

Banner Policies at Government-Owned Athletic Stadiums: The First Amendment Pitfalls

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I. INTRODUCTION

Imagine you are the manager of a major, government-owned stadium where professional athletic teams play their games. Team owners (who lease the facility from the government) want to encourage fans to bring banners and signs to the games but want to ensure that such banners satisfy certain standards. The owners want limitations on the size of the banners and want their messages to be game-related. They are worried that some banners will contain offensive or inappropriate language. In addition, the owners, ever conscious of the television audience, do not want their “product” invaded by what might be uncomfortable political or religious slogans. How can the owners’ desire to encourage “team spirit” be facilitated while still maintaining significant control?

Two recent cases are examples of how the results of this balancing act can be unconstitutional. In *Aubrey v. City of Cincinnati*¹ and *Stewart v. District of Columbia*,² federal district judges ruled that stadium banner policies, in Cincinnati’s Riverfront Stadium and Washington D.C.’s RFK Stadium respectively, facially violated the First Amendment.³ Using these two decisions as a guide, this Note examines three First Amendment obstacles facing those who wish to create and enforce banner policies at government-owned athletic facilities.⁴ Part II of this Note briefly discusses the two principle cases and outlines the First Amendment pitfalls. Part III discusses the most significant of these pitfalls—maintaining nonpublic forum status. Finally, Part IV discusses the related problems of overbreadth and vagueness.

¹ 815 F. Supp. 1100 (S.D. Ohio 1993).

² 789 F. Supp. 402 (D.D.C. 1992).

³ *Aubrey*, 815 F. Supp. at 1104; *Stewart*, 789 F. Supp. at 406.

⁴ Of course the bulk of the First Amendment analysis in this Note is applicable to other instances where speech is being regulated on or at government-owned property. However, the purpose of this Note is to focus on the distinct problems encountered by the defending parties in the stadium banner policy cases.

II. THE PRINCIPAL CASES: EXAMPLES OF THE FIRST AMENDMENT PITFALLS

A. *The Aubrey v. City of Cincinnati Decision*

On October 17, 1990, the Cincinnati Reds (Reds) played the Oakland Athletics in game two of the World Series.⁵ One of the fans in attendance was Reverend Guy Anthony Aubrey who brought a sign measuring two feet by three feet inscribed with the phrase "John 3:16."⁶ Pursuant to a written banner policy,⁷ Reds security officers confronted Aubrey, escorted him to a security room, notified him that he could not display his sign, and confiscated the sign until the conclusion of the game.⁸ Aubrey brought a lawsuit under 42 U.S.C. § 1983 seeking declaratory judgment, compensatory and punitive damages, and injunctive relief.⁹

On Plaintiff's Motion for Partial Summary Judgment, United States District Court Judge S. Arthur Spiegel ruled that the Reds's banner policy was unconstitutionally overbroad and vague.¹⁰ Noting that the courts have disagreed in their approach to speech rights at athletic events,¹¹ the court discussed that the overbreadth doctrine could invalidate a regulation

⁵ *Aubrey*, 815 F. Supp. at 1102.

⁶ *Id.* at 1103. *John 3:16* (New Revised Standard Version) [hereinafter NRSV] states: "For God so loved the world that he gave his only Son, so that everyone who believes in him may not perish but may have eternal life."

⁷ The written banner policy stated:

[B]allpark patrons are permitted to bring signs and banners to the Stadium. They must be in good taste (as determined by Reds [sic] management) or the banner will be removed. . . . The only restrictions are the banners cannot interfere with the sight-line of the batter, pitcher or umpire looking down the foul line or in any way that obstructs the view of anyone in the stands. Reds [sic] management reserves the right to remove any banner or sign that is viewed to be in bad taste or is causing an obstruction.

Aubrey, 815 F. Supp. at 1102. While not expressly stating it, the Reds maintained that the policy had "always been understood to mean that all allowable signs must be game-related." *Id.* In addition to their banner policy, the Reds were encouraged by Major League Baseball not to allow religious signs in the stadium. *Id.* at 1103.

⁸ *Id.* at 1103.

⁹ *Id.*

¹⁰ *Id.* at 1106.

