NO. _____

IN THE UNITED STATES SUPREME COURT

GRANITE STATE OUTDOOR ADVERTISING, INC.,

Petitioner,

v.

CITY OF FORT LAUDERDALE, FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether overbreadth standing no longer operates to allow an applicant for a sign to facially challenge the lack of procedural safeguards in a sign permitting regulation and whether overbreadth standing no longer allows a facial challenge to any other provision of a sign ordinance that has not been directly applied to the applicant?

2. Whether the Eleventh Circuit Court of Appeals erroneously affirmed the district court's application of the incorrect standard by not presuming the allegations of the complaint to be true and by relying on affidavit evidence from the defendant?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to this proceeding are properly set forth in the case caption. Petitioner Granite State Outdoor Advertising, Inc. has no parent corporation and no publicly held company owns ten percent or more of the corporation's common stock.

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OPINIONS BELOW

The unpublished opinion of the three-judge panel of the Eleventh Circuit Court of Appeals is reported as *Granite State Outdoor Advertising, Inc. v. City of Fort Lauderdale*, 2006 WL 2560679 (11th Cir. Sept. 6, 2006).[1] The opinion and judgment of the district court are unreported.

JURISDICTION

The Court of Appeals entered judgment on September 6, 2006. A petition for rehearing and hearing en banc was denied on October 17, 2006. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides that "Congress shall make no law . . . abridging the freedom of speech or of the press . . . ."

Section 1983 of Title 42 of the United States Code states that any person that "subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

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[1] The Appendix attached hereto includes the circuit court decision (1a-8a), and the district court decision (9a-30a).

STATEMENT

I. OVERVIEW OF THE CASE

Pursuant to 42 U.S.C. § 1983, Petitioner Granite State Outdoor Advertising, Inc. ("Granite State") filed suit against Respondent City of Fort Lauderdale, Florida ("City"), alleging that the City's Sign Ordinance violated Granite State's and others' First Amendment rights. Granite State alleged in its Complaint that the Sign Ordinance was facially invalid because, *inter alia*, it failed to contain the necessary procedural safeguards and endowed City officials with unbridled discretion to issue or withhold sign permits. The City responded by filing a Motion to Dismiss pursuant to Federal Rule 12(b)(6). The district court granted the City's Motion to Dismiss finding that Granite State lacked standing to challenge the Sign Ordinance except for one provision, the ban on advertising signs with "off-premise" messages, and that this particular provision was constitutional. (9a-30a).

The Eleventh Circuit panel upheld the decision of the district court that Granite State only had standing to challenge Subsection 47-22.11(E)(1) of the Sign Ordinance – just one line of the 26-page Sign Ordinance – and specifically rejected Granite State's contention that it had standing to facially challenge the Ordinance's licensing scheme under the overbreadth doctrine. (6a-8a). Both courts held that Granite State, even though it had unquestionably applied for permits from the City, had no standing to challenge the permitting process or any other deficiency in the code. Moreover, the Eleventh Circuit completely ignored Granite State's argument that the district court applied the wrong standard in rendering its decision on the City's Motion to Dismiss. (1a-8a).

II. FACTUAL BACKGROUND OF THE CASE

Granite State is in the business of developing sign locations to be used for the dissemination of both commercial and noncommercial speech. (10a). Granite State entered into leases with owners of real property in the City authorizing Granite State to post a total of nine signs. *Id.* Granite State applied to the City for permission to post the signs. *Id.* The City enforced its Sign Ordinance to deny Granite State's applications. (10a-11a).

III. PROCEEDINGS BELOW

Granite State filed suit and challenged the constitutionality of Fort Lauderdale's Sign Ordinance. (2a). In lieu of filing an Answer, the City filed a Motion to Dismiss. (12a). Without converting the motion to one for summary judgment, the district court granted dismissal, finding that Granite State lacked standing to challenge the Ordinance, including the licensing scheme, and that the one subsection that Granite State had standing to challenge (six words out of 26 pages) was constitutional. (12a-30a).

