**ELEVENTH CIRCUIT DOCKET NO. 04-13210-U**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

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**TANNER ADVERTISING GROUP, L.L.C.**

**Plaintiff/Appellant**

**v.**

**FAYETTE COUNTY, GEORGIA,**

**Defendant/Appellee**

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# AMENDED BRIEF OF AMICI AMERICAN PLANNING ASSOCIATION ("APA"), THE ALABAMA, GEORGIA AND FLORIDA CHAPTERS OF THE APA, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, SCENIC AMERICA, AND THE LEAGUE OF CALIFORNIA CITIES

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Tanner Advertising, L.L.C. v. Fayette County, Georgia
Eleventh Circuit No. 04-13210-U

**CERTIFICATE OF INTERESTED PERSONS**

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1-1-3, Amici Curiae state that the following trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations meet the criteria stated in Eleventh Circuit Rule 26.1-1:

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## CORPORATE DISCLOSURE STATEMENT

Amicus curiae, the American Planning Association ("APA"), is a nonprofit public interest and research organization with offices in Chicago, Illinois and Washington, D.C. It has no corporate subsidiaries.

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Amicus curiae, APA-Alabama Chapter, is an affiliate of the American Planning Association.

Amicus curiae, International Municipal Lawyers Association, is a nonprofit professional organization. It has no corporate subsidiaries.

Amicus curiae, Scenic America, Inc., is a national nonprofit conservation organization that is based in Washington, D.C. and incorporated in the State of Pennsylvania. It has no corporate subsidiaries.

Amicus curiae, League of California Cities, is an association of 476 California cities. It has no parent corporations, affiliates, or subsidiaries that have issued shares to the public.

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## STATEMENT CONCERNING THE IDENTITY OF AMICI CURIAE, THEIR INTEREST IN THE CASE, AND THE SOURCE OF THEIR AUTHORITY TO FILE

Amicus curiae, the American Planning Association ("APA"), is a nonprofit public interest and research organization with more than 34,000 members nationwide, and offices in Chicago, Illinois and Washington, D.C. It was founded in 1978 to advance the art and science of planning at the local, regional, state, and national levels. It has no corporate subsidiaries.

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Amicus curiae, APA-Alabama Chapter, is an affiliate of the American Planning Association.

Amicus curiae, International Municipal Lawyers Association, is a nonprofit nonpartisan professional organization whose 1,400 members include local governments of all kinds, state municipal leagues, and attorneys who represent local governments.

Amicus curiae, Scenic America, Inc., is a national nonprofit conservation organization that is based in Washington, D.C. and incorporated in the State of

Pennsylvania. It has no corporate subsidiaries. It is dedicated to preserving and enhancing this nation's scenic character.

Amicus curiae, League of California Cities, is an association of 476 California cities united in promoting the general welfare of cities and their citizens. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys representing all 16 divisions of the League from all parts of the State. The committee monitors appellate litigation affecting municipalities and identifies those that are of statewide or nationwide significance.

These amici have a common interest in preserving the well-established constitutional authority of state and local governments to adopt and enforce restrictions on the size, location, and nature of billboards. How this Court resolves the questions before it will have a direct impact on whether state and local governments will continue to have the ability to exercise such authority, or whether those powers may be negated through misguided interpretations of the doctrines of standing, overbreadth, the First Amendment, and severability. Amici also have a common interest in preserving the constitutional system of separation of powers and checks and balances.

## SUMMARY OF LEGAL ARGUMENT

These amici ask this Court to close what Judge Middlebrooks has described as a "Pandora's Box." Florida Outdoor Advertising, LLC v. City of Boynton Beach, 182 F.Supp.2d 1201, 1206 (S.D.Fla. 2001):

> Billboard companies, some knowing full well what local ordinance and/or regulatory requirements are, make applications to construct billboards in excess of the size and location requirements contained in such ordinances/regulations. When, as expected, the permits are denied, the companies then file constitutional challenges of the sort presented in this case.

Id. This Court is confronted with what Judge King described as "an ever-increasing trend through which outdoor advertising companies facially challenge municipal ordinances seeking to strike down such ordinances as entirely void." National Advertising Company v. City of Miami, Florida, 287 F. Supp. 2d 1349, 1356 (S.D.Fla. 2003), *rev'd on other grounds*, 402 F.3d 1329 (11th Cir. 2005), *petition for cert. filed* (October 14, 2005).[1] Judge King also astutely pointed out that "[t]hrough these actions, advertising companies transform the proverbial First Amendment shield, intended to protect noncommercial speech, into a sword that assures their commercial well-being." Id. at 1357. By attempting to bring down

[1] On appeal, the City of Miami argued (and a panel of this Court agreed) that the District Court should have dismissed the billboard company's suit at an earlier point, when an amendment to the law mooted the claims. *See* National Advertising Co. v. City of Miami, 402 F.3d 1329 (11th Cir. 2005), petition for cert. filed, 74 U.S.L.W. 3261 (U.S. Oct. 14, 2005). This decision, however, does nothing to undermine the correctness of the District Court's characterization of this "ever-increasing" and disturbing "trend".

sign codes in their entirety, the billboard companies seek *carte blanche* to build any permanent structure, anywhere they want, whenever they want.