¹¹ *Id.* at 1103. In fact the court conceded that the case "raises a question of free speech on the outer edges of the First Amendment." *Id.*

regardless of whether the speech rights of the plaintiff were violated.¹² The overbreadth doctrine's goal "is to avoid 'chill[ing] the expressive activity of others not before the court.'" ¹³ Furthermore, a regulation limiting freedom of speech "may be struck down as overbroad when it delegates excessive discretion in a decision maker to determine whether certain speech is permissible."¹⁴ The court pointed out that in *Board of Airport Commissioners v. Jews for Jesus, Inc.*,¹⁵ the Supreme Court had invalidated an airport regulation "subject to multiple, contradictory interpretations" without addressing the ultimate substantive issue of how much speech could be regulated in an airport terminal.¹⁶

Applying these principles, Judge Spiegel found unconstitutional overbreadth in the banner policy's use of the terminology "good taste" and the Reds's understanding of "baseball related."¹⁷ Reds's employees could not agree as to what constituted "good taste" as the Reds had defined it.¹⁸ The banner policy left "too much discretion in the decision maker without any standards . . . [upon which] to base his or her determination."¹⁹ Thus, Judge Spiegel did not hesitate to declare the banner policy unconstitutional as facially overbroad and vague.²⁰

B. *The Stewart v. District of Columbia Armory Board Decision*

On January 4, 1992, the Washington Redskins were playing in a postseason football game, and Edwin Thate, Jr. was in attendance at RFK Stadium.²¹ Before and during the game, Thate placed two signs in the stadium—one reading "John 3:3" and the other reading "Mark 8:36."²²

¹² *Id.*

¹³ *Id.* at 1104 (quoting *Forsyth County v. Nationalist Movement*, 112 S. Ct. 2395, 2401 (1992)).

¹⁴ *Id.* at 1103 (citing *Forsyth County v. Nationalist Movement*, 112 S. Ct. 2395, 2401 (1992)). Here the court fails to distinguish between overbreadth and vagueness. See *infra* part IV.B.

¹⁵ 482 U.S. 569, 576 (1987).

¹⁶ *Aubrey*, 815 F. Supp. at 1104.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Stewart v. District of Columbia Armory Bd.*, 789 F. Supp. 402, 403-04 (D.D.C. 1992).

²² *Id.* John 3:3 (NRSV) states: "Jesus answered him, 'Very truly, I tell you, no one can see the kingdom of God without being born from above.'" Mark 8:36 (NRSV) questions: "For what will it profit them to gain the whole world and forfeit their life?"

Employees of the District of Columbia Armory Board²³ removed both signs at the direction of the National Football League and pursuant to an Armory Board regulation requiring that banners "pertain to the event."²⁴ On January 10, 1992, Thate and two others filed an action in federal district court to enjoin the Armory Board from preventing the display of religious signs.²⁵ On that day, United States District Judge Joyce Hens Green granted plaintiffs' motion for a temporary restraining order/preliminary injunction on the following two grounds: (1) RFK Stadium is a public forum, and therefore, the Armory Board can only limit speech pursuant to a compelling state interest which did not exist in this case, and (2) the regulation was overbroad and vague.²⁶

First, the court determined that RFK Stadium was a public forum by government designation in that the Armory Board consistently failed to remove non-event-related signs in the past including religious signs placed by the plaintiffs.²⁷ This being so, the court ruled that the Armory Board could not justify its actions against the "compelling state interest" test applicable in a public forum.²⁸ Concern about offending fans, team owners, tenants, and the NFL was held not to be a compelling state interest and, in addition, was held to be evidence of viewpoint discrimination.²⁹

Second, the court ruled that the banner regulation was overbroad and vague.³⁰ Citing and discussing *Board of Airport Commissioners v. Jews for*

²³ The District of Columbia Armory Board "is an independent government agency established by Congress and charged with the responsibility of constructing, maintaining, and operating RFK Stadium" *Stewart*, 789 F. Supp. at 404.

²⁴ *Id.* at 403-04. The banner regulation allowed signs to be exhibited if the following conditions were met: (1) the banner pertained to the event, (2) the banner was not commercial, vulgar or derogatory, and (3) the dimensions of the banner did not exceed 4' x 6'. *Id.* at 403.

²⁵ *Id.*

²⁶ *Id.* at 404-06.

²⁷ *Id.* at 405.