Appellate briefing was concluded on October 17, 2005. As a result of the Eleventh Circuit's decision to rehear en banc *Tanner Advertising Group, L.L.C. v. Fayette County*, 411 F.3d 1272 (11th Cir. 2005), the appeal was placed in abeyance along with several other cases in which sign applicants had been denied standing. After the Eleventh Circuit's en banc decision in *Tanner*, 451 F.3d 777 (11th Cir. 2006), and the panel decision in *CAMP Legal Defense Fund, Inc. v. City of Atlanta*, 451 F.3d 1257 (11th Cir. 2006), were issued, the court requested supplemental briefing. (2a). Shortly thereafter, without oral argument, the Eleventh Circuit affirmed the decision of the district court, finding that Granite State did not have standing to facially challenge the code as unduly discretionary or lacking procedural

safeguards. (6a-8a). The three other cases involving sign applicants that had been denied standing to challenge sign ordinances were also decided in unpublished decisions without argument.[2]

REASONS FOR GRANTING THE PETITION

The decision of the Eleventh Circuit Court of Appeals affirming the district court's grant of dismissal exposes a conflict among the circuit courts of appeal. The Eleventh Circuit's conclusion that a speech applicant does not have standing to facially challenge a permitting scheme on the ground that it is an unconstitutional prior restraint on speech and that it conveys unbridled discretion to government actors is in direct conflict with decisions from at least the Second, Sixth, and Ninth Circuits. This new position of the Eleventh Circuit has now been adopted by the Fifth Circuit as well. Speech applicants must be able to mount facial challenges under the overbreadth doctrine to licensing schemes that deny applicants a prompt or objective response. Without access to such court review, government officials will have unchecked power to delay or subjectively deny permits for speech activity, to include parades, demonstrations, festivals, solicitation, and signs. Therefore, the Court should grant this petition in order to resolve the dispute among the circuit courts.

In addition to resolving a dispute among the circuit courts on a matter of great importance, granting this petition will also allow this Court to remedy a departure from the accepted and usual course of judicial proceedings. The

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[2] *Advantage Adver., L.L.C. v. City of Hoover*, 2006 WL 2344957 (11th Cir. Aug. 11, 2006) (now final); *Granite State Outdoor Adver., Inc. v. Cobb County*, 2006 WL 2373528 (11th Cir. Aug. 17, 2006) (remanded for consideration of Georgia Constitution which was found to be more protective of free speech than First Amendment); *Tinsley Media, L.L.C. v. Pickens County*, 2006 WL 2917561 (11th Cir. Oct. 12, 2006).

Eleventh Circuit has abused the use of unpublished decisions in a seeming attempt to bury its controversial holdings in this and other similar cases. Also, the court's misapplication of the standard of review on motion to dismiss is a proper ground for this Court to exercise its supervisory power of review.

I. THE ELEVENTH CIRCUIT'S DECISION EPITOMIZES THE CONFLICT AMONG THE CIRCUITS REGARDING THE OVERBREADTH STANDING DOCTRINE.

The overbreadth standing doctrine plays an important role in preserving First Amendment rights against overly broad licensing schemes and those with no procedural safeguards, including time limits on the permitting process. While a plaintiff must generally demonstrate that it has suffered an injury-in-fact, that there is a causal connection between the injury and the conduct complained of, and that it is likely that the injury will be redressed by a favorable decision,[3] the Supreme Court created an exception to these general rules of standing beginning in *Thornhill v. Alabama*, 310 U.S. 88, 60 S. Ct. 736 (1940), where this Court noted that the very existence of some broadly written statutes may have such a deterrent effect on free expression that they should be subject to challenge even by a party whose own conduct may be unprotected. The Eleventh Circuit's recent analysis presents an odd contrast with *Thornhill*, because speech applicants are being subjected to stricter standing limits than other litigants, and are denied standing to challenge even permitting schemes under which they have unquestionably applied.

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[3] *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 2136 (1992).

As the Supreme Court established in *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 799, 104 S. Ct. 2118, 2125 (1984), the overbreadth "exception from the general rule is predicated on 'a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.'" (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S. Ct. 2908, 2916 (1973)).

In *Broadrick* the Court held "[i]t has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." 413 U.S. at 611, 93 S. Ct. at 2915. Moreover, this Court noted that it "has altered its traditional rules of standing to permit – in the First Amendment area – 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'" *Id.* at 612, 93 S. Ct. at 2916 (citing *Dombrowski v. Pfister*, 380 U.S. 479, 486, 85 S. Ct. 1116, 1121 (1965)). Therefore, litigants "are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick*, 413 U.S. at 612, 93 S. Ct. at 2916.

