interest.⁵⁵ Whereas "[a]ccess to a nonpublic forum . . . can be restricted as long as the restrictions are reasonable and [are] not an effort to suppress expression"⁵⁶ In a

⁵³ See *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 800 (1985) ("[T]he extent to which the Government can control access depends on the nature of the relevant forum.").

⁵⁴ See *Ward v. Rock Against Racism*, 491 U.S. 781, 784 (1989). There are exceptions to content-neutrality in such areas as obscenity, child pornography, fighting words, and secondary effects associated with adult businesses; however, for speech that is fully protected by the First Amendment, the regulations must be content-neutral. Id.

⁵⁵ See *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 800 (1985).

⁵⁶ See id.

case involving a First Amendment challenge to a ban of solicitations within airport terminals, the Court held that the airport terminal was a nonpublic forum.⁵⁷ As a nonpublic forum, a government regulation would only have to satisfy a requirement of reasonableness.⁵⁸

Beyond the forum, an analysis of the constitutionality of the government's ban on cell phone use during flight requires the consideration of several additional factors. One factor is the applicable case law concerning the location - an enclosed area with relatively limited ability to relocate - which may create conflicts with unwilling listeners or minors. This issue is addressed by the captive audience doctrine. Another factor is the type of government regulation - i.e. whether it is a content-neutral time, place, and manner regulation or a reasonable regulation of a nonpublic forum.

⁵⁷ See Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 680-81 (1992) (holding that airports are a nonpublic forum because they have not been held out for expressive activity "immemorially . . . time out of mind," and that the continued litigation concerning expressive activity in airports evidences operators' objections countering assertions of a designated forum).

⁵⁸ See id. ("The restriction need only be reasonable; it need not be the most reasonable or the only reasonable limitation.") (citation omitted).

III. The Collision Between a Captive Audience and Free Speech Rights

This section addresses three topics: (i) whether someone accessing the Internet on a cell phone in an enclosed area, like an airplane, falls under what the Court calls the captive audience doctrine, (ii) how the Court balances privacy and speech, and (iii) the considerations of the Court when minors are part of the audience.

A. What Makes an Audience Captive?

Traditionally, captive audience doctrine applies to a situation where the listener has no choice but to hear (or see, in the case of visual speech) the undesired speech.⁵⁹ A captive audience may allow the government greater latitude in regulating the speech within constitutional boundaries. The factors

⁵⁹ See *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974); cf. *Kuntz v. New York*, 340 U.S. 290, 298 (1951) (Jackson, J., dissenting) (using, for the first time, the term "captive audience," in this case referring to an audience on a public street involuntarily listening to a minister); see also *Close v. Lederle*, 424 F.2d 988, 991 (1st Cir. 1970) ("Freedom of speech must recognize, at least within limits, freedom not to listen.").

considered in finding an audience to be captive are: (i) the location of the speech - containing a strong spatial component,⁶⁰ (ii) the intrusiveness of the speech - often based on how loud or how visible,⁶¹ and (iii) the ability or effort required by an unwilling listener to avoid the speech.⁶²

The general purpose of the captive audience doctrine is to ensure that "free speech rights do not stand as an absolute bar to government's discretion to decide to favor the unwilling

⁶⁰ See *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302-04 (1952) (Blackmun, J.); id. at 306-08 (Douglas, J., concurring).

⁶¹ See *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210-11, n. 6 (1975) ("[I]t may not be the content of the speech, as much as the deliberate 'verbal or visual assault,' that justifies proscription.") (citation and brackets omitted); see also *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302-04 (1952) (Blackmun, J.); id. at 306-08 (Douglas, J., concurring).

⁶² See *Hill v. Colorado*, 530 U.S. 703, 716 (2000) "[T]he protection afforded to offensive messages does not always embrace offensive speech that is so intrusive that the unwilling audience cannot avoid it." Id. (citing *Frisby v. Schultz*, 487 U.S. 474, 487 (1988)). See also *Cohen v. California*, 403 U.S. 15, 21 (1971) (recognizing that using a right to privacy to allow regulation of speech that is easily avoidable, like writing on a jacket, is not constitutional).

listener over the unpleasant speaker.”⁶³ The Supreme Court has said “we are inescapably captive audiences for many purposes.”⁶⁴ However, under the Court’s captive audience doctrine, certain factors temper the government’s discretion to “favor the unwilling listener” by regulating the speech through content-based or time, place, or manner regulations.⁶⁵

One such factor is location. The Supreme Court’s interpretation of the First Amendment gives the government greater ability to protect people in their homes from intrusive speech. The Court has said, “surely [the interest of being free from unwanted expression in public] is nothing like the interest in being free from unwanted expression in the confines of one’s own home.”⁶⁶ However, this location/spatial factor is not the only consideration in finding a captive audience. While the spatial factor is part of the Court’s consideration in finding a captive audience, another factor to focus on, especially in

⁶³ William D. Araiza, Captive Audiences, Children and the Internet, 41 **Brandeis L.J.** 397, 404 (2003) (emphasis added).

⁶⁴ *Rowan v. Post Office Dept.*, 397 U.S. 728, 736 (1970).

⁶⁵ *Cohen v. California*, 403 U.S. 15, 21 (1971) (“[T]he mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense”) (citation omitted).

