How Clean Is Too Clean?: The Purposes, Effects, and Constitutionality of Super Bowl "Clean Zones"

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I. INTRODUCTION

According to the well-known travel guide series *Lonely Planet*, Indianapolis, Indiana, is "[n]icknamed 'Nap Town'" and "is, truth be told, kind of snore-evoking."[1] In addition to its tame and apparently unexciting nature, on an average February day, temperatures in the city range from twenty-two to thirty-nine degrees Fahrenheit.[2] As is the case

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1. *Introducing Indianapolis*, LONELY PLANET, http://www.lonelyplanet.com/usa/great-lakes/Indianapolis (last updated Sept. 22, 2008).

2. *Monthly Weather for Indianapolis*, WEATHER CHANNEL, http://www.weather.com/outlook/travel/businesstraveler/wxclimatology/monthly/graph/USIN0305 (last visited Feb. 23, 2012).

with most cities, "Nap Town" has a number of no-frills motels, which aim to appeal to the low-budget visitor to the city by offering low rates.[3] One such motel, the America's Best Value Inn, for example, normally charges around $46 per night in the winter months.[4] In order to keep prices low, this particular motel seems to cut corners on cleanliness and maintenance, as evidenced by online reviewers complaining that "[t]he shower fixtures were hanging off the wall"[5] and "[t]he door . . . smell[ed] heavily of mold."[6] These same reviewers suggest that the Inn "[s]hould be condemned"[7] and that "[i]f you absolutely need somewhere to stay one night because you've been homeless for 30 years . . . you [should] take your money elsewhere."[8] However, shockingly, during the weekend of February 3 through February 5, 2012, rooms at the America's Best Value Inn in Indianapolis were being rented for the staggering price of $950 per night.[9] The owners of this establishment, and many others like it, have one event to thank for this astronomical increase in revenue—the National Football League's (NFL or League) 46th Super Bowl.[10]

The game between the New York Giants and New England Patriots, which was held at Indianapolis' Lucas Oil Stadium on February 5, 2012, was not only "the most-watched television show in U.S. history,"[11] but it also brought an estimated 150,000 visitors to the City.[12] Fans and corporations, in turn, spent approximately $150 million in the area during the first weekend in February.[13] According to economists, this infusion of spending on everything from food and hotel rooms—like those at the America's Best Value Inn—to entertainment and retail

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3. *Indianapolis Hotels & Hostels*, LONELY PLANET, http://hotels.lonelyplanet.com/Indiana/Indianapolis-r1976554/?lpaffil=dest-hav-hotels (last visited Oct. 25, 2012).

4. Jennifer Carmack, *Hotel Prices Skyrocketing for Super Bowl Weekend*, WTHR.COM INDIANAPOLIS (Jan. 10, 2012, 10:08 AM), http://www.wthr.com/story/15991136/hotel-prices-skyrocketing-for-super-bowl-weekend.

5. Joanne, Review of *America's Best Value Inn—Indy South*, *"The Hotel Was Super Dirty and Filthy,"* GOOGLE (Feb. 8, 2012), https://plus.google.com/103055414397491345015/about?gl=US&hl=en-US#103055414397491345015/about?gl=US&hl=en-US.

6. Gunnar, Review of *America's Best Value Inn—South Indy*, *"This Place Is Worth About 1/10th of What I Paid,"* GOOGLE (Nov. 4, 2011), https://plus.google.com/103055414397491345015/about?gl=US&hl=en-US#103055414397491345015/about?gl=US&hl=en-US.

7. Joanne, *supra* note 5.

8. Gunnar, *supra* note 6.

9. Carmack, *supra* note 4.

10. *Id.*

11. Richard Deitsch, *Super Bowl XLVI Sets Viewership Records*, SI.COM (Feb. 6, 2012, 3:05 PM), http://sportsillustrated.cnn.com/2012/football/nfl/02/06/tvratings.record/index.html.

12. J.K. Wall, *Super Bowl Payoff Substantial, But May Fall Short of Hype*, IBJ.COM (Feb. 4, 2012), http://www.ibj.com/super-bowl-payoff-substantial-but-may-fall-short-of-hype/PARAMS/article/32437.

13. *Id.*

merchandise, means that the long-term financial impact of the Super Bowl on the city was between $100 and $400 million.[14]

Because of the huge economic benefits of the game, and the publicity that comes with being the focal point of American sports and culture for the period leading up to the Super Bowl, many cities throughout the country vie for the right to play host each year.[15] In order to be successful, these cities must convince the NFL that they can provide the space, security, and amenities that are necessary to make the game and the surrounding environment as successful as possible.[16] While proving that it has well-equipped stadiums and a well-run police department lends support to a city's claim that it would be able to handle the influx of visitors, the NFL has also recently required cities bidding for the right to host the Super Bowl to take actions that ensure that the League and its official sponsors can profit as much as possible from the game.[17] Specifically, the NFL has worked with potential host cities to limit the extent to which individuals, companies, or groups that are not officially affiliated with the league can advertise or conduct business near the game site.[18]

Under the NFL's direction, the last two host cities, Arlington, Texas, and Indianapolis, Indiana, passed ordinances in anticipation of the Super Bowl, under the NFL's direction.[19] The Arlington law, in effect for only two weeks, prohibited outdoor advertising and "sale or distribution of merchandise" that was "visible from any public street" within the area surrounding Cowboys Stadium, where the 2011 game was held.[20] The Indianapolis ordinance, however, is not limited in either time or space to a single event.[21] Instead, it includes a laundry list of major sporting events that may take place in the City in the future to which the restrictions may apply[22] and allows a "license administrator" to set the physical bounds where the law would apply to any such covered event.[23] Within the applicable areas during any such event, the law prohibits

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14. *Id.*
15. *See* Adriana Lopez, *New Orleans Is Stepping Up its Game for Super Bowl XLVII*, FORBES.COM (Oct. 9, 2012, 12:48 PM), http://www.forbes.com/sites/adrianalopez/2012/10/09/new-orleans-is-stepping-up-its-game-for-super-bowl-xlvii.
16. ARLINGTON, TEX., ORDINANCE 10-095 (2010).
17. *Id.*
18. *Id.*
19. *Id.*; DEP'T OF CODE ENFORCEMENT, CITY OF INDIANAPOLIS, SUPER BOWL XLVI: DEP'T OF CODE ENFORCEMENT INFORMATION PACKET (2011).
20. ARLINGTON, TEX., ORDINANCE 10-095.
21. INDIANAPOLIS, IND., REV. CODE ch. 986, art. 1, § 986-104(c) (2011).
22. *Id.* § 986-110(a).
23. *Id.* § 986-110.

