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CLEAN ZONES: THE DIRTY SIDE OF SUPER BOWL XLVI

Marc A. Albanese

Part I: Introduction

In 2010, the National Football League (NFL) generated nine billion dollars of revenue.¹ NFL Commissioner Roger Goodell expects that amount to exponentially increase in the future.² The NFL's Super Bowl has become a cultural and commercial phenomenon.³ The Super Bowl, originally played in 1967 at a half-empty L.A. Memorial Coliseum⁴, is entrenched in the American social scene.⁵ Almost 163 million Americans watch the game.⁶ Such high viewership leads to an increase in advertisement demand. With only 63 in-game commercial spots available, NBC—the game's 2012 broadcaster—sought 3.5 million dollars per thirty-second spot.⁷

Not all interested companies can afford to purchase on-air Super Bowl spots. Wanting to capitalize on all revenue streams, the NFL offers non-television advertisement opportunities.⁸ For example, Visa is “The Official Payment Service of the NFL” and Sprint is “The Official

¹ Associated Press, *League, Players Disagree on Interpretation of Revenue Figures*, NFL.COM (March 21, 2011, 08:05 PM), <http://www.nfl.com/news/story/09000d5d81edda24/article/league-players-disagree-on-interpretation-of-revenue-figures>.

² Jake I. Fisher, *The NFL's Current Business Model and the Potential 2011 Lockout*, (May 4, 2010), <http://harvardsportsanalysis.files.wordpress.com/2009/09/the-nfl-business-model-and-potential-lockout.pdf>.

³ David Glisan, *The Superbowl As A Cultural Phenomenon*, SPORTS UNTAPPED, (Jan. 30, 2010), <http://www.sportsuntapped.com/the-superbowl-as-a-cultural-phenomenon-14102/>.

⁴ *Super Bowl Comparison: 1967 vs. 2012*, THE ORANGE COUNTY REGISTER, <http://www.ocregister.com/articles/game-337284-super-bowl.html?pic=1> (last visited Feb. 12, 2012).

⁵ Michael Jay Friedman, *Super Bowl Sunday an Unofficial Holiday For Millions*, U.S. DIPLOMATIC MISSION TO GERMANY, (Feb. 4, 2006), http://usa.usembassy.de/etexts/sport/feature_football1.htm.

⁶ Anthony Crupi, *NBC Super Bowl Ad Spots Selling for up to \$3.5 Mil. Each*, THE HOLLYWOOD REPORTER, (Sept. 6, 2011, 7:34 PM), <http://www.hollywoodreporter.com/news/nbc-super-bowl-ad-spots-231829>.

⁷ *Id.*

⁸ *Sponsors Opportunities*, TAMPA SUPER BOWL, http://tampabaysuperbowl.com/sponsor_opps.htm (last visited Jan. 21, 2012).

Wireless Provider of the NFL.”⁹ These companies pay large sums of money to gain sponsorship status.¹⁰ Such companies demand protection on their advertisements.¹¹ The NFL provides brand protection to these Super Bowl sponsors through “Clean Zones.”¹² In short, Clean Zones are designated areas that restrict or promote certain activities.¹³

The NFL uses Clean Zones to prevent non-sponsors from infringing upon sponsors’ advertisement spaces.¹⁴ A non-governmental entity does not have the power to establish and enforce these clean zone provisions.¹⁵ The NFL, a non-governmental entity, solves this problem by having local government committees enact ordinances establishing Clean Zones.¹⁶ With the city government’s help, the NFL is able to establish Clean Zones.

Part II of this comment provides background and describes Clean Zones.¹⁷ It articulates why the formation of a Clean Zone is in the mutual best interests of the NFL and the City of Indianapolis. Part III discusses the rights and protections of speech guaranteed by the First Amendment and why Indianapolis’s Clean Zone violates these rights.¹⁸ This paper then applies the *Central Hudson* Test to an on-going suit determining if such a Clean Zone ordinance is constitutional.

⁹ Andrew Morland, *Super Bowl Ads to Further Confuse Us on NFL “Official Sponsorship” Status*, KING MORLAND (Feb. 2, 2010), <http://www.kingmorland.com/2010/02/02/super-bowl-ads-to-further-confuse-us-on-nfl-official-sponsor-status/>.

¹⁰ Associated Press, *Bud Light to be Official Beer Sponsor*, ESPN.com (May 4, 2010, 6:45 PM), <http://sports.espn.go.com/nfl/news/story?id=5162445>.

¹¹ Kate Bosley, *Protecting Sponsorship Rights: the NFL and Clean Zone Ordinances Surrounding the Super Bowl*, Sport Law 101 (Feb. 6, 2012, 10:29 AM), <http://www.sportslaw101.com/2012/02/06/protecting-sponsorship-rights-the-nfl-and-clean-zone-ordinances-surrounding-the-super-bowl/>.

¹² For definition of clean zone refer to Part II.

¹³ Julie Taylor, *Rugby World Cup Clean Zones Explained*, The Daily Post (June 14, 2011, 9:45 AM), <http://www.rotoruardailypost.co.nz/news/rugby-world-cup-clean-zones-explained/1058871/>.

¹⁴ Bosley, *supra* note 12.

¹⁵ A non-government body is unable to enact public regulatory ordinances.

¹⁶ City of Indianapolis Prop. 188, 2011, June. 27, 2011.

¹⁷ See *infra* Part II.

¹⁸ See *infra* Part III.

Part IV explores the possibility and feasibility of a lawsuit through analyzing the case and controversy doctrinal requirements needed to sue in federal courts.¹⁹ Finally, Part V discusses how the NFL can achieve the aims of a Clean Zone without upsetting First Amendment Rights.²⁰ Part V also examines the effectiveness of a constitutionally valid Clean Zone for Super Bowl XLVI in terms of discouraging “guerilla” marketing.²¹

Part II: What is a Clean Zone?

A Clean Zone is a designated area near the Super Bowl venue that restricts activities.²² Clean Zones are not recent inventions. They have been installed at Super Bowls since 2001.²³ Clean Zones range in size from a few hundred feet to one mile in diameter.²⁴ Indianapolis defines its Clean Zone for Super Bowl XLVI as a set area within a special event zone that no temporary advertising, signage, or structures shall be erected or otherwise licensed activity take place without first having received approval from the event sponsors and a license from the bureau of license and permit services.²⁵

To illustrate, consider Mr. Eric Williams striking an agreement with a local Best Buy, situated in a Clean Zone, to park his van in their lot during Super Bowl weekend and host a video game tournament to raise funds for his charity.²⁶ Because the signs and activity lack approval

¹⁹ See *infra* Part IV.

²⁰ See *infra* Part V.

²¹ *Id.*

²² Natalia Contreras, *Arlington City Council Approves Super Bowl Clean Zone*, THE SHORTHORN (Jan. 13, 2011, 9:43 PM), <http://www.theshorthorn.com/index.php/news/citystate/402-arlington-city-council-approves-super-bowl-clean-zone>.

²³ Mike Brasfield, *'Clean Zones' Rile Some Business Owners*, ST. PETERSBURG TIMES (Feb. 21, 2003), http://www.sptimes.com/2003/02/21/news_pf/Grandprix/_Clean_zone__riles_so.shtml.

²⁴ Paul Ogden, *Indianapolis Downtown Businesses: Beware the Super Bowl "Clean Zone" Ordinance*, OGDEN ON POLITICS (July 11, 2009), <http://www.ogdenonpolitics.com/2009/07/downtown-businesses-beware-super-bowl.html>.

²⁵ City of Indianapolis Prop. 188, 2011, *supra* note 16.

²⁶ Bosley, *supra* note 12.

by the bureau of license and permit services and event sponsor, Mr. Williams receives a citation for “ambush marketing”.²⁷ This situation is not far-fetched. In actuality, these facts mirror the first case brought challenging the constitutionality of Clean Zones.²⁸ Mr. Williams brought this suit in response to the Arlington Clean Zone ordinance put in place during Super Bowl XLV and, after surviving dismissal motions, is set to be heard in a Texas District Court.²⁹ Because this paper focuses on the Indianapolis Clean Zone, the facts of Mr. Williams’s suit are applied against the Indianapolis Clean Zone.³⁰

Such a suit seems trivial; however, it raises a First Amendment red flag. The content of Mr. Williams’s speech and activity serves as the impetus behind the citation. The Supreme Court looks at such content-based restriction on commercial speech with intermediate scrutiny.³¹ Clean Zones seem benign and incidental on the surface. However, as seen in Mr. Williams’s situation, Clean Zones debilitate citizen’s Freedom of Speech as guaranteed by the First Amendment of the United State Constitution.³²

A: What are the Aims and Purposes of a Clean Zone?