⁶⁶ Id. at 21-22.

situations outside the home, is the listener's ability to avoid the unwanted speech.⁶⁷

1. Location, Location, Location: The Spatial Factor of
the Captive Audience Doctrine

The Supreme Court first applied the captive audience doctrine in cases involving speech intruding upon an unwilling listener's home. This led some commentators to conclude that the captive audience doctrine is essentially one focused on a home setting.⁶⁸ The typical example of a captive audience is one who is the subject of intrusive speech at his residence - such as residential picketing⁶⁹ or mail.⁷⁰ However, courts recognize that

⁶⁷ See generally id. (holding that unwilling audience could avert their eyes from the writing on jacket).

⁶⁸ See Marcy Strauss, Redefining the Captive Audience Doctrine, 19 **Hastings Const. L.Q.** 85, 90 (1991); **Erwin Chemerinsky, Constitutional Law: Principles and Policies** 845 (Aspen Law & Business 2002).

⁶⁹ See generally *Frisby v. Schultz*, 487 U.S. 474 (1988) (upholding a narrow reading of a state law banning picketing in residential neighborhoods to protect those who were presumptively unwilling to receive such speech); *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994) (upholding the part of an injunction

a captive audience can exist outside the home. For example, courts have applied the doctrine in cases involving bus advertisements⁷¹ and radio communication in a streetcar.⁷²

restricting the audible speech of protesters that recovering patients could not reasonably avoid).

⁷⁰ Cf. *Bolger v. Young's Drug Products Co.*, 463 U.S. 60 (1983) (finding unconstitutional a federal law that prevented the unsolicited mailing of contraceptive information because "[r]ecipients of objectionable mailings . . . may effectively avoid further bombardment of their sensibilities [through a] . . . journey from mail box to trash can") (internal quotation omitted) (citations omitted), and *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 737 (1970) (holding that a mailer's right to communicate had to stop at the mailbox of an unreceptive addressee because "[t]o hold less would tend to license a form of trespass and would make hardly more sense than to say that a radio or television viewer may not twist the dial to cut off an offensive or boring communication and thus bar its entering his home").

⁷¹ See *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974).

⁷² See *Pub. Utils. Comm'n v. Pollack*, 343 U.S. 451 (1952) (stating that passengers of city streetcars and buses had to get to work, often had no other alternatives to public transportation, and could not ignore the speech and therefore were captive audiences) (Douglas, J., dissenting).

During the infancy of the captive audience doctrine there was no concept of the spatial factor that is so important in today's application of the doctrine. Justice Jackson's dissent in Kuntz v. New York⁷³ first used the term captive audience. The majority of the Court did not apply the captive audience doctrine to Kuntz because the case involved a minister speaking on a public street.⁷⁴ The Court has been reluctant to apply the captive audience doctrine to publicly accessible places.⁷⁵ In another early, Wolin v. Port of New York Authority,⁷⁶ the first outline of the spatial factor beginning to develop. Wolin involved speech in a bus terminal and succinctly summarizes when restrictions on speech may be permissible in a public but enclosed setting:

⁷³ 340 U.S. 290, 298 (1951).

⁷⁴ Kuntz v. New York, 340 U.S. 290, 298 (1951) (Jackson, J., dissenting).

⁷⁵ See Wolin v. Port of New York Authority, 392 F.2d 83 (1968) (finding that a transit station did not constitute a captive audience just because it had a roof, but was architecturally similar to a public street that happened to be underground); Public Utilities Comm'n v. Pollak, 343 U.S. 451 (1952) (stating that music transmitted in buses and streetcars did not infringe on the First Amendment rights of the passengers).

⁷⁶ 392 F.2d 83 (1968).

[W]here the issue involves the exercise of First Amendment rights in a place clearly available to the general public, the inquiry must go further: does the character of the place, the pattern of usual activity, the nature of its essential purpose and the population who take advantage of the general invitation extended, make it an appropriate place for communication.⁷⁷

The use of the spatial factor in Wolin to determine if there is a captive audience is evident - "the enclosed design of the forum will affect the degree of restriction on communication tolerable under the Constitution."⁷⁸ While this spatial component is one factor in a captive audience analysis, another consideration is how easily the unwilling listener - who is perhaps spatially close - can avoid the speech.⁷⁹

2. Avoidability: The Intrusiveness of the Speech and the Captive's Opportunity to Avoid it

⁷⁷ Id. at 89.

⁷⁸ Id. at 93.

⁷⁹ See Lehman v. City of Shaker Heights, 418 U.S. 298, 302-04 (1952) (Blackmun, J.); id. at 306-08 (Douglas, J., concurring) (recognizing the tension between the right of a person to speak and the rights of an unwilling listener not to be "forced" to listen).

The failure to find a captive audience usually arises because of the listener's ability to avoid the unwanted speech.⁸⁰ There are two interrelated factors in evaluating the avoidability of the speech - the intrusiveness of the speech and the effort involved by the potential "captive" to avoid the speech.⁸¹

Because speech comes in many forms, it can be unavoidable in a variety of ways. For example, speech can be intrusive and potentially unavoidable because of the volume or the size of the visual aid the speaker uses. In Madsen v. Women's Health Center, Inc.,⁸² one of the issues was the volume of the protestors outside a women's health clinic.⁸³ In that case the Court upheld a noise injunction against picketers outside a clinic reasoning that

⁸⁰ See Madsen v. Women's Health Center, Inc., 512 U.S. 753, 772-73 (1994) (upholding the part of the injunction restricting the audible speech of protestors but striking down the part of the injunction restricting the use of "images observable" because of the ease with which patients could avoid them, by closing the blinds).

