UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

TARA JILL CICCARONE and TROY BOHN, Plaintiffs, – Versus – The CITY OF NEW ORLEANS; MITCHELL J. LANDRIEU, in his official capacity; RONAL SERPAS, in his official capacity. Defendants.	NUMBER: 2:13-cv-133 JUDGE: MAGISTRATE JUDGE:

MEMORANDUM IN SUPPORT OF TEMPORARY RESTRAINING ORDER/PRELIMINARY INJUNCTION

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Introduction

To prepare for the Super Bowl, the City of New Orleans intends to enforce a "Clean Zone" around the Superdome, most of the Central Business District, the entire French Quarter, most of the Faubourg Marigny, and many of the surrounding neighborhoods. Inside the Clean Zone, no temporary signs, banners or flags of any kind may be displayed, unless their content is approved by either the City or the National Football League. To be approved, the signholder must apply in advance, and the content of his display must be at least 60% NFL "branding, look and feel." No one but an official NFL commercial sponsor may apply.

By their simple and straightforward terms, the Clean Zone sign restrictions form a content-based, viewpoint-discriminatory, prior restraint on First Amendment-protected expression in a traditional public forum. Indeed, under a plain reading of those restrictions, no signs of any kind – whether as mundane as a "Lost Dog" notice stapled to a telephone pole in the Marigny, as practical as a "Now Playing" sign in the window of a music club in the French Quarter, or as provocative as a religious protest on Bourbon Street – would be allowed, unless the messenger is an NFL sponsor and the message NFL-branded. Similarly, no flags – not Mardi Gras flags, not American flags, not Gadsden's revolutionary-minded "Don't Tread on Me" flag – would be permitted, as they contain no NFL "brand, look and feel." And absurdly, anyone wishing to seek the City or the NFL's approval to wave such a sign or fly such a flag – content aside – would be unable even to seek permission unless they had paid the NFL for the privilege.

Plaintiff Tara Jill Ciccarone, a member of the political organization Occupy NOLA, wants to protest in the Clean Zone by holding signs and carrying flags that draw attention to various political, social and economic problems in the area. She does not plan to engage in any commercial activities or advertising; she intends to protest. Plaintiff Troy Bohn, a local pastor whose congregation regularly preaches and carries religious signs in the French Quarter, wants to continue his ministry during Super Bowl week. Similarly, Bohn does not plan to engage in commercial activities or advertising; he intends to preach. They bring this matter to secure their First Amendment rights to do so.

Facts

The Clean Zone and its relevant restrictions are the product of two official City policies: Municipal Code §24-913, passed by the City Council, and the "Super Bowl XLVII Permit and Code Enforcement Guide," promulgated by the Mayor's office. Under those enactments, speech restrictions in the Clean Zone begin at 6:00AM on January 28, 2013, carry through the Super Bowl on February 3rd, and end at 6:00PM on February 5th. *See* **Exhibit P-1**, Ordinance prefatory language, p.1.

The area of the Clean Zone is defined as follows:

> Section 1.
>
> a. The area bounded by Earhart Boulevard to Calliope Street; Religious Street to Orange Street proceeding across the Mississippi River along the West bank Levee (at the Orleans Parish line); continuing across the Mississippi River to Elysian Fields Avenue (including Crescent Park); North Claiborne Avenue to Tulane Avenue; North Broad to Earhart Boulevard;

> and including the Louisiana Superdome Property (Champion Square), the New Orleans Arena, and the Ernest N. Morial Convention Center property.

[*See* **Exhibit P-1**, p.2]

Here is a map:

[*See* **Exhibit P-2**, Permit and Code Enforcement Guide, p.4]

As the map makes clear, the Clean Zone includes most of the CBD, all of the French Quarter, most of the Marigny and many of the surrounding neighborhoods, and the same restrictions on signs, banners and flags that apply in front of the Superdome on Poydras Street apply to the residential neighborhoods just off

Frenchman, and every public space in between.

The Ordinance

Between those times and within that area, *under the Ordinance*, the following prohibitions apply to various forms of public demonstration and speech:

> Section 3
> j. Inflatables, cold air balloons, banners, pennants, flags, building wraps, A-frame signs, projected image signs, electronic variable message signs, and light emitting diode signs of any kind shall be prohibited except for those sanctioned or authorized by the City (subject to the requirements set forth in Section 4 below) or by the National Football League (NFL).

[*See* **Exhibit P-1**, p.4]

> Section 4
> Any temporary signage approved by the City pursuant to Section 3 above shall be required to consist of at least 60% Super Bowl/NFL branding, look and feel, and no more than 40% third party commercial identification.

[*See* **Exhibit P-1**, p.5]

Essentially, the Ordinance requires all Section 3(j) media (banners, pennants, flags, etc.) within the Clean Zone to contain only that content approved by *either* the City or the NFL, and establishes that the only approvable content must include at least 60% Super Bowl branding, look and feel. It is those provisions of the Ordinance – Section 3(j) and Section 4 – that Plaintiffs challenge here.