A primary reason the overbreadth doctrine was created was to encourage the evaluation and removal of unconstitutional speech restrictions where most of those regulated have little or no ability to assert a challenge. The overbreadth doctrine was developed "to enable 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***." *Board of Trustees v. Fox*, 492 U.S. 469, 484, 109 S. Ct. 3028, 3037 (1989) (emphasis added). This rule was seemingly extended to sign companies in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 504, n.11, 101 S. Ct. 2882, 2890 (1981) ("we have never held that one with a 'commercial interest' in speech also cannot challenge the facial validity of a statute on the grounds of its substantial infringement of the First Amendment interests of others"). Seven Justices joined the Court's holding in *Metromedia* establishing a sign company's ability to facially challenge a sign ordinance. Id. at 493, 101 S. Ct. at 2885 (holding of Justices White, Stewart, Marshall, and Powell); id. at 525, 101 S. Ct. at 2901 (concurrence of Justices Brennan and Blackmun) (specifying that "[w]here the plurality and I disagree is . . . the appropriate analytical framework to apply"); id. at 544, 101 S. Ct. at 2911 (Stevens, J., dissenting in part) (recognizing "[a]ppellants, of course, have standing to challenge the ordinance because of its impact on their own commercial operations"). The Court established that those who have a "commercial interest" in that signs, including outdoor advertisers, have standing to facially challenge sign ordinances.

A. The Eleventh And Fifth Circuits' Overbreadth Analysis Conflicts With Other Circuits.

Despite this Court's plain reasoning for the overbreadth doctrine and the unbroken development of this body of jurisprudence, the Eleventh and Fifth Circuits, as evidenced by the decision below as well as *Granite State Outdoor Advertising, Inc. v. City of Clearwater*, 351 F.3d 1112 (11th Cir. 2003), and *Brazos Valley Coalition for Life,*

Inc. v. City of Bryan, 421 F.3d 314 (5th Cir. 2005), threaten to deprive millions of persons and organizations of the benefits of the overbreadth doctrine. Their narrow view of standing is at odds with other circuit courts.

Granite State sought to facially challenge under the overbreadth doctrine various provisions of the Ft. Lauderdale Sign Ordinance on the grounds that they conveyed unbridled discretion to officials or were unconstitutional prior restraints. (3a). While the Eleventh Circuit recognized this Court's holding in *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 755-56, 108 S. Ct. 2138, 2143 (1988), that "when a licensing 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," the court reasoned that because the signs requested were banned under the ordinance, Granite State was therefore not subject to the permitting requirements. (6a). This approach removes the ability of one who has submitted an application under a law to mount a facial challenge by limiting the scope of the court's analysis to only the use applied for, rather than allowing a true facial challenge.

The Eleventh Circuit's logic ignores the fundamental underpinnings of the overbreadth doctrine:

> [i]n 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.

Lakewood, 486 U.S. at 755-56, 108 S. Ct. at 2143 (emphasis added). The Eleventh Circuit's new approach eviscerates this rule.

The Eleventh Circuit is not alone in its narrow application of the overbreadth doctrine. As seen in *Brazos Valley Coalition for Life*, the Fifth Circuit has adopted the Eleventh Circuit's approach. In *Brazos*, the Fifth Circuit rejected the appellants' facial challenge to numerous provisions of the sign code at issue because the provisions were "unrelated and [did] not apply . . . to activities in which appellants have alleged below that they engaged in." 421 F.3d at 323 (citing *Clearwater*, 351 F.3d at 1116-17). The approach adopted in *Brazos* ties the scope of a litigant's facial challenge to that of its as-applied challenge. *Id.*[4] Thus, although at the time Granite State's petition for certiorari in *Clearwater* was denied it could easily have appeared that *Clearwater* was simply a mistake and an aberration, *Brazos* and the several recent Eleventh Circuit opinions prove that the overbreadth doctrine is under siege.