"temporary advertising [or] signage" and bans "transient merchant[s], [or] vendor[s]" unless such advertisers, merchants, or vendors obtain the approval of the event sponsor, such as the NFL.[24] Generally, laws such as the Arlington and Indianapolis ordinances create so-called "clean zones" and ensure that only league-approved vendors and establishments can fully capitalize on the event in the vicinity of the host stadium.[25]

Although councils and legislative bodies in cities competing for the right to host major sporting events, such as the Super Bowl, are understandably giddy with the prospect of infusing their local economies with hundreds of millions of dollars in such small periods of time, the means by which localities have recently restricted advertising and merchandising during these events raise serious constitutional concerns. First, both the Arlington and Indianapolis ordinances restrict what the United States Supreme Court has referred to as "commercial speech."[26] While the Court affords less protection to commercial speech, government limitations on such expression are still subject to an intermediate degree of constitutional scrutiny under the First Amendment.[27] The applicable test requires that the government show that any such restriction furthers a "substantial" interest and does not apply in an overly broad manner.[28] Because of their wide-ranging and sometimes undefined scope, the so-called "clean zone" laws discussed herein are suspect under this doctrine.

Additionally, and more generally, the Supreme Court has stated that overly vague laws can violate the Fourteenth Amendment's Due Process Clause if they fail either to define the conduct that they prohibit or to make citizens aware of what activity is and is not permitted.[29] Again because of their broad and unclear nature, clean zone laws may run afoul of this provision as well.

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24. *Id.* § 986-101 (defining "clean zones" as areas where "no temporary advertising, signage, or structures shall be erected or transient merchant, vendor, or otherwise licensed activity may take place without the person or entity performing such activity first having received approval from the event sponsor").

25. Michael McCann, *As Super Bowl Week Commences, NFL's Clean Zones Still an Issue*, SI.COM (Jan. 30, 2012, 5:18 AM), http://sportsillustrated.cnn.com/2012/writers/michael_mccann/01/30/cleanzones/index.html#ixzz1lKU4R6Md.

26. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 561 (1980).

27. Sorrell v. IMS Health, Inc., 131 S. Ct. 2653, 2667-68 (2011).

28. *Id.*

29. *See, e.g.*, NAACP v. Button, 371 U.S. 415, 433 (1967). *But see* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES & POLICIES 941-43 (3d ed. 2006) ("[C]ourts are particularly troubled about vague laws restricting speech out of concern that they will chill constitutionally protected speech.").

In order to analyze the legitimacy of such laws, this Article will first examine the purposes, intended effects, and language of clean zone provisions, focusing specifically on those passed in anticipation of the 2011 and 2012 Super Bowls in Arlington, and Indianapolis, respectively. The Article will then discuss the potential policy-based and constitutional objections to such laws. In order to further illustrate the possible issues with the laws, the Article will also discuss the only substantial case brought against such laws thus far, *Williams v. City of Arlington*, which involves the Arlington ordinance and is currently before a United States district court in Texas.[30] Lastly, the Article will conclude that, based on the constitutional provisions and doctrines that apply, broad clean zone ordinances, such as those instituted in Arlington and Indianapolis, may be unduly restrictive of commercial speech, overly vague, and therefore constitutionally suspect.

II. CLEAN ZONES: PURPOSES, LEGITIMACY, AND LANGUAGE

City councilors are charged with protecting and improving the economic viability of their constituencies, and in their role as political leaders, they often look to take actions that will benefit their region, either socially or financially.[31] Therefore, as discussed briefly above, it is unsurprising that such community leaders would salivate at the idea of welcoming the Super Bowl, and the hundreds of millions of dollars and publicity that come with it, to their local economies.

Because the idea of hosting a Super Bowl is so attractive, competition among potential host sites is steep, and the NFL has various requirements for such bidders.[32] One such requirement is that the local city council assure the League that, if chosen, they will regulate advertising, sales, and distribution of merchandise around the host stadium during the time that the NFL plans to host Super Bowl-related events.[33] Legislative bodies do so by either banning such actions not connected with the NFL or by requiring additional permitting in order to conduct such activities.[34]

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30. First Amended Complaint at 8-9, Williams v. City of Arlington, No. 4:11-CV-093-Y (N.D. Tex. Apr. 21, 2011).

31. *See Citizens Boards and Commissions*, ARLINGTON, TEX., http://www.arlingtontx.gov/boards/index.html (last visited Oct. 2, 2012).

32. *See* ARLINGTON CITY COUNCIL, STAFF REPORT, CLEAN ZONE IN SUPPORT OF SUPER BOWL XLV (Dec. 7, 2010), *available at* http://arlingtontx.granicus.com/MetaViewer.php?view_id=2&clip_id=720&meta_id=83733; McCann, *supra* note 25.

33. ARLINGTON CITY COUNCIL, *supra* note 32.

34. *Id.*; McCann, *supra* note 25.

A Why Clean Zones?

Supporters of clean zone legislation and the NFL claim that such regulations are necessary to ensure the safety and comfort of patrons attending the Super Bowl.[35] Specifically, the League claims that in the past when cities have not closely regulated outdoor advertising, sales, and temporary structures, there have been "pedestrian and vehicular traffic issues" causing safety concerns.[36] At first glance, it is logical that increased sales and advertising in a relatively small area surrounding an arena or stadium could result in increased traffic and driver distraction. However, the number of people and vehicles in the area during a major event would already be astronomical, considering the fact that Cowboys Stadium in Texas, for example, can hold over 100,000 people.[37] Therefore, it is far from obvious that non-League-affiliated advertising would noticeably increase traffic or pedestrian congestion around the site of a Super Bowl.

Secondly, and more compellingly, regulations limiting advertising and sales not approved by the NFL benefit the League, its business partners, and, to some extent, consumers by preventing unlicensed merchants from selling merchandise near the event and suggesting, or overtly claiming, a business or endorsement connection to the League or the game that does not actually exist. Clean zones allow the NFL and other intellectual property owners to more effectively police and combat unauthorized use of their copyrights and trademarks in the areas around their most prestigious and financially beneficial events. Infringing uses of copyrights and trademarks on advertisements and merchandise near event sites, often referred to as "ambush marketing," can result, in addition to economic loss to the intellectual property owner, in consumers purchasing products under the incorrect assumption that the NFL has approved their quality and can also affect the income of those companies or individuals that have paid to have an actual relationship with the League.[38] However, while knowing that items sold within the

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35. ARLINGTON, TEX., ORDINANCE 10-095 (2010).

36. *Id.* ("[T]he NFL has related to the City of Arlington experiences in other cities where failure to regulate temporary structures, outdoor sale/distribution of merchandise and temporary outdoor advertising displays visible from public streets in the vicinity of Super Bowl events resulted in . . . traffic and pedestrian safety problems . . . .").

37. *Cowboys' Party Pass Expands Stadium Capacity Beyond 100,000*, SPORTS BUS. J. DAILY (Aug. 3, 2009), http://www.sportsbusinessdaily.com/Daily/Issues/2009/08/Issue-219/Facilities-Venues/Cowboys-Party-Pass-Expands-Stadium-Capacity-Beyond-100000.aspx.