²⁸ *Id.*

²⁹ *Id.* at 405-06. Viewpoint discrimination occurs when some views on a particular subject are allowed and the opposing or differing views are not allowed. This is contrasted with "content-based regulations" which prohibit an entire subject matter. *See, e.g., Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141, 2147 (1993) ("That all religions and all uses for religious purposes are treated alike under Rule 7 [content-based discrimination], however, does not answer the critical question whether it discriminates on a basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child-rearing except those dealing with the subject matter from a religious standpoint [viewpoint discrimination].").

³⁰ *Stewart*, 789 F. Supp. at 406.

Jesus,³¹ Judge Green held that the Armory Board regulation failed to define key terms, and thus, allowed excessive discretion by officials enforcing the policy.³² “[T]he fact that defendants’ officials alone have the power to decide in the first instance whether a given activity is related to the event itself presents serious constitutional difficulty.”³³ As a result, the RFK Stadium banner policy was effectively declared unconstitutional.³⁴

C. An Outline of the First Amendment Pitfalls

Aubrey and *Stewart* provide examples of the three main First Amendment pitfalls facing officials who wish to encourage the display of banners, but that prohibit those banners which are not game-related or might cause religious or political discomfort.³⁵ First, and most importantly, stadium officials must ensure that the stadium is not deemed a public forum. As seen in *Stewart*, once the stadium is declared a public forum, all limitations on speech must satisfy a rigorous, strict scrutiny test which does not allow content-based discrimination against political or religious messages. Second, a banner policy must not be overbroad—it must not be drafted so as to significantly chill otherwise protected speech. Finally, the banner policy must not be vague—it must be drafted in a way as to be clearly understood and not allow excessive discretion by enforcement personnel.

III. THE PROBLEM OF BEING A PUBLIC FORUM

A. An Overview of the Public Forum Doctrine: The Perry Approach

The public forum doctrine was developed by the Supreme Court over many years but was not clearly enunciated until the Court’s 1983 decision

³¹ 482 U.S. 569 (1987).

³² *Id.* To illustrate its point, the court highlighted the banner regulation terms “vulgar,” “derogatory,” and “pertain to the event” as failing to be adequately defined. *Id.*

³³ *Id.*

³⁴ I use the word “effectively” because pursuant to a motion for a temporary restraining order the court need only determine if the plaintiff would likely succeed on the merits. *See id.* at 404.

³⁵ It should be noted that this analysis and Note only apply when First Amendment principles are deemed applicable. First Amendment scrutiny may not apply in stadiums not owned by any governmental body or where the government is not involved in enacting or enforcing the policy.

in *Perry Education Ass'n v. Perry Local Educators' Ass'n*.³⁶ In *Perry*, the petitioner, Perry Education Association (PEA), was the duly elected exclusive bargaining representative for the teachers of the Metropolitan School District of Perry Township, Indiana.³⁷ As part of the collective-bargaining agreement, PEA was the only union permitted to have access to the interschool mail system and teachers' mailboxes in the schools.³⁸ Respondent Perry Local Educators' Association, a rival teachers' union, filed suit arguing that being denied the use of teachers' mailboxes violated *inter alia* the First Amendment.³⁹

Writing for the majority, Justice White rejected the First Amendment claim, and in the process, he classified three types of government-owned property, each with a corresponding First Amendment standard.⁴⁰ The first type of government-owned property is the traditional public forum, the second type includes property designated as a public forum by the government, and the third type consists of property which is not by tradition or designation a forum for public expression.⁴¹

Traditional public forums are created when they "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."⁴² These "quintessential public forums,"⁴³ such as public parks and streets, provide the highest level of First Amendment protection. Content-based regulations must serve a compelling state interest.⁴⁴ Time, place, and manner regulations must be

³⁶ 460 U.S. 37 (1983). For a more detailed overview of the public forum doctrine, see generally JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* §§ 16.45-16.46 (4th ed. 1991) (discussing the history and implementation of the public forum doctrine); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 12-4 to 12-25 (2d ed. 1988) (delineating public, semipublic, and private forums); Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219 (1984); Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713 (1987).

³⁷ *Perry*, 460 U.S. at 38-39.

³⁸ *Id.* at 39.

³⁹ *Id.* at 41.

⁴⁰ *Id.* at 44-54.

⁴¹ *Id.* at 45-46. See generally NOWAK & ROTUNDA, *supra* note 36, § 16.46, at 1090-93 (analyzing the significance of *Perry*).