This practice imposes extraordinary burdens on the federal judiciary and local governments, for the purpose of nullifying unquestionably content neutral and constitutional size and location restrictions. Federal courts have repeatedly affirmed that the First Amendment allows municipalities to ban billboards and to limit the size and location of such imposing structures.[2] Thus, Tanner and similar billboard companies are unable to invalidate the size and location rules of law directly by establishing that the rules ignored by the billboard companies are unconstitutional. Instead, the billboard companies attempt to do so by attacking completely different rules elsewhere in a local government's sign code. These

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[2]Members of City Council of City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 787 (1984) (in Metromedia v. City of San Diego, 453 U.S. 490, 512 (1981), "seven Justices explicitly concluded that this interest [avoiding visual clutter] was sufficient to justify a prohibition of billboards"), see Metromedia, 453 U.S. at 507-508, 510-12 (opinion of WHITE, J., joined by STEWART, MARSHALL, and POWELL, JJ.)("Thus, offsite commercial billboards may be prohibited while onsite commercial billboards are permitted"); Id., at 552 (STEVENS, J., dissenting in part); Id., at 559-561 (BURGER, C.J., dissenting); Id., at 570 (REHNQUIST, J., dissenting); City of Cincinnati v. Discovery Network, 507 U.S. 410, 425 n.20 (1993). See also Prime Media, Inc. v. City of Brentwood, Tennessee, 398 F.3d 814, 818 (6th Cir. 2005), Valley Outdoor, Inc. v. County of Riverside, 337 F.3d 1111, 1115 (9th Cir. 2003), cert. denied sub nom., Regency Outdoor Adv. v. Riverside County, California, 540 U.S. 1111 (2004), and Harp Adver. Illinois, Inc. v. Village of Chicago Ridge, Illinois, 9 F.3d 1290 (7th Cir. 1993) (easily upholding constitutionality of size and other dimensional restrictions on billboards).

separate regulations are not applicable to their billboard permit submissions. However, the billboard plaintiffs try to persuade the courts to use imperfections in the sign codes that have no effect on their permit applications to topple the entire sign code, including the constitutional billboard bans or size and location rules. The end result the billboard plaintiffs seek is a handful of very profitable billboard permits.

The billboard companies' strategy rests on a fundamental misunderstanding of the role of federal courts. Rather than satisfying the mandatory standing requirements arising from Article III, the companies completely ignore them. Instead, they treat the phrase "First Amendment overbreadth" as the magic words they merely have to utter in order to open the courthouse doors for a full attack on any aspect of a sign code. Pursuant to their theory, it does not matter if the particular provisions they challenge have interfered in any respect with what they propose to do. The overbreadth doctrine should not be abused in a manner that makes it possible for a plaintiff to nullify and make a mockery of the Article III standing requirements.

These amici urge this Court to direct the lower court to dismiss Tanner's lawsuit because Tanner does not have Article III standing and thus, neither this Court nor the District Court can take jurisdiction. In the alternative, if this Court permits Tanner to litigate code sections that do not apply to it, this Court should

direct the dismissal of Tanner's suit because in this setting (and in nearly all similar cases), any unconstitutional overbreadth is not "real and substantial" when compared to the sign code's plainly legitimate sweep. Osborne v. Ohio, 495 U.S. 103, 112 (1990); *See also* Granite State Outdoor Adver., Inc. v. City of Clearwater**,** 351 F.3d 1112, 1118 (11th Cir. 2003) (stressing that speculative and hypothetical injury will not confer standing).[3]

## LEGAL ARGUMENT

### I. TANNER'S SUIT IS PART OF A NATIONAL EPIDEMIC OF SUITS DESIGNED TO CIRCUMVENT COMMUNITIES' LAWFUL RIGHT TO LIMIT THE SIZE AND LOCATION OF BILLBOARD STRUCTURES.

Municipalities and counties seeking to regulate visual clutter for aesthetic and safety reasons have been increasingly subject to a litigation strategy designed to exploit the courts' "protective instincts" with regard to the First Amendment. The technique has been described as follows:

> The [billboard] plaintiffs in these cases have followed the same script: negotiate leases with private property owners in a jurisdiction with outdated sign regulations; apply for multiple billboard permits, knowing that they will be denied due to noncompliance with the regulations; immediately sue the agency to invalidate the ordinance on unrelated grounds based on precedent from other federal circuits and non-sign law cases; and, finally, attempt to convince the court to order issuance of permits for billboards in otherwise prohibited or restricted

[3] "Regardless of the scope of the law that forms the denominator of the fraction here, the numerator of potential invalid applications is too small to result in a finding of substantial overbreadth." Virginia v. Hicks, 539 U.S. 113, 125 (2003) (Souter, J., concurring).