38. *See* McCann, *supra* note 25; Matthew Karmel, *NFL's Clean Zones Are Being Dragged Through the Dirt*, SPORTS BLAWG WITH FORDHAM SPORTS L.F. (Feb. 10, 2012), http://www.iplj.net/blog/archives/4239.

clean zone surrounding a Super Bowl are officially licensed may provide some quality assurances to consumers, the exclusivity also means that there is less economic competition and that prices for merchandise within the area will likely be higher than without the regulations in question.[39]

Regardless of the legitimacy of the NFL's concerns, cities involved in the bidding process to host the Super Bowl have acquiesced—specifically, Arlington in 2011 and Indianapolis in 2012. An examination of the stated motivations behind these two most recent laws, the language that they use, and the possible policy-based objections to them further illustrates the effect of clean zone ordinances and aids in the analysis of their constitutional legitimacy.

B. Arlington, Texas—Ordinance 10-095 and the 2011 Super Bowl

The City of Arlington began the process of convincing the NFL to bring the 2011 Super Bowl, which crowned the champion of the 2010 League season, to north Texas as early as 2007, before the current Cowboys Stadium was built and long before anyone had an inkling as to what two teams would participate in the game.[40] As part of this early bidding process, the City Council passed a resolution promising to fully support the League's efforts to make the 2011 event successful, if it were to be held in their City.[41] Eventually, in 2010, after the NFL agreed to host the game at the mammoth new Cowboys Stadium, and in keeping with their earlier promises, the Council unanimously passed an ordinance establishing so-called "clean zones" surrounding the stadium during the period before, during, and after the Super Bowl.[42]

The Arlington ordinance begins by reciting a number of factual findings and statements regarding the benefits of hosting the Super Bowl.[43] Echoing the rationales for clean zone laws discussed above, the ordinance states, "[A]s recognized by the Texas Legislature, the North Texas Region hosting Super Bowl XLV and its related Super Bowl Activities [sic] will generate goodwill, enhance worldwide renown and prestige of the City of Arlington, create temporary jobs and create substantial beneficial economic and fiscal activity."[44] The law then

39. McCann, *supra* note 25.
40. ARLINGTON, TEX., ORDINANCE 10-095.
41. ARLINGTON CITY COUNCIL, *supra* note 32.
42. ARLINGTON, TEX., ORDINANCE 10-095; *see also* ARLINGTON CITY COUNCIL, *supra* note 32.
43. ARLINGTON, TEX., ORDINANCE 10-095.
44. *Id.*

continues by stating the need for clean zone restrictions in order to "promote and protect good order and aesthetic quality and to protect the safety and convenience of drivers and pedestrians in and around [Cowboys Stadium] relating to Super Bowl XLV and its related Super Bowl Activities."[45]

After officially stating the legislative purposes and motivations for the law, the relatively short ordinance proceeds to limit its own application in time and space.[46] Specifically, Section II states that the following provisions only apply "[w]ithin the area surrounding Cowboys Stadium Major Sports Complex," an area that is explicitly marked off on an attached map—and "during the period beginning at 12:01 a.m. January 23, 2011 through and until 12:01 a.m. February 7, 2011."[47]

Section II then sets out the most important provisions of the Arlington law, prohibiting three types of displays or activities within the newly created zone.[48] First, the ordinance states that the "construction, placement, occupation or use of any temporary structure"—such as "temporary retail locations [or] tents"—"visible from any public street" within the relevant area will constitute prohibited "outdoor festival" for purposes of City law, effectively banning such "structures."[49] Next, the law prohibits "outdoor sale or distribution of merchandise . . . to the public visible from any public street" in the zone and notes that the term "merchandise" should be understood in its "broadest sense."[50] The only exception to this prohibition is "merchandise sold or distributed in the ordinary course of business at a location" licensed by the City.[51] Thirdly, and most importantly for purposes of the constitutional analysis to follow, the ordinance restricts "outdoor advertising displays," which includes "portable signs, flags, banners, video screens . . . inflatables and building wraps" among other types of materials, that are visible from public streets.[52] These displays are only allowed if expressly permitted by other sections of the City Code relating to zoning and sports complexes, which only apply in this context in very limited and unlikely circumstances.[53]

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45. *Id.*
46. *Id.*
47. *Id.* § II.
48. *Id.*
49. *Id.* § II(1).
50. *Id.* § II(2).
51. *Id.*
52. *Id.* § II(3).
53. *Id.*

After effectively prohibiting temporary structures, distribution of merchandise, and outdoor advertising visible from public streets within the clean zone, the ordinance states that a violation of its terms is a misdemeanor and carries a maximum fine of $500.[54] Perhaps looking to fend off potential legal attacks—such as those discussed later in this Article—the law also explicitly restates the City Council's concern for "the health, safety and welfare of the general public" in passing the restrictions.[55] Lastly, because of the ordinance's explicit prohibition of public advertising and merchandise distribution as opposed to some type of licensing scheme, the ordinance provides an "Exclusion" for Cowboys Stadium itself from its restrictions.[56] This exclusion ensures that the law, which was meant, at least in part, to protect the NFL's ability to capitalize off the event, allows the League to engage in the activities that bar potential competitors from profiting.

Overall, the Arlington clean zone ordinance is very straightforward and succinct. The law generally prohibits distributing merchandise, advertising, or setting up temporary structures visible to the public near the Super Bowl site, unless such activities are part of a previously existing business.[57] The ordinance does not create any special licenses to allow such activities within the zone and it only applied in a very small geographic area over a roughly two-week period.[58]

Conversely, the City of Indianapolis, which hosted the 2012 Super Bowl, opted for a more wide-ranging and complex system of permits and administrators,[59] which may raise even more legal and constitutional concerns than the Arlington law.

C. Indianapolis, Indiana—Chapter 986 and the 2012 Super Bowl

Facing the same NFL demands and potential financial effects discussed above, the Indianapolis-Marion County "City-County Council" devised a clean zone system that dwarfs the Arlington law both in intricacy and potential effect.[60] In fact, the Indianapolis law, Chapter 986 of the Code of Ordinances, which was passed on August 15, 2011, is so complex and wide-ranging that the City Department of Code Enforcement prepared a forty-four-page "Information Packet" explaining

54. *Id.* § III.
55. *Id.* § VI.
56. *Id.* ex. A ("Exclusion").
57. *See* ARLINGTON, TEX., ORDINANCE 10-095.
58. *Id.*
59. *See* INDIANAPOLIS, IND., REV. CODE ch. 986, art. 1 § 986-201 (2011).
60. DEP'T OF CODE ENFORCEMENT, *supra* note 19.

the practical implications of the newly-created clean zones to local businesses in anticipation of the 2012 Super Bowl.[61] This packet explained that the new ordinance was necessary to "provide[] Indianapolis businesses with legitimate opportunities to capitalize on their assets during special events, while also protecting the long term interests of neighborhoods and residents."[62] As opposed to the Arlington City Council, the Indianapolis government seems to have more explicitly embraced the economic and business-related rationale for clean zones, evidenced in part by the fact that the information packet mentions neither public safety nor traffic concerns as motivations for the law.[63] This focus on economics as the primary purpose behind the Indianapolis ordinance may also help to explain why the Council opted for a more complex system of permits and permissions as opposed to an almost absolute prohibition on certain activities.[64] If the City was most concerned about traffic and pedestrian congestion, then an outright ban on the activities involved seems more reasonable, but if the goal is economic efficiency and financial benefit, then a balancing of interests and some allowances makes sense.