⁴² *Perry*, 460 U.S. at 45 (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)).

⁴³ *Id.*

⁴⁴ *Id.*; see, e.g., *Burson v. Freeman*, 112 S. Ct. 1846 (1992) (holding that a Tennessee statute prohibiting election day campaigning within 100 feet of a polling

content neutral, must be narrowly tailored to serve a significant government interest, and must leave ample alternative channels of communication.⁴⁵

Public forums by designation consist of property that the government "has opened for use by the public as a place for expressive activity."⁴⁶ The government is not required to create these forums, nor is the government required to maintain the open character of them.⁴⁷ However, as long as the forum is open, the government is bound by the same First Amendment standards applied to the traditional public forum—content-based restrictions can only be applied upon satisfying the compelling state interest test and satisfying the reasonable time, place, and manner limitations.⁴⁸

The third category consists of government-owned property that is not a public forum by tradition or designation.⁴⁹ The First Amendment does not require complete protection for all government-owned or operated property.⁵⁰ In this category, the government may control the property's use consistent with its purpose.⁵¹ "In addition to time, place, and manner regulation, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is

place was a content-based restriction in a public forum but satisfied the compelling state interest test); *Boos v. Barry*, 485 U.S. 312 (1988) (holding that a city ordinance prohibiting the critical picketing of an embassy was a content-based restriction in a public forum and did not satisfy the compelling state interest test); *see also Grayned v. City of Rockford*, 408 U.S. 104, 115–19 (1972).

⁴⁵ *Perry*, 460 U.S. at 45; *see, e.g., United States v. Grace*, 461 U.S. 171 (1983) (holding that a federal statute prohibiting picketing in or on the Supreme Court grounds was not a reasonable time, place, and manner restriction); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (upholding a National Park Service regulation prohibiting camping in certain parks as a reasonable time, place, and manner restriction).

⁴⁶ *Perry*, 460 U.S. at 45.

⁴⁷ *Id.* at 45–46.

⁴⁸ *Id.*; *see, e.g., Widmar v. Vincent*, 454 U.S. 263 (1981) (holding that public university meeting places constituted designated public forums and that regulation prohibiting use for religious purposes violated the First Amendment); *Madison Joint Sch. Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976) (holding that a school board meeting is a designated public forum and that prohibiting certain teachers from speaking violated the First Amendment); *Flower v. United States*, 407 U.S. 197 (1975) (holding that an open street through a military fort is a designated public forum and thus authorities could not prohibit distribution of leaflets by pedestrians on the street).

⁴⁹ *Perry*, 460 U.S. at 46.

⁵⁰ *Id.*

⁵¹ *Id.*

reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."⁵² Justice White found the school district internal mail system to be just such a forum.⁵³ Consequently, the Perry Local Educators' Association's First Amendment challenge was denied.⁵⁴

When determining if a government-owned property is a public forum, the primary factor on which courts focus is the specific property's location and purpose.⁵⁵ For example, not all government-owned sidewalks are public forums. A sidewalk on the perimeter of a government-owned building may be a public forum if the sidewalk is indistinguishable from and is used as any other public sidewalk.⁵⁶ However, a sidewalk designed and constructed solely to provide clear passage for those wishing to enter and do business within the government-owned building might not be a public forum.⁵⁷ Thus, the public forum doctrine requires a case-by-case

⁵² *Id.*; see, e.g., *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141 (1993) (holding that even if a school facility is not a public forum, excluding the use of such facilities to religious views about family issues and child-rearing, after such facilities had been open to other viewpoints on these issues, violated the requirement that regulations be viewpoint neutral); *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2701 (1992) (concurring opinion reported separately at 112 S. Ct. 2711 (1992)) (holding that airport terminals were not a public forum and that regulations prohibiting solicitation were reasonable); *Lee v. Int'l Soc'y for Krishna Consciousness*, 112 S. Ct. 2709 (1992) (concurring opinion reported separately at 112 S. Ct. 2711 (1992)) (holding that even though airport terminals are not public forums, a regulation prohibiting the distribution of literature was not reasonable); *United States v. Kokinda*, 497 U.S. 720 (1990) (holding that a sidewalk leading from parking lot to post office is neither a traditional nor a designated public forum and that a regulation prohibiting solicitation there was reasonable); *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788 (1985) (holding that a charity drive directed at federal employees was not a public forum and that regulations excluding the participation of legal defense and political organizations was reasonable); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (upholding ban on political advertisements in city transit vehicles which were declared not to be public forums).