> locations, or negotiate a similar deal with the victim agency in exchange for a waiver of an attorney's fees claim.

Donald M. Davis, *Avoiding the Sign Code Shakedown: A Checklist of Basic Provisions*, 27 Public Law Journal No. 1, published by the State and Local Government Section of the State Bar of California, Winter 2004. *See* Exhibit B.

Billboard companies are using this strategy on a mass-production scale.[4] As Federal District Court Judge Thomas Whelan has observed:

> The Court notes that such conduct [lawsuits challenging sign ordinances] is consistent with the litigation strategy repeatedly employed by Plaintiff's counsel of record, E. Adam Webb. According to the Atlanta Journal Constitution: '[g]ive out the billboards or he'll take you to court, revving up the First Amendment like a dentist's drill – and digging out space for more signs.' So far he's sued 25 cities in Georgia, and has cases pending in Cobb County, Atlanta and Fulton County. With area officials getting wise to him and fixing their sign laws to withstand legal challenges, Webb's gone interstate, filing suits in Alabama, Florida, Tennessee, California and Connecticut.

Get Outdoors II, LLC v. City of El Cajon, Ct. File No. 03:03cv1437, docket entry 24 at p. 3, n.1 (S.D. Cal. Oct. 6, 2003) (quoting Matt Kempner, *Lawyer Fights for Billboards*, The Atlanta Journal Constitution, July 23, 2003, at A.1).

The First Amendment of the United States Constitution provides, "[c]ongress shall make no law abridging... the freedom of speech." Neither the House nor the Senate debates illuminate the meaning of the First Amendment

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[4] In the past five years, more than one hundred cases of this kind have been filed, most of them by the same attorney. For a list of most of the known cases filed in recent years see Exhibit A attached hereto.

beyond these simple words. Constitution of the United States: Analysis & Interpretation, 92d Cong; 2d. Sess., Senate Document 92-82 (1973), at p. 936. One can only marvel at the legal odyssey that has brought local governments from those simple and eloquent words of the Constitution, penned before billboards were imagined, to the legal argument Tanner and other billboard plaintiffs have asked this Court and other courts across the nation to accept. Billboard plaintiffs hope to generate huge advertising revenue, almost all for commercial messages, by building new, permanent, multi-ton steel and concrete monolithic structures that inevitably mar the public view and scare away tourist dollars.

Billboard plaintiffs have consistently urged courts to override legitimate aesthetic and safety concerns raised by the local governments. The billboard plaintiffs allege that they are attempting to liberate themselves, and third party plaintiffs not before the court, from draconian speech restrictions. However, a Florida court recently illuminated the strategy as follows:

> The now familiar strategy is to apply for a permit for erection of a billboard knowing full well that the permit will be denied under the city's existing sign ordinance but also aware that the ordinance is subject to legal attack. . .Florida Outdoor has its own very commercial self-interest at stake. . . . the case is really about the use of the concept of vested rights to create a window of opportunity to build a large. . . and valuable billboard.'

Florida Outdoor Advertising v. City of Boca Raton, 266 F. Supp. 2d 1376, 1379 (S.D. Fla. 2003).

In the highly prolific similar cases recently filed in the Eleventh Circuit and elsewhere the complaints are drafted in such a way as to invoke the courts' protective instincts regarding First Amendment issues. However, these cases are not about asserting the rights of ordinary citizens attempting to speak on various issues. Billboards mean big money for whoever wins a permit.[5]

As Judge King recognized, "the courts play an essential role in drawing viable constitutional lines between government regulations and an individual's right to exercise his First Amendment freedoms. Nonetheless, plaintiffs must not be allowed to manipulate courts' visceral need to protect the First Amendment. Instead, courts must vigilantly reject arguments intended to pervert that Amendment's primary purpose." National Advertising Co., v. City of Miami, 287 F. Supp. 2d at 1356.[6]

The success or failure of these sign code suits does not turn entirely on whether a court grants billboard companies standing to adjudicate irrelevant rules.

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[5] When billboard permits are extracted from local governments through litigation, they are routinely sold by the plaintiffs to large billboard companies. *See* Granite State Outdoor Adv. Inc. v. City of Clearwater, Florida, 213 F. Supp. 2d 1312, 1316 (M.D. Fla. 2002), aff'd in part and rev'd in part on other grounds, 351 F.3d 1112 (11th Cir. 2003).

[6] It is worthwhile to recall Justice Rehnquist's famous observation in Metromedia: "In a case where city planning commissions and zoning boards must regularly confront constitutional claims of this sort, it is a genuine misfortune to have the Court's treatment of the subject be a virtual Tower of Babel, from which no definitive principles can be clearly drawn." Metromedia, 453 U.S. at 569 (Rehnquist, J., dissenting).