⁸¹ See id.

⁸² 512 U.S. 753 (1994).

⁸³ See Madsen v. Women's Health Center, Inc., 512 U.S. 753, 759-60 (1994).

recovering patients could not avoid speech at high volumes.⁸⁴ Because of this unavoidability the Court upheld the injunction of the volume of the protestors.⁸⁵

The Court seems more likely to deem that audible speech is unavoidable while potentially intrusive visible speech is not unavoidable.⁸⁶ For example, in one case the Court held that a drive-in theater screen visible to the public was not unavoidable.⁸⁷ This is just one example very visible speech still being avoidable.

⁸⁴ See *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 772-73 (1994) (upholding the part of an injunction restricting the audible speech of protestors that recovering patients could not reasonably avoid. "The First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests. 'If overamplified loud-speakers assault the citizenry, government may turn them down.'") (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972)).

⁸⁵ See id.

⁸⁶ See *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 773 (1994) ("[I]t is much easier for the [unwilling listener] to pull [the] curtains [to avoid visible speech] than for the [unwilling listener] to stop up her ears . . .").

⁸⁷ In *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), the government tried to defend a city ordinance making the exhibition

Along with unavailability, the Court analyzes the effort required to avoid the unwanted speech before holding that an audience is captive. The best example of the analysis of the effort to avoid speech appears in Erznoznik.⁸⁸ Erznoznik involved the prosecution of a drive-in movie theatre and its operator.⁸⁹ Under a Jacksonville, Florida, ordinance, the exhibition of films containing nudity was a punishable offense as a public nuisance if the screen was visible from a public street or place outside the property.⁹⁰ The Court looked at both how "obtrusive" the speech, in this case the movie theatre screen, was and how easily viewers could avoid the speech.⁹¹ The Court found that even a

of "any motion picture . . . in which the human male or female bare buttocks, human female bare breasts, or human bare pubic areas are shown" by a drive-in movies theater visible from public streets or public places a public nuisance, Id. at 207, based on "protect[ing] its citizens against unwilling exposure to materials that may be offensive." Id. at 208. However, the Court held that "the screen of a drive-in theater is not 'so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it.'" Id. at 212 (quoting Redrup v. New York, 386 U.S. 767, 769 (1967)) (emphasis added).

⁸⁸ Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975).

⁸⁹ See id.

⁹⁰ See generally id.

⁹¹ See id. at 208-12.

drive-in movie theater screen was not "so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it."⁹²

The burden normally falls on the unwitting viewer to avoid exposure, where practicable, by "simply by averting [his] eyes."⁹³

The Court applied the reasoning in Erznoznik to more enclosed settings. In Lehman v. City of Shaker Heights, both the plurality and concurring opinions recognized that the degree of captivity and the resultant intrusion on privacy is significantly

⁹² See id. at 212 (quoting Redrup v. New York, 386 U.S. 767, 769 (1967)); but see Cactus Corp. v. State of Arizona, 480 P.2d 375, 379 (1971) ("A drive-in theatre is capable of imposing its pictures upon persons without their consent [W]e conceive of no reason why [the drive-in theatre] cannot be prohibited from polluting the neighborhood with visual material harmful to children.").

⁹³ Cohen v. California, 403 U.S. 15, 21 (1971); see Erznoznik v. City of Jacksonville, 422 U.S. 205, 211 (1975); see also Frisby v. Schultz, 487 U.S. 474, 484 (1988) ("[I]n many locations, [the Supreme Court] expects individuals simply to avoid speech they do not want to hear") (citation omitted); Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 72 (1983) (stating that unwanted mail is easily avoided by merely throwing it out); Consolidated Edison Co. v. Public Service Comm'n of New York, 447 U.S. 530, 542 (1980).

greater for a passenger on a bus than for a person on the street.⁹⁴

3. Application of the Captive Audience Doctrine to Cell Phone Internet Access in an Airplane

If the unwilling listener on the airplane is captive, then this gives the government greater justification in imposing regulations on speakers.⁹⁵ A captive audience might justify the government in maintaining the ban on cell phones in-flight. However, this is a superficial application of the captive audience doctrine. Even given that an airplane is close quarters and that a passenger is definitely captive in the sense that he cannot just get up and leave, this does not assure a finding of a captive audience. Because unwilling listeners can easily avoid cell phone Internet browsing, the captive audience doctrine does not apply. Even one of the largest cell phones only has a screen

⁹⁴ See *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302-04 (1952) (Blackmun, J.); id. at 306-08 (Douglas, J., concurring).

⁹⁵ See *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975) (stating that selective restrictions of speech can be upheld if the degree of captivity makes it impractical for the unwilling viewer to avoid exposure (citing *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302-04 (1952))).

that is approximately 2.5 inches wide by 2.71 inches high.⁹⁶ These screens are not exactly as large as a drive-in theatre screen, where the Court did not find the visual speech unavoidable.⁹⁷ To get an accurate idea of images on such a small screen would require effort seeking out that speech. The effort to avoid such visual cell phone speech, even in close quarters, is practically nil.⁹⁸ Since this visual cell phone speech, even if unwanted, and even if in close quarters where one cannot leave or relocate, is so easily avoided, it is unlikely that a passenger is captive under these particular facts.⁹⁹

⁹⁶ Cingular Wireless sells a BlackBerry 7100g, one of the mobile devices with the largest screen - 240 x 260 pixels (2.5 x 2.71 inches. Cingular Wireless, Online Store, http://onlinestorez.cingular.com/cell-phone-service/cell-phones/cell-phones.jsp?source=INC230063&_requestid=94064 (enter zip code when prompt; then scroll down to BlackBerry 7100g) (last visited Dec. 2, 2005).