⁵³ *Perry*, 460 U.S. at 46.

⁵⁴ *Id.* at 55.

⁵⁵ *Kokinda*, 497 U.S. at 728-29 (citing *United States v. Grace*, 461 U.S. 171 (1983)).

⁵⁶ See *United States v. Grace*, 461 U.S. 171, 179 (1983) (holding that the sidewalks forming the perimeter of the Supreme Court building grounds are public forums).

⁵⁷ See *Kokinda*, 497 U.S. at 729 (holding sidewalk leading to U.S. Post Office building not to be a public forum).

analysis into the functional purposes and uses of specific government-owned properties.

Although the public forum doctrine often has been criticized,⁵⁸ there is no evidence that the Supreme Court intends to abandon its principles.⁵⁹ As a result, it is vital that stadium officials wishing to regulate speech through banner policies avoid strict scrutiny by ensuring that their stadiums are not categorized as public forums.⁶⁰

B. *The Stadium Cases: An Overview*

As alluded to by Judge Spiegel in *Aubrey v. City of Cincinnati*,⁶¹ stadiums have been declared both public and nonpublic forums by the courts. Consistent with the public forum doctrine, the courts have engaged in a case-specific factual inquiry into the functional purpose and use of the particular stadium, and as a result, the courts have avoided categorical pronouncements that all government-owned stadiums are or are not public forums.⁶² The majority of the cases have found stadiums not to be public forums.⁶³

⁵⁸ Post, *supra* note 36, at 1715 & n.7; see, e.g., *TRIBE*, *supra* note 36, §§ 12-24 to 12-26; R. Alexander Acosta, Recent Development, 16 HARV. J.L. & PUB. POL'Y 269 (1993); Ronald A. Cass, *First Amendment Access to Government Facilities*, 65 VA. L. REV. 1287, 1308-09 (1979); Lonnie S. Davis, Note, Board of Airport Commissioners v. Jews for Jesus, Inc.: A Missed Opportunity to Restore Fundamental Fairness to Public Forum Analysis, 8 PACE L. REV. 607, 626-30 (1988); Marianne E. Dixon, Note, International Society for Krishna Consciousness, Inc. v. Lee: The Failure of the Public Forum Doctrine to Protect Free Speech, 37 ST. LOUIS U. L.J. 437, 458-64 (1993); Farber & Nowak, *supra* note 36, at 1224.

⁵⁹ See, e.g., *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141 (1993); *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2701 (1992) (concurring opinion reported separately at 112 S. Ct. 2711 (1992)); *Lee v. Int'l Soc'y for Krishna Consciousness*, 112 S. Ct. 2709 (1992) (concurring opinion reported separately at 112 S. Ct. 2711 (1992)); *Burson v. Freeman*, 112 S. Ct. 1846 (1992); *Boos v. Barry*, 458 U.S. 312 (1988).

⁶⁰ See *Stewart v. District of Columbia Armory Bd.*, 789 F. Supp. 402 (D.D.C. 1992); see also *supra* text accompanying notes 27-29.

⁶¹ 815 F. Supp. 1100, 1103 (S.D. Ohio 1993); see *supra* note 11 and accompanying text.

⁶² For example, the U.S. Court of Appeals for the Second Circuit held that in one factual situation, a government-owned stadium was not a public forum, and that under a different factual situation another government-owned stadium was a public forum. Compare *Calash v. City of Bridgeport*, 788 F.2d 80 (2d Cir. 1986) with *Paulsen v. County of Nassau*, 925 F.2d 65 (2d Cir. 1991).

⁶³ See *infra* text accompanying notes 64-77.