The Guide

The express language of the Ordinance bars only banners, pennants, flags, and those other forms of expression set forth in Section 3(j), above. The Guide goes even further, however, banning *all temporary signs*, and adding that no signs or

other prohibited forms of speech will not be permitted *unless the signholder is an official NFL sponsor*. The relevant excerpt from the Guide is here:

Banner & Signs:

The City of New Orleans Clean Zone Ordinance Number 24,913, M.C.S. prohibits the following activity related to Banners & Signs & Advertising (unless sanctioned and authorized by the City and the National Football League)

- Unless the applicant is an official NFL sponsor, no temporary signs, banners, inflatables, cold air balloons, pennants, flags, building wraps, A-frame signs, billboards, projected image signs, electronic variable message signs, or light emitting diode sings of any kind can be applied for or permitted.
- Any temporary signage approved by the City pursuant to SECTION 3 above shall be required to consist of at least 60% Super Bowl/NFL branding, look and feel, and no more than 40% third party commercial identification.
- Inflatables, cold air balloons, banners, pennants, flags, building wraps, A-frame signs, projected image signs, electronic variable message signs, and light emitting diode signs of any kind shall be prohibited except for those sanctioned or authorized by the City and by the National Football League (NFL).
- General and mobile advertising (including, but not limited to, signs on or attached to a vehicle, portable device or person) shall be prohibited except for promotional displays sanctioned or authorized by the City and by the National Football League, including, but not limited to, those placed on existing public utility poles.
- The distribution or provision of free products, service or coupons (otherwise referred to as sampling) and other promotional giveaways shall be prohibited except if such activities are sanctioned and authorized by the National Football League.

[*See* **Exhibit P-2**, p.24]

Essentially, the Guide broadens the media proscriptions already set forth in Section 3(j) of the Ordinance by prohibiting *all temporary signs*, and adds to the Ordinance the restriction that non-NFL sponsors cannot even apply for sign permits. It is that provision of the Guide – the provision on page twenty-four titled "Banners and Signs" – as well as all other provisions related to the permitting of noncommercial banners and signs, that Plaintiffs Bohn and Ciccarone challenge here.

The Plaintiffs

Tara Jill Ciccarone is a member of Occupy NOLA. She and several other Occupy members have planned a number of expressive activities for Super Bowl week, all of which would be prohibited under the Clean Zone restrictions, and some of which will be directed at the Clean Zone restrictions themselves. They include:

(1) displaying the following flags in the Clean Zone, specifically in or near Jackson Square and on streets in between the Super Dome, the French Quarter, and near the Mississippi River,

- (a) a flag that reads "We are the 99%" or something similar;
- (b) a flag that looks like the American flag but has corporate logos on it;
- (c) a flag with a message emphasizing the important of free speech

(2) displaying various signs in the same areas, containing the following messages:

- (a) "Money is not more important than constitutional rights, despite what Clean Zone would indicate.";
- (b) "Congress shall make no law ... abridging the freedom of speech...";
- (c) "Your Tax Dollars Working to Help the Rich Get Richer";
- (d) "Super Bowl XLVII – Sponsored by Corporate Greed"

(3) displaying a variable-message LED sign with the words "this sign is illegal" at a to-be-determined location in the Clean Zone.

Ciccarone also plans a "human billboard" operation in which she and several other Occupy members will stand side-by-side at various places in the Clean Zone, holding signs with ten-word messages about various political, social and economic problems in Louisiana and directing readers to online sources of additional

information. For example, one sign would read "New Orleans: incarceration capital of the world" and include a link to a website with contact information for someone who could be contacted for a true story behind the message.

Neither Ciccarone nor any other Occupy NOLA member is an official NFL sponsor, and none of their proposed signs, flags or banners contain any NFL branding, look or feel. Moreover, neither Ciccarone nor any other Occupy member has applied for a permit, as the sponsorship and branding restrictions would have made such an application completely futile, *infra*. Put simply, everything Ciccarone has been planning violates the Ordinance and Guide, and under the terms of the Ordinance is punishable by a $500 fine and 6 months in jail. Because Ciccarone and the other Occupy members do not want to risk the arrest, fines and incarceration that would almost certainly result if they carried out their protests, they ask this Court to intervene preenforcement and protect their First Amendment rights.

Troy Bohn is the pastor of Raven Ministries, a religious congregation that regularly preaches on Bourbon Street in the French Quarter. As part of their religious exercise, Bohn and his congregation wear t-shirts and carry signs that read "I Love Jesus," "Ask Me How Jesus Changed My Life," or similar messages, and they carry a large cross emblazoned with the words "Raven Street Church." Like Ciccarone's protest signs, Bohn's religious signs arguably would be criminalized under Sections 3(j) and 4 of the Ordinance and the Permitting Guide, and, like Ciccarone, Bohn and his congregation are concerned about arrest, fines

and incarceration. Like Ciccarone, Bohn brings this matter to secure his First Amendment right to continue carrying religious signs in the Quarter.

Legal Argument

Preliminary relief is appropriate when a petitioner demonstrates "(1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest." *Speaks v. Kruse*, 445 F.3d 396, 399-400 (5th Cir. 2006). "When analyzing the degree of 'success on the merits' that a movant must demonstrate to justify injunctive relief, the Fifth Circuit employs a sliding scale involving the balancing the hardships associated with the issuance or denial of a preliminary injunction with the degree of likelihood of success on the merits." *McWaters v. Federal Emergency Mgmt. Agency*, 408 F. Supp. 2d 221, 228 (E.D. La. 2006). "Moreover, when the other factors weigh in favor of an injunction, a showing of some likelihood of success on the merits will justify temporary injunctive relief." *Id*. As set forth below, Plaintiffs easily meet the relevant standard.