Chapter 986 begins by defining a number of relevant terms.[65] Most importantly, of course, for this analysis, is the phrase "clean zone," which is first described as a "geographically defined area within a special event zone during a civic sponsored special event."[66] The definition then continues to state that "temporary advertising, signage, or structures" as well as "transient merchant[s], vendor[s], [and] otherwise licensed activity" are prohibited within these zones, unless the party taking part in such activities has "received approval *from the event sponsor*" as well as a "limited duration license" from the City-County government.[67] As will be discussed later, this definition provides immense power to the "event sponsor"—in the context of the 2012 Super Bowl, the NFL—and may raise constitutional and policy issues regarding the propriety of granting such authority to a private party.

After defining the relevant terms, the ordinance proceeds to explain what types of events are considered "civic sponsored" and thereby

61. *Id.*
62. *Id.* at 3.
63. *See id.*
64. INDIANAPOLIS-MARION COUNTY, IND., CODE OF ORDINANCES ch. 986, art. 1, § 986-101 (2011), *available at* http://library.municode.com/index.aspx?clientId=12016&stateId=14&stateName=Indiana.
65. *Id.*
66. *Id.*
67. *Id.* (emphasis added).

entitled to "clean zone" protection.[68] Chapter 986 first lists six annual events, among them the Indiana State Fair, the St. Patrick's Day Parade, and the "Indiana Black Expo concert," which carry the "civic sponsored special event" designation each year.[69] In addition to these annual occurrences, the law prospectively designates a number of potential future sporting events as "civic sponsored," "during any year in which they are to be held in the city."[70] These include any National Collegiate Athletic Association (NCAA) championships, Big Ten Conference championships, National Basketball Association (NBA) and Women's National Basketball Association (WNBA) championships or All-Star events and, finally, the NFL Super Bowl, Pro Bowl, or draft.[71] All "official related events" associated with these competitions are also automatically entitled to the label.[72] Lastly, the City's mayor has the power to grant the "civic sponsored special event" label to other future events "at his or her sole discretion."[73] The ordinance states that this flexibility is intended to "retain[] the ability to attract additional events to the city," illustrating the importance of clean zones to event sponsors, producers, and leagues.[74]

Once an event has obtained the "civic sponsored" label, the City must determine the boundaries and duration of the event's clean zones.[75] Chapter 986 grants this responsibility, and power, to the "license administrator,"[76] the individual in charge of the County "Bureau of License and Permit Services."[77] The "license administrator" is instructed to consult with the public safety and public works departments when deciding where and when the zones will be effective, and may designate as many such areas around a "civic sponsored special event" as he or she sees fit.[78]

After explaining what events warrant clean zone protection and how the specific zones are created, the ordinance proceeds to list otherwise prohibited activities (based on the definition of "clean zone" discussed above) that the license administrator may allow within the designated

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68. *Id.*
69. *Id.* ch. 986, art. 1, § 986-104(a).
70. *Id.* ch. 986, art. 1, § 986-104(b).
71. *Id.*
72. *Id.*
73. *Id.* ch. 986, art. 1, § 986-104(c).
74. *Id.*
75. *Id.* ch. 986, art. 1, § 986-110(b).
76. *Id.*
77. *See id.*
78. *See id.*

areas by granting a "limited duration license" (LDL).[79] However, as the definitions section also states, these licenses are "subject to the approval of the event sponsor."[80] Activities that are allowed if an individual or entity has the event sponsor's approval and receives an LDL include outdoor distribution and sale of "marketing or promotional items, merchandise, food [and] souvenirs," the use of outdoor signs or displays, and the use of previously vacant structures.[81] In the section describing activities permitted by an LDL, the ordinance also makes clear that the restrictions on merchandise and food sale and distribution do not apply to stores or restaurants that provide such food or merchandise "in the ordinary course of business" and have been in "continuous operation for more than thirty days prior to the start of a licensed special event."[82] This exception, however, does not affect the prohibition on outdoor advertising, which does apply to preexisting establishments.[83]

After describing the types of activities allowed with an LDL and explaining the application and approval process for such licenses, the ordinance sets out penalties for violating its provisions.[84] First, any person found in violation may be fined a predetermined amount based on the Code of Ordinance's general penalty language, which applies to many of the Code's sections.[85] Additionally, and probably most importantly to event sponsors such as the NFL, Code Enforcement Officers and police officers are instructed to seize any "illegal, non-licensed, or unauthorized merchandise," whether or not the individual selling or offering such merchandise has an LDL.[86] Lastly, any "Indiana Law Enforcement Academy certified officer" working for the event sponsor (such as off-duty police officers) is authorized to "inspect the merchandise of licensed entities related to copyright infringement and trademark violation."[87]

D. Problems and Concerns

The benefit of clean zones to event sponsors and affiliated companies is quite obvious: such entities maintain an exclusive market on event-related merchandise and maximize their resultant profits.

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79. *Id.* ch. 986, art. 2, § 986-201(a).
80. *Id.* ch. 986, art. 2, § 986-203(b).
81. *Id.* ch. 986, art. 2, § 986-201(a)(1).
82. *Id.*
83. *Id.*
84. *Id.* ch. 986, art. 4, § 986-401(b)-(c).
85. *Id.* ch. 986, art. 4, § 986-401(a); *id.* ch. 103, art. 1, § 103-3.
86. *Id.* ch. 986, art. 4, § 986-401(b)-(c).
87. *Id.* § 986-401(b).

Similarly, the benefits to municipalities that pass these ordinances are substantial, because such laws attract event sponsors, such as the NFL, and their sizable economic impacts. Legal clean zones also arguably provide some public safety protection, by preventing a madhouse of unlicensed and unregulated advertisement surrounding event sites.[88] However, a number of aspects of clean zone ordinances, specifically the Arlington and Indianapolis laws discussed above, raise significant policy-based and philosophical concerns.[89]

First, the laws grant a high degree of power to private organizations such as the NFL to either help enforce or help create the restrictions on merchandising and advertising.[90] In Arlington, under the NFL's direction, the City Council banned almost all such activity that was not already in place around Cowboys Stadium to allow the League to reap as much of the financial benefit of the Super Bowl "brand" as possible.[91] Similarly, in Indianapolis, the City-County Council granted the NFL, and other future event sponsors, the right to participate in an influential way in the permitting process, by either approving or rejecting applications for LDLs within designated clean zones.[92] This type of private influence under color of law raises the distinct possibility of arbitrary or even discriminatory decision making. To this point, the NFL and other private entities are not bound by the same political and legal restrictions that guide public officials regarding the processes and criteria that must be used in determining who will and will not be issued the relevant permits or where the boundaries of the zones ought to be located.

Similarly, while the Arlington City Council set the boundaries of the clean zone for the 2011 Super Bowl in the ordinance itself, the Indianapolis law left that right and responsibility, as to the 2012 Super Bowl and any future "civic sponsored special events," to a bureaucrat within the City-County government.[93] This again raises the concern that such zones may be designed arbitrarily or otherwise improperly, because the "license administrator" is not under the same political and public pressure as legislators, even city councilors.