This approach advocated by at least the Fifth and Eleventh Circuits is in direct contrast to the approach taken by other circuit courts. *E.g.*, *R.S.W.W., Inc. v. City of Keego Harbor*, 397 F.3d 427, 436-37 (6th Cir. 2005); *Lamar Adver. of Penn, LLC v. Town of Orchard Park*, 356 F.3d 365, 374-75 (2d Cir. 2004); *Peachlum v. City of York*, 333 F.3d 429, 430 (3d Cir. 2003); *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 512-51 (4th Cir. 2002); *Deja Vu of Nashville, Inc. v. Metropolitan Gov't of Nashville and Davidson County*, 274 F.3d 377, 385 (6th Cir. 2001), *cert. denied*, 535 U.S. 1073 (2002); *Ackerley Communications of Mass., Inc. v. City of Cambridge*, 88 F.3d 33 (1st Cir. 1996); *Desert Outdoor Adver., Inc. v. City of Moreno Valley*, 103 F.3d 814, 818 (9th Cir. 1996); *National Adver. Co. v. Town of Babylon*, 900

[4] *See also Gospel Missions v. City of Los Angeles*, 328 F.3d 548, 553-55 (9th Cir. 2003) (rejecting challenge to certain provisions of professional fundraising ordinance on similar grounds).

F.2d 551, 553, 555 (2d Cir. 1990), *cert. denied*, 492 U.S. 852 (1990). The majority of these decisions involved facial challenges to sign ordinances by outdoor advertising companies like Granite State.

In *R.S.W.W.*, for example, the Sixth Circuit reached the opposite conclusion of what the Eleventh Circuit reached below, and reversed the grant of a motion to dismiss. 397 F.3d at 436-37. Specifically, the Sixth Circuit recognized,

> "[W]hen a licensing statute 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." The "root of this long line of precedent is the time-tested knowledge that 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."

Id. at 437 (internal citations omitted). In its complaint, the plaintiff alleged that the sign code granted overly broad licensing discretion to the city when processing applications. *Id.* However, the Sixth Circuit commented, "[f]or purposes of determining [plaintiff's] standing on this claim, it is irrelevant that the city did not actually deny [plaintiff's] request to change its sign but only delayed consideration of the request." *Id.* Thus, in contrast to the Eleventh and Fifth Circuits, the Sixth Circuit recognized that the particular circumstances play little role in analyzing the facial challenge. *See Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133 n.10, 112 S. Ct. 2395, 2403 (1992) ("[f]acial attacks on the discretion granted a decisionmaker are not dependent on the facts"). Therefore, the Sixth Circuit

afforded the plaintiff standing to facially challenge the sign code's permitting scheme. *Id.*

That a litigant may facially challenge a statute regardless of the facts of the as-applied challenge is also seen in the Third Circuit's decision in *Peachlum v. City of York*, 333 F.3d 429 (3d Cir. 2003). There, the Third Circuit noted, "[i]n the case of overbreadth challenges, standing arises 'not because [the plaintiff's] own rights of free expression are violated, but because of a judicial prediction or assumption that the [challenged statute's] very existence may cause others not before the court to refrain from constitutionally protected speech or expression.'" *Id.* at 438 (quoting *Broadrick,* 413 U.S. at 612, 93 S.Ct. 2908). Therefore, a sign company can challenge a regulation "because [it] also threatens others not before the court – those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid." *Id.* (relying on *Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 503, 105 S. Ct. 2794 (1985)).

The approach taken by the Eleventh and Fifth Circuits also conflicts with the Second Circuit's holding in *Lamar Advertising of Penn, LLC v. Town of Orchard Park*, 356 F.3d 365 (2d Cir. 2004). In *Orchard Park*, the lower court had found that Lamar lacked standing to challenge the sign ordinance. *Id.* at 373-74. On appeal, the Town argued that because the applications submitted by Lamar were for signs larger than the size permitted under the ordinance, Lamar lacked standing. The Second Circuit rejected this argument, however, holding, "[t]hat Lamar only sought permits for those signs that were larger than the size allowed, however, is of little consequence; Lamar need not have first sought and been denied *any* permit prior to filing a facial challenge." *Id.* at 374 (citing *National Adver. Co. v. Town of Babylon*, 703 F. Supp. 228, 232-33 (E.D.N.Y. 1989), *aff'd in relevant part*, 900 F.2d 551, 555 (2d Cir. 1990)). In addition, the Second

Circuit also noted, "[b]ecause we find that Lamar's standing to bring this facial challenge is not defeated by its not having submitted permit requests for signs that would have met Orchard Park's size restrictions, we need not address the parties' factual dispute . . . ." *Id.* at n.12. As a result, the court reversed the lower court's finding that Lamar lacked standing to facially challenge the ordinance.