I. Plaintiffs are likely to succeed on the merits of their claims.

A. The Ordinance and Guide violate the First Amendment.

The Clean Zone restrictions challenged here – Sections 3(j) and 4 of the Ordinance and all sections of the Permitting Guide concerning the approval and display of signs, flags, banners and other forms of noncommercial speech – present

a viewpoint-discriminatory, content-based prior restraint on public speech in a traditional public forum. They are presumptively unconstitutional, and unless the City can demonstrate that they are the least restrictive measures necessary to achieve a compelling government interest, this Court must grant Plaintiffs' motion and suspend their enforcement.

i. The Clean Zone is almost entirely a traditional public forum.

As a preliminary matter, the public streets and parks of the Clean Zone – indeed, almost the entire Zone, not including private property – are traditional public fora. Content-based restrictions of speech in traditional public fora are presumptively invalid, and the restrictions challenged here are no exception.

There are three types of fora. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *Doe v. Santa Fe Independent School Dist.*, 168 F.3d 806, 819 (5th Cir. 1999). The first category, the traditional public forum, consists of places like public streets and parks, which "[T]ime out of mind.... have been used for public assembly and debate." *Frisby v. Schultz*, 487 U.S. 474, 480 (1988) (internal quotes omitted). Moreover, traditional public fora do not lose their revered character as neighborhoods quiet and streets narrow; indeed, all public streets are traditional public fora. *Id.* at 481, *citing Hague v. CIO*, 307 U.S. 496, 515 (1939) (Roberts, J.) ("[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public.").

In a traditional public forum, "government entities are strictly limited in their ability to regulate private speech...." *Service Employees, Local 5 v. City of*

Houston, 595 F.3d 588, 595 (5th Cir. 2010), *quoting Pleasant Grove City, Utah v. Summum*, 555 U.S. 460 (2009). For the government to enforce a content-based exclusion in a traditional public forum, the exclusion must survive strict scrutiny; that is, the government must show that its regulation is "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Id*. This is an almost insurmountable obstacle, as it has long been the case that content-based restrictions on speech in public fora are presumptively invalid. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *Rangra v. Brown*, 566 F.3d 515 (5th Cir. 2009).

Here, the Clean Zone includes all the streets and public parks within its boundaries, all of which have been recognized by this Court as traditional public fora. *See*, *e.g.*, *Howell v. City of New Orleans*, 844 F.Supp. 292, 294 (E.D. La. 1994) (noting that Jackson Square is a traditional public forum and granting a TRO against content-based restrictions of First Amendment activity there); *Acorn v. City of New Orleans*, 606 F.Supp. 16, 23 (E.D. La. 1984) (striking down a New Orleans anti-solicitation ordinance because solicitations were made in the street, a traditional public forum); *Trebert v. City of New Orleans*, 2005 WL 273253 (E.D. La. 2005) ("Jackson Square in the French Quarter is a quintessential public forum").

ii. The Ordinance and Guide impose content-based restrictions on speech.

As discussed, "[C]ontent discrimination in regulations of the speech of private citizens on private property *or in a traditional public forum* is presumptively impermissible, and this presumption is a very strong one." *City of Ladue, et al., v.*

Gilleo, 512 U.S. 43 (1994) (O'Connor, J. concurring) (emphasis added). If the Court agrees that the Clean Zone is largely a traditional public forum, it then must determine whether the challenged provisions – Sections 3(j) and 4 of the Ordinance and all Guide sections regarding the approval and display of signs, flags, banners and other forms of speech – are content-based. For that, the Supreme Court has set forth a simple test: if, in enforcing the law, one "must necessarily examine the content of the message that is conveyed," the law is content-based. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992); *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 448 (2002) (Kennedy, J., concurring) (stating that the statute "describes speech by content," therefore "it is content based").

Here, Section 3(j) of the Ordinance and the "Banners and Signs" portion of the Guide forbid signs, banners, flags and various other forms of public media from the Clean Zone unless those media contain "at least 60% Super Bowl/NFL branding, look and feel, and no more than 40% third party commercial identification." *See* **Exhibit P-1**, p.5. This is as plain a content-based restriction as can be fashioned. And of course, neither Ciccarone's "Occupy" and "99%" flags, her "human billboard," nor her LED-sign, nor Bohn's religious signs or large cross, contain any such NFL branding. As such, they almost certainly violate the ordinance and would not be allowed in the Clean Zone.

iii. The Guide creates a viewpoint-discriminatory prior restraint on protected speech.

The Ordinance and Guide impose a content-based restriction on speech in a traditional public forum. Even worse, however, the Guide's "Banners and Signs"

permitting scheme, *see* **Exhibit P-2**, p.24, establishes a viewpoint-discriminatory prior restraint on public, noncommercial speech. Independently of the ordinance, the Guide's "Banners and Signs" permitting scheme, and all other elements of the Guide related to the permitting of noncommercial banners, signs and other forms of communication, must be thrown out.

Viewpoint discrimination is "discrimination because of the speaker's specific motivating ideology, opinion, or perspective." *Rosenberger v. Rector & Visitors Univ. Va*, 515 U.S. 819, 829 (1995). It is "presumed impermissible when directed against speech otherwise within the forum's limitations." *Id*. Moreover, where the government's choice of speaker or message is wound into a permitting scheme that vests unbridled discretion in city officials to determine what speech is allowed and what is not, based purely upon the identity of the speaker and/or the content of the sign, the scheme is almost always unconstitutional. *City of Lakewood v. Plain Dealer Publishing Co*, 486 U.S. 750, 763 (1988) ("In the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship. . . . This danger is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official.").