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88. McCann, *supra* note 25.

89. As stated earlier, the ordinances also raise serious constitutional concerns, which will be addressed in the following sections. *See infra* Part III.

90. INDIANAPOLIS, IND., REV. CODE ch. 986, art. 1, § 986-104 (2011); McCann, *supra* note 25.

91. McCann, *supra* note 25.

92. *Id.*

93. INDIANAPOLIS-MARION COUNTY, IND., CODE OF ORDINANCES ch. 986, art. 1, § 986-110(b) (2011).

Lastly, as discussed above, both the Arlington and Indianapolis ordinances limit competition in the market for merchandise and food physically located near the relevant event site.[94] This fact means that the NFL and its partners will likely serve as the only source for such products and, as a result, consumers will be forced to pay artificially high prices in the area.[95] While the event sponsors and the city as a whole may benefit financially from the clean zones, the economic implications of the laws on individual consumers ought not to be ignored.[96]

Generally, clean zone ordinances provide understandable incentive to private event sponsors to bring their competitions and performances to cities with such laws. However, the regulations provide immense power to such private actors, create the potential for arbitrary and perhaps discriminatory enforcement and application, and affect the market that consumers face in the physical area surrounding large-scale special events. While these concerns should give legislators pause when considering such proposals in the future, the ordinances also face significant, and potentially fatal, constitutional issues based on the First and Fourteenth Amendments and the degree to which they restrict protected speech.

III. CONSTITUTIONAL CONCERNS

Clean zone statutes and ordinances implicate a number of constitutional doctrines rooted in the First and Fourteenth Amendments to the United States Constitution. Specifically, the laws are suspect under the Supreme Court's "commercial speech" doctrine as well as the Due Process-based prohibition on overly vague laws.[97]

A. *Commercial Speech and the First Amendment*

The First Amendment to the United States Constitution, which applies to the states through the Fourteenth Amendment,[98] commands that "Congress shall make no law . . . abridging the freedom of speech."[99] In interpreting and applying this provision, the Supreme Court has repeatedly employed a system of various levels of scrutiny to evaluate whether state or federal laws infringing on speech are constitutionally

94. McCann, *supra* note 25.
95. *Id.*
96. *See id.*
97. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 561 (1980).
98. U.S. CONST. amends. I, XIV.
99. *Id.* amend. I.

permissible.[100] As part of this system of analysis, for example, the Court has emphasized that content-based regulations must satisfy a higher level of scrutiny than content-neutral laws[101] and that certain types of speech are entitled to less or, in the case of obscenity, no constitutional protection.[102] Another aspect of the Court's analysis, and that which is most relevant to the constitutionality of clean zone laws is the so-called "commercial speech doctrine."[103]

In its seminal commercial speech case, *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, the Court stated that other than false commercial speech or speech concerning illegal activities, which the government has the authority to ban, its past precedents had "rejected the highly paternalistic view that government has complete power to suppress or regulate commercial speech."[104] However, the Court also highlighted the appropriate and "commonsense distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech."[105] In essence, *Central Hudson* recognized that truthful commercial speech—that is, speech proposing a transaction—is protected by the First Amendment if proposing legal products or services, but laws that restrict such speech are subject to a lower standard of review than prototypical content-based regulations.[106]

After determining that commercial speech is subject to a lesser degree of scrutiny, *Central Hudson* specified its standard, setting out a test for determining whether a restriction on such speech violates the constitution.[107] First, under the *Central Hudson* test, an evaluating court must determine whether the speech being restricted concerns lawful activity and is not misleading, as to bring it within the Amendment's protection.[108] If the speech is protected, then the government must show that the regulation furthers a "substantial" government interest.[109] Lastly, if the government's interest is deemed to be "substantial," the law must

100. *See Cent. Hudson*, 447 U.S. at 573; R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992); Roth v. United States, 354 U.S. 476, 485 (1957).
101. *R.A.V.*, 505 U.S. at 382.
102. *Roth*, 354 U.S. at 485.
103. *Cent. Hudson*, 447 U.S. at 562.
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.* at 566.
108. *Id.*
109. *Id.*

"directly advance[] [that interest]" and "not [be] more extensive than is necessary to serve" it, in order to be upheld.[110]

The Court has repeatedly applied the *Central Hudson* test, using it as recently as 2011 when invalidating a Vermont state law restricting the dissemination and use of pharmacy records to determine individual doctors' tendency to prescribe certain medications.[111] In that case, the Court reemphasized that "[u]nder a commercial speech inquiry, it is the State's burden to justify its . . . law as consistent with the First Amendment."[112] The Court also stated that the requirements that a restriction on commercial speech further a substantial government interest and that it not be overly broad, "ensure not only that the State's interests are proportional to the resulting burdens placed on speech but also that the law does not seek to suppress a disfavored message."[113]

It is important to note that the aspect of the *Central Hudson* test that asks whether the government's claimed interest is "substantial" enough to justify a commercial speech restriction is an example so-called "intermediate scrutiny."[114] Therefore, a "substantial" interest must fall somewhere in between the requisite governmental purpose under the easy-to-satisfy "rational basis" review and that required by the often insurmountable "strict scrutiny" analysis. Specifically, for example, the Supreme Court has recognized the government interests in reducing energy consumption,[115] improving or maintaining the aesthetics of a municipality, and, of course, public health and safety as "substantial" in the commercial speech context.[116]

Another aspect of the *Central Hudson* test that requires further explanation is the command that a regulation of commercial speech not be overly broad. In *Central Hudson* itself, the Court invalidated the statute in question because the government failed to "demonstrate[] that its interest [could not] be protected adequately by more limited regulation."[117] This language suggests that commercial speech restrictions are only proper when they represent the least restrictive option available to satisfy the government's objective. However, nine years later, the court held to the contrary in *Board of Trustees of State University of New York v. Fox*, when Justice Scalia wrote that

110. *Id.*
111. Sorrell v. IMS Health, Inc., 131 S. Ct. 2653, 2667-68 (2011).
112. *Id.* at 2667.
113. *Id.* at 2668.
114. Fla. Bar v. Went for It, Inc., 515 U.S. 618, 623 (1995).
115. *Cent. Hudson*, 447 U.S. at 568.
116. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 507-08 (1981).
117. *Cent. Hudson*, 447 U.S. at 570.

commercial speech restrictions are not "subject to a least-restrictive-means requirement."[118] While the least-restrictive-means test is inappropriate, according to *Fox*, the speech restriction must still be "narrowly tailored to achieve the desired objective."[119]

The Court seemed to swing back in the direction of applying a least-restrictive-means analysis in commercial speech cases in *Rubin v. Coors Brewing Co.*, six years after *Fox*.[120] In *Rubin*, Justice Thomas concluded, seemingly in direct contradiction of Justice Scalia's statements in *Fox*, that "the availability of . . . options . . . which could advance the Government's asserted interest in a manner less intrusive to . . . First Amendment rights, indicates that [the law in question] is more extensive than necessary."[121] Considering *Central Hudson*, *Fox*, and *Rubin* together, it appears that while government regulations of commercial speech must be narrowly targeted to satisfy a substantial objective, they *may* not be invalidated based solely on the fact that a city or state did not choose the absolute least restrictive option available.