1. Cases Finding Stadiums not to be Public Forums

Courts which have held that a stadium is not a public forum have generally emphasized that the purpose and intent of a stadium are limited and primarily business-like in nature.⁶⁴

In *International Society for Krishna Consciousness, Inc. v. New Jersey Sports and Exposition Authority*,⁶⁵ the Court of Appeals for the Third Circuit upheld a regulation prohibiting the solicitation of money by outside organizations in the Meadowlands Sports Complex in New Jersey.⁶⁶ The court pointed out that the Meadowlands was not analogous to the traditional public forum such as streets and parks, nor was the Meadowlands similar to "theatres and auditoriums" created for the primary purpose of communication and the public exchange of ideas.⁶⁷ Significantly, the court ruled that:

Instead, the Meadowlands is a commercial venture by the state. It is designed to bring economic benefits to northern New Jersey, and is expected to generate at least enough revenue to meet its current expenses and debt service. It earns money by attracting and entertaining spectators with athletic events and horse races. The complex is not intended to be a public forum, and it is not unreasonable for the Authority to prohibit outside groups from engaging in activities which are counterproductive to its objectives.⁶⁸

Because being solicited "is not what a patron bargained for, and it does not tend to make his visit to the sport complex more pleasurable," the regulation was reasonable.⁶⁹

This reasoning was also followed by the Court of Appeals for the Eighth Circuit when it upheld a sport complex's exclusive advertising contract in *Hubbard Broadcasting, Inc. v. Metropolitan Sports Facilities Commission*.⁷⁰ According to the court, the Metrodome was intended to be a sports complex not a public forum.⁷¹ Created by the Twin Cities as a commercial venture, the Metrodome's purposes were "to meet the need for

⁶⁴ See *infra* text accompanying notes 65-77.

⁶⁵ 691 F.2d 155 (3d Cir. 1982).

⁶⁶ *Id.* at 158.

⁶⁷ *Id.* at 161 (citing *TRIBE*, *supra* note 36, at 689-90).

⁶⁸ *Id.*

⁶⁹ *Id.* at 162.

⁷⁰ 797 F.2d 552 (8th Cir. 1986), *cert. denied*, 479 U.S. 986 (1986).

⁷¹ *Id.* at 555.

a major sports facility” and to “provide economic benefits to the area.”⁷² As a result, the stadium was found not to be a public forum.⁷³

This lack of intent to create a public forum was significant to the Court of Appeals for the Second Circuit in *Calash v. City of Bridgeport*.⁷⁴ In *Calash*, the court upheld a regulation prohibiting the use of a municipal stadium for profit-making endeavors.⁷⁵ According to the court, the city did not intend to open the stadium to the general public.⁷⁶ The city designated the stadium as a “service facility” and had consistently allowed only selective access.⁷⁷ Consequently, the stadium was held not to be a public forum by designation.

2. Cases Finding Stadiums to be a Public Forum

The only reported cases to hold that a government-owned stadium is a public forum are the Circuit Court for the District of Columbia decision of *Stewart v. District of Columbia Armory Board*⁷⁸ and the Court of Appeals for the Second Circuit decision of *Paulsen v. County of Nassau*.⁷⁹

In *Paulsen*, the court ruled that prohibiting the distribution of materials on sidewalks of a county-owned coliseum violated the Constitution.⁸⁰ Applying the public forum doctrine, the court ruled that while the county asserted that it had not intended the coliseum to be a public forum, objective factors did not support such a claim.⁸¹ Provisions of the county charter evidenced that the coliseum was intended to be used for many purposes including “general public interest.”⁸² Furthermore, there was evidence that officials had failed to consistently limit expressive activities on the coliseum grounds, including solicitation of contributions and the

⁷² *Id.*

⁷³ *Id.*

⁷⁴ 788 F.2d 80 (2d Cir. 1986).

⁷⁵ *Id.* at 81.

⁷⁶ *Id.* at 83.

⁷⁷ *Id.*

⁷⁸ 789 F. Supp. 402 (D.D.C. 1992); see *supra* text accompanying notes 21–33.

⁷⁹ 925 F.2d 65 (2d Cir. 1991). It should be noted however that in *Carreras v. City of Anaheim*, 768 F.2d 1039 (9th Cir. 1985), the court ruled that Anaheim Stadium was a public forum under California state constitutional principles, and that in *Cinevision Corp. v. City of Burbank*, 745 F.2d 560 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985), the court held that a municipally-owned amphitheater was a public forum by designation under the U.S. Constitution.

⁸⁰ *Paulsen*, 925 F.2d at 67.

⁸¹ *Id.* at 69.

⁸² *Id.* (quoting § 2206-a(2)(a) of the Nassau County Charter).

distribution of literature.⁸³ As a result, the county coliseum had become a public forum by designation.