Here, the Guide limits sign permit applicants to official NFL sponsors. *See* **Exhibit P-2**, p.24. Non-sponsors cannot even apply. This is viewpoint discrimination in its simplest form, and this Court must not hesitate to end it before it starts.

iv. Neither the Ordinance nor the Guide can survive strict scrutiny.

Content-based restrictions and viewpoint-discriminatory prior restraints on speech in traditional public fora must survive strict scrutiny; that is, they must be narrowly tailored to serve a compelling government interest. *Service Employees, Local 5*, *supra* at 595 (strict scrutiny for content-based restrictions in traditional public fora); *Estiverne v. La. State Bar Ass'n*, 863 F.2d 371, 376 (5th Cir. 1989) (the same for viewpoint discrimination). Neither the Ordinance nor the Guide meet this most rigorous standard of review.

a. Defendants have no compelling interest in banning all signs and other restricted media from the Clean Zone.

The Ordinance states the City's interest in the Clean Zone restrictions as follows:

> WHEREAS, the 2013 National Football League's Super Bowl XLVII will have a tremendous positive economic impact on the City of New Orleans and the State of Louisiana; and
>
> WHEREAS, given the thousands of visitors, dignitaries, and media personnel who will be in attendance, it is necessary that certain areas in and around events related to the 2013 National Football League's Super Bowl XLVII, be regulated and controlled to provide for the public health, safety, and welfare of the above mentioned participants so that the maximum benefit and enjoyment of all that the 2013 National Football League's Super Bowl XLVII events have to offer may be enjoyed by all

[*See* **Exhibit P-1**, Prefatory text, p.2]

The Guide echoes those sentiments, stating that the City's interest is "to protect the quality of life for residents and assist[] businesses in thriving during the

National Football League's Super Bowl XLVII," and simultaneously, "to facilitate a tremendous positive economic impact on the City of new Orleans and the State of Louisiana through the regulation and control of certain areas in order to provide for the public health, safety, and welfare of thousands of residents, visitors, dignitaries, and media personnel who will attend events related to the 2013 National Football League's Super Bowl XLVII." *See* **Exhibit P-2**, p. 5. The Guide then adds additional justifications for its permitting restrictions on banners and temporary signs:

Banner Permit

A **Banner Permit** from the Department of Safety and Permits is required for any banner in the City of New Orleans, including building wraps. The City's sign regulations are designed to: protect the public safety – so that signs do not fall down on pedestrians or customers, to prevent signs from becoming projectiles in the event of heavy winds or rains, and to regulate the aesthetics of an area as to the size and number of signs visible at any given time.

[*See* **Exhibit P-2**, p.25]

Attached/Detached Sign Permit

An **Attached/Detached Sign Permit** from the Department of Safety and Permits is required to erect, construct, post, paint, alter, maintain, or relocate any sign in the City of New Orleans. The City's sign regulations are designed to: protect the public safety – so that signs do not fall down on pedestrians or customers, to prevent signs from becoming projectiles in the event of heavy winds or rains, and to regulate the aesthetics of an area as to the size and number of signs visible at any given time.

[*See* **Exhibit P-2**, p.25]

While generalized interests in public health, safety,[1] aesthetics and economic development may be legitimate, they are not compelling. *See*, generally, *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000) (generalized interests in **preventing and curtailing ordinary crime are not compelling** governmental

[1] Indeed, Plaintiffs wonder what interest the City has in allowing only NFL-sponsored and branded signs to become wind-propelled projectiles.

interests); *Dimmitt v. City of Clearwater*, 985 F.2d 1565, 1569-70 (11th Cir. 1993) (general interests in **safety and aesthetics were not compelling** interests sufficient to justify flag ordinance); *Nat'l Adver. Co. v. City of Orange*, 861 F.2d 246, 249 (9th Cir. 1988) (general interests in **safety and aesthetics were not compelling** interests sufficient to justify restriction on noncommercial billboards), *citing Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 520 (1981); *Netherland v. City of Zachary, La.*, 626 F. Supp. 2d 603, 609 (M.D. La. 2009) (general interest in **safety was not compelling** interest sufficient to justify restriction on speech); *Lawless v. Lower Providence Twp.*, 02-cv-7886, 2002 WL 31356304 (E.D. Pa. Oct. 17, 2002) (general interests in **safety and aesthetics were not compelling** interests sufficient to justify content-based sign ordinance), *citing Whitton v. City of Glandstone, Mo.*, 832 F.Supp. 1329, 1335 (W.D.Mo.1993). *C.f. Metromedia, Inc.*, *supra* at 493 (government interests in health, **safety and aesthetics are *legitimate* interests in a *content-neutral* ordinance** prohibiting all off-site outdoor advertising signs).

Moreover, while Plaintiffs here do not challenge the Clean Zone's commercial speech restrictions, they nonetheless are uncertain how an ordinance that imposes content-based restrictions on all signs – including advertisements – in the Clean Zone *improves* the City's economic well-being. Indeed, some recent commentary has suggested that when the Super Bowl comes to town, the host city tends to either *lose* money or break even due to preparation costs, while local businesses see modest increases in revenue and the bulk of the profits go to the NFL and out-of-

town corporate sponsors. *See* Darren Rovell, "What Is a Super Bowl Worth? Good Question," *ESPN* (Feb. 2, 2006), http://sports.espn.go.com/nfl/playoffs05/news/story?id=2315303. Last visited January 23, 2013.