In addition to being called into question under the First Amendment commercial speech doctrine, broad prohibitions on advertising and other similar expression can also run afoul of the Fourteenth Amendment's Due Process Clause.[122]

B. Vagueness, Speech Restrictions, and the Fourteenth Amendment

According to the Supreme Court, a law that is overly vague can violate the Fourteenth Amendment's Due Process requirement if "it . . . fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits," or if it "encourage[s] arbitrary and discriminatory enforcement."[123] Additionally, allegedly vague laws that restrict speech are especially suspect.[124] To this point, the Court has

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118. Bd. of Trs. v. Fox, 492 U.S. 469, 477 (1989).

119. *Id.* at 470, 480.

120. Rubin v. Coors Brewing Co., 514 U.S. 476, 491 (1995).

121. *Id.*

122. Normally, an undefined law that burdens speech would also be suspect under a First Amendment overbreadth analysis, which asks whether the restriction burdens more speech than allowed by the Constitution and allows plaintiffs to challenge the law based on its hypothetical application to others. *See, e.g.*, Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65-66 (1981); CHEMERINSKY, *supra* note 29, at 943-44. However, the Court has expressly held that overbreadth analysis is not applicable to commercial speech cases. *Fox*, 492 U.S. at 481. Were the Court to rethink this rule, the clean zone ordinances may be called into question as overbroad. However, based on the most recent cases on the subject, such as *Fox*, this does not appear to be an available avenue for an attack on the laws.

123. City of Chicago v. Morales, 527 U.S. 41, 56 (1999).

124. *Id.*

stated that "standards of permissible statutory vagueness are strict in the area of free expression," because the rights implicated "are delicate and vulnerable, as well as supremely precious in our society."[125] Similarly, the Justices have reasoned that "[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."[126]

As with the commercial speech analysis discussed above, a Fourteenth Amendment vagueness evaluation depends heavily on the narrowness and defined nature of any government regulation of commercial speech. If such a restriction applies, or could apply, in an overly broad or inconsistent manner, it may fail to provide sufficient notice to the public of what types of speech or expression it prohibits and therefore violate standards of Due Process.

The Arlington and Indianapolis ordinances passed in anticipation of the 2011 and 2012 Super Bowls are suspect under the constitutional standards discussed above, and if challenged, parts of each law may be held to violate different aspects of the Supreme Court's various tests. However, considering the cases referenced in previous sections, the Indianapolis law faces more significant constitutional concerns.

C. Arlington, Texas Ordinance 10-095 and Williams v. City of Arlington

The Arlington City Council's restrictions on "outdoor advertising displays" and distribution of merchandise explicitly implicate and restrict commercial speech, as the Supreme Court has defined the term: the City's law prohibits an individual from expressing his or her desire to offer goods or services to the public.[127] Therefore, the regulation must satisfy the Court's commercial speech test expounded in *Central Hudson* in order to comply with the First Amendment.[128]

As stated above, the first step in the *Central Hudson* analysis asks whether the particular speech targeted is lawful and proposes legal goods or services.[129] Because the clean zone ordinance prohibits all outdoor advertising visible from the street—as opposed to banning untruthful statements or those offering trademark-infringing or other illegal

125. NAACP v. Button, 371 U.S. 415, 432-33 (1963).

126. *Id.* at 433; *see* CHEMERINSKY, *supra* note 29, at 942 (discussing the Court's void for vagueness doctrine and its specific application to speech).

127. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 561-62 (1980); ARLINGTON, TEX., ORDINANCE 10-095, § II(1)-(2) (2010).

128. *Cent. Hudson*, 447 U.S. at 561-62.

129. *Id.* at 566.

merchandise—the speech involved falls within the Amendment's zone of protection.[130]

Next, in order to answer a claim that the law violates the First Amendment, the City would have to show that the law furthers a substantial government interest.[131] As discussed above, the Arlington ordinance itself, as well as a City Council staff report associated with the law, repeatedly reference public safety, traffic control, and aesthetics as the guiding forces behind the law.[132] Specifically, the ordinance describes the government's goal of "promot[ing] and protect[ing] good order and aesthetic quality and . . . protect[ing] the safety and convenience of drivers and pedestrians."[133] As stated earlier, the Supreme Court has repeatedly recognized that the government's interest in public safety and aesthetic quality are among the strongest justifications available and would almost certainly suffice to satisfy this prong of the *Central Hudson* test.[134]

The significant question as to the Arlington law's legitimacy relates to the last step of the commercial speech test—that is, whether the ordinance restricts more speech than is necessary to satisfy the substantial government interest involved.[135] To this point, the Arlington law simply bans all outdoor advertising visible from the street, with few exceptions.[136] In opting for an almost absolute ban on commercial speech within the zone, the Arlington City Council clearly bypassed licensing or permitting schemes, such as the one used by Indianapolis, which, although suspect for other reasons, would have been more narrowly tailored to protecting public safety and aesthetic quality.[137] Such a system could have allowed for evaluation of the effects of each proposed advertisement and an individualized determination of whether such a display would be allowed and would have helped to ensure that no more speech than necessary was restricted. Conversely, the fact that the city

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130. ARLINGTON, TEX., ORDINANCE 10-095, § II(3).

131. *Cent. Hudson*, 447 U.S. at 556.

132. ARLINGTON, TEX. ORDINANCE 10-095; ARLINGTON CITY COUNCIL, *supra* note 35.

133. ARLINGTON, TEX., ORDINANCE 10-095.

134. *See, e.g.*, Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 507-08 (1981). If a plaintiff were able to convince a court considering the constitutionality of the Arlington ordinance that the City Council was not concerned with public safety or aesthetic quality when passing the law, but instead simply wanted to give the NFL exclusive marketing rights in the area, then the government interest would be far less substantial. However, based on the language in the ordinance and the staff reports regarding the public safety concerns, this seems highly unlikely.

135. *Cent. Hudson*, 447 U.S. at 566.

136. ARLINGTON, TEX., ORDINANCE 10-095, § II(1)-(3).

137. *Id.*

chose the more heavy-handed approach suggests that the law fails the *Central Hudson* test and violates the First Amendment.[138]

However, such an analysis would be far more compelling if the Court accepted the "least-restrictive-means" analysis rejected by Justice Scalia in *Fox*,[139] but used by Justice Thomas in *Rubin*.[140] If a reviewing court were to follow *Rubin*, then the statute would likely fail, because there were other, less far-reaching ways that the City could have furthered its interests. If the reasoning in *Fox* controlled, however, the court would simply consider whether, considering the limits on the law and the other available routes the City could have chosen to protect public safety and aesthetic quality, the law was "narrowly tailored."[141] In this type of analysis, Arlington would be able to claim that the limits on the law, particularly the fact that the restrictions were only in effect for a two-week period and only covered a few city blocks, show that it is sufficiently narrowly tailored to survive intermediate scrutiny.[142]