The NFL provided safety justification in asking the cities of Dallas, Fort Worth, and Arlington to establish Clean Zones for Super Bowl XLV.³³ The NFL claimed in past Super

²⁷ *Id.*; Monika Diaz, *Businesses confused by Super Bowl 'clean zones'*, WFAA.COM (JAN. 29, 2011, 1:26 AM), <http://www.wfaa.com/sports/football/super-bowl/City-NFL-clean-zones-cause-confusion-for-business-owners-114845989.html>.

²⁸ Bosley, *supra* note 12.

²⁹ *Id.*

³⁰ Further adding credence to the analysis is that the Arlington and Indianapolis Clean Zones are very similar in nature.

³¹ *Central Hudson Gas & Elec. Corp. v. Public Service Comm’n*, 447 U.S. 557,573 (1980). Other content based restrictions on protected speech are viewed with strict scrutiny.

³² U.S.C.A. Const. Amend. I.; Hypothetical Restaurant Owner A was not allowed to advertise his business.

³³ Lara Pearson, *Super Bowl Clean Zones*, Brand Geek (Jan. 31, 2011), <http://brandgeek.net/2011/01/31/super-bowl-clean-zones/>. (Three cities had to comply because of their close proximity and to each other and the game and because Super Bowl themed events were held in each city. A list of a few events in the three cities can be seen at <http://www.thedallassoc.com/events/2011-super-bowl-parties-events-shindigs/>).

Bowl cities, the failure to regulate temporary structures, activities, and outdoor advertisement displays resulted in pedestrian and vehicular traffic issues negatively effecting public safety operations.³⁴

The relationship between Clean Zones and reduced safety issues is cloaked in superficial reasoning. The reasoning that links Clean Zones to increased public safety is flawed.³⁵ Clean Zones are installed to protect the NFL's sponsorship interests.³⁶ The NFL is a nine billion dollar business and companies spend hundreds of millions dollars to be affiliated with the Super Bowl and NFL.³⁷ Anheuser-Busch alone has brokered a sponsorship deal worth a reported one billion dollars.³⁸ Clean Zones have been installed to protect these sponsors from "ambush" or "guerilla" marketers.³⁹

Ambush or guerilla marketing is an unconventional way of marketing.⁴⁰ Such schemes are typically utilized by firms on a limited budget.⁴¹ In economic downturns, guerilla marketing is a popular way to advertise.⁴² The NFL has constantly battled these marketing tactics: In 1985, quarterback Jim McMahon was fined for wearing a headband whose company did not purchase advertising with the NFL.⁴³ At Super Bowl XLI, Brian Urlacher was fined \$100,000 dollars

³⁴ *Id.*

³⁵ See *infra* Part III.E.iii

³⁶ Bosley, *supra* note 12.; Ian McNulty, 'Clean' Zones Shield Super Bowl Fans from Commercial Pitches, ALLBUSINESS.COM, <http://www.allbusiness.com/marketing-advertising/advertising/894202-1.html> (last visited Jan. 21, 2012).

³⁷ *Bud Light to be Official Beer Sponsor*, *supra* note 10.

³⁸ *Id.*

³⁹ Bosley, *supra* note 12.

⁴⁰ *Small Business Encyclopedia: Guerilla Marketing*, Entrepreneur.com, <http://www.entrepreneur.com/encyclopedia/term/82168.html> (last visited Jan. 21, 2012).

⁴¹ *Id.*

⁴² Abby Johnson, *Get Ahead With Guerilla Marketing*, SMALLBUSINESSNEWZ.COM (Apr. 1, 2009, 12:37 PM), <http://www.smallbusinessnewz.com/topnews/2009/04/01/get-ahead-with-guerilla-marketing>.

⁴³ Charles Robinson, *NFL Shipwrecks Captain Morgan Campaign*, YAHOO! SPORTS (Nov. 12, 2009), <http://sports.yahoo.com/nfl/news?slug=cr-celekpose111209>.

for wearing a Vitamin Water hat during media day.⁴⁴ Vitamin Water was not an official NFL Sponsor.⁴⁵ In 2009, The NFL threatened fines if any player were to strike a pose resembling Captain Morgan's pirate logo.⁴⁶

Clean Zones are the NFL's latest attempt to quash guerilla marketing. A company that wants to advertise at the Super Bowl—but cannot afford to— may be able to “market” their product for much less through guerilla marketing.⁴⁷ For example, Company Z is a midsize firm that sells liquor. Its advertising budget does not allow the company to advertise during the Super Bowl. Yet, printing signs or a banner is relatively cheap. Therefore, company Z decides to give banners to all of the bars around the participating stadium reading: “Watch The Big Game Here With Z In Your Hand.” For the cost of ink and banners, Company Z will be exposed to the thousands visiting the area to watch the game. Compare that small cost to the millions of dollars that Company Y pays to the NFL to be “The Official Sponsor of the Super Bowl Parking Lot Experience.” Guerilla marketing appeals to companies because they receive substantial exposure for a fraction of the cost.⁴⁸

Guerilla marketing presents a problem to the NFL because companies can gain significant exposure without the assistance of the NFL. The NFL requires host cities to adopt Clean Zone Ordinances out of fear companies will resort to less expensive marketing tactics and take their money elsewhere.⁴⁹ Clean Zone Ordinances greatly limit—if not completely

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ McNulty, *supra* note 36.

⁴⁸ Kevin Leonard, *Clean Zones*, CLEANFAX (Dec. 29, 2011), <http://www.cleanfax.com/marketing-and-advertising/article/guerrilla-marketing>.

⁴⁹ Eriq Gardner, *Super Bowl Madness: 7 Legal Question*, THE HOLLYWOOD REPORTER (Feb. 5, 2012, 8:00 AM), <http://www.hollywoodreporter.com/thr-esq/super-bowl-patriots-giants-madonna-286924>. (Refer to Question 2 asking, “OK, I won’t throw a “Super Bowl” party. How about just holding a Madden video game contest in the parking lot of Lucas Oil Stadium?)

ban— guerilla marketing tactics such as temporary signage, mobile signage, street vendors, and “freebie give-aways.”⁵⁰ The NFL hopes that if ambush and guerilla marketers face municipal citations, they will cease such marketing practices similarly to how player’s ceased striking a “Captain Morgan” posed when threatened with fines.⁵¹ With the threat of guerilla marketing diminished via Clean Zones, the NFL hopes that sponsors will confidently give the league millions of dollars to become an official game sponsor.⁵²

B: Why Would The City of Indianapolis Adopt This Provision?

American cities aggressively bid to host the Super Bowl similar to how countries compete to host the Olympic Games.⁵³ Cities want to host the game because it brings prestige, attention, and a supposed economic boom.⁵⁴ During the Super Bowl’s forty-five year history, the game has been played in only thirteen American cities.⁵⁵ Super Bowl Host is a title that many cities seek but few hold. Indianapolis never hosted a game during the Game’s history.⁵⁶ Super Bowls are typically played in warm weather cities in the American South or West Coast that offer entertainment options.⁵⁷ Indianapolis does not fit that profile. In its 46th edition, the Super Bowl took place in Indianapolis, putting it in an exclusive group of cities.

The Super Bowl brings waves of publicity to a city. Thousands of media personnel

⁵⁰ See Generally City of Indianapolis Prop. 188,2011, *supra* note 16.

⁵¹ *NFL Sinks Captain Morgan Guerilla Marketing*, BOARD COMMUNICATIONS, INC. (Nov. 13, 2009, 2:49 PM), <http://boardroompr.com/blog/2009/11/13/nfl-sinks-captain-morgan-guerrilla-marketing-charitable-promotion-%E2%80%93-but-did-p-r-work/>.

⁵² See Generally Matt Higgins, *Post No Bills*, ESPN.COM (Feb. 18, 2010, 9:03 AM), <http://espn.go.com/action/news/story?id=4921916>; McNulty, *supra* note 36.

⁵³ Benjamin Levisohn, *Cities Compete for Super Bowl Cash*, ABC NEWS (FEB. 2, 2007), <http://abcnews.go.com/Business/FunMoney/story?id=2844676&page=1>.

⁵⁴ See *infra* note 37, note 40, note 45.

⁵⁵ James Alder, *Super Bowl Stadiums & Cities*, ABOUT.COM, <http://football.about.com/cs/superbowl/a/sbstadiums.htm> (last visited Jan. 21, 2012).