At any rate, while the City may have legitimate interests in economic improvement and general public safety, those interests are not compelling, and do not justify the Clean Zone restrictions.

b. Neither the Ordinance nor the Guide are narrowly tailored.

Second, even if the City had a compelling interest in limiting the content of all temporary signs and various other media in the Clean Zone, the restrictions at issue here are not narrowly tailored to do so. A narrowly tailored restriction is the "least restrictive alternative necessary to forward a compelling government interest," *John Doe No. 1 v. Reed*, 130 S.Ct. 2811, 2839 (2010), and simply put, prohibiting *all* banners, signs, flags and other public displays that lack at least 60% Super Bowl/NFL branding, look and feel, from any public property within the Clean Zone at any hour between 6:00AM on Monday, January 28, 2013 and 6:00PM on Tuesday, February 5, 2013 is not narrowly-tailored.

Indeed, such a heavyhanded approach to public speech has been rejected by the Supreme Court and the Fifth Circuit in the past, at even less-rigorous levels of scrutiny. *See*, *e.g.*, *Lovell v. Griffin*, 303 U.S. 444, 451-452 (1938) (striking down a content-neutral ban on distribution of handbills on public streets); *Jamison v. Texas*, 318 U.S. 413, 416 (1943) (tossing out ban on door-to-door distribution of literature); *Martin v. Struthers*, 319 U.S. 141, 145-149, (1943) (same); *Schad v.*

Mount Ephraim, 452 U.S. 61, 75-76 (1981) (throwing out ban on live entertainment); *Fernandes v. Limmer*, 663 F.2d 619 (5th Cir. 1981) (throwing out a content-neutral anti-pamphleting ordinance at the Dallas-Fort Worth Airport because it was not narrowly tailored); *Beckerman v. City of Tupelo*, 664 F.2d 502, 507 (5th Cir. 1981) (throwing out an ordinance authorizing the local police chief to deny a parade permit if he found that the parade would "probably cause injury to persons or property or provoke disorderly conduct or create a disturbance"); *Dallas Acorn v. Dallas County Hospital District*, 670 F.2d 629 (5th Cir. 1982) (striking down a public hospital's "no solicitation rule" because it was vague); *Acorn v. City of New Orleans*, *supra*, 606 F.Supp. at 23 (tossing out an ordinance that prohibited solicitation from pedestrians, even when streets were closed to vehicular traffic).

v. The Ordinance and Guide are not merely time, place or manner restrictions.

Defendants may argue that the Ordinance and Guide are merely time, place or manner restrictions because they are limited to a clearly-defined part of the City, because they are in effect for only a limited time, and because they provide for "Public Participation Areas" as follows:

> SECTION 6. One or more Public Participation Areas shall be established within or around the Clean Zone. Each Public Participation Area shall allow for the reasonable expression by the public in a manner that shall not be disruptive to the 2013 National Football League's Super Bowl XLVII, activities and events. Public Participation Zones shall be provided for during such reasonable times, and in such reasonable locations or proximity in and/or around the Clean Zone as to allow for meaningful and effective expression by the public.

[*See* **Exhibit P-1**, Section 6]

However, even with those allowances, the restrictions are not time, place or manner restrictions, as the first rule of such regulations is that they must be content-neutral. *Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1989). They also must be "narrowly tailored to serve a significant governmental interest," and must "leave open ample alternative channels for communication of the information." *Id.* As discussed above, the Clean Zone speech restrictions meet neither requirement.

B. The Ordinance and Guide violate the Fourteenth Amendment.

The Ordinance and Guide are also unconstitutional under the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Together, the Ordinance and Guide violate the Equal Protection Clause because they discriminate between NFL-branded speech and non-NFL-branded speech. Separately, the Guide raises additional Due Process Clause concerns. The Guide's permitting plan deprives Plaintiffs of a meaningful opportunity to obtain a permit, and thus deprives Plaintiffs of their First Amendment rights without due process. The Guide also is unconstitutionally vague. Moreover, it purports to proscribe *more* speech than the Ordinance enacted by the City Council would proscribe, and thus impermissibly skirts the legislative process. Finally, because the Guide, as well as the Ordinance, gives the NFL apparently unbridled discretion to determine what signage shall be allowed in the Clean Zone, it impermissibly delegates the authority to make decisions affecting people's constitutional rights to a private party.

Each of these infirmities is addressed in turn below.

i. The Ordinance and Guide violate the Equal Protection Clause.

The Ordinance and Guide blatantly discriminate between NFL-branded speech and non-NFL-branded speech. Under Section 4 of the Ordinance, "Any temporary signage approved by the City … shall be required to consist of 60% Super Bowl/NFL branding, look and feel, and no more than 40% third party commercial identification." *See* **Exhibit P-1**. This requirement does not apply merely to commercial signage; per §3(j) it applies to any "[i]nflatables, cold air balloons, banners, pennants, flags, building wraps, A-frame signs, projected image signs, electronic variable message signs, and light emitting diode signs *of any kind*." (Emphasis added.)