⁹⁷ See *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975).

⁹⁸ See id. at 221 ("In the case of newspapers and magazines, there must be some seeking by the one who is to see") (Burger, C.J., dissenting).

⁹⁹ Passengers can avoid written advertisements, as opposed to auditory speech, by simply not looking at them and therefore any "captive" audience considerations should yield to First Amendment rights. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 320-21

However, this reasoning becomes more strained the larger the visible screen becomes, like with, for example, laptops or portable DVD players. Portable DVD players have screens that can be as large as 9 inches diagonally and laptop computers can have screens as large as 19 inches diagonally. Even with these larger visible areas, they are still avoidable by the unwilling viewer. For example, in a case involving male firefighters looking at a Playboy magazine in the firehouse in the presence of female firefighters the court found that the unwilling viewers were not a captive audience because they could easily avert their eyes.¹⁰⁰

(1952) (Brennan, J., dissenting). Also the Court has drawn a distinction between newspapers and periodicals, which are easily avoided, and are even more observable by a surrounding audience than visual images on a cell phone, and billboards or streetcar signs which are not as easily avoided by an unwilling listener. See *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302 (1974) (referencing *Packer Corp. v. Utah*, 285 U.S. 105 (1932)).

Applying this logic to passengers on an airplane, it is difficult to rationalize applying the captive audience doctrine to visual images on a cell phone, regardless of the spatial setting because the images are so easily avoided by an unwilling viewer.

¹⁰⁰ See *Johnson v. County of Los Angeles Fire Department*, 1994 U.S. Dist. LEXIS 8270, 24, note 6 (C.D. Cal. 1994) (holding that "[i]ndividuals who may avoid material by averting their eyes are not a 'captive audience'").

The situation is slightly more complicated if the cell phone use constitutes audible speech. Audible speech is much harder to avoid than visual speech,¹⁰¹ and it is therefore more likely that a passenger is a captive audience.¹⁰² However, the largest challenge for the government is distinguishing audible cell phone use from conversations between passengers or announcements from the captain over the airplane's speakers.¹⁰³

¹⁰¹ See *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994) (upholding the part of an injunction prohibiting picketers from making excessive noise outside an abortion clinic based in part that patients were a captive audience and the speech was not easily avoided, but striking down the part of the injunction that prohibited observable messages because that speech is easily avoided by closing the blinds).

¹⁰² See *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974).

¹⁰³ See *Public Utilities Comm'n v. Pollak*, 343 U.S. 451, 468 (1952) (Douglas, J., dissenting) ("One who is in a public vehicle may not of course complain of the noise of the crowd and the babble of tongues. One who enters any public place sacrifices some of his privacy"). The degree of interference caused by the unwanted speech should be considered. If the speech does not interfere with the business or privacy expectations of the customers, then the speech should not be proscribed. See generally *In re Hoffman*, 67 Cal. 2d 845, 434 P.2d 353 (1967).

When the FCC and FAA instituted the ban on cell phone use during flight in was because of safety, which is a weighty government interest.¹⁰⁴ However, once this brick is removed from the scales, the balancing of First Amendment freedom of speech rights and constitutionally allowable regulation of such speech is much more difficult. The captive audience doctrine could provide the government with more weight on the side of the scale favoring regulation.

However, in light of the analysis above, it seems unlikely that the Court would apply the captive audience doctrine to audible cell phone speech because it is virtually indistinguishable, constitutionally, from conversations between passengers.¹⁰⁵ Additionally, unwilling passengers subjected to

¹⁰⁴ See supra note 13.

¹⁰⁵ There are differences between a conversation between two passengers - an airplane conversation - and a conversation between one passenger and someone on the ground via a cell phone - an in-flight cell phone conversation. However, it seems that there might be greater reasons for protecting an in-flight cell phone conversation rather than an airplane conversation. First, during an airplane conversation both speaker and listener are in the same physical location so they expect their speech to be subject to the same restrictions. But with an in-flight cell phone conversation any restrictions placed on the airline passenger are "felt" by the person on the ground. So if the

visual cell phone use are even less likely to qualify as a captive audience due to the ease with which they can avert their eyes. Importantly, the government currently does not regulate the use of laptops, magazines, or portable DVD players during flight, which are harder to avoid than cell phones because of their larger displays. Since laptops, magazines, and portable DVD players do not pose a safety concern because they do not transmit radio signals, the government has not imposed an in-flight ban.¹⁰⁶ It would seem incongruous to try to use the

government restricts passengers from using the word bomb in any context, this will affect the person on the ground's ability to hear any speech containing that word even though that person is not on an airplane and the same safety concerns do not apply to that person.

Second, a third party who is unwillingly listening to the conversation is forced to avoid twice as much speech in an airplane conversation as opposed to an in-flight cell phone conversation where only one side of the conversation is discernable.