As the stadium cases show, officials must objectively demonstrate the nonpublic nature of a government-owned stadium. Important factors that stadium officials should consider include the reasons why the stadium was constructed in the first place,⁸⁴ the commercial nature of its operations,⁸⁵ the written policies stating its purpose,⁸⁶ and the consistency of enforcing regulations limiting expressive activities.⁸⁷

IV. THE RELATED PROBLEMS OF OVERBREADTH AND VAGUENESS

In addition to the problem of maintaining nonpublic forum status, officials who desire to regulate the content of stadium banners must consider the related problems of overbreadth and vagueness.⁸⁸

A. *The Problem of Overbreadth*

In First Amendment jurisprudence, a regulation limiting speech may be facially unconstitutional if it is overbroad.⁸⁹ An overbroad statute or regulation is one which is designed to prohibit or limit unprotected speech, but its scope includes speech protected by the First Amendment.⁹⁰ Thus,

an individual whose own speech or conduct may be prohibited is permitted to challenge a statute on its face "because it also threatens others not before the court—those who desire to engage in legally protected

⁸³ *Id.* at 70.

⁸⁴ See *supra* text accompanying notes 68, 72.

⁸⁵ See *supra* text accompanying notes 68, 72.

⁸⁶ See *supra* text accompanying notes 77, 82.

⁸⁷ See *supra* text accompanying note 83.

⁸⁸ See *supra* part II.

⁸⁹ *Aubrey v. City of Cincinnati*, 815 F. Supp. 1100, 1103 (S.D. Ohio 1993). For a more detailed overview of the overbreadth doctrine, see generally NOWAK & ROTUNDA, *supra* note 36, § 16.8; TRIBE, *supra* note 36, §§ 12-27 to 12-33; Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853 (1991); Henry P. Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1 (1982); Jeffrey M. Shaman, *The First Amendment Rule Against Overbreadth*, 52 TEMP. L.Q. 259 (1979).

⁹⁰ NOWAK & ROTUNDA, *supra* note 36, § 16.8, at 944.

expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid.”⁹¹

However, this chilling effect on protected speech must be substantial in order for the statute or regulation to be declared void as overbroad.⁹²

In an overbreadth challenge, a court’s crucial task is to determine whether the regulation “sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments.”⁹³ What may or may not be prohibited under the First and Fourteenth Amendments depends upon the level of First Amendment protection existing when or where the statute applies. If the statute only applies in situations where First Amendment protection is minimal, then the likelihood of the statute being overbroad is slight.⁹⁴ Consequently, in cases involving regulations of speech on government-owned property, a court must first determine the type of forum that exists, and thus the level of First Amendment protection afforded, before it can determine if protected speech is being chilled.

For officials wishing to regulate the content of banners in government-owned stadiums this aspect of the overbreadth doctrine is significant. While the stadium is deemed a nonpublic forum, it is likely that almost any regulation limiting the content of banners will prevail in an overbreadth challenge.⁹⁵ Officials of a nonpublic forum stadium may regulate speech as long as the regulation is reasonable and viewpoint neutral.⁹⁶ Given that a prohibition of all banners is reasonable (because of safety or clean-up concerns) and viewpoint neutral (because it does not discriminate between different religious beliefs), a fan could not complain that a prohibition of only some banners—those which are religious, political, or vulgar—is

⁹¹ *Board of Airport Comm’rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987) (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985)).

⁹² *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

⁹³ *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972).

⁹⁴ *See, e.g., Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982) (holding that a commercial regulation was not unconstitutionally overbroad because it only potentially implicated speech that the government could regulate or ban).

⁹⁵ In *Aubrey*, the court applied the overbreadth doctrine without first deciding the type of forum. *Aubrey v. City of Cincinnati*, 815 F. Supp. 1100 (1993). As suggested *supra* note 14, the court was actually applying the void-for-vagueness doctrine. *See also infra* part IV.B.

⁹⁶ *See supra* note 52 and accompanying text.

overbroad.⁹⁷ Because no banner can claim First Amendment protection, the decision to prohibit some banners cannot be unconstitutionally overbroad.