The approach adopted by the Second Circuit of allowing a facial challenge even if the permit requests were for signs that were not in compliance with the code stands in direct contrast to the Eleventh Circuit's approach of denying Granite State standing to facially challenge the Ft. Lauderdale Sign Ordinance because the signs it applied for were not permitted.

The approach adopted by the Eleventh Circuit also conflicts with the Ninth Circuit's opinion in *Desert Outdoor Advertising, Inc. v. City of Moreno Valley*, 103 F.3d 814 (9th Cir. 1996). In *Desert Outdoor*, the Ninth Circuit reviewed the lower court's grant of summary judgment in favor of the city. *Id.* at 816. On appeal, the city asserted that the plaintiffs did not have standing to challenge the permitting requirements because no applications were filed. *Id.* at 818. The Ninth Circuit disagreed, finding that the plaintiffs "also have standing to challenge the permit requirement, even though they did not apply for permits, because applying for a permit would have been futile." *Id.* One of the reasons the Ninth Circuit found that applying for a permit would have been futile was because "the ordinance flatly prohibited appellants' off-site signs located outside the three permitted zones." *Id.* The court found that the appellants indeed had standing to challenge the permitting requirement on the ground it conveyed unbridled discretion and ultimately they found it unconstitutional. *Id.* at 819. Even though the appellants in *Desert Outdoor* had never applied for a permit, and the signs they operated were flatly prohibited by the ordinance, the Ninth Circuit still permitted a facial challenge.

The result of the conflict between the Eleventh and Fifth Circuits and the other circuits is clear: parties asserting First Amendment challenges in the Eleventh and Fifth Circuits are now denied standing to challenge speech restrictions under the overbreadth doctrine while such challenges are allowed elsewhere. Such a disparity in treatment by the federal courts in regard to fundamental freedoms should not be allowed to continue.

B. The Eleventh Circuit's Former Overbreadth Jurisprudence Illustrates Its Recent Errors.

While the Eleventh Circuit's recent opinions conflict with the holdings of most other courts as to overbreadth standing, the court's prior case law on this issue was in concert with the other circuits. *See, e.g.*, *National Adver. Co. v. City of Ft. Lauderdale*, 934 F.2d 283 (11th Cir. 1991); *also Granite State Outdoor Adver., Inc. v. City of St. Petersburg*, 348 F.3d 1278 (11th Cir. 2003). In *National Advertising*, the sign company challenged the district court's order granting the city's motion to dismiss. While the city argued that the appellant lacked standing because the ban on billboards was constitutional – the same argument the City made before the district court here – the Eleventh Circuit disagreed. 934 F.2d at 285. Just as here, one of the main defects alleged by the appellant was that the city possessed unlimited discretion in permitting public interest advertising. *Id.* Even though the appellant submitted only applications for billboards, the Eleventh Circuit found that the appellant had standing to bring its facial challenges to the sign ordinance, relying almost exclusively on this Court's opinion in *Metromedia*. *Id.* Thus, when faced with the substantively identical set of circumstances over a decade ago, the Eleventh Circuit reached the opposite conclusion than it did in this case despite the absence of any change in the law of overbreadth.

In *St. Petersburg*, the Eleventh Circuit affirmed standing to make a facial challenge without discussion. 348 F.3d at 1280. The court stated, "[w]e affirm without discussion much of the result reached by the district court." *Id.* In a footnote to that holding, the court noted: "In particular, we note our review of the record confirms the district court's finding that three provisions of the sign ordinance [none of which pertained to the billboard applications at issue] are invalid and severable." *Id.* at n.2. The Eleventh Circuit also afforded Granite State standing to challenge the constitutionality of the permitting procedure but, oddly, it found the lack of time limits acceptable. *Id*. at 1281-82.