On first blush it seems that there is more justification for regulating an airplane conversation than there is for regulating an in-flight cell phone conversation when technological safety is not the issue.

¹⁰⁶ See **Subcommittee on Aviation, Hearing on Cell Phones on Aircraft: Nuisance or Necessity?** (July 15, 2005) [available at](#)

captive audience doctrine to justify a government-imposed regulation on cell phone use in-flight when there is not similar regulations for non-transmitting laptops, magazines, or portable DVD players.¹⁰⁷

B. Privacy (and Personal Autonomy) . . . Outside the Home?

Another, not altogether separate, factor in cases involving unwilling listeners is the listener's right to privacy. The right to privacy involves personal autonomy and the right not to

<http://www.house.gov/transportation/aviation/07-15-05/07-15-05memo.html>.

¹⁰⁷ The incongruity exists because laptops, magazines, and portable DVD players are as capable of displaying - either audibly or visually - indecent or offensive material as a cell phone with Internet capability. The government may try and justify the continuation of the in-flight cell phone ban based on protecting minors or other captive audience members from indecent or offensive speech. However, if the government has not imposed the same indecency restrictions on laptops, magazines, or portable DVD players then the statute is unconstitutionally under-inclusive. A ban on cell phone use during flight justified by indecency concerns is under-inclusiveness because it fails to address the potential indecency seen on laptops and portable DVD players.

be forced to listen to unwanted speech.¹⁰⁸ Recognition of such rights risk impeding upon free speech. Therefore a certain balancing between the privacy rights and free speech rights must be done.¹⁰⁹ In considering this "intersection between the . . . protection of . . . privacy and the First Amendment's protection of an individual's right to receive, and consider, information

¹⁰⁸ See *Stanley v. Georgia*, 394 U.S. 557, 568 (1969) ("[T]he individual's right to read or observe what he pleases . . . is . . . fundamental to our scheme of individual liberty"); see also *Lawrence v. Texas*, 539 U.S. 558, 652 (2003) ("[T]here are . . . spheres of a person's lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self.").

¹⁰⁹ See *Hill v. Colorado*, 530 U.S. 703, 718 (2000) ("The dissenters . . . appear to consider recognizing any of the interest of unwilling listeners - let alone balancing those interests against the rights of speakers - to be unconstitutional. Our cases do not support this view."); see also *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 208 (1975) (stating that the Court "has considered analogous issues - pitting the First Amendment rights of speakers against the privacy rights of those who may be unwilling viewers or auditors - in a variety of contexts. Such cases demand delicate balancing.") (citations omitted).

and ideas,"¹¹⁰ the Court is very protective of the unwilling listener in their home.¹¹¹ However, regulations favoring an unwilling listener over a person exercising free speech outside the home are less likely to be held constitutional.¹¹²

"The recognizable privacy interest in avoiding unwanted communication varies widely in different settings."¹¹³ In locations accessible to more people it is important to remember that "[o]ne who is in a public vehicle may not of course complain

¹¹⁰ *United States v. Extreme Associates, Inc.*, 352 F. Supp. 2d 578, 589 (2005).

¹¹¹ See *Frisby v. Schultz*, 487 U.S. 474, 487 (1988); see also *Rowan v. United States Post Office Department*, 397 U.S. 728, 736 (1970) ("[T]he right of every person 'to be let alone' must be placed in the scales with the right of others to communicate.").

¹¹² See *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997) (upholding a fixed 15 foot buffer zone around the clinic's entrances where abortion demonstrators were prohibited, but striking down a floating 15 foot no-protest buffer zone around a person or vehicle seeking access or leaving the clinic); cf. *Hill v. Colorado*, 530 U.S. 703 (2000) (upholding a statute providing an eight foot buffer zone around people entering a health care facility as a valid restriction on speech, serving a significant governmental interest).

¹¹³ *Hill v. Colorado*, 530 U.S. 703, 716 (2000).

of the noise of the crowd and the babble of tongues. One who enters any public place sacrifices some of his privacy.”¹¹⁴

C. Minors as Part of the Captured

The above discussion of the application of the captive audience doctrine did not thoroughly address the additional complications posed by minors in the audience. Minors often introduce unique considerations. The Court has found that children can be treated differently than adults across a broad range of areas - such as marriage, voting, military service, and drinking to name a few.

There are many cases discussing captive audience generally, but none make specific references to minors being part of the captured. However, in Ginsberg¹¹⁵ Justice Stewart’s concurrence stated that the “free trade of ideas” required that listeners have the ability to choose what to listen to.¹¹⁶ Such choice depends on the ability to avoid or tune out the unwanted speech according to Justice Stewart. He then compared a minor to a

¹¹⁴ Public Utilities Comm’n v. Pollak, 343 U.S. 451, 468 (1952) (Douglas, J., dissenting).

¹¹⁵ Ginsberg v. New York, 390 U.S. 629 (1968).

¹¹⁶ See id. at 649 (Stewart, J., concurring) (citing Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

captive audience in that both lacked this choice, one because of captivity and the other because of immaturity.¹¹⁷

Then there are cases that discuss the issues of free speech that impact minors. Access to the Internet by minors, due to its rapid adoption by youth and massive amount of information - educational, entertaining, useful, offensive, and even obscene - that is accessible, and the associated regulation is constitutionally difficult.¹¹⁸

The important aspect of these cases as they pertain to the use of cell phones during flight is in determining the relative weight of the government interest for supporting the ban if minors are on the plane. The Court has found a constitutional right for parents to control what their children see.¹¹⁹ But it is unclear whether this right would extend so far as to support a

¹¹⁷ See id. at 639.