⁵⁶ *Id.*

⁵⁷ Jabber Head, *The Super Bowl’s Warm Weather Rule*, BLEACHER REPORT (June 16, 2010), <http://bleacherreport.com/articles/407096-the-super-bowl-and-the-warm-weather-rule>.

make the Super Bowl city the center of the sports world.⁵⁸ This coverage makes the Super Bowl a vehicle to showcase a city to the rest of the world.⁵⁹ Indianapolis, like Pittsburgh, is a Midwestern city and may utilize such exposure to project a diverse metropolis, not a gloomy rust or farm belt city.⁶⁰

Finally, hosting the Super Bowl brings economic gain.⁶¹ The Sports Management Research Institute estimated that \$463 million dollars was pumped into Miami's economy when hosting the game in 2007.⁶² Though some economists disagree with this high estimate, there is no argument that hosting the Super Bowl generates new revenue for the host city.⁶³

These three boons of hosting a Super Bowl—prestige, publicity, and economic gain—cause cities to do whatever necessary to be selected. Indianapolis, by its geography, does not make it an attractive locale to host a Super Bowl. The NFL wants to ensure that the host will promote a sponsor-friendly environment.⁶⁴ With Clean Zones becoming common-place during the last few Super Bowls, you *have* to include a Clean Zone Provision in a bid to be considered by the NFL.⁶⁵ This explains why the City of Indianapolis enacted such an ordinance and why Indianapolis was selected to play host to the game.

⁵⁸ Sarah Talalay, *Super Bowl: Economic Windfall or Hot Air*, THE SUN SENTINEL (Feb. 3, 2010), http://articles.sun-sentinel.com/2010-02-03/sports/fl-impact-super-bowl-0204-20100203_1_super-bowl-xliv-million-into-local-businesses-total-impact.

⁵⁹ Mike Sunnucks, *Tourism leaders react to Super Bowl XLIX coming to Arizona in 2015*, PHOENIX BUSINESS JOURNAL (Oct. 11, 2011, 1:37 PM), <http://www.bizjournals.com/phoenix/news/2011/10/11/tourism-leaders-react-to-super-bowl.html>.

⁶⁰ Associated Press, *Pittsburgh Uses Super Bowl to Showcase City to Nation*, PITTSBURGH TRIBUNE (FEB. 2, 2006), http://www.pittsburghlive.com/x/pittsburghtrib/s_419915.html.

⁶¹ Talalay, *supra* note 58.

⁶² *Id.*

⁶³ Jeff Ostrowski, *Super Bowl Economic Impact of \$400 million? That's Super-Inflated, Scholars Argue*, THE PALM BEACH POST (Feb. 4, 2010, 11:26 PM), <http://www.palmbeachpost.com/sports/super-bowl-economic-impact-of-400super-bowl-economic-impact-of-400-million-thats-206042.html>.

⁶⁴ See generally Diaz, *supra* note 27.

⁶⁵ Gardner, *supra* note 49. (Refer to Question 2 asking, "OK, I won't throw a "Super Bowl" party. How about just holding a Madden video game contest in the parking lot of Lucas Oil Stadium?")

Part III: Freedom of Speech Protections and Why Clean Zones Violate Them

The First Amendment to the United States Constitution spells out our sacred right to Freedom of Speech in that, “Congress shall make no law... abridging the freedom of speech.”⁶⁶ From a textual standpoint, the intent of the amendment bars government restriction of speech. Like many clauses and phrases in our Constitution, the application of the provision and right raises many practical questions and issues.

A: Government Action Requirement

The First Amendment’s protection of Free Speech is among the fundamental liberties secured by the Fourteenth Amendment.⁶⁷ Freedom of speech is “indispensable to the discovery and spread of political truth.”⁶⁸ The guarantee of speech freedoms is intrinsically tied to a liberal free market economy because, “the best test of truth is the power of the thought to get itself accepted in the competition of the market ...”⁶⁹ By removing government restraints on the flow and exchange of ideas, the First and Fourteenth Amendments allow citizenry to accept and utilize the good ideas and reject the poor ones.⁷⁰

The First Amendment bars the government dictating what we see, read, speak, or hear.⁷¹ Several exceptions to the rule against content discrimination are defined by the speech itself, and are justified by the speech's lack of positive value or potential harm.⁷²

⁶⁶ U.S.C.A. Const. Amend. I.

⁶⁷ *Schneider v. State of New Jersey*, 308 U.S. 147, 147 (1939).

⁶⁸ *Whitney v. California*, 274 U.S. 357, 375 (1927).

⁶⁹ *Abrams v. United States*, 250 U.S. 616, 629 (1919).

⁷⁰ *Cohen v. California*, 403 U.S. 15, 24 (1971) (“it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.”).

⁷¹ *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245 (2002).

⁷² National Endowment of the Arts, *Freedom of Expression*, <http://www.csulb.edu/~jvancamp/freedom1.htm>, (last visited Jan. 26, 2012).

B: Content Based Versus Content Neutral Restrictions

In deciding whether regulation of speech passes judicial scrutiny, a court's inquiry begins with a determination of whether a regulation is content-based or content-neutral.⁷³ Then, based on the answer to that question, the court applies the proper level of scrutiny.⁷⁴ Our jurisprudence holds 'that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'⁷⁵ When a regulation is based on the content of speech, an analysis of strict scrutiny is applied.⁷⁶ An exception to this rule exists.⁷⁷ Intermediate scrutiny applies if such regulation is a content-based regulation of commercial speech.⁷⁸ In some instances it is clear that a regulation is content-based and must be scrutinized as such. Other times, a content-based regulation is disguised as being content-neutral and will be strictly or intermediately scrutinized.⁷⁹

C: Time, Place, and Manner Restrictions

If the restriction on the time, place, and manner of conduct is content-neutral, it triggers an intermediate type of scrutiny.⁸⁰ It is upheld if it is "narrowly tailored to serve a significant governmental interest and leaves open ample alternative channels for communication of the information."⁸¹ However, "government regulation that allows arbitrary application is inherently inconsistent with a valid time, place, and manner regulation because such discretion has the

⁷³ *City of Ladue v. Gilleo*, 512 U.S. 43, 59 (1994). O'Connor's assent.

⁷⁴ *Id.*

⁷⁵ *Arkansas Writers' Project, Inc. v Ragland*, 481 U.S. 221, 229 (1987).

⁷⁶ *R.A.V. v City of St. Paul*, 505 U.S. 377, 404 (1992).

⁷⁷ *Sullivan v. City of Augusta*, 511 F.3d 16, 33 (1st Cir. 2007).

⁷⁸ *Id.*

⁷⁹ *See infra* Part III.E.iv.

⁸⁰ *Clark v. Cmnty. For Creative Non-Violence*, 468 U.S. 288, 298 (1984).

⁸¹ *Id.*

potential for becoming a means of suppressing a particular point of view.”⁸² Hence, a valid time, place, and manner regulation becomes invalid if its language allows subjective enforcement. Unbridled discretion given to the event sponsors and licensing bureau makes the Clean Zone Ordinance an unconstitutional time, place, and manner regulation.⁸³

D: Commercial Speech

The unstated aim of Super Bowl XLVI’s Clean Zone is to limit certain commercial speech. Certain categories of speech—incitement, threats, fighting words, obscenity, false statements, etc.—carry with them very little protection or rights. There is no need to establish an area that bars them.⁸⁴ Such categories of speech typically are not permitted anywhere.⁸⁵ It is redundant for a City Council to pass an ordinance prohibiting an already banned expression. Because of this, one can logically deduce that the Clean Zone provisions are passed to ratchet down protection for a semi-protected category of speech—commercial speech.⁸⁶

Before 1976, commercial speech was not protected by the First and Fourteenth Amendments.⁸⁷ In *Virginia Pharmacy State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the Court, held “commercial speech” was not wholly outside the protection of the First and Fourteenth Amendments.⁸⁸ This flagship decision established that commercial speech does merit protection.⁸⁹ Society may have strong interests in the free flow of commercial

⁸² *Forsyth County, GA v Nationalist Movement*, 505 U.S. 123, 130 (1992).

⁸³ See *infra* Part III.E.iv.

⁸⁴ *R.A.V.*, 505 U.S. at 377.

⁸⁵ *Id.* at 383.

⁸⁶ Deroy Murdock, *Commercial Speech: Set It Free*, CHIEFEXECUTIVE.NET, (Jan. 1, 2003), <http://chiefexecutive.net/commercial-speech-set-it-free>. (Stating the “judiciary, however, has fashioned a gray area for commercial speech. Corporate expression is an oft-neglected stepchild compared with its beloved siblings: political and artistic speech.”).

⁸⁷ ANALYSIS AND INTERPRETATION: ANNOTATIONS OF CASES DECIDED BY THE SUPREME COURT OF THE UNITED STATES 1113-18 (1992 ed.)(updated 1996), available at <http://www.abuse.net/commercial.html>.