As previously noted, the Guide reaches even further. Under the Guide: "*Unless the applicant is an official NFL sponsor*, no temporary signs, banners, inflatables, cold air balloons, pennants, flags, building wraps, A-frame signs, billboards, projected image signs, electronic variable message signs, and light emitting diode signs *of any kind can be applied for or permitted*." *See* **Exhibit P-2**, p.24 (emphasis added).

"[U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Here, however, the Ordinance and Guide grant use of the Clean Zone for expressive

activity to individuals displaying signage that bears "60% Super Bowl/NFL branding" and to "official NFL sponsors," but deny the same use to all others.

The City, through the Ordinance and Guide, has effectively established two classes of speech: permitted NFL-branded speech and excluded non-NFL-branded speech. Classifications that affect fundamental rights, such as freedom of speech, are subject to strict scrutiny. *A.M. ex rel. McAllum v. Cash*, 585 F.3d 214, 226 (5th Cir. 2009) ("Under the equal protection clause, strict scrutiny applies to classifications that infringe on a fundamental right (such as the right to free speech and expression) or involve a protected classification."), *citing Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 & n.4 (1976). "When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized." *Carey v. Brown*, 447 U.S. 455, 461-63 (1980).

For the same reasons the Ordinance and Guide do not survive strict scrutiny under First Amendment analysis, they also do not survive strict scrutiny under Equal Protection analysis. *Supra* at I.A.iv. The Ordinance and Guide are unconstitutional under the Equal Protection Clause.

ii. The Ordinance and Guide are unconstitutionally overbroad.

The Ordinance and Guide are substantially overbroad. Not only does the Ordinance bar a great deal of otherwise protected speech, it does so over an enormous geographic area having little if anything to do with the Super Bowl. Its

restrictions on private speech in various forms, and its applicability in areas as far from the Superdome as the Marigny cannot possibly be related to the City's legitimate goals in creating the Clean Zone.

When a law "prohibits a substantial amount of protected speech[,] not only in an absolute sense but also relative to the statute's plainly legitimate sweep," it violates the First Amendment. *United States v. Williams*, 535 U.S. 285, 292 (2008); *Hill v. City of Houston, Tex.*, 764 F.2d 1156, 1161 (5th Cir. 1985). "An overbroad statute is invalid on its face, not merely as applied, and cannot be enforced until it is either re-drafted or construed more narrowly by a properly authorized court." *Id.* To be sure, a declaration of overbreadth is "strong medicine" applied "sparingly and only as a last resort," *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973), and the overbreadth of the ordinance "must not only be real, but substantial as well," in relation to its "plainly legitimate sweep." *Id.* at 615. But where a statute's deterrent effect on legitimate expression is indeed both "real and substantial," it must be invalidated. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975).

Here, when it comes to banning noncommercial speech in traditional public fora, the Clean Zone ordinances have no legitimate sweep. There simply is no rational connection between the City's stated interests in promoting the Super Bowl and protecting guests and attendees, and regulating the substance of noncommercial speech in a viewpoint-discriminatory, content-based manner. Moreover, there is no reason for the City to regulate the content of such media in areas such as the Marigny, the Warehouse District and the *opposite bank of the*

Mississippi River. *See*, **Exhibit P-2**, p.4. Thus, Sections 3(j) and 4 of the Ordinance, and the Guide's "Banners and Signs" permitting scheme are overbroad in both (1) their complete prohibition of all signs and other Section 3(j)-listed media, and (2) in their range.

Moreover, even if the boundaries of a "legitimate sweep" could be defined from the stated purpose of the Ordinance, *see* **Exhibit P-1**, Prefatory text, p.2, and **Exhibit P-2**, p.5, a content-based restriction on *all* temporary signs and other Section 3(j)-listed media is bound to restrict activities that have nothing to do with those goals.

iii. The Guide separately raises a number of Due Process Clause concerns.

a. The Guide's *permitting plan* deprives Plaintiffs of their First Amendment rights without procedural due process.

Even assuming that the Guide is otherwise constitutional, its permitting plan deprives Plaintiffs of a meaningful opportunity to obtain a permit. Plaintiffs wish to exercise their First Amendment right to display signs or banners in the Clean Zone, a designated area that, given its breadth, indisputably includes numerous traditional public fora. *Supra* I.A.i. But not only are Plaintiffs required to obtain permits to exercise their right in these public fora, according to the Guide, the last day to apply for a permit to display a sign or banner was January 4, 2013. **Exhibit P-2**, p.5 ("January 4 – Last Day to Submit Permit Applications for Signs, Banners"). Thus, an individual wishing to display a sign or banner expressing his or her opinion of a recent public event – for instance, the January 18, 2013, indictment of

former New Orleans mayor Ray Nagin – would have no opportunity to apply for and obtain a permit before the City's Clean Zone prohibitions go into effect on January 28, 2013.

Moreover, even if such individual had applied for a permit before January 4, 2013, the permit would have been denied. The Guide makes clear that unless an applicant is an official NFL sponsor, no permit will be issued. *See* **Exhibit P-2**, p.24 ("*Unless the applicant is an official NFL sponsor*, no temporary signs, banners … *of any kind can be applied for or permitted.*") (emphasis added). It does not provide for an appeal of a permit denial. It is doubtful that even if an appeal were contemplated there would be time ample to do so before January 28, 2013.

"Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (citations omitted). "It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'" *Fuentes*, 407 at 80, *quoting Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). Because the Guide's permitting plan did not provide Plaintiffs ample time to apply for a permit in advance of the date the City's Clean Zone prohibitions go into effect, and, more importantly, because application was futile for all non-official NFL sponsors, the Guide did not provide Plaintiffs a meaningful right to notice and opportunity to be heard.