¹¹⁸ See, e.g., Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002); Reno v. ACLU, 521 U.S. 844 (1997); see also United States v. Am. Library Ass'n, 539 U.S. 194 (2003) (holding that the installation of Internet filters removable upon the request of patrons did not violate the First Amendment).

¹¹⁹ See Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925); see also, e.g., Ginsberg v. New York, 390 U.S. 629 (1968); Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding that Amish parents could not be compelled to send their children to a certain level of schooling).

ban on cell phones but still allow the use of laptops, magazines and portable DVD players - all of which could pose the same concerns of indecency.

IV. Regulating Cell Phone Internet Access Through Time, Place, and Manner Restrictions: Can the Government Make You Hang Up?

No forum for speech is without boundaries or regulation.¹²⁰ “[P]rotected speech is not equally permissible in all places and at all times . . . without regard to the nature of the property or to the disruption that might be caused by the speaker’s activities.”¹²¹ For example, time, place, and manner regulations are a way to make speech orderly and understandable without suppressing ideas, no matter how unpopular. Such regulations must be (i) content-neutral, (ii) narrowly tailored to serve a significant government interest, and (iii) leaves open ample alternative channels for communication.¹²² However, the strict

¹²⁰ See *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 799 (1985) (“Even protected speech is not equally permissible in all places and at all times.”).

¹²¹ Id. at 799-800.

¹²² *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); see also *United States v. O’Brien*, 391 U.S. 367, 377 (1968) (explaining that a regulation on free expression may be upheld if it furthers a substantial government interest, is

scrutiny of this doctrine is only applicable to an airplane if a court determines that an airplane is a government-designated forum. Otherwise, for a nonpublic forum the government regulation only has to be reasonable - i.e. not requiring narrow tailoring or leaving open ample alternative channels for communication. However, even in a nonpublic forum regulations must be viewpoint neutral.¹²³

A. Content and Viewpoint Neutrality

"The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The

content-neutral, and narrowly tailored); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Frisby v. Schultz*, 487 U.S. 474, 481 (1988).

¹²³ See *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 806 (1985) ("Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.") (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983)).

government's purpose is the controlling consideration."¹²⁴ The current ban on in-flight cell phone use is content neutral.¹²⁵ The ban makes no reference as to the content of the speech, but rather bans a particular mode of communication - the manner - when the airplane's - the place - doors close - the time. The Court has upheld bans that "distinguish[ed] between speakers . . . based only upon the manner in which [the] speakers transmit[ted] their messages to viewers, and not upon the messages they carr[ied]." ¹²⁶

While captive audience doctrine and privacy considerations may not justify government restrictions, the government may still try to regulate in-flight cell phone use by relying on the reasoning in Ward v. Rock Against Racism.¹²⁷ In Ward, New York city officials attempted to regulate the volume of amplified music. The Court held that this was a valid exercise of a content-neutral time, place, and manner restriction because the government had a strong interest in protecting the privacy of

¹²⁴ Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

¹²⁵ See supra note 13. The bans are on all radio transmission devices during flight and in no way refer to the content; therefore the current regulations banning cell phone use in-flight are content-neutral.

¹²⁶ Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 645 (1994).

¹²⁷ 491 U.S. 781 (1989).

those living in homes nearby. The city could "act to protect even such traditional public forums as city streets and parks from excessive noise."¹²⁸ By extension, the government could argue that there is an interest in maintaining a reasonable volume in an enclosed area like an airplane, especially considering that one cannot just get up and leave. This may support a volume regulation of cell phone Internet usage, or the requirement to use headphones, but Ward did not contain a total ban. Therefore Ward is not helpful to support maintaining a total ban for the benefit of noise reduction.

B. Regulation Advancing a Government Interest

This element is much more variable and dependent upon a variety of fact-driven considerations. Factors include: "the nature of the speech activity being regulated; the perceived significance of the governmental interest; the scope of the restriction; the availability of effective, but less restrictive alternatives; and the court's judgment as to the actual effectiveness of the restriction in advancing the proffered interest."¹²⁹

¹²⁸ Ward v. Rock Against Racism, 491 U.S. 781, 796 (1989) (citing Kovacs v. Cooper, 336 U.S. 77, 86-87 (1949)).

¹²⁹ BOOK - Ides and May, pp. 369 § 8.4.2

In determining the nature of the speech activity, the Court is much more sympathetic to claimed violations of First Amendment rights when the mode of communication is more traditional.¹³⁰ In Watchtower,¹³¹ the Court began by noting that the speech at issue was highly valued and had "historical importance . . . for the dissemination ideas."¹³² While cell phone use, especially for Internet browsing, lacks the important historical aspect that the Court looks for in important speech activities and forums,¹³³ it does represent an increasingly important mode of communication in modern life.

Cases finding that particular speech activities are important vary. Speaking to people by displaying a sign in one's

¹³⁰ See Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton, 536 U.S. 150 (2002) (striking down an ordinance requiring a permit to engage in door-to-door solicitations or neighborhood canvassing); City of Ladue v. Gilleo, 512 U.S. 43 (1994) (striking down a city ordinance prohibiting homeowners from display signs on their property unless they fell under particular exemptions).