⁸⁸ *Virginia Pharmacy State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

⁸⁹ *Id.* at 748.

information.⁹⁰ Speech does not lose its First Amendment protection because money is spent to project it, as is the case of paid advertisements.⁹¹ The Court found that commercial speech is not so removed from any “exposition of ideas” and deserves protection.⁹²

In 1980 the Supreme Court rendered a seminal decision regarding commercial speech protection.⁹³ In *Central Hudson*, the Supreme Court established that content-based government regulations inhibiting commercial speech would be subjected to a form of intermediate scrutiny.⁹⁴ For commercial speech to come within the First Amendment, it must (1) concern lawful activity and (2) not be misleading.⁹⁵ Next, it must be determined whether the asserted governmental interest to be served by the restriction is substantial.⁹⁶ If the inquiries yield positive answers, it must be decided whether the regulation directly advances the governmental interest asserted, and whether it is no more extensive than necessary to serve that interest.⁹⁷ If every prong of this test is met with a positive response, the government regulation will be constitutionally valid and upheld.⁹⁸

Recently, the Court added another layer to commercial speech protection. In *44 Liquormart, Inc. v. Rhode Island*, the Court ruled that regulations entirely suppressing commercial speech in pursuit of a policy not related to the general welfare must be reviewed

⁹⁰ *Id.*

⁹¹ *Id.* at 760.

⁹² *Id.* at 762.

⁹³ Shannon M. Hinegardner, *Abrogating The Supreme Court’s De Facto Rational Basis Standard For Commercial Speech: A Survey And Proposed Revision Of The Third Central Hudson Prong*, 43 NEW ENG. LAW REV., 521, 521 (2010) (Noting the importance and impact of the *Central Hudson* decision).

⁹⁴ *Central Hudson Gas & Elec. Corp.*, 447 U.S. at 573.

⁹⁵ *Id.* at 564.

⁹⁶ *Id.* at 566.

⁹⁷ *Id.* For example, commercial speech that advocates committing a crime receives no protection. Also, if the government is trying to ban certain radio advertisements advocating the purchase solely of Miami Dolphins tickets, the court will not allow these regulations because the government has no substantial interest picking and choosing what team’s advertisements should be heard.

⁹⁸ See generally *Central Hudson Gas & Elec. Corp.*, 447 U.S. at 557.

with “special care.”⁹⁹ Blanket bans do not merit approval unless the speech itself is flawed in some way, either because it was deceptive or related to unlawful activity.¹⁰⁰

E: Why the Indianapolis Clean Zone Is At Odds with the First Amendment

Because there has not been a suit filed challenging the Indianapolis Clean Zone regulation, it is difficult to apply the four-pronged *Central Hudson* Test without using a fact pattern to illustrate the analysis.¹⁰¹ A suit challenging the Super Bowl XLV Clean Zone has been filed, albeit in Texas.¹⁰² Due to the similarities between the Indianapolis and Arlington ordinances, such suit presents a vehicle to test the constitutionality of the Indianapolis Clean Zone.¹⁰³

Recall Mr. Williams enters an agreement with a local Best Buy, situated in a Clean Zone, to park his van in their parking lot during Super Bowl weekend and host a video game tournament to raise funds for his charity.¹⁰⁴ Because the sign and activity lacks approval by the bureau of license and permit services and the event sponsors, he receives a citation for “ambush marketing.”¹⁰⁵ Applying the *Central Hudson* Test to Mr. Williams’s facts, the analysis shows the Indianapolis Clean Zone violates the First Amendment because it fails to meet the final two prongs of the *Central Hudson* test.¹⁰⁶

i: Whether the Commercial Speech Concerns Lawful Activity and Is Not Misleading

⁹⁹ 44 Liquormart Inc. v. Rhode Island, 517 U.S. 484, 485 (1996). This added layer of protection does not apply to the case at hand because there is not a blanket ban on speech.

¹⁰⁰ *Id.*

¹⁰¹ Diaz, *supra* note 27.

¹⁰² Bosley, *supra* note 12.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ The first is whether the commercial speech concerns lawful activity and is not misleading. The second prong is whether the asserted governmental interest to be served by the restriction on commercial speech is substantial.

Under the *Central Hudson* Test, the first question is whether the commercial speech concerns lawful activity and not misleading.¹⁰⁷ In our example, Mr. Williams and Best Buy host a video game tournament in Best Buy's parking lot located in a Clean Zone. Clearly this speech concerns a legal activity. Playing video games in a parked car is perfectly legal so long as a person is not driving and playing at the same time. If the video game competition entailed racing around the parking while playing video games, this would be advertising unlawful activities and not merit constitutional protection.¹⁰⁸ For example, the Supreme Court holds that honest advertisement of liquor prices satisfies this first prong.¹⁰⁹ In our example, the first prong of the *Central Hudson* Test is met because the speech and activity is lawful and not misleading.

ii: Whether the Asserted Governmental Interest To Be Served By the Restriction On Commercial Speech Is Substantial

Next, it must be determined whether the asserted governmental interest to be served by the restriction on commercial speech is substantial.¹¹⁰ Super Bowl XLV, held in North Texas, had Clean Zones established almost identical in manner and scope to the one in Indianapolis.¹¹¹ The NFL required the cities of Arlington, Dallas, and Fort Worth to establish Clean Zones citing safety reasons provided above.¹¹²

The NFL gave the city of Indianapolis the same public safety reasons for instituting Clean Zones as it did to North Texas.¹¹³ The city of Indianapolis establishes a Clean Zone for

¹⁰⁷ *Central Hudson Gas & Elec. Corp.*, 447 U.S. at 557.

¹⁰⁸ Individuals under the age of 21 can not purchase, receive, or consume alcohol as per the National Minimum Drinking Age Act of 1984.

¹⁰⁹ See *Generally 44 Liquormart Inc.*, 517 U.S. at 484.

¹¹⁰ *Central Hudson Gas & Elec. Corp.*, 447 U.S. at 557.

¹¹¹ Diaz, *supra* note 27.

¹¹² Arlington City Council, Clean Zone in Support of Super Bowl XLV- Staff Report. Dec. 7, 2010. , See Contreras, *supra* note 22.

¹¹³ *Id.*; Mayor Gregory A. Ballard, *Super Bowl XLVI: Department of Code Enforcement Information Packet*, Super Bowl XLVI Indianapolis Host Committee p. 8.

Super Bowl XLVI to preserve public safety.¹¹⁴ Government interest in vehicular and pedestrian safety is a substantial interest as per the Court's analysis in *Metromedia Inc. v. City of San Diego*.¹¹⁵ If the court follows the *Metromedia*¹¹⁶ analysis, then the Clean Zone regulation has met the second prong of the Central Hudson Test because public traffic safety is of substantial interest to a city council.

iii: Whether The Regulation Directly Advances The Governmental Interest Asserted

Third, it must be decided whether the regulation directly advances the governmental interest asserted.¹¹⁷ Stated above, the government interest in this regulation is vehicular and pedestrian safety.¹¹⁸ The burden, the Court explains, "is not satisfied by mere speculation or conjecture."¹¹⁹ The government "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."¹²⁰ The Court in *Central Hudson* establishes that the burden is on the government to prove the third prong of the test.¹²¹ In the present case, the City of Indianapolis must demonstrate the harms it seeks to prevent are real and the Clean Zone would alleviate these concerns.

The Court explains the third prong stating, "[t]he State's burden is not slight; the 'free flow of commercial information is valuable...'"¹²² The city may offer the court evidence that temporary signage and activity in previous Super Bowl cities resulted in increased traffic and pedestrian safety issues. If such evidence is affirmed, a court may conclude the government

¹¹⁴ Ballard, *supra* note 111.

¹¹⁵ See *Generally* *Metromedia Inc. v. City of San Diego*, 453 U.S. 490 (1981)(The Supreme Court stated that a government's interest in vehicular and pedestrian safety is a legitimate and substantial interest).

¹¹⁶ *Id.*

¹¹⁷ *Central Hudson Gas & Elec. Corp.*, 447 U.S. at 557.

¹¹⁸ See *supra* Part II.A.

¹¹⁹ *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 626 (1995).

¹²⁰ *Id.*

¹²¹ *Central Hudson Gas & Elec. Corp.*, 447 U.S. at 564.

¹²² *Ibanez v. Florida Dept. of Bus. and Prof'l Regulation, Bd. of Accountancy*, 512 U.S. 136,143 (1994).

meets its burden in establishing regulations that directly advance public safety. A city's burden is not slight, making such a finding highly unlikely because each venue and Super Bowl city is unique.¹²³

Alternatively, such evidence may fail in establishing the regulation's direct advancement of the government goal. A court may require the city to rely on an independent expert. If the challenging party offers their own data findings, a court may be hesitant to accept the City's NFL evidence without skepticism because the NFL has an ulterior motive in protecting the League's advertisers from outside competition.¹²⁴ Because the burden is not "slight" a court may require evidence beyond the City's NFL findings to prove that the regulation will advance public safety.