Such suits can also fail if the billboard companies cannot demonstrate that the provisions they attack are unconstitutional, or that any unconstitutional provisions may not be severed out. Size and height rules are independently enforceable. See footnote 2, supra. Yet the billboard companies' standing theory, where successful, imposes the greatest burden on the judiciary and creates the greatest intrusion on principles of federalism and separation of powers. Granting the functional equivalent of third party standing to billboard companies fundamentally redefines the relationship between the courts and the law. The answer to the standing question will decide whether a court is resolving a concrete dispute, or auditing dozens of irrelevant aspects of an entire chapter of a local government code. In most cases of this kind, the analysis the billboard companies urge the court to engage in a purely advisory analysis, because the case can and should be decided only on the constitutionality of a ban on new billboards or the separate enforceability of size and height rules (provisions directly applying to the plaintiff before the court). Significantly, the prospect that Tanner's suit must fail on the merits, or that the restrictions on its proposed signs will be severable, should not distract this Court from its paramount consideration of enforcing the standing requirements so as to curb these abuses.

## II. THIS COURT SHOULD REJECT TANNER'S INVITATION TO IGNORE ARTICLE III'S LONGSTANDING REQUIREMENTS.

"'The province of the court,' as Chief Justice Marshall said in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170, 2 L.Ed. 60 (1803), 'is, solely, to decide on the rights of individuals.'" Lujan v. Defenders of Wildlife, 504 U.S. 555, 576 (1992). That is why a plaintiff cannot adjudicate an alleged imperfection in a statute or law unless that flaw has caused that plaintiff to suffer (1) an injury that is (2) "fairly traceable to the defendant's allegedly unlawful conduct" and that is (3) "likely to be redressed by the requested relief." Id. 504 U.S. at 560. Some standing requirements are merely prudential, but these three are mandatory. Id. (describing the factors as meet "the irreducible constitutional minimum of standing"). These limits are particularly important in constitutional cases, because a "fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 445 (1988). Allowing a litigant to finesse some or all of these requirements "would convert the judicial process into 'no more than a vehicle for the vindication of the value interests of concerned bystanders.'" Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 473 (1982) (quoting United States v. SCRAP, 412 U.S. 669, 687 (1973)).

As the Supreme Court has repeatedly recognized, these standing requirements apply to facial and as-applied challenges under the First Amendment. *See* Virginia v. Am. Booksellers Ass'n, Inc., 484 U.S. 383, 392-93 (1988) (explaining that to facially challenge the constitutionality of a statute on overbreadth grounds the plaintiff must "establish at an irreducible minimum an injury in fact; that is, there must be some 'threatened or actual injury resulting from the putatively illegal action.....'"); Sec'y of State of Maryland v. Joseph H. Munson Co., Inc., 467 U.S. 947, 958 (1984) (a plaintiff's ability to invoke overbreadth standing **depends upon whether the plaintiff "satisfies the requirement of 'injury-in-fact,'** and whether it can be expected satisfactorily to frame the issues in the case" (emphasis added)). *Cf.* FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 233-35 (1990) (declining to review claim that certain adult business ordinance provisions violated the First Amendment, because those provisions did not apply to the plaintiffs). As the Seventh Circuit noted when rejecting the standing of a First Amendment plaintiff, "[a] litigant cannot create a case or controversy just by making an untenable 'facial' attack on a statute; actual injury and redressability are essential no matter how the challenge is cast." Wisconsin Right to Life, Inc. v. Paradise, 138 F.3d 1183, 1186 (7th Cir. 1998).

These amici recognize that Article III would have permitted Tanner to adjudicate the constitutionality of those rules of law that caused the County to deny

its applications. (Indeed, had Tanner demonstrated any immediate interest in engaging in any other conduct forbidden by some other rule of law, Tanner might also have been able to establish standing to adjudicate that rule as well.) But Tanner may not adjudicate the constitutionality of other rules of law, because those rules have not caused it to suffer any injury-in-fact. The essential "causation" requirement is not present under these circumstances. Indeed, this Court has recognized this requirement in a number of recent cases. The First Amendment overbreadth doctrine, properly applied, does not sanction Tanner's strategy. *See* Granite State Outdoor Adver., Inc. v. City of Clearwater**,** 351 F.3d at 1117 (holding that the plaintiff cannot establish Article III standing because it suffered no "injury in fact").

Tanner's Opening Brief suggests that it would have this Court declare a "First Amendment suit" exception to Article III that entitles it to attack any code chapter in its entirety simply by asserting that some portion of that chapter is "overbroad" in violation of the First Amendment. Such an approach would contradict American Booksellers and Munson, supra, at 11-12, where Article III standing requirements were applied to facial and overbreadth claims under the First Amendment. It would create an exception to Article III's requirements that swallows the whole rule:

> Here, the Plaintiff argues that the Court . . . instead should allow Plaintiff to challenge an entire Ordinance, without regard to whether Plaintiff was injured by a particular provision, or to whether the alleged harm can be redressed. However, the Court finds that under Plaintiff's theory, the exception to the standing requirements would swallow the constitutional rule. The Court therefore rejects Plaintiff's arguments and finds that Plaintiff cannot meet the Article III standing requirements because Plaintiff cannot meet its burden to establish the redressability and a causal connection.