¹³¹ Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton, 536 U.S. 150 (2002).

¹³² Id. at 162.

¹³³ See Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., 473 U.S. 788, 802 (1985).

front yard is an important speech activity.¹³⁴ Demonstrating dissatisfaction through protest and picketing is an important speech activity.¹³⁵ Reading newspapers, magazines, or other periodicals is an important speech activity.

The Internet is a virtual public square where similar such activities take place electronically. One can enter this virtual square, through a computer or cell phone, and choose to read a particular electronic newspaper, blog,¹³⁶ or personal webpage. All these forms of communication in their more traditional format, whether it is in books, signs, or speeches on the street corner, are protected as important speech activities. It seems difficult to see how the right to speak or listen is changed by the fact that the speech now exists in an electronic format, unless the government has a reasonable interest particular to this electronic mode of communication.

¹³⁴ See *City of Ladue v. Gilleo*, 512 U.S. 43 (1994).

¹³⁵ See *Hill v. Colorado*, 530 U.S. 703 (2000); see also *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994); *Frisby v. Schultz*, 487 U.S. 474 (1988).

¹³⁶ A blog is the common term used for a web-log, which is an electronic diary where a person posts their thoughts, ideas, or pictures in a relatively unformatted, almost stream of consciousness, fashion.

<http://dictionary.reference.com/search?q=blog>.

Traditionally, the government interest in restricting access to such electronic speech through the use of cell phones during an airplane flight was significant - public safety and reliable communication. The FCC's primary concern is "possible disruption of cell phone communication on the ground."¹³⁷ The FAA's worry is that "cell phones might interfere with a plane's navigation and electrical systems."¹³⁸ NASA noted at least four years ago that cell phones are being designed such that "they emitted remarkably fewer interference-causing spurious radio

¹³⁷ Marguerite Reardon and Ben Charny, *Feds Move on Wireless Web, Cell Phones in Flight*, CNET News.com Dec. 15, 2004, available at http://news.zdnet.com/2100-1035_22-5491802.html; see also David Armstrong, *Airlines Could Allow Chatter FCC Reconsidering Ban on In-Flight Calls, Starting to Ask Travelers What They Think*, San Francisco Chronicle, Apr. 28, 2005, Page C-1, available at [http://sfgate.com/cgi-](http://sfgate.com/cgi-bin/article.cgi?f=/c/a/2005/04/28/BUGECCBEKN61.DTL&type=business)

[bin/article.cgi?f=/c/a/2005/04/28/BUGECCBEKN61.DTL&type=business](http://sfgate.com/cgi-bin/article.cgi?f=/c/a/2005/04/28/BUGECCBEKN61.DTL&type=business)

¹³⁸ Marguerite Reardon and Ben Charny, *Feds Move on Wireless Web, Cell Phones in Flight*, CNET News.com Dec. 15, 2004, available at http://news.zdnet.com/2100-1035_22-5491802.html; see also David Armstrong, *Airlines Could Allow Chatter FCC Reconsidering Ban on In-Flight Calls, Starting to Ask Travelers What They Think*, San Francisco Chronicle, Apr. 28, 2005, Page C-1, available at [\[bin/article.cgi?f=/c/a/2005/04/28/BUGECCBEKN61.DTL&type=business\]\(http://sfgate.com/cgi-bin/article.cgi?f=/c/a/2005/04/28/BUGECCBEKN61.DTL&type=business\)](http://sfgate.com/cgi-</p></div><div data-bbox=)

signals.”¹³⁹ If technological improvements and scientific studies demonstrate that using cell phones during flight is safe, then the government would need to put forth another interest to justify a ban. The substantial interests that the government is likely to use to try and justify maintaining a ban would be (i) protecting the privacy/comfort of a captive audience, (ii) protect unwilling listeners, especially children, from being subjected to offensive and potentially indecent speech or (iii) because such use may increase passenger-flight attendant confrontations.

Protecting an adult audience from potentially offensive cell phone Internet speech in an airplane based on the fact that they are a captive audience cannot be sustained.¹⁴⁰ However, it is a closer call whether protecting minors from potentially offensive cell phone Internet speech in an enclosed setting is a reasonable government interest. The Court has failed to articulate a clear rule. Some cases have held that the

¹³⁹ Marguerite Reardon and Ben Charny, *Feds Move on Wireless Web, Cell Phones in Flight*, CNET News.com Dec. 15, 2004, available at http://news.zdnet.com/2100-1035_22-5491802.html

¹⁴⁰ See supra Part III; see generally *Public Utilities Commission of the District of Columbia v. Pollack*, 343 U.S. 451 (1952) (holding that the government could continue to permit audio, consisting of music, talk, and commercials, to be played through speakers in streetcars and buses).

government should just provide parents with the opportunities to shield their children from certain speech if they so choose.¹⁴¹

Other cases seem to suggest that the government may have an interest, independent that of the parents, in protecting minors.

Beyond the issue of whether the government has an independent interest in protecting minors, it seems that any regulation maintaining a total ban based on this interest would fail to be narrowly tailored. Again, however, in a nonpublic forum narrow tailoring is not required, just a reasonable interest in regulation.¹⁴² The Court has struck down other regulations aimed at protecting minors that were not even total bans. In Playboy¹⁴³ the government was concerned about the impact of bleed-over from adult channels on children viewers. The Court discussed how there were more narrowly tailored options, such as providing lock boxes that would totally block out the channels to parents who requested them.¹⁴⁴

¹⁴¹ See *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000) (holding that providing households with the opportunity to request better measures to block unwanted cable channels was sufficient).