The City of Indianapolis's theory that prohibiting temporary signage and activity increases public safety fails because of one caveat: temporary signage or activity will be permitted if the business purchases the \$75 limited duration license subject to approval of the event sponsors and bureau of licenses.¹²⁵ If the absence of temporary signage and activity was *so vital* to the safety of the public, why would the city allow it so long as *the city* was compensated? The *Central Hudson* test requires the regulation directly advance the asserted governmental interest. Without more substantial evidence coming from a third party, a court may reject that a Clean Zone directly advances the government's interest of public and traffic safety. Courts may ponder, "If Clean Zones equal public safety, why haven't more crowded metropolitan areas enacted Clean Zone legislation?" Courts may also ask, "If temporary signage and activity is so detrimental to the public safety, why allow an event *sponsor* to approve or deny

¹²³ *Id.* at 143.; Dallas and Indianapolis are different cities with different needs and infrastructure. Evidence showing something was suitable for Dallas, may not be applicable to Indianapolis.

¹²⁴ Bosley, *supra* note 12.

¹²⁵ *Super Bowl Trademark Safe Zones Multiply*, BVR'S INTELLECTUAL PROPERTY BLOG (Feb. 6, 2012), <http://www.ipvalue-site.com/index.php/2012/02/06/super-bowl-trademark-safe-zones-multiply/>.

license applications? Does temporary signage and activity become less dangerous if the City is compensated?”

iv: Whether The Regulation Of Speech Is More Extensive Than It Needs To Be To Further The Government’s Interests

The fourth and final prong of the *Central Hudson* Test asks whether the regulation of speech is more extensive than need be to further the government’s interest.¹²⁶ The Court’s jurisprudence suggests government restrictions on commercial speech be “no more broad or expansive than ‘necessary’, to serve its substantial interests.”¹²⁷

Next, the meaning of the word necessary must be determined as per *Central Hudson*. The Court interprets “necessary” quite narrowly and strictly, turning it into a “least restrictive means test.”¹²⁸ In *Central Hudson*, a least restrictive means test requires, “if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.”¹²⁹ Though the Supreme Court has supported this least restrictive means test, the Court has moved away from requiring it in certain situations.¹³⁰

The Supreme Court recently defined the word “necessary” in less restrictive terms. Necessary means “restrictions...no more extensive than reasonably necessary to further substantial interests.”¹³¹ The Court uses this less restrictive definition of “necessary” in determining the validity of commercial speech regulations based on time, place, and manner restrictions.¹³² On its surface, Indianapolis’s regulation of commercial speech appears to be a

¹²⁶ *Central Hudson Gas & Elec. Corp.*, 447 U.S. at 564.

¹²⁷ *Board of Trustees v. Fox*, 492 U.S. 469, 476 (1989).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² See *Generally Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

content-neutral regulation of time, place, and in manner. However, it is a disguised content-based regulation.¹³³ The Fourth Prong of the *Central Hudson* Test does not require commercial regulations to be the least restrictive possible, but rather “only a ‘reasonable fit’ between the government purpose and means chosen to achieve it.”¹³⁴

Per the Court’s decision in *City of Cincinnati v. Discovery Network, Inc.*, it must be determined what constitutes a “reasonable fit” between the government purpose and the means taken to achieve it.¹³⁵ A city must “carefully calculate” the costs and benefits associated with the burden on speech imposed by its prohibition.”¹³⁶ Further, the Court holds, “that government may impose reasonable restrictions on the time, place, or manner of engaging in protected speech provided they are adequately justified without reference to the content of the regulated speech.”¹³⁷

Courts allow speech restrictions based on time, place, and manner so long as they are justified and still allow open communication mediums.¹³⁸ But, if the restrictions make reference to the content of the speech, courts view them with suspicion.¹³⁹ It must be decided if the Clean Zone restrictions are content-based or content-neutral.¹⁴⁰ If the restrictions are categorically based on content, the court will reject them for failing to meet the “reasonable fit test” of the *Central Hudson* Test’s Fourth Prong.¹⁴¹

¹³³ *Infra* at p.20 ¶1.

¹³⁴ *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 414 (1993).

¹³⁵ *Id.* at 415.

¹³⁶ *Id.* at 410.

¹³⁷ *Id.* at 426.

¹³⁸ See *Generally Clark*, 468 U.S. at 288.; *Ward*, 401 U.S. at 781.

¹³⁹ *McCullen v Coakley*, 357 F.3d 167, 175 (1st Cir. 2009).

¹⁴⁰ See *City of Cincinnati*, 507 U.S. at 410.

¹⁴¹ *Id.* at 417.

On their face, the regulations are content-neutral.¹⁴² In *City of Cincinnati v. Discovery Network*, Cincinnati enacted a regulation calling for the removal of certain news racks for safety and aesthetic purposes.¹⁴³ The Supreme Court said that even though the regulation was content-neutral on its face, it was not content-neutral in practice because the *only* news racks that were deemed in violation of the code were those that contained *commercial* handbills (emphasis added).¹⁴⁴ The Court deduced that the ban was “content-based” because whether any particular news rack falls within the ban was determined by the *content* of the publication resting inside that news rack.¹⁴⁵ If a “city’s regulation...is predicated on the difference in content between ordinary newspapers and commercial speech, it is not content-neutral and cannot qualify as a valid time, place, or manner restriction on protected speech.”¹⁴⁶

Clean Zones are areas where no temporary advertising, signage, structures or activity shall be erected or undertaken without first having received approval from the event sponsor and license from the bureau of licenses.¹⁴⁷ On its face, this appears content-neutral. The Super Bowl Host Committees states that there are numerous event sponsors including all NFL and Super Bowl sponsors.¹⁴⁸ The regulation *requires* temporary signage and activity be approved by the event sponsors.¹⁴⁹ Hence, any temporary signage or activity must be approved by the sponsors of the Super Bowl. Sponsors, not with concerned public safety, grant or deny licenses based on the sign content akin to *City of Cincinnati v. Discovery Network*.

During Super Bowl XLV, Mr. Williams was cited for “ambush marketing” partnering

¹⁴² City of Indianapolis Prop. 188,2011, *supra* note 16.

¹⁴³ See generally *City of Cincinnati*, 507 U.S. at 410.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 429.

¹⁴⁶ *Id.* at 410.

¹⁴⁷ City of Indianapolis Prop. 188,2011, *supra* note 16.

¹⁴⁸ Telephone Interview with Elizabeth M., Administrator, Super Bowl XLII Host Committee (January 27, 2012).

¹⁴⁹ City of Indianapolis Prop. 188,2011, *supra* note 16.

with Best Buy to host a video game tournament in his car.¹⁵⁰ Best Buy has no official sponsorship ties with the Super Bowl; hence the activity is not permitted in the Clean Zone. Even though the Clean Zone regulation states requirements needed to gain a license, it grants unqualified approval and veto power to the event sponsors and License Bureau.¹⁵¹ Where a government actor has unbridled discretion in determining the allocation of permits or licenses, the court views the regulation as being content-based.¹⁵² The reasoning follows, “if the permit scheme involves appraisal of facts, the exercise of judgment, and the formation of an opinion by the licensing authority, the danger of censorship and of abridgment of our precious First Amendment freedoms is too great to be permitted.”¹⁵³

The Clean Zone regulations appear content-neutral on their face, but the decisions to grant approval and licenses are content-based, making the restrictions content-based. Because the restrictions on free speech are content-based, a reasonable fit between the government interest and the regulations used to further that interest is absent.¹⁵⁴ The lack of reasonable fit constitutionally disqualifies the restrictions under the Fourth Prong of the *Central Hudson* Test.¹⁵⁵

v: Final Analysis Under *Central Hudson* Test

The Supreme Court applies the *Central Hudson* Test in determining the constitutional validity of government regulations inhibiting commercial speech.¹⁵⁶ For commercial speech to be protected under the First Amendment, it must concern lawful activity and not be

¹⁵⁰ Bosley, *supra* note 12.

¹⁵¹ Diaz, *supra* note 27.; City of Indianapolis Prop. 188, 2011, *supra* note 16.

¹⁵² City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 760 (1988).

¹⁵³ *Nationalist Movement*, 505 U.S. at 131.

¹⁵⁴ *City of Cincinnati*, 507 U.S. at 417.

¹⁵⁵ *Id.*

¹⁵⁶ *City of Cincinnati*, 507 U.S. at 416.

misleading.¹⁵⁷ In Mr. William’s situation, the activity deals with lawful action and is not misleading. Next, it must be determined whether the asserted governmental interest to be served by the restriction on commercial speech is substantial.¹⁵⁸ In the present case, pedestrian and traffic safety are substantial government interests.¹⁵⁹ Because both inquiries yield positive answers, it must be decided whether the regulation directly advances the governmental interest asserted and whether it is not more extensive than is necessary to serve the interest.¹⁶⁰ Clean Zone restrictions yield negative answers to these questions.¹⁶¹ A court may find the Clean Zone Ordinance does not directly advance the government’s interest in traffic and pedestrian safety and is more extensive than necessary because the Clean Zones are content-based restrictions.

F: Overbroad Restriction on Free Speech

The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's sphere.¹⁶² Stepping back from Mr. Williams’s situation and the Clean Zone’s effect on commercial speech, the breadth of the City Council’s proposition is investigated.