B. *The Problem of Vagueness*

The void-for-vagueness doctrine, like the overbreadth doctrine, can facially invalidate a statute or regulation designed to limit expressive activities. Statutes are void-for-vagueness if they "are so unclear that people of ordinary intelligence would need to guess at whether their conduct was or was not forbidden."⁹⁸ There are two rationales for the void-for-vagueness doctrine. First, like overbroad regulations, vague regulations deter or chill otherwise protected speech because the citizens cannot be certain to what extent the regulations apply.⁹⁹ Second, vague regulations, because they lack clear guidelines, create an environment in which those enforcing the regulations will do so "on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application."¹⁰⁰

The chilling effect rationale of the void-for-vagueness doctrine suffers from the same limitations as the overbreadth analysis.¹⁰¹ A regulation, even if vague, does not chill protected speech if the regulation occurs in a situation in which the speech being chilled is not otherwise protected. As in an overbreadth doctrine challenge to banner policies,¹⁰² banner policies in stadiums deemed nonpublic forums should prevail over a void-for-vagueness challenge grounded simply upon the chilling effect rationale. Even though terms such as "religious," "political," or "vulgar" may not be entirely clear, the only speech which could be chilled by such banner-limiting regulations would necessarily apply only to speech in stadium banners, since all banner speech, in a nonpublic forum, can be limited (or

⁹⁷ Professor Richard H. Fallon provides an analogous example: A statute which prohibits some, but not all, obscene publications cannot be overbroad "since no publication could fall within the prohibition unless it were 'obscene' in the constitutional sense, and therefore constitutionally unprotected." Fallon, *supra* note 89, at 905.

⁹⁸ *Id.* at 903-04; *see* *Coates v. Cincinnati*, 402 U.S. 611 (1971) (holding that a city ordinance prohibiting the assembly of three or more persons on a sidewalk in a manner annoying to others was unconstitutionally vague).

⁹⁹ *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972); *see also* NOWAK & ROTUNDA, *supra* note 36, § 14.36, at 950; Fallon, *supra* note 89 at 867-68.

¹⁰⁰ *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972); *see also* NOWAK & ROTUNDA, *supra* note 36, §16.9, at 950.

¹⁰¹ *See supra* text accompanying notes 93-97.

¹⁰² *See supra* text accompanying notes 93-97.

even eliminated) by viewpoint neutral regulations, there is no "banner speech" to be protected.¹⁰³

However, the second rationale for the void-for-vagueness doctrine is distinct from those supporting the overbreadth doctrine. As a result, stadium officials must be more aware of void-for-vagueness challenges grounded on the "excessive discretion" rationale.¹⁰⁴ Even in a nonpublic forum, speech regulations must be viewpoint neutral.¹⁰⁵ Thus, banner regulations using the terms "game related" or "baseball related" allow excessive discretion to those enforcing the regulation which risks selective enforcement based on viewpoint.¹⁰⁶ Regulations which prohibit religious, vulgar, or political banners, however, need not succumb to this criticism.

First, regulations which prohibit all religious, vulgar, or political banners do not constitute viewpoint discrimination since all such banners, not just those with particular religious, vulgar, or political views are prohibited.¹⁰⁷ Second, unlike the simple phrase "game related," the words religious, vulgar, or political can be defined with examples designed to provide guidance to enforcement personnel.¹⁰⁸

V. CONCLUSION

As evidenced by the two principal cases, *Aubrey v. City of Cincinnati* and *Stewart v. District of Columbia Armory Board*, there are three major First Amendment pitfalls facing officials wishing to regulate the content of banners in government-owned stadiums. However, all three of these pitfalls can be avoided. Officials, through policy and practice, can ensure that the stadium is deemed a nonpublic forum allowing greater restriction on expressive activity. Careful drafting of policies and their consistent enforcement can likely eliminate challenges based on the overbreadth or void-for-vagueness doctrines. As a result, banner policies in government-owned stadiums need not face the same result as those at Riverfront and RFK stadiums.

¹⁰³ See *supra* text accompanying note 97.

¹⁰⁴ See *supra* part II.

¹⁰⁵ See *supra* text accompanying note 52.

¹⁰⁶ See *supra* part II; *Aubrey v. City of Cincinnati*, 815 F. Supp. 1100, 1104 (S.D. Ohio 1993).

¹⁰⁷ See *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788 (1985) (holding that a regulation excluding the participation of legal defense and political organizations from federal employee charity drive was viewpoint neutral).

¹⁰⁸ For example: "religious" would include any reference to God, a diety, or scripture passages.