¹⁴² See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983).

¹⁴³ *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000).

¹⁴⁴ See id. at 816.

Determining whether protecting minors constitutionally supports maintaining a total ban on cell phone Internet usage is difficult. The Court tends to closely examine regulations that foreclose an entire medium.¹⁴⁵ Airplanes offering Internet access could install filtering software similar to that in many public libraries instead of a total ban. This solution seems more reasonably related to the government interest of protecting minors from access to harmful material than a total ban.¹⁴⁶

¹⁴⁵ *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994) (“Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent - by eliminating a common means of speaking, such measures can suppress too much speech.”).

¹⁴⁶ Cf. *United States v. Am. Library Ass’n*, 539 U.S. 194 (2003) (holding that the installation of Internet filters removable upon the request of patrons did not violate the First Amendment). However, even considering that the cost of such filters would be minimal - beyond the cost of the other technological requirements like a special transmitter on the airplane, such as a pico cell - the fact that many airlines are filing or have filed for bankruptcy indicates that they may not voluntarily incur these extra costs. See Despina Afentouli, New Heights for In-Flight Internet, **CNN.com**, Mar. 31, 2005, <http://www.cnn.com/2005/TRAVEL/03/31/bt.internet.flight/> (“Many U.S. airlines are still in a difficult position financially and

V. The Government Cannot Constitutionally Maintain a Complete Ban on Cell Phone Use In-Flight

The focus of this analysis has been to determine if the First Amendment allows the FCC or FAA to maintain the current ban on in-flight cell phone use if there is no reasonable possibility of interference with ground communication or on-board navigation systems. Total bans absent strong government interests are often considered unconstitutional.¹⁴⁷ Plus, lifting the ban would have

Delta Airlines is only now considering in-flight Internet - which would make it the first domestic U.S. airline to do so.") It is also important to note that such filtering software would not block any stored images on a passenger's cell phone.

¹⁴⁷ See *Butler v. Michigan*, 352 U.S. 380, 383 (1957) (stating that the State may not "reduce the adult population . . . to reading only what is fit for children"); see also *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 252 (2002); *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 814 (2000) ("The objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative"); *Reno v. ACLU*, 521 U.S. 844, 875 (1997) ("The government interest in protecting children from harmful materials . . . does not justify an unnecessarily broad suppression of speech addressed to adults").

positive effects - increased business productivity and greater freedom of expression during flight. However, many people support maintaining the ban. Some are concerned that cell phone use during flight would impinge on the privacy of other passengers, force unwilling listeners to endure offensive speech, or subject minors to indecent material. However, the Court is often hesitant to infringe on constitutionally protected speech for incidental benefits.¹⁴⁸

Prior jurisprudence addressed such concerns through application of the captive audience doctrine. This doctrine

¹⁴⁸ See *Cohen v. California*, 403 U.S. 15, 21-22 (1971) (stating that the presence of an unwilling listener does not justify proscribing otherwise constitutionally protected speech if the speech is easily avoidable by the unwilling listener); see also *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213-14 (1975) (holding unconstitutional a regulation banning all films containing any nudity on a drive-in theater screen. One failing justification by the city was the protection of minors outside the drive-in who could see the films. "Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them. In most circumstances, the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors.").

balanced the interests of the unwilling listener with the interests of the speaker. While the confined nature of an airplane might seem like a prototypical location for a captive audience, airplane passengers are not captives. Both the audio and visual parts of cell phone Internet use during flight are easily avoided, which weighs heavily against favoring the unwilling listener by banning the use of cell phones. Most cell phone screens are small and any unwilling viewer can easily avert their eyes. It requires little effort for a passenger to avoid a screen that only measures 2.5 inches wide by 2.71 inches high.¹⁴⁹ Also, a regulation that screen filters be installed to limit the angles at which the screen is visible would quell many concerns about exposure to unwilling viewers or minors.¹⁵⁰

¹⁴⁹ Cingular Wireless sells a BlackBerry 7100g, one of the mobile devices with the largest screen - 240 x 260 pixels (2.5 x 2.71 inches. Cingular Wireless, Online Store, http://onlinestorez.cingular.com/cell-phone-service/cell-phones/cell-phones.jsp?source=INC230063&_requestid=94064 (enter zip code when prompt; then scroll down to BlackBerry 7100g) (last visited Dec. 2, 2005).

¹⁵⁰ Privacy filters are commonly available for laptops. **Secure-It, 3M Privacy Filters, Keep Private Information Private with 3M Filters**, <http://www.secure-it.com/products/privacy.htm> (follow "3M Privacy Filter / Privacy Screen" hyperlink) (last visited Jan. 10, 2006). Privacy filters restrict the visible area to

While there is little differentiation between audio cell phone speech and passenger conversations, the Court may uphold a regulation short of a total ban of in-flight cell phone use - such as a volume or headphone regulation - as a reasonable regulation. Being that an airplane is not a traditional public forum, the government regulations only have to be reasonable. However, a total ban of cell phones when other, less drastic, regulations are available seems less and less reasonable.

those directly in front of the screen and present nothing but a black screen to those viewing from an angle. Id.