A month later in *Granite State Outdoor Advertising, Inc. v. City of Clearwater*, 351 F.3d 1112 (11th Cir. 2003), an Eleventh Circuit panel reached a different conclusion regarding overbreadth standing. Rather than allow the appellant to challenge the permitting procedure of the ordinance in question on the grounds that it lacked safeguards and conveyed discretion, the *Clearwater* panel concluded that, since the sign applications were denied within a reasonable time, the appellant suffered no injury under the licensing provisions and therefore lacked standing to challenge them. 351 F.3d at 1118. In addition, the *Clearwater* panel held that before a litigant can facially challenge a provision on behalf of others he must himself first show a specific injury under that section or subsection of the ordinance. *Id.*

The obvious conflict between *Clearwater* and the circuit's prior decisions came to a head in 2005 in *Tanner Advertising Group, L.L.C. v. Fayette County*, 411 F.3d 1272 (11th Cir. 2005). A different panel of judges found that the "*Clearwater* court overlooked our past precedent, however, when it assumed that under the overbreadth doctrine, a plaintiff can only challenge the one section under which it suffered a concrete injury." 411 F.3d at 1276. The *Tanner*

court held the prior decisions controlling and that the *Clearwater* approach was inconsistent with prior precedent. *Id.* at 1276-77.

The *Tanner* opinion was vacated pending a rehearing en banc to consider the scope of the overbreadth doctrine. 429 F.3d 1012 (11th Cir. 2005). However, because the county enacted a new sign ordinance while the court was considering the case en banc, the court found that the appeal was largely moot and left its determination regarding the overbreadth doctrine for another day. 451 F.3d at 791. Apparently however, the Eleventh Circuit has decided the overbreadth issue *sub silentio* in the wake of *Tanner*, because in its subsequent overbreadth cases such as *Ft. Lauderdale*, *Hoover*, *Cobb County*, and *Pickens County*, the court has applied *Clearwater* and the decision in *CAMP Legal Defense Fund, Inc. v. City of Atlanta*, 451 F.3d at 1257, 1269-77 (11th Cir. 2006).[5] As it is clear that the Eleventh and Fifth Circuits have settled on an overbreadth analysis that is inconsistent with the approach taken by the majority of circuits, review by the Supreme Court is warranted.

II. THE ELEVENTH CIRCUIT'S OPINION IS A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

Admittedly, as noted by Supreme Court Rule 10, a petition for writ of certiorari is rarely granted when the error asserted is that the opinion below is a departure from the usual and accepted course of judicial proceedings or asserts a misapplication of a properly stated rule of law. However, in this instance, when considering the following arguments in

[5] Despite the obvious inconsistencies in the analysis regarding the overbreadth doctrine in *Clearwater* and *CAMP*, the Eleventh Circuit has chosen to consider them as a unified body of law.

addition to the conflict between the circuits, review by this Court is warranted.

A. The Eleventh Circuit's Decision To Issue An Unpublished Opinion Was An Abuse Of The Accepted And Usual Judicial Process.

The Eleventh Circuit's decision to issue an unpublished opinion in this matter, and several similar cases, is a departure from the accepted course of judicial proceedings. The Eleventh Circuit has established a policy that "[t]he unlimited proliferation of published opinions is undesirable because it tends to impair the development of the cohesive body of law. To meet this serious problem it is declared to be the basic policy of this court to . . . reduce the volume of published opinions." *See* 11th Cir. I.O.P. 5 to Fed. R. App. P. 36. While the unlimited proliferation of published decisions may be undesirable, given the previously disjointed body of case law with respect to the overbreadth doctrine and sign ordinances within the Eleventh Circuit, the court's decision to issue a truncated opinion with sparse reasoning and authority to support its various conclusions is puzzling.