The Supreme Court recognizes an Overbreadth Doctrine stating, “a statute that regulates a broad category of speech may deter expression that is protected by the First Amendment.”¹⁶³ The Overbreadth Doctrine “enable(s) persons who are themselves unharmed by the defect in a statute nevertheless to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court.”¹⁶⁴

¹⁵⁷ *Central Hudson Gas & Elec. Corp.*, 447 U.S. at 557.

¹⁵⁸ *Id.*

¹⁵⁹ *Supra* Part III.E.II.

¹⁶⁰ *Id.*

¹⁶¹ *Supra* Part III.E. III, IV.

¹⁶² *Ashcroft*, 535 U.S. at 244.

¹⁶³ *Dimmit v City of Clearwater*, 985 F.2d 1565, 1571 (11th Cir. 1993).

¹⁶⁴ *Id.*

The over-inclusiveness of what requires license and approval under the Clean Zone ordinance inhibits the expression of non-commercial speech. To illustrate, Mr. Voting Fan is a Republican and lives within the one mile Clean Zone around Lucas Oil Stadium.¹⁶⁵ To express his distaste with President Obama, he places a cardboard cut-out of the President wearing a jersey of the New England Patriots—a hated rival of Indianapolis Colts Fans—made by Puma.¹⁶⁶ When the Clean Zone ordinance comes into effect, Mr. Voting Fan is forced to remove his cardboard cutout because the Super Bowl Sponsors are competitors of Puma.¹⁶⁷ The sponsors do not want an unofficial sponsor's brand visible in the Clean Zone and the municipality refuses to issue a permit or license to Mr. Voting Fan. When courts determine the constitutionality of non-commercial protected speech, such as political speech in this case, they use a strict scrutiny standard rather than intermediate scrutiny in their analysis.¹⁶⁸

As shown in the above section dealing with the Fourth Prong of the *Central Hudson* Test, the Clean Zone ordinance regulations are content-based laws that may infringe on protected speech.¹⁶⁹ Laws burdening political speech are subject to strict scrutiny, which requires the Government to prove that the restriction “furthers a compelling interest and is narrowly tailored to achieve that interest.”¹⁷⁰ Strict Scrutiny is the highest burden the government must meet for its law to be upheld.¹⁷¹ This ordinance does not pass the intermediate scrutiny test used when determining its constitutionality in limiting commercial speech through content-based

¹⁶⁵ Lucas Oil Stadium is the name of the Super Bowl XLVI venue.

¹⁶⁶ Puma is a sports clothing retailer in the same vein as Nike or Reebok. See generally www.puma.com.

¹⁶⁷ Ken Belson, *Nike to Replace Reebok as N.F.L.'s Licensed-Apparel Maker*, THE NEW YORK TIMES (Oct. 12, 2010), <http://www.nytimes.com/2010/10/13/sports/football/13nike.html>. (The NFL apparel sponsor and supplier as of Dec. 20, 2011 is Reebok. A transition to Nike will occur in 2012).

¹⁶⁸ *R.A.V.*, 505 U.S. at 404.

¹⁶⁹ See *supra* Part III.E.IV.

¹⁷⁰ *Citizens United v. Federal Election Com'n*, 130 S.Ct. 876, 882 (2010).

¹⁷¹ *History of Equal Protection and the Levels of Review*, THE NATIONAL PARALEGAL COLLEGE, http://nationalparalegal.edu/conlawcrimproc_public/EqualProtection/HistoryOfEqualProtection.asp (last visited Jan. 21, 2012).

regulations.¹⁷² Thus, it does not meet the burden of strict scrutiny. The over-inclusiveness of the Clean Zone ordinance may lead to lawsuits over the curbing of political speech as evidenced by the hypothetical situation of Mr. Voting Fan.

Part IV: The Possibility and Feasibility of a Law Suit

The facts of Mr. Williams's suit highlight the feasibility of a civil suit brought by a citizen who suffers due to the establishment of the Clean Zone.¹⁷³ Mr. Williams sues the City of Indianapolis in citing him for ambush marketing. The claim roots itself in the U.S. Constitution's First Amendment; it is a federal question and will be brought in front of a federal court.¹⁷⁴ Before a federal court considers the merits of a legal claim, the person seeking to invoke the court's jurisdiction must meet the case and controversy doctrine of Article III of the United States Constitution.¹⁷⁵ The party bringing suit must establish the requisite standing to sue and that the dispute is justiciable.¹⁷⁶ Asserting the case meets the case and controversy requirements allows the case to proceed to federal court. Mr. Williams has standing and is able to show that the dispute is justiciable, meeting the case and controversy requirements.¹⁷⁷

A: Standing

To establish an Article III case or controversy, a litigant must demonstrate suffering an "injury in fact."¹⁷⁸ The Supreme Court holds the injury must be concrete in both a

¹⁷² See *supra* Part III.

¹⁷³ Obviously Mr. Williams's suit is feasible as it has survived motions to dismiss and now awaits trial in the Spring of 2012 in a Texas District Courtroom. Because this paper focuses on Indianapolis's Clean Zone, we will apply his facts against the Clean Zone to determine if it would survive motions to dismiss.

¹⁷⁴ 28 U.S.C.A. § 1331.

¹⁷⁵ *Allen v. Wright*, 468 U.S. 737 (1984).

¹⁷⁶ *Whitmore v. Arkansas*, 495 U.S. 149 (1990).

¹⁷⁷ Please Refer to Proceeding Sections.

¹⁷⁸ *Whitmore*, 495 U.S. at 149.

qualitative and temporal sense.¹⁷⁹ The complainant must allege an injury to himself that is “distinct and palpable, opposed to merely abstract” and the alleged harm must be actual or imminent, not “conjectural or hypothetical”.¹⁸⁰ Further, the litigant must satisfy the “causation” and “redressability” prongs of Article III showing that the injury “fairly can be traced to the challenged action” and “is likely to be redressed by a favorable decision.”¹⁸¹

i: Injury in Fact

The plaintiff must suffer an “injury in fact.”¹⁸² The invasion of a legally protected interest must be (a) concrete and particularized and (b) “actual or imminent, not conjectural or hypothetical.”¹⁸³ Mr. Williams suffers an injury in fact. He was cited for hosting a video game tournament out of his vehicle; he had to cease or face financial penalties.¹⁸⁴ As shown in Proposition 188, the temporary sign or activity must first receive approval from the event sponsor and a limited duration license from the Bureau of License and Permit Services before it can be hung or performed.¹⁸⁵ The guidelines the bureau of licensing uses when issuing licenses clearly state that the event sponsors have the power to approve or disapprove of the application.¹⁸⁶ Nowhere in this proposition does it describe criteria the *event sponsors* will use when deciding to approve or disprove a sign or activity.¹⁸⁷

There is no listed meaningful appeal process in the case of a denial.¹⁸⁸ The Sixth Circuit Court of the United States holds when a licensing statute gives unbridled discretion to

¹⁷⁹ *Id.*

¹⁸⁰ *Whitmore, 495 U.S. at 155.*

¹⁸¹ *Id.*

¹⁸² *Lujan v Defenders of Wildlife, 504 U.S. 555, 560 (1992).*

¹⁸³ *Id.*

¹⁸⁴ *See Generally City of Ladue, 512 U.S. (1994).*

¹⁸⁵ *City of Indianapolis Prop. 188, 2011, supra note 16 at Sec. 986-203.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ Pat Andrews, *Super Bowl Ordinance Should Have Included Review Process*, HAD ENOUGH INDY? (Jan. 14, 2012), <http://hadenoughindy.blogspot.com/2012/01/super-bowl-ordinance-should-have.html>.

a government official in permitting or denying expressive activity, the person who is subject to the law may challenge it without applying for and being denied a license.¹⁸⁹ Such a licensing requirement constitutes a prior restraint and results in censorship.¹⁹⁰ Thus, the prior restraint of a licensing provision coupled with unbridled discretion itself amounts to an actual injury.¹⁹¹

Mr. Williams properly states a concrete injury in asserting his activity was denied licensure. By challenging the “unbridled discretion’ of the bureau and event sponsors, he is stating a concrete injury even if he was never denied a license.

The injury in fact must be “actual or imminent, not conjectural or hypothetical.”¹⁹² Mr. Williams suffers an actual injury—he was denied a license for his activity and cited.¹⁹³ Imagine Mr. Williams reads the city ordinance months before the Super Bowl, gets nervous about the Clean Zone provisions, and files suit against the city. In this instance, there are no actual injuries as he has not been denied approval nor prohibited from hosting the activity.

Likewise, in *Lujan v. Defenders of Wildlife*, a nature enthusiast claimed he had standing in an environment regulation dispute because the enthusiast feared that he would not see endangered animals on future trips to their habitats.¹⁹⁴ The Supreme Court ruled that this did not constitute imminent injury because the intent to return to a place and be deprived of the opportunity to the endangered species is simply not enough.¹⁹⁵ Intentions without any concrete plans or even specification of when the day will be does not qualify as an actual or imminent injury.¹⁹⁶

¹⁸⁹ Prime Media Inc. v. City of Brentwood, 485 F.3d 343, 348 (6th Cir. 2007).