"[T]he injury that stems from a denial of due process is not the liberty or property that was taken from the plaintiff, but the fact that it was taken without

sufficient process." *Bowlby v. City of Aberdeen, Miss.*, 681 F.3d 215, 222 (5th Cir. 2012), *citing Nasierowski Bros. Inv. Co. v. City of Sterling Heights*, 949 F.2d 890, 894 (6th Cir. 1991) (stating that, "[c]onceptually, in the case of a procedural due process claim, 'the allegedly infirm process is an injury in itself'"). "A due process injury is therefore complete at the time process is denied." *Id.* The Guide restricts Plaintiffs' First Amendment rights without sufficient process, and thereby violates the Due Process Clause.

b. The Guide's prohibitions are impermissibly vague.

In a defect that overlaps somewhat with that of its permitting scheme, the Guide's prohibitions themselves are unconstitutionally vague. They define key terms imprecisely or not at all, making it confusing to the public, unenforceable by police and prosecutors, and uninterpretable by the judiciary.

It is basic due process law that "an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). To avoid vagueness, an enactment must meet two requirements: it must 1) be clear enough to provide a person of ordinary intelligence notice of what conduct is prohibited, and 2) provide standards for those who enforce its prohibitions. *Id.*

Under the first prong, "Mathematical certainty" is not required," *id.*, but where "[p]eople of common intelligence must necessarily guess at the law's meaning and differ as to its application," it is unconstitutional. *Citizens United v. Federal Election Commission*, 130 S.Ct. 876, 889 (2010) (citation omitted). Indeed, where a law "fails to give a person of ordinary intelligence fair notice that his contemplated

conduct is forbidden," it must be struck down. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972).

Under the second prong, the law must provide enforcement officials with "explicit standards." *Grayned* at 108. It cannot "encourage arbitrary and erratic arrests and convictions," *Papachristou* at 162; nor can it place "unfettered discretion. . . in the hands of the [police]," *id.* at 168, or "furnish a convenient tool for harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure." *Id.* at 170. As the *Grayned* Court noted, a law is vague under the Fourteenth Amendment where it "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Id.* at 108-109.

The Guide fails the first prong – notice of prohibited conduct – in several ways. First, *it conflicts with the Ordinance on what signs are banned*: the Guide illegalizes *all temporary signs*, **Exhibit P-2**, p.24, whereas the Ordinance bans only "Inflatables, cold air balloons, banners, pennants, flags, building wraps, A-frame signs, projected image signs, electronic variable message signs, and light emitting diode signs." **Exhibit P-1**, p.4. Second, the Guide *conflicts with the Ordinance on who may speak*: the Guide limits permit applicants to official NFL sponsors, s*ee* **Exhibit P-2**, p.24, while the Ordinance imposes no limits on who may apply, instead restricting, albeit still unconstitutionally, only the content of signs to those with an appropriate amount of NFL branding. *See* **Exhibit P-1**, p.5. Lastly, the

Guide fails to define the "temporary sign" in any meaningful way. Without guidance on size, material, manner of display, or duration of display, people of ordinary intelligence are bound to reasonably disagree about whether a particular items constitutes a temporary sign.

In light of the above, the Guide also fails the second prong – meaningful standards for enforcement. Because the Ordinance and the Guide conflict, signholders will be subject to the erratic and arbitrary decisions of the City's police officers, who will have the sort of "unfettered discretion" cautioned against by the Supreme Court in *Grayned* and *Papachristou*.

c. The Guide impermissibly skirts the legislative process.

The Guide not only conflicts with the Ordinance, it purports to proscribe *more* speech than the Ordinance would proscribe. As just one example, whereas the Ordinance requires only that a sign "consist of 60% Super Bowl/NFL branding," the Guide requires that the sign be displayed by an "official NFL sponsor." *Compare* **Exhibit P-1**, §4 *with* **Exhibit P-2**, p.24.

To the extent a prohibition of speech is greater under the Guide than the legislatively enacted Ordinance would allow, the Guide deprives the public of their right to legislative process. "Procedural due process entitles citizens to a legislative body that 'performs its responsibilities in the normal manner prescribed by law.'" *Samson v. City of Bainbridge Island*, 683 F.3d 1051, 1060 (9th Cir. 2012) *cert. denied*, 133 S. Ct. 652 (2012) (citation omitted). *See also County Line Joint Venture v. City of Grand Prairie, Tex.*, 839 F.2d 1142, 1144 (5th Cir. 1988). In the absence of

legislative process, the public's rights are not "protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule." *Bi–Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915). The Guide, by pronouncing restrictions on speech that were not enacted by the Ordinance, skirts the legislative process and violates the Due Process Clause.

d. The Guide impermissibly delegates authority to the NFL.

Finally, the Guide, as well as the Ordinance, gives the NFL apparently unbridled discretion to determine what signage shall be allowed in the Clean Zone. The NFL has sole authority to bestow "official NFL sponsor" status on a would-be permit seeker, such that he or she may apply for a permit to display a sign or banner under the Guide's provisions. *See* **Exhibit P-2**, p. 24. Further, both the Guide and Ordinance advise that described activities are prohibited "unless sanctioned and authorized by the National Football League and the City of New Orleans." **Exhibit P-**2, p.5; **Exhibit P-1**, §3 ("Within the Clean Zone the activities described below … except those approved by both the City of New Orleans and the National Football League shall be regulated …").