Get Outdoors II, LLC v. City of San Diego, 381 F. Supp. 2d 1250, 1260-61 (S.D.Cal. 2005).

Not every First Amendment facial attack **is** an overbreadth attack in the proper legal meaning of that term. Allowing a proper "overbreadth" attack is reconcilable with Article III's causation requirement, while Tanner's claims are not proper "overbreadth" attacks, and are not reconcilable with Article III.

The overbreadth doctrine properly allows a plaintiff to attack the constitutionality of a restriction on his or her own conduct, without the need to "demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973) (quoting Dombrowski v. Pfister, 380 U.S. 479, 486 (1965)). Thus, in an appropriate First Amendment overbreadth claim, a plaintiff whose conduct is regulated by a rule of law is permitted to challenge the constitutionality of **that particular rule of law** regardless of the fact that a more circumscribed version of

that rule of law could be applied in a constitutional fashion to prohibit that plaintiff's conduct.

Properly applied, the overbreadth doctrine focuses on the constitutionality of the legal rules that actually apply to the Plaintiff's present or future conduct, rather than on the constitutionality of rules that govern conduct that the plaintiff did not engage in, did not seek to engage in, and was not about to engage in. This distinction is not only necessary to honor the causation requirement for Article III standing, but also to honor the fundamental principles behind the overbreadth doctrine.

As one of the celebrated passages from the most frequently cited authority on overbreadth states, the overbreadth doctrine is based on "the conventional principle that any litigant may insist on not being burdened by a constitutionally invalid rule." Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 37 (1981).[7] Tanner may attack the constitutionality of those rules of law that "burden" it, even if a narrower version of those rules as properly pruned by the court could constitutionally restrict Tanner's activity. In that setting, the challenged rule of law's "burden" on Tanner's activity satisfies the causation

[7] See George P. Choundas, *Comment, Neither Equal Nor Protected: The Invisible Law of Equal Protection, The Legal Invisibility of Its Gender-Based Victims*, 44 EMORY L.J. 1069, 1158 (1995) ("[Monaghan's] comprehensive treatment of overbreadth theory [is] popularly considered among the most authoritative").

element of standing, while bringing that challenge within the scope of the overbreadth doctrine's "conventional principle."

Conversely, if a rule of law does not apply to what Tanner proposed or intended to do, then that rule did not burden Tanner. Thus, the "conventional principle" behind overbreadth can have no application. "The 'injury in fact' requirement means that a plaintiff has overbreadth standing to challenge only a provision to which it is subject or which may indirectly injure its business." Covenant Media of California, LLC v. City of Huntington Park, California, 377 F. Supp. 2d 828, 830 n.2 (C.D. Cal. 2005). *See also* 4805 Convoy v. City of San Diego, 183 F.3d 1108, 1111 (9th Cir. 1999); Get Outdoors II, LLC v. City of San Diego, 381 F. Supp. 2d 1250, 1258 n.60 (S.D. Cal. 2005), appeal docketed, No. 05-56366 (9th Cir. Sept. 16, 2005) ; Advantage Media, LLC v. City of Eden Prairie, --- F. Supp. 2d ---, 2005 WL 3417276 (D. Minn. Dec. 13, 2005), appeal docketed, No. 06-1035 (8th Cir. Jan. 4, 2006). As the Seventh Circuit held in Harp Adver. Illinois, Inc., 9 F.3d at 1292, a plaintiff who applied to erect an unlawfully large billboard lacked standing to argue that the city's ban on off-premises signs discriminated against non-commercial speech. *Cf.* Alfred Hill, *The Puzzling First Amendment Overbreadth Doctrine,* 25 HOFSTRA L. REV. 1063, 1072 (1997) ("A holding that part of a statute is unconstitutional does not result in nullification of its valid parts. . . . Even when a Court has purportedly invalidated a statute in its

entirety, that does not result in nullification of parts of a statute whose constitutionality was not at issue and passed upon.") For this reason, the overbreadth doctrine cannot be stretched far enough to authorize Tanner to litigate the constitutionality of such rules.

The Supreme Court's willingness to grant standing to billboard companies in Metromedia v. City of San Diego, 453 U.S. 490 (1981) does not undermine these principles. Before the U.S. Supreme Court, the plaintiffs in Metromedia only challenged the constitutionality of the regulations that applied to them. San Diego had adopted a prohibition on signs that was subject to thirteen exceptions. Id. at 494. While it was the exceptions that made that prohibition unconstitutional in the eyes of a plurality of justices, Id. at 514-16, the fact that they were exceptions to the very rule of law that burdened the plaintiff meant that the Plaintiff could challenge it under the overbreadth doctrine and Article III. Since the reasons for allowing standing in Metromedia are not present here, Metromedia does not support Tanner's position.[8]

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[8] In Metromedia the billboard companies were trying to prevent the uncompensated amortization of existing billboards, *see* Metromedia, Inc. v. City of San Diego, 26 Cal.3d 848, 854 (Cal. 1980) ("The City of San Diego enacted an ordinance which bans all off-site advertising billboards and requires the removal of existing billboards following expiration of an amortization period.") However, this case, like many others, is an attempt to get permits for new billboards even though the U.S. Supreme Court has on three occasions sustained a complete ban on **new** billboards. *See also* Ackerley Communications of the Northwest Inc. v. Krochalis, 108 F.3d 1095, 1098-1100 (9th Cir. 1997).