¹⁹⁰ *Id.* at 351.

¹⁹¹ *Id.*

¹⁹² *Lujan*, 504 U.S. at 560.

¹⁹³ Bosley, *supra* note 12.

¹⁹⁴ See generally *Lujan*, 504 U.S. at 555.

¹⁹⁵ *Id.* at 562.

¹⁹⁶ *Id.* at 564.

Clearly, in the case of the Super Bowl Clean Zones, there are concrete plans. Mr. Williams intends to host a video game tournament at Best Buy during the week of Super Bowl XLVI. He has no way of knowing whether the activity will get approved due to the unbridled discretion given to event sponsors. Hence, if he brings suit before he was denied a license, the injury would be conjectural or hypothetical which would not meet the injury in fact standard. Mr. Williams does, however, have a way to bring suit before he has been actually denied a license. As shown above, so long as Mr. Williams's suit challenges the "unbridled" authority of the event sponsors and license bureau and the lack of appeal process, the ordinances may be facially challenged without having actually suffered.¹⁹⁷

ii. Causation

It must be determined whether the injury "fairly can be traced to the challenged action."¹⁹⁸ Mr. Williams suffers an injury in fact.¹⁹⁹ It must be decided if the City of Indianapolis's Proposition 188 caused this injury. A federal court acts only to redress injury that can be fairly traced to the challenged action of the defendant, not the independent actions of some third party not before the court.²⁰⁰ The City Council's Proposition directly creates the Clean Zone ordinance which bans temporary signage and activity not approved by the bureau of licenses and the event sponsors. The Clean Zone ordinance is cited in refusing to grant Mr. Williams the license. Thus, the City Council of Indianapolis, which enacted the Clean Zone ordinance, is directly responsible for Mr. Williams's injury—not being granted a license to hold a video game tournament in Best Buy parking lot.

iii. Redressability

¹⁹⁷ *Prime Media Inc.*, 485 F.3d at 351.; *City of Lakewood*, 486 U.S. at 750.

¹⁹⁸ *Whitmore*, 495 U.S. at 149.

¹⁹⁹ Part IV.A.i.

²⁰⁰ *Steel Co. v Citizens for a Better Environment*, 523 U.S. 83, 103 (1997).

Article III judicial power exists to redress or protect against injury to the complaining party.²⁰¹ A plaintiff invokes a federal court's jurisdiction when suffering some threatened or actual injury resulting from the putatively illegal action.²⁰² Mr. Williams suffers an injury caused by the City Council's enacted Clean Zone proposition.²⁰³

The third requirement to have standing is to show the injury is likely redressed by a favorable decision.²⁰⁴ In Mr. Williams's lawsuit, an injunction against the implementation of the Clean Zone ordinance prevents the injury from occurring.²⁰⁵ The City Council's ordinance establishing Clean Zones was enacted in response to the Super Bowl coming to Indianapolis.²⁰⁶ The ordinance does not only establish Clean Zones for the Super Bowl XLVI, however.²⁰⁷ The ordinance establishes Clean Zones for events including the Big Ten Championship Game, NCAA Basketball Tournaments, etc.²⁰⁸ If Mr. Williams brings suit after the Super Bowl occurs, the dispute is still able to be remedied because the same rejection of a license may occur when the Big Ten Football Championship is played in Indianapolis in 2012.²⁰⁹ Hence, a ruling favorable to Mr. Williams will prevent future injuries—fulfilling the third requirement to have standing.

B: Is the Controversy Justiciable?

In addition to establishing standing, Mr. Williams must show the controversy is

²⁰¹ *Lujan*, 504 U.S. at 583.

²⁰² *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

²⁰³ Part IV.A.ii.

²⁰⁴ *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 27 (1976).

²⁰⁵ BLACK'S LAW DICTIONARY 855 (9th ed. 2009) (An injunction is a court order commanding or preventing an action).

²⁰⁶ Paul Ogden, *City Decides Agreed-Upon One Mile Radius 'Clean Zone' Isn't Big Enough*, Ogden on Politics (July 1, 2009), <http://www.ogdenonpolitics.com/2011/07/city-decides-mile-radius-super-bowl.html>.

²⁰⁷ City of Indianapolis Prop. 188, 2011, *supra* note 16 at 986-104.

²⁰⁸ *Id.*

²⁰⁹ *Big Ten Announces Championship Sites*, PURDUE UNIVERSITY ATHLETIC DEPARTMENT (June 5, 2011), <http://www.purduesports.com/sports/m-footbl/spec-rel/060511aaa.html>.

justiciable.²¹⁰ Justiciable cases are capable of being settled by law or an action of the court.²¹¹ To be justiciable, case and controversy requirements must be met to ensure the separation of powers within our government.²¹² To meet the case and controversy elements besides standing, the case must be a non-moot, ripe, non-political question.²¹³

i: Mootness

The Supreme Court describes mootness as “the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation—standing—must continue throughout its existence—mootness.”²¹⁴ There must be a live controversy at all stages of review, not just when the complaint is filed. An exception to the mootness exists for acts that are “capable of repetition, yet evading review.”²¹⁵ Further, a defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not qualify a lawsuit as moot.²¹⁶

In our situation, it is probable that a complaint is filed and proceeds long after Super Bowl XLVI occurs. For example, a month after the Super Bowl in March, Mr. Williams will be free to host whatever tournament he wishes because the ordinance is only active during specified times, hence he is not suffering an injury any more. But, as shown when discussing redressability, the provisions establishing a Clean Zone in Indianapolis go into effect when certain events occur such as Big 10 Championships or the NBA Finals.²¹⁷ The Big Ten Football Championship will be held annually in Indianapolis through 2015.²¹⁸ These allegedly illegal acts of speech restrictions can occur at distinct times in the foreseeable future. Because the harmful

²¹⁰ *Lujan*, 504 U.S. at 560.

²¹¹ BLACK'S LAW DICTIONARY 943 (9th ed. 2009).

²¹² *Allen*, 468 U.S. at 737.

²¹³ *Id.* at 750.

²¹⁴ *Friend's of the Earth, Inc. v Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 170 (2000).

²¹⁵ *Id.* at 170.

²¹⁶ *Id.* at 169.

²¹⁷ See *supra* Part IV.A.iii.

²¹⁸ *Big Ten Announces Championship Sites*, *supra* note 206.

results of the provision are capable of repetition by the city, Mr. Williams's case meets the exception to the mootness requirement.²¹⁹

ii: Ripeness

The basic rationale of the ripeness doctrine prevents the courts from entangling themselves in disagreements over administrative policies.²²⁰ Courts want to protect agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.²²¹ Courts do not want to second guess agency policy before the effects are fully known.

The ripeness doctrine prevents the Court from issuing advisory opinions which would muddy the distinction between the courts, the legislature, and the executive.²²² Injunctive and declaratory judgment remedies are discretionary and courts are reluctant to apply them to administrative determinations unless arising in a controversy 'ripe' for judicial resolution.²²³ Unless the effects of the challenged administrative action have been "felt in a concrete way by the challenging parties" courts want to avoid involvement.²²⁴

When Mr. Williams is denied approval and cited for his activity, he concretely feels the effects of the city council proposition because he can not advertise and run his activity as he wishes. Hence, because Mr. Williams suffers as a result of the ordinance, his suit meets the ripeness standard.

What if Mr. Williams brings suit before he is denied approval and cited? Assuming that he brings suit because of the event sponsors' and bureau's "unbridled" authority to determine

²¹⁹ See *Generally Friends of the Earth, Inc.*, 528 U.S. at 167.

²²⁰ *Abbot Laboratories v Gardner*, 387 U.S. 136,148 (1967).

²²¹ *Abbot Laboratories*, 387 U.S. at 136,148. ; *Reno v Catholic Services Inc.*, 509 U.S. 43,57 (1993).

²²² See *id.*

²²³ *Reno*, 509 U.S. at 57.

²²⁴ *Id.*

what signage and activity is approved, it has been determined above²²⁵ that such “unbridled” authority— even if it has not harmed a party— may constitute an injury in fact.²²⁶

In *City of Lakewood v Plain Dealer Pub. Co.*, the city of Lakewood enacted an ordinance that read, “The Mayor shall either deny the application [for a permit], stating the reasons for such denial or grant said permit subject to the following terms... including: such other terms and conditions deemed necessary and reasonable by the Mayor.”²²⁷ The plain text of that ordinance contained no explicit limits on the mayor's discretion; nothing in the law required the mayor do more than make the statement, “It is not in the public interest” when denying a permit application.²²⁸ The city of Lakewood asked the Supreme Court to presume that the mayor would deny a permit application only for reasons related to the health, safety, or welfare of Lakewood citizens, and that additional terms and conditions will be imposed only for similar reasons.