While the standards that a reviewing court would apply to an evaluation of the Arlington ordinance under the Supreme Court's commercial speech doctrine are somewhat unclear, particularly with regards to the law's breadth, the restriction and others like it call into question First Amendment protections and would be suspect if challenged. Further, although the language of the law is clear in prohibiting the covered activities (i.e., outdoor advertising), which makes any Fourteenth Amendment-based claims more difficult, individuals may still be able to claim that it is vague or violative of Due Process based on discriminatory enforcement. In fact, in 2011, a man named Eric Williams brought a case directly questioning the Arlington clean zone regulations' constitutionality.[143]

Williams lives in Texas and, with the assistance of corporate sponsors and local radio personalities, devotes his time to campaigning to end bullying.[144] As part of this effort, Williams has a large bus, adorned with pictures of local radio personalities, all of whom, like Williams, are African American.[145] Williams takes this bus to local events and promotes his message.[146]

138. *Id.*
139. Bd. of Trs. v. Fox, 492 U.S. 469, 477 (1989).
140. Rubin v. Coors Brewing Co., 514 U.S. 476, 491 (1995).
141. *Fox*, 492 U.S. at 480.
142. ARLINGTON, TEX. ORDINANCE 10-095, § II.
143. McCann, *supra* note 25.
144. First Amended Complaint, *supra* note 30, at 8-9.
145. *Id.* at 9.
146. *Id.* at 8-9.

During the weeks leading up to and including the 2011 Super Bowl, Williams had an agreement with local and regional management of Best Buy, allowing him to park his bus in the store's lot near Cowboys Stadium and conduct a video game tournament.[147] Until the day of the Super Bowl, Williams did so without incident and even continued his campaigning when, on the day before the game, the very parking lot that he was in was used to hold a country music concert featuring large advertisements from Super Bowl sponsors.[148] However, on Super Bowl Sunday, February 6, 2011, despite the fact that the owner of the property where Williams was situated consented to his presence, an Arlington code enforcement officer confronted Williams on his bus.[149] The officer told Williams to leave the bus and, according to Williams, pointed to the pictures of the African American radio personalities and asked, "What's all this shit?"[150] Although Best Buy representatives tried to convince the officer that Williams should be allowed to stay, the officer was insistent that the bus be removed from the area, at one point stating that, according to Williams, "[T]he NFL had instructed the officers to get Mr. Williams' bus out of the area."[151] The confrontation ended when the code enforcement officer returned with police officers who, according to Williams, "approached with lights and sirens blaring" and walked towards the bus "with their hands on their guns, where their hands remained throughout" the encounter.[152] Williams eventually found his bus driver and left the area after being charged with "ambush marketing,"[153] despite the fact that Arlington ordinance 10-095 does not contain the word "ambush" or "marketing" anywhere within its provisions.[154]

Williams has levied a number of constitutional, contractual, and tort-based claims against the City of Arlington, the NFL, and individual teams and owners as a result of these events.[155] Among his claims are violations of the Fourteenth Amendment's Equal Protection Clause and the Constitution's Contract Clause based on alleged selective enforcement against him based on his race, as well as common law

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147. *Id.* at 9-10.
148. *Id.*
149. *Id.*
150. *Id.* at 10.
151. *Id.* at 10-11.
152. *Id.* at 11.
153. *Id.* at 11, 14.
154. ARLINGTON, TEX., ORDINANCE 10-095 (2010).
155. First Amended Complaint, *supra* note 30, at 12-18.

defamation and negligence.[156] However, most importantly for the purpose of analyzing clean zone ordinances' constitutionality in general, in his complaint, Williams argues that the ordinance and the enforcement violated his First Amendment free speech rights and his Fourteenth Amendment Due Process rights.[157]

While the prior discussion of First Amendment precedents already concluded that the commercial speech doctrine *might* threaten the Arlington ordinance's legitimacy on its face, Williams' specific free speech claim, based on its application in his circumstances, may be significantly stronger. Considering the requirement that the law is no broader than necessary to protect the substantial government interest in public safety and aesthetics, Williams could claim that his single bus parked in a privately owned parking lot posed no threat to either the safety of those around him or the aesthetic quality of the area. This could serve to illustrate that the law applied to far more speech and conduct than was necessary and push the court to hold it invalid as not sufficiently narrow.

Although the general analysis of the Arlington law above was focused on the potential First Amendment concerns, Williams also raises a legitimate question about the Due Process implications of the way the law was enforced during the two-week period in which it was effective.[158] According to Williams' complaint, on Saturday, February 5, the day before the Super Bowl and before the confrontation between Williams and the code enforcement officer, a concert was held in the same location, featuring large advertisements.[159] Williams also asserts that the advertisers, Coors Light and Plains Capital Bank, were official Super Bowl sponsors and were allowed to advertise and hold their event without interruption or controversy and, as noted earlier, that he was told that that the NFL had specifically requested that officers remove his bus.[160] However, the text of the ordinance simply and absolutely prohibits all such temporary outdoor advertising in the area, regardless of affiliation with an event sponsor or other group.[161] The fact that despite the broad language of the law, only Williams was punished for his activities in the parking lot, strongly suggests that the City applied the ordinance to those unaffiliated with the NFL and not to the League's

156. *Id.* at 12-17.
157. *Id.* at 12-14.
158. *Id.* at 13-14.
159. *Id.* at 10.
160. *Id.* at 10-11.
161. ARLINGTON, TEX., ORDINANCE 10-095, § II(2)-(3) (Dec. 7, 2010).

official sponsors.[162] This, in turn, may convince the court that Ordinance 10-095's structure and breadth "encourage[s] arbitrary and discriminatory enforcement" and therefore violates the Fourteenth Amendment Due Process Clause.[163]

Currently, Williams' case is before the United States District Court for the Northern District of Texas and has survived the defendants' motion to dismiss.[164] Although it may not address every facet of the constitutional arguments against clean zone legislation, the case could potentially result in the first judicial discussion of some of the issues that suggest that such laws may be invalid.

D. Indianapolis, Indiana, Chapter 986

While the Arlington clean zone ordinance can be questioned under the commercial speech doctrine, but may be constitutional, the Indianapolis law clearly appears to fail the *Central Hudson* test and likely does not comply with the Fourteenth Amendment vagueness standard, discussed above.[165]

First, because the Indianapolis law restricts outdoor advertisements and distribution of merchandise and does not differentiate between lawful and truthful advertising and illegal or misleading expression, much of the speech that it effects would be protected by the First Amendment.[166] Therefore the Indianapolis government would have to satisfy the *Central Hudson* test, first by showing a substantial government interest behind the restrictions.[167]

As opposed to its counterpart in Arlington, the relevant section of the Indianapolis Code does not discuss public safety or aesthetic quality.[168] In fact, the law makes little mention of the government interests involved in its passage, although it does at one point leave discretion for the mayor to designate further "civic sponsored special events" "[i]n the interest of retaining the ability to attract additional

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162. First Amended Complaint, *supra* note 30, at 10.

163. City of Chicago v. Morales, 527 U.S. 41, 56 (1999).

164. Order Denying in Part and Granting in Part Motions To Dismiss and Granting Leave To File Amended Complaint at 8-9, Williams v. City of Arlington, No. 4:11-CV-093-Y (N.D. Tex. Oct. 11, 2011).

165. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 561-62 (1980); U.S. CONST. amend. XIV.

166. INDIANAPOLIS-MARION COUNTY, IND. CODE OF ORDINANCES ch. 986, art. 1, § 986-101 (2011).

167. *Cent. Hudson*, 447 U.S. at 561-62.

168. DEP'T OF CODE ENFORCEMENT, *supra* note 19, at 3.

events to the city."[169] Similarly demonstrating the purely economic interests behind the Indianapolis law, the City-County Department of Code Enforcement's information packet summarizes the goals of the clean zone restrictions without mentioning public safety or aesthetic quality.[170] Based on these facts, the City-County government would likely face an uphill battle if it claimed that either of these were the driving force behind the law.

If a court rejected the claim that public safety or aesthetic quality were the government interests behind the clean zone regulations, the government would be forced to rely on the economic implications and effects of the law, perhaps based on the economic interest in bringing the Super Bowl and other events like it, and the hundreds of millions of dollars that come with some of them, to Indianapolis. However, the financial benefits of clean zone regulations to certain businesses within the city, while important, do not necessarily provide a significant enough government motivation to justify infringing upon protected speech. Traditionally accepted substantial interests, such as protecting public safety and aesthetic quality, implicate government's fundamental duties, while making a policy decision about which private entities to favor in the hopes of bringing an influx of money into a city's economy is a more nuanced, and perhaps less substantial, government goal.

However, if a court were to accept one of the City-County government's potential substantial interests—either public safety, aesthetic quality, the financial benefits, or any other interest—the law may still be suspect under the requirement that it be narrowly tailored to that interest. As opposed to the Arlington ordinance, the Indianapolis law sets up an intricate permitting and licensing system that allows the government to individually evaluate proposals for advertisements within a clean zone and decide whether or not to approve them.[171] This suggests that the law may be sufficiently narrow. On the other hand, though, the law also grants the event sponsor the discretion to block any applicants from advertising, without requiring the sponsor to explain or justify their decision.[172] This may lead a court to conclude that the system is not narrowly tailored to protect public safety or aesthetics—if the court had believed that either or both of those interests were involved—because the power granted to the private party is unrelated to those interests, but may

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169. INDIANAPOLIS-MARION COUNTY, IND., CODE OF ORDINANCES ch. 986, art. 1, § 986-104(c).
170. DEP'T OF CODE ENFORCEMENT, *supra* note 19.
171. *See supra* text accompanying notes 62-87.
172. *See supra* text accompanying notes 62-87.

be acceptable if the interest in financial benefit was deemed sufficiently "substantial," because providing this discretion to event sponsors is apparently particularly important for attracting money-making events.

Lastly as to the breadth of the restrictions, unlike the Arlington ordinance, the Indianapolis law applies to an unlimited number of potential and scheduled annual and one-time events within the City.[173] It is not limited in time or space, since the events can take place any time in the future and the actual boundary-setting responsibilities are left to a license administrator at the time that the event is scheduled.[174] These factors would also likely push a court towards finding that the potential application and effects of the law are overly broad and not narrowly tailored to any single substantial government interest.

While it is uncertain whether the permitting and licensing system for advertisements within clean zones in Indianapolis makes the law more "narrowly tailored" than an outright ban, and this perceived flexibility may benefit the government in a First Amendment evaluation, the system clearly opens the law up to serious challenges based on the prohibition on overly vague laws rooted in the Fourteenth Amendment's Due Process Clause.

Specifically, the delegation of authority to event sponsors, allowing them to reject applications, renders the standards for who will be granted the necessary permits to advertise in a clean zone completely undefined. In the language of the Supreme Court's precedents on the void for vagueness doctrine, the system put in place in Indianapolis "fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct" is allowed or prohibited.[175] In practice, an individual who would like to advertise a legal product or service within the clean zone created for a particular civic sponsored special event has no guidance as to what types of vendors, merchants, products, or services will be allowed to do so.

Additionally, the unfettered decision making authority granted to private event sponsors makes it quite likely that the law will be applied in an "arbitrary and discriminatory" manner, which makes it contrary to Due Process and unconstitutional.[176] Nothing in the law prevents an event sponsor from rejecting all applications submitted by those who would like to advertise in a clean zone around their event. In fact, it

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173. INDIANAPOLIS-MARION COUNTY, IND., CODE OF ORDINANCES ch. 986, art. 1, § 986-110(b).

174. *Id.*

175. City of Chicago v. Morales, 527 U.S. 41, 56 (1999).

176. *Id.*

would be bad business for such an entity to allow any such applications to proceed, because blocking all applications allows the sponsor to be the sole provider of advertising and merchandise in areas immediately surrounding their events. Alternatively, if an event sponsor decided to allow some advertising, nothing in the language of the regulations would prevent that sponsor from discriminating against any type of business, or person, in choosing which applications to approve.

Courts are especially suspicious of potentially vague laws that restrict speech.[177] Consequently, the broad and unconstrained discretion that the Indianapolis clean zone law grants to private entities holding special events to restrict who may solicit and distribute goods and services to the public may prove to be a fatal flaw in a constitutional analysis focused on the Fourteenth Amendment's Due Process requirement.

IV. CONCLUSION

Any time a single event has the potential to infuse hundreds of millions of dollars into a local economy; those representing that community should be interested and committed to bringing that often-needed money into their city. Similarly, the NFL's, and other event sponsors' concerns regarding consumer confusion and potential unlawful use of their trademarks and event property, and to a lesser extent the concern for traffic and public safety, are understandable. However, as illustrated by the constitutional analysis of the Arlington and Indianapolis laws above, when crafting ways to protect these sponsors' interests and lure them to town, local legislators must remain conscious of the legal constraints on their power. Specifically, when potential event sponsors request that new ordinances be passed restricting advertising and sales around the stadium, arena, or venue in question, cities must consider the First Amendment protections afforded to commercial speech and the potential that overly vague laws can violate constitutional due process.

In order to avoid constitutional questions, for example, cities could explicitly target unlawful trademark infringement, which can be banned without judicial scrutiny because commercial speech involving illegal products is unprotected. Such a prohibition would help protect the NFL's rational intellectual property concerns, while avoiding infringing on legitimate speech. Similarly, if a city or sponsor were concerned about public safety or aesthetic quality, a law could prohibit overly large or intrusive advertisements or provide for a system of permitting that

177. NAACP v. Button, 371 U.S. 415, 432-33 (1963).

involved individual evaluation of proposed advertisements. However, a city instituting such a system would have to avoid the prohibition on overly vague laws by, unlike Indianapolis in 2011, refusing to give the sponsor the absolute and unconstrained power to reject applications.

These suggestions represent a few ways in which municipalities can continue to attract major events and the resultant financial benefits within the bounds of constitutional legitimacy. However, until and unless American cities looking to host Super Bowls, all-star games, and championships are careful to consider the constitutional implications of the laws that they pass at the behest of event sponsors, such local actions will likely continue to be suspect based on a variety of permutations of the First and Fourteenth Amendments to the United States Constitution.