Even though the Eleventh Circuit deemed the issue of overbreadth standing to be of such great importance as to warrant en banc consideration in *Tanner* – and to put a hold on several appeals in which overbreadth standing was denied – which was ultimately decided on mootness grounds, it issued unpublished decisions in this case and in three similarly situated cases within a span of weeks. *Advantage Adver., L.L.C. v. City of Hoover*, 2006 WL 2344957 (11th Cir. Aug. 11, 2006); *Granite State Outdoor Adver., Inc. v. Cobb County*, 2006 WL 2373528 (11th Cir. Aug. 17, 2006); *Tinsley Media, L.L.C. v. Pickens County*, 2006 WL 2917561 (11th Cir. Oct. 12, 2006). The court's en banc opinion in *Tanner* plainly did not settle the standing issue. Nevertheless, it is clear from the court's opinion in *CAMP*,

and from the subsequent four unpublished opinions, that the Eleventh Circuit has decided this issue *sub silentio*. The Eleventh Circuit's attempt to sweep these four cases "under the rug" by issuing markedly similar unpublished decisions on a very contentious issue of law represents a misuse of unpublished decisions. Given that this Court has recently enunciated a new Federal Rule of Appellate Procedure 32.1, which guards against courts attempting to obscure unpublished decisions, the Eleventh Circuit's attempt to do just that in this instance should be reviewed.

B. The Eleventh Circuit Misapplied The Established Standard For Motions To Dismiss.

Motions to dismiss are "appropriate only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Friedl v. City of New York*, 210 F.3d 79, 83 (2d Cir. 2000) (reversing judgment for defendants on a 42 U.S.C. § 1983 claim and quoting *Harris v. City of New York*, 186 F.3d. 243, 250 (2d Cir. 1999)). Furthermore, at the beginning stage of litigation, all of a plaintiff's allegations should be taken as true and all reasonable inferences should have be drawn in its favor. *E.g.*, *Leatherman v. Tarrant County Narcotics Unit*, 507 U.S. 163, 164, 113 S. Ct. 1160, 1161 (1993).

Dismissal is improper "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102 (1957). Moreover, as this Court recognized in *Lujan*, "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" 504 U.S. at 561, 112 S. Ct. at 2137 (quoting *Lujan v. National*

Wildlife Fed'n, 497 U.S. 871, 889, 110 S. Ct. 3177, 3189 (1990)); *also Bischoff v. Osceola County*, 222 F.3d 874, 878 (11th Cir. 2000) ("when standing becomes an issue on a motion to dismiss, general factual allegations of injury resulting from the defendant's conduct may be sufficient to show standing").

Despite this well-established standard, the decisions of the Eleventh Circuit and the district court reveal that no deference was given to Granite State, and neither court correctly presumed that the allegations were true even though Granite State's allegations embraced the specific facts necessary to support its claims. (1a-8a; 9a-30a). Moreover, despite the fact that the City attached evidence in support of its Motion to Dismiss, which the district court considered in rendering its decision (12a, n.5, 13a), the district court failed to convert the motion into one for summary judgment. *See Carter v. Stanton*, 405 U.S. 669, 671, 92 S. Ct. 1232, 1234 (1972); *Trustmark Ins. Co. v. Eslu, Inc.*, 299 F.3d 1265, 1267 (11th Cir. 2002) ("Whenever a judge considers matters outside the pleadings in a 12(b)(6) motion, that motion is thereby converted into a Rule 56 Summary Judgment motion"). Granite State appealed these errors, but the Eleventh Circuit completely ignored them in its decision. (1a-8a).

CONCLUSION

The Eleventh Circuit's erroneous interpretation of overbreadth standing has developed from cases, such as this one, brought by outdoor advertising companies. As is usually the case in First Amendment jurisprudence, bad law develops to stymie unpopular speakers. The mistaken rule of law is then applied to other types of speakers, however, as has been illustrated here. The Eleventh and Fifth Circuits' recent standing decisions effectively preclude any viable use of overbreadth standing to remove unconstitutional laws

from the books. The divergence of this new rule of law from the holdings of the Second, Third, Sixth, and Ninth Circuits is stark. Outside of the Eleventh and Fifth Circuits, plaintiffs are still permitted to facially attack unconstitutional speech restrictions. Facial attacks on discretionary permitting schemes and those lacking procedural safeguards are particularly welcomed elsewhere. Such a disparity in access to the corrective authority of the federal courts, particularly in regard to fundamental liberties, should not be allowed to continue. Moreover, given that there have been notable departures from the normal judicial process in this case, including the abusive use of unpublished opinions and misapplication of the proper standard for motions to dismiss, this petition should be granted.

DATED this 16th day of January, 2007.

Respectfully submitted,

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