The Court said such assumption “presumes the mayor will act in good faith and adhere to standards absent from the ordinance's face. But this is the very presumption that the doctrine forbidding unbridled discretion disallows.”²²⁹ The Court struck down this ordinance before its effects were felt by the challenging party.²³⁰ A party may bring a facial challenge to the ordinance without first applying for, and being denied, a permit.²³¹ In this decision, the Supreme Court clearly gives parties the ability to bring suit when an ordinance gives “unbridled” authority to licensors, even if they haven’t been denied a license.²³² Following this ruling, parties have the power to bring suit before an actual injury occurs under certain circumstances

²²⁵ See *supra* Part III.E.iv.

²²⁶ *Prime Media, Inc.*, 485 F.3d at 351. ; *City of Lakewood*, 486 U.S. at 750.

²²⁷ *City of Lakewood*, 486 U.S. at 769.

²²⁸ *Id.*

²²⁹ *City of Lakewood*, 486 U.S. at 770.

²³⁰ *City of Lakewood*, 486 U.S. at 750.

²³¹ *Id.*

²³² *Id.*

such as a license distributor having unbridled authority. As shown above, Mr. Williams's suit falls under such circumstance. Mr. Williams meets the ripeness requirement due to the unbridled discretion given to the license bureau and event sponsors.

Part V: Ways the NFL Can Achieve the Results of the Clean Zone Legally

Is it possible for the NFL and Indianapolis to achieve the results of the Clean Zone in a constitutionally acceptable manner? Is it possible to protect NFL sponsors and discourage guerilla marketing? The NFL requires Super Bowl cities to adopt Clean Zone Ordinances to protect sponsor investments and prevent companies from using guerilla marketing tactics to dominate the game-day environment. The NFL can constitutionally achieve these aims through city ordinances by slightly altering the definition of a Clean Zone and how licenses are distributed.

A: Altering the Definition of a Clean Zone and the License Approval Procedure

The relevant portion of the ordinance that outlines the license approval procedure reads, "...any license applicant seeking a license to operate within a designated clean zone may be issued a limited duration license by the bureau of license and permit services and *shall be subject to approval by the event sponsor* (emphasis added)."²³³

This ordinance is unconstitutional as it gives unbridled discretion to the event sponsor and licensing bureau.²³⁴ Removing the event sponsor input helps the definition of a Clean Zone achieve constitutional validity by making this a content-neutral regulation. Ideally, the definition should read:

a defined area within a special event zone during a civic sponsored special event that no temporary advertising, signage, or structures shall be erected or transient merchant,

²³³ City of Indianapolis Prop. 188,2011, *supra* note 16 at Sec. 986-203.

²³⁴ See *supra* Parts III and IV.

vendor, or other licensed activity may take place without the person or entity performing such activity first having received a limited duration license from the bureau of license and permit services *independent of the approval of event sponsors* (emphasis added).

This definition would presumably become constitutionally valid because it passes the *Central Hudson Test*²³⁵ and not be a content-based restriction on free speech because event sponsors are not given unbridled authority over license distribution and there are guidelines the license and permit service must follow.

The license granting procedures are constitutionally invalid because they grant unbridled authority to the event sponsors in approving or disproving licenses.²³⁶ The requirements of acquiring a license are clearly laid out in Prop 188.²³⁷ The following portion of those requirements must be struck by the City Council because of unchecked authority given to the event sponsors:

...any license applicant seeking a license to operate within a designated clean zone may be issued a limited duration license by the bureau of license and permit services and shall be subject to approval by the event sponsor.²³⁸

The licensing procedure lacks an appeal process for rejected applications.²³⁹ A simple provision allowing rejected applicants a method to appeal the licensing bureau's decisions to an independent body would make this licensing process constitutionally acceptable because it provides due process.²⁴⁰

As discussed in the third part of the *Central Hudson Test* analysis, this Clean Zone

²³⁵ Due to removing the unbridled discretion given to the event sponsors.

²³⁶ See *supra* Part IV.

²³⁷ City of Indianapolis Prop. 188, 2011, *supra* note 16.

²³⁸ *Id.*

²³⁹ *Andrews*, *supra* note 185.

²⁴⁰ *United States v. Antoine*, 906 F.2d 1379, 1382 (9th Cir. 1990) (Stating that an extreme delay in appeal process may result in due process infringement). Using this logic, one may deduce that a complete absence of an appeals process may violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

provision suffers by lacking strong evidentiary support linking Clean Zones to traffic and public safety.²⁴¹ To ensure that a court finds the evidentiary support linking Clean Zones to traffic and public safety compelling, the City Council should have third parties develop empirical data analyses that link Clean Zones to traffic and public safety.

B: Will These Updated Provisions Discourage Guerilla Marketing?

Guerilla marketing is a valuable tool for businesses lacking marketing funds.²⁴² Moreover, in an age where new forms of media take shape overnight, businesses take advantage of these new mediums in promoting business. Advertisements do not only encompass billboards and commercial spots on television networks. Many businesses that cannot afford to purchase traditional advertisement space and are barred from guerilla marketing in certain areas now resort to social media advertising methods.²⁴³

Even as councils become smarter in preventing certain guerilla marketing through Clean Zones, businesses have been slyer and more discrete at finding ways around these regulations.²⁴⁴ Guerilla marketers now set their eyes on Internet marketing due to its new and less developed jurisprudence. Guerilla marketers use Twitter²⁴⁵, Facebook²⁴⁶, and smart phone technology to spread their advertisements.²⁴⁷

²⁴¹ See *supra* Part III.C.iii.

²⁴² *The Future of Guerilla Marketing*, WEBURBANIST.COM, (<http://weburbanist.com/2008/06/26/the-future-of-guerrilla-marketing>) (Last visited Jan. 21, 2012).

²⁴³ *Guerilla Marketing and the 2012 Olympics*, I SPY'S BLOG, <http://www.ispymarketing.com/blog/?p=1971> (Last visited Jan. 21, 2012).

²⁴⁴ *The Future of Guerilla Marketing*, *supra* note 239.

²⁴⁵ Twitter is a social network Internet site that allows user to share information with fellow users. See generally www.twitter.com.

²⁴⁶ Facebook is a social network Internet site that allows users to share information with fellow users. See generally www.facebook.com.

²⁴⁷ *Guerilla Marketing and the 2012 Olympics*, *supra* note 240.

The innovation of the Internet and guerilla marketers' use of it makes an end to the guerilla marketing during the Super Bowl week unimaginable. Nowhere in the Clean Zone provisions is the use of the Internet addressed.²⁴⁸ If a company is not allowed to hang a temporary sign near Lucas Oil Stadium, nothing bars the company from digitally altering their logo to the side of the stadium and posting it on their Facebook page. In short, the proposed updated provisions may curtail the physical occurrences of guerilla marketing, but does nothing to stop digital guerilla marketing. In today's high-tech, wi-fi world, it may be more detrimental to the sponsors if guerilla marketers take to the wireless world than to the physical one.

Part VI: Conclusion

Clean Zones are recent phenomena, but are no different in constitutional review from traditional advertising regulations. The purpose of Clean Zones is regulating what fans see and hear at events. Such zones appear around Super Bowl venues as required by the NFL via city councils. These ordinances may be aimed at protecting the public safety but are, in reality, thinly disguised sponsor protections.

The Clean Zone ordinance enacted by the Indianapolis City Council is an unconstitutional regulation of commercial speech as it fails the *Central Hudson* Test. The regulation does not directly advance the governmental interest, is more extensive than necessary to serve the interest, and possibly overbroad. Hence, the ordinance is an unconstitutional burden on free speech. The veto power and authority vested in the event sponsors are the downfall of the regulation making it susceptible to abuse of discretion. Ultimately, even correcting the Clean Zone ordinance and making it constitutionally permissible may not necessarily make it

²⁴⁸ See generally City of Indianapolis Prop. 188, 2011, *supra* note 16.

effective with the birth of social media. With a Clean Zone already established for Super Bowl XLVII in Louisiana, Clean Zones are not going away any time soon.²⁴⁹ In fact, with the Super Bowl scheduled to take place at MetLife Stadium in 2014²⁵⁰, we may soon see a Clean Zone encompass New York City.

²⁴⁹ McNulty, *supra* note 36.

²⁵⁰ Rich Cimini, *NY/NJ Has It Down Cold as Super Bowl Host*, ESPN.COM (May 26, 2010, 9:33 AM), <http://sports.espn.go.com/new-york/nfl/news/story?id=5219486>.; MetLife Stadium is located in East Rutherford, NJ. However, due to its close proximity to the New York metropolitan area a clean zone may be established in Manhattan similar to Clean Zones being established in Dallas and Fort Worth even though Super Bowl XLV took place in Arlington, TX.