NO. _____

IN THE UNITED STATES SUPREME COURT

COVENANT MEDIA OF SOUTH CAROLINA, LLC,

Petitioner,

v.

CITY OF NORTH CHARLESTON, SOUTH CAROLINA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether an ordinance that operates as a prior restraint on speech need not contain *any* procedural safeguards to ensure prompt decision-making and access to judicial review merely because the permitting regulation is deemed content-neutral.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to this proceeding are properly set forth in the case caption. Petitioner Covenant Media of South Carolina, LLC ("Covenant Media" or "Covenant") has no parent corporation and no publicly held company owns ten percent or more of the corporation's common stock.

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The published opinion of the three-judge panel of the Fourth Circuit Court of Appeals is reported as *Covenant Media of South Carolina, LLC v. City of North Charleston*, 493 F.3d 421 (4th Cir. 2007).[1] The opinion and judgment of the district court were unpublished, but was assigned a Westlaw cite at 2006 WL 1967308 (D.S.C. July 12, 2006).

JURISDICTION

The Court of Appeals entered judgment on July 6, 2007. A petition for rehearing and hearing en banc was denied on August 3, 2007. 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 ... "

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-38a), and the district court decision (39a-58a).

STATEMENT

I. OVERVIEW OF THE CASE

On December 1, 2004, Covenant Media submitted an application for permission to post one advertising sign to the City of North Charleston. (40a). As a result of the City's failure to process or otherwise respond to the application, Covenant filed suit, pursuant to 42 U.S.C. § 1983, against the City on May 12, 2005 alleging that the failure to process the application, and the City's Sign Regulations which plainly allowed such delay, violated Covenant's First Amendment rights. (40a).

The parties moved for summary judgment, with Covenant requesting that the district court establish that the City's conduct in failing to process its initial sign application for over 10 months violated Covenant's constitutional rights and the City seeking summary judgment in its favor as to all claims. (9a). It was undisputed that the Sign Regulations set no time limits for official action and did not require that sign applications ever be responded to. (7a). On July 12, 2006, the court entered judgment for the City, holding that Covenant lacked standing to challenge the unconstitutional aspects of the Regulations either as-applied or pursuant to the overbreadth doctrine. (50a, 55a-57a). Covenant timely appealed. (11a).

On appeal, the Fouth Circuit found that the district court erred in finding that Covenant lacked standing to challenge the City's failure to timely process the initial sign application. *Covenant Media of S.C., LLC v. City of N. Charleston*, 493 F.3d 421, 428-29 (4th Cir. 2007). (12a-14a). However, the

Fourth Circuit affirmed the lower court's award of summary judgment on other grounds, finding that because the sign code enforced against Covenant was content-neutral it did not need to impose any time limits whatsoever. *Id.* at 431-35 (17a-28a). Further, the court excused the City's failure to process the sign application as merely negligent and not a constitutional violation. *Id.* at 435-37. (28a-32a).

II. FACTUAL BACKGROUND OF THE CASE

The Sign Regulations enforced by North Charleston at the time Covenant submitted its application controlled the permitting, content, number, size, height, and design of signs, and other visual displays, such as flags and banners. (5a, 39a). To post a sign, a person or organization had to first receive permission from the City. (5a, 39a).

Under that scheme, the City was never required to pass judgment on a sign application. (7a). Indeed, the court of appeals acknowledged that the permitting scheme enforced against Covenant did not require the City to process an application within any specific time period. *Id.* Even though Covenant submitted an application on December 1, 2004 the City had still not responded to this application by the time Covenant filed its Complaint on May 12, 2005. (5a). Five months later, after the City had enacted a new sign code, the City finally denied Covenant's initial application. (41a).

III. PROCEEDINGS BELOW

As a result of the City's failure to process the initial sign application, Covenant filed suit

challenging the constitutionality of North Charleston's Sign Regulations. (5a). After Covenant moved for injunctive relief, the City adopted new sign restrictions. (9a). In light of the new ordinance, the district court found Covenant's request for injunctive relief moot. *Id.* However, the court held that Covenant's claims for damages were not rendered moot as a result of the new ordinance. *Id.*

On summary judgment, the district court found that Covenant lacked standing to assert a damage claim because it concluded that Covenant's sign application would have been denied despite unconstitutional provisions contained in the original Sign Regulations. (9a-11a, 50a). The court failed to consider Covenant's standing to challenge the 300-day delay in processing the first sign application and the code's total lack of procedural safeguards. (13a, 43a-46a). The court also held that Covenant's subsequent applications were properly denied based on the pending ordinance doctrine. (10a, 55a).

On appeal, the Fouth Circuit found that the district court erred in finding that Covenant lacked standing to challenge the City's failure to timely process the initial sign application. (12a-14a). The court reasoned that Covenant's injury of not having its application processed in a timely fashion was distinct from the injury of the denial of the application. (13a). While the Fourth Circuit found that the lower court erred as to standing, the court affirmed on the basis that no time limits were required because the Sign Regulations were content-neutral. *Id.* at 431-35 (17a-28a). Further, the court excused the City's failure to process Covenant's sign application as merely negligent and not a First Amendment violation. *Id.* at 435-37. (28a-32a).