The City cannot authorize the NFL to deprive members of the public of their rights without due process of law. *See, e.g., Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 122 (1928) (law that empowered landowners to determine, by whim, how a neighbor may use his property was unconstitutional; "They are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily … The delegation of power so attempted is repugnant to the due process clause of the

Fourteenth Amendment.") (citations omitted). *See also Del's Big Saver Foods, Inc. v. Carpenter Cook, Inc.*, 795 F.2d 1344, 1346 (7th Cir. 1986) ("A state cannot avoid its obligations under the due process clause by delegating to private persons the authority to deprive people of their property without due process of law."). Such delegations of authority require sufficient limitations. *Seattle Title Trust Co.*, 278 U.S. 116. As the NFL's discretion to authorize signage that shall be allowed in the Clean Zone has no limitations, the delegation runs afoul of the Due Process Clause.

C. Plaintiffs have standing to bring a preenforcement challenge.

Defendants may argue that Plaintiffs lack standing because they never applied to the City for a sign permit. However, it is well-established that where a sign-permitting scheme leaves no possibility that a particular speaker's proposed sign would have been approved (essentially, where exhaustion of an administrative remedy would be futile), that speaker's standing is preserved. *See*, *generally*, *M. L. v. Frisco Indep. Sch. Dist.*, 451 Fed. Appx. 424 (5th Cir. 2011) ("Generally, a party required to pursue administrative relief may refuse to engage in or complete such process 'where exhaustion would be futile or inadequate.'"), *citing Honig v. Doe*, 484 U.S. 305, 327 (1988).

Additionally, is equally well-settled that "where a permitting scheme allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license." *City of Lakewood*, 486 U.S. at 756, *quoting Freedman v. Maryland*, 380 U.S. 51, 56, (1965)

("In the area of freedom of expression it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, whether or not his conduct could be proscribed by a properly drawn statute, and whether or not he applied for a license.").

II. Without a TRO and preliminary injunction, Plaintiffs will be irreparably harmed.

"Violation of constitutional rights constitutes irreparable injury as a matter of law." *Springtree Apartments, ALPIC v. Livingston Parish Council*, 207 F. Supp. 2d 507, 515 (M.D. La. 2001). As the Supreme Court has noted, "the loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Deerfield Medical Ctr. v. City of Deerfield Beach*, 661 F.2d. 328 (5th Cir. 1981) ("we have already determined that the constitutional right of privacy is either threatened or is in fact being impaired and this conclusion mandates a finding of irreparable injury"); 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2948.1 (2d Ed. 1995) ("When an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."). This reasoning essentially collapses the "likelihood of success on the merits" and "irreparable harm" prongs of the injunctive inquiry where constitutional rights are at stake. *Forum for Academic & Inst. Rights v. Rumsfeld*, 390 F.3d 219, 246 (3d Cir. 2004).

Because Plaintiffs have a legitimate fear of arrest, fines and prosecution if they carry their signs and engage in other acts of prohibited speech in the Clean

Zone, their speech already has been chilled. For every day that chilling effect remains, the harm to Plaintiffs' First and Fourteenth Amendment rights will continue.

III. The injury to Plaintiffs' First and Fourteenth Amendment rights outweighs any harm an injunction may cause the City.

The City has no legitimate interest in enforcing a blatantly unconstitutional content-based restriction on private, noncommercial speech in traditional public fora, particularly where such enforcement would harm the protected First and Fourteenth Amendment rights of its citizens. *American Civil Liberties Union v. Johnson*, 194 F.3d 1149 (10th Cir. 1999) (upholding the district court's issuance of a TRO and noting that "*the threatened injury* to Plaintiffs' constitutionally protected speech outweighs whatever damage the preliminary injunction may cause Defendants' inability to enforce what appears to be an unconstitutional statute") Here, while the City has an obligation to enact and enforce ordinances that keep its residents and guests safe during times of festivity, there are far more focused and less restrictive means by which the City can accomplish those ends. Therefore, any harm to the City under a temporary restraining order will be minimal. The City will, at most, have to tolerate some social, political or religious speech during the Super Bowl at various places within the Clean Zone, and it will be required to consider more carefully the constitutionality of any ordinances it passes.

IV. The public interest will be served by a TRO.

A temporary restraining order enjoining the Defendants from enforcing Sections 3(j) and 4 of the Ordinance and any portion of the Guide related to the

permitting of noncommercial banners and signs will serve the public interest, as the public interest is always served by ensuring the government's compliance with the Constitution and civil rights laws. *See*, *e.g.*, *Valley v. Rapides Parish School Board*, 118 F.3d 1047, 1056 (5th Cir. 1997) (finding that public interest would be undermined if the unconstitutional actions of a school board were permitted to stand); *G&V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994) (holding that it is always in the public interest to prevent violation of constitutional rights); *Forum for Acad. & Inst. Rights*, *supra*. ("The public interest is best served by enjoining a statute that unconstitutionally impairs First Amendment rights.").

Conclusion

For the reasons set out above, this Court should issue a temporary restraining order and preliminary injunction prohibiting Defendants from enforcing Sections 3(j) and 4 of the Ordinance and any portion of the Guide related to the permitting of Banners and Signs.

Respectfully submitted by:

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