Tanner's misuse of the overbreadth doctrine also fails because the kind of First Amendment challenges found in billboard companies' typical suits are about enforcing a (particularly absolutist) notion of content-neutrality.[9] The heart of Tanner's challenges to other portions of the County's sign ordinance are efforts to invalidate restrictions because the County has **exempted** certain kinds of signs (such as traffic directional signs, time and temperature signs, name plates, building markers, on-premises signs, and noncommercial signs) from general prohibitions. (Tanner Op. Brf. at 5-6). Tanner does not seriously argue that a local government cannot forbid certain signs, but argues that it cannot exempt the signs it points to in its arguments while forbidding others. It must be emphasized that Tanner's claims are not the kind that must be resolved by redrawing a statute with "the requisite narrow specificity." Broadrick, 413 U.S. at 612.

### A. This Court Should Not Adjudicate the Constitutionality of a Rule of Law in the Absence of a Party Affected by that Rule.

Tanner contends that it should be entitled to attack the constitutionality of rules of laws that do not affect it, pretending to be a protector of the interests of hypothetical residents of the County who are not participants in this case. (Tanner

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[9] As one District Court judge in this Circuit has observed, "[t]his almost-conclusory mandate that an ordinance with a category or exception for a sign based on its content automatically makes the ordinance unconstitutional *per se* is the proverbial 'catch-22' confronting many cities and municipalities when they attempt to regulate signs in their communities." Granite State v. City of Clearwater, 213 F. Supp. 2d at 1325 n.21 (M.D. Fla. 2002).

does not purport to satisfy the requirements for third-party standing, however, and apparently considers that step to be unnecessary as well.) The question before the Court is essentially whether the constitutionality of other portions of a municipality's sign ordinance will be adjudicated in the presence, or in the absence, of one or more of the parties actually affected by that rule of law.

Cases of this type present a vivid example of why courts facing such suits should enforce the Article III standing requirements and thus, reject Tanner's approach. Tanner's justification for permitting such challenges is based almost entirely upon a hypothetical "chilling effect" on the conduct of third parties. That justification rests on a paternalistic assumption that the interests of those third parties are better served by allowing an unaffected stranger with no commonality of interests, such as Tanner, to seek invalidation of such restrictions, rather than by allowing the hypothetical affected parties to assert their own rights. For example, Tanner's approach requires this Court to presume that adjudicating the constitutionality of the County's prohibition on signs that flash, because that prohibition includes a time or temperature exception, better serves the interests of third parties whose signs do not flash than allowing those sign owners to decide for themselves whether this exemption infringes their speech rights. Under circumstances in which the County could quite easily moot such a challenge by removing the "time and temperature" exception, and thereby foreclose even more

expressive activity, it is especially presumptuous to believe that the decision of other sign owners not to sue needs to be overridden, and **at Tanner's election**. The owner of other signs may prefer to benefit from a bank's installation of a time and temperature sign across the street than to undertake an approach that may cause that sign to go dim while securing no benefit for itself.

As Professor Lea Brilmayer has recognized, Article III standing requirements protect the rights of non-litigating third parties, by protecting them from the very real prospect that an unaffected plaintiff with its own agenda will establish a precedent that will hamper the affected parties' ability to protect their own interests. Lea Brilmayer, *The Jurisprudence Of Article III: Perspectives On The "Case Or Controversy" Requirement,* 93 HARV. L. REV. 297 (1979). At the outset of her article, Professor Brilmayer posed a hypothetical that is strikingly similar to the issue before this Court:

> To illustrate what the standing, ripeness, and mootness doctrines hold, imagine a citizen in a town that has recently enacted an ordinance prohibiting the posting of campaign signs on residential property. Assume he believes it is unconstitutional to restrict political expression this way, but has posted no campaign signs himself and therefore has not been prosecuted. In fact, he has no present interest in putting up a sign. He does, however, resent this ordinance. What can he do?