REASONS FOR GRANTING THE PETITION

The *North Charleston* decision has further widened the split among the circuit courts with regard to whether any procedural safeguards are required in a content-neutral speech permitting scheme. The Fourth Circuit's conclusion that permits for speech activity can be held indefinitely so long as the regulation is not based on content is in conflict with decisions from the Second, Third, Fifth, and Seventh Circuits. Given the fact that the First, Ninth, and Eleventh Circuits have previously accepted the position now adopted by the Fourth – that content-neutral licensing schemes need not contain any procedural safeguards – the split among the circuits continues to widen. Such divergence of opinion as to this important issue should be rectified.

Inaction will encourage courts to uphold licensing schemes that are completely devoid of any safeguards. This will allow government officials to indefinitely delay the processing of applications for speech activity such as parades, demonstrations, festivals, door-to-door solicitation, and signs without consequence, so long as the regulation in question is found to be content-neutral. Such a "pocket veto" of time-sensitive speech activity is inconsistent with this Court's prior restraint jurisprudence.

Moreover, the granting of this petition will allow the Court to clarify whether the decision in *Thomas v. Chicago Park District*, 534 U.S. 316, 122 S. Ct. 775 (2002), was actually intended to overturn *FW/PBS, Inc. v. Dallas*, 493 U.S. 215. 110 S. Ct. 596 (1990), and *Riley v. National Federation of the Blind*, 487 U.S. 781, 108 S. Ct. 2667 (1988), which held that even content-neutral prior restraint schemes must contain procedural safeguards.

I. THE FOURTH CIRCUIT'S DECISION IN *NORTH CHARLESTON* EPITOMIZES THE CONFUSION RESULTING FROM THIS COURT'S DECISION IN *THOMAS*.

The Fourth Circuit in *North Charleston* held that the Sign Regulations' lack of any time limits for rendering a decision on sign applications was not unconstitutional because the Regulations were content-neutral. 493 F.3d at 431-37 (21a-28a). In reaching this determination, the panel held that *Thomas* dictated that time limits were not necessary. 493 F.3d at 431-32 (18a-21a). Such a conclusion, however, is based on a misreading of *Thomas*.

The jurisprudence of procedural safeguards began in earnest in 1965 with *Freedman v. Maryland*, 380 U.S. 51, 85 S. Ct. 734 (1965). This Court held that a state law that prevented films from being shown until a censorship board had given its approval was unconstitutional. 380 U.S. at 59, 85 S. Ct. at 739. The Court established the minimum procedural requirements that must be included whenever speech activity is subject to government approval. *Id.* The three necessary safeguards are:

> (1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof . . . .

FW/PBS, Inc., 493 U.S. at 227, 110 S. Ct. at 606. From 1965 to 1988, this Court invalidated at least ten laws or procedures that limited speech activity without integrating the *Freedman* safeguards. *E.g.*, *Dombrowski v. Pfister*, 380 U.S. 479, 489, 85 S. Ct. 1116, 1122 (1965) (invalidating state "Subversive Activities" law in part because it failed *Freedman* test); *Teitel Film Corp. v. Cusack*, 390 U.S. 139, 141-42, 88 S. Ct. 754, 755-56 (1968) (invalidating censorship ordinance for failure to provide adequate safeguards); *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175, 181-82, 89 S. Ct. 347, 351-52 (1968) (holding that restraining order against rally by racist group was invalid because did not comply with *Freedman*); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 155 n.4, 89 S. Ct. 935, 941 (1969) (recognizing that parade permit scheme would need to comply with *Freedman*); *Blount v. Rizzi*, 400 U.S. 410, 417-19, 91 S. Ct. 423, 428-30 (1971) (invalidating postal rules restricting obscene materials because rules lacked safeguards); *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 372-75, 91 S. Ct. 1400, 1406-08 (1971) (imposing time limits on federal statute that allowed seizure of obscene materials); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559-62, 95 S. Ct. 1239, 1246-48 (1975) (finding unconstitutional city facility rental policy absent *Freedman* procedures); *McKinney v. Alabama*, 424 U.S. 669, 676, 96 S. Ct. 1189, 1194 (1976) (overturning obscenity conviction in part because no safeguards in place); *National Socialist Party of Am. v. Skokie*, 432 U.S. 43, 44, 97 S. Ct. 2205, 2206 (1977) (staying court-ordered injunction where appellate review not expedited); *Vance v. Universal Amusement Co.*, 445 U.S. 308, 317, 100 S.

Ct. 1156, 1162 (1980) (public nuisance statute could not be applied to film exhibition); *M.I.C. Ltd. v. Bedford Township*, 463 U.S. 1341, 1343, 104 S. Ct. 17, 18-19 (1983) (granting stay of injunction where state courts did not ensure prompt resolution).

Although several of these decisions dealt with pieces of legislation that were content-neutral, this Court had never specifically analyzed