Brilmayer, supra, at 298-299. As part of her answer, she explained why allowing the unaffected plaintiff to sue does a disservice to those who are truly affected by the restriction:

> Because stare decisis, like res judicata, may have a binding effect, we should be reluctant to permit the concerned citizen to assert the legal rights of his neighbor who perhaps would like to post campaign signs. **We need to protect the neighbor's present and future interests; we do not want the concerned citizen to litigate abstract principles of constitutional law when the precedent established will govern someone else's first amendment rights**. Similarly, even if the concerned citizen has his own claim, we should insist that he state it with specificity so that no overly broad precedent will threaten the rights of persons in different positions.

supra, at 308 (emphasis added). The author asks, rhetorically:

> Isn't a traditional plaintiff better able vividly to illustrate the adverse effects of the complained-of activity? Isn't there a danger that by seeking to change the law too rapidly an ideological plaintiff will take greater risks by framing the issues in a broader, more controversial, manner?

supra, at 309 (footnote omitted). Professor Brilmayer concluded that the "easy" answer to the hypothetical was that the unaffected plaintiff's claim **would** not be permitted,[10] and that the rights and interests of the affected parties are better served by that outcome. She stressed:

> To abandon the case or controversy doctrines would be, in effect, to say that it is not important to find out who is personally affected and what their wishes are. **In the first amendment hypothetical, the doctrines mean that the citizen cannot initiate litigation on his neighbor's behalf without his neighbor's cooperation**. He cannot, more generally, assert the first amendment rights of the world at large without the cooperation of at least one member of the affected group.

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[10] Given billboard companies' current pattern of disregarding Article III, it is important to recall that Professor Brilmayer remarked, "[w]e would be unlikely, in practice, to encounter so easy a case as the hypothetical illustration at the outset of this paper. **No one would be likely to attempt litigation so clearly in violation of existing procedural requirements**." supra, at 315 (emphasis added).

supra, at 314 (emphasis added).

Although Tanner is motivated by private financial interest rather than by ideology, it is indeed taking "greater risks by framing the issues in a broader, more controversial, manner." Id. at 309. This is significant because the Supreme Court has recognized that "the threshold for facial challenges is a species of third party *(jus tertii)* standing," City of Chicago v. Morales, 527 U.S. 41, 55 n.22 (1999), and third-party standing presumes that "the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter." Singleton v. Wulff, 428 U.S. 106, 115 (1976). In cases of this type, the billboard companies attack the constitutionality of unrelated provisions with quantity, not quality, in mind. Because size and location restrictions are constitutional,[11] billboard companies have no choice but to convince the court to adopt an interpretation of the First Amendment that taints the greatest number of provisions, because they need the entire regulatory regime to collapse from the weight of as many invalidated provisions as possible.

For any given sign regulation that was not applied to the billboard company's applications, but whose constitutionality it challenges, the billboard company has neither the incentive nor the briefing space to make a thorough constitutional challenge. Thus, it often mentions those provisions only in passing,

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[11]See authorities cited in footnote 2, supra.

as part of an absolutist accusation of content discrimination. Yet when Tanner loses its adjudication of the constitutionality of such a provision, that outcome is *stare decisis* for any truly affected party's suit, impairing that party's interests without its consent or participation. Even if such suits do not reach a final judgment, giving Tanner standing to attack unrelated provisions of the sign code is likely to **reduce** the amount of small-scale expressive activity in the community. This is because in the long run the easiest way for a local government to avoid a billboard company's broad interpretation of the concept of "content discrimination" is to regulate all signs more restrictively, as if they were billboards.

An exception to Article III designed to prevent chilled speech ultimately proves too much. Any requirement that places conditions or limitations on the ability of any plaintiff to attack the constitutionality of any rule would create the risk that some unconstitutional rule will remain on the books and chill someone's protected conduct. "The prophylactic concern with avoiding 'chilling effect' drives an important element of First Amendment overbreadth doctrine, but does not constitute its whole." Richard H. Fallon Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 855 (1991).

## III. TANNER'S PROPOSED LIMITATIONS ON ITS USE OF THE OVERBREADTH DOCTRINE DO LITTLE TO KEEP ITS PROPOSED EXCEPTION TO ARTICLE III FROM DEVOURING THE RULE.

In its Opening Brief, Tanner acknowledges that the overbreadth doctrine should be used "only as a last resort." (Tanner Op. Brf. at 40 (quoting Broadrick, 413 U.S. at 613). But in response to this Court's question about "what, if any, are the limiting principles" to a broad interpretation of the overbreadth doctrine, Tanner offers only two, the limitation of the overbreadth doctrine to the First Amendment, and Broadrick's requirement that overbreadth be real and substantial. Id.

The U.S. Supreme Court has emphasized that "[i]n the development of the overbreadth doctrine the Court has been sensitive to the risk that the doctrine itself might sweep so broadly that the exception to ordinary standing requirements would swallow the general rule." Taxpayers for Vincent, 466 U.S. at 799. Tanner has no such sensitivity, as shown by its unwillingness to place any meaningful limitations on its supposed overbreadth exception. While paying lip service to the notion that overbreadth must be used only as a "last resort," none of the limitations that Tanner suggests would do anything to prevent billboard companies from continuing to use it as a **first** resort. "Such a course would convert use of the overbreadth doctrine from a necessary means of vindicating the plaintiff's own right not to be bound by a statute that is unconstitutional into a means of mounting

gratuitous wholesale attacks upon state and federal laws." Board of Trustees of the State Univ. of New York v. Fox, 492 U.S. 469, 485 (1989).

Acknowledging that the Supreme Court has foreclosed overbreadth attacks outside of the First Amendment provides little solace. Even in the context of a First Amendment suit, Justice Black, one of the First Amendment's greatest protectors, recognized that "[p]rocedures for testing the constitutionality of a statute 'on its face' . . . are fundamentally at odds with the function of the federal courts in our constitutional plan." Younger v. Harris, 401 U.S. 37, 52 (1971).

In considering whether Broadrick's "real and substantial" requirement provides a sufficiently meaningful limitation, it is noteworthy that Tanner sought the preliminary injunction below without making any effort to satisfy the requirement of "real and substantial" overbreadth. Moreover, Tanner's belated acknowledgement of the requirement that overbreadth be "real and substantial" does little to reduce the burden on the judiciary of allowing plaintiffs to challenge rules that do not govern their behavior. Before a court can fairly decide whether the overbreadth in a statute is "real and substantial in relation to its plainly legitimate sweep," it must separately consider each particular alleged constitutional infirmity, on the merits, to distinguish the overbreadth of a defendants' laws from the overstatement of a plaintiff's complaint. After a court concludes that the overbreadth is not "real and substantial" enough, it need not **declare** which

provisions are overbroad. However, if the "real and substantial" overbreadth requirement is the only meaningful limit on a First Amendment plaintiff's use of overbreadth, then the plaintiff's suit would still have imposed a pointless burden on the judiciary's precious time and resources.

Moreover, Tanner's approach will continually require courts to evaluate the constitutionality of laws in a factual vacuum, without the benefit of evidence indicating the effect, if any, of such provisions. As Professor Monaghan has noted, "a law cannot be evaluated ex ante, in a vacuum, as it sits on the statute books . . . . [The time] at which to determine whether any statute is facially defective is at the time and in the terms in which it is applied to a litigant." Monaghan, supra, at 16, 1981 Sup. Ct. Rev. at 28-29.

Finally, allowing overbreadth to devour so much of the standing requirements would degrade the responsibility of local legislators to uphold the Constitution. John G. Roberts Jr., (now Chief Justice Roberts) has recognized:

> [S]tanding -- like other doctrines of judicial self-restraint -- compels the other branches of government to do a better job in carrying out their responsibilities under the Constitution. By properly contenting itself with the decision of actual cases or controversies at the instance of someone suffering distinct and palpable injury, the judiciary leaves for the political branches the generalized grievances that are their responsibility under the Constitution. Far from an assault on the other branches, this is an insistence that they are supreme within their respective spheres, protected from intrusion -- however welcome or invited -- of the judiciary.

John G. Roberts Jr., *Article III Limits On Statutory Standing*, 42 Duke L.J. 1219, 1229-1230 (1993). By directing those without standing who seek to rewrite laws back to the legislative bodies that adopted them, the Court would validate its role and the role of local governments' elected officials:

> One of the features which most differentiates judicial from legislative decision-making, and makes it more sensitive to those who will be affected by the decision, is the fact that courts respond to requests of individuals whose personal rights are at stake. Surely it would be desirable to increase the involvement of affected groups in the legislative process. It is not that our judicial system is so perfectly just and sensitive, but rather that abandonment of these procedural limitations seems guaranteed to make things worse.

Brilmayer, supra, at 321.

## CONCLUSION

Tanner and its cohorts seek to litigate in the stratosphere of free speech theory on behalf of unknown, unidentifiable third parties. Despite the high-minded posturing, their goal is on the ground: huge, multi-ton, permanent structures which do nothing but display advertising, blocking the public view, for decades.

Foreclosing this particular plaintiff from using the overbreadth doctrine to demand a judicial "audit" of the entire sign code does not insulate that code from legitimate attack. It simply means that the participants in an adjudication of those provisions will be those actually injured by the alleged infirmities, and will thus be in a better position to express their own interests, and to better assist the court to reach the most appropriate decision.

Respectfully submitted this 25th day of January, 2006.

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## FRAP 32(A)(7)(B) CERTIFICATE OF COMPLIANCE

**I HEREBY CERTIFY** that the foregoing brief complies with the type and volume limitation specified in Rule 32(a)(7)(B), Federal Rules of Appellate Procedure. This brief contains 6,427 words, including footnotes.


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## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** (1) that an original and nineteen copies of the foregoing were furnished to the U.S. Court of Appeals, Eleventh Circuit, 56 Forsyth Street, N.W., Atlanta, GA 30303, (2) that two copies of the foregoing were furnished to E. Adam Webb, Esq., and G. Franklin Lemond, Jr., Esq., The Webb Law Group, L.L.C., 2625 Cumberland Parkway, S.E., Suite 220, Atlanta, Georgia 30339, (3) that two copies of the foregoing were furnished to Laurel E. Henderson, Esq., Laurel E. Henderson, P.C., 315 W. Ponce de Leon Avenue, Suite 912, Decatur, Georgia 30030, Attorneys for Appellee Fayette County, Georgia, (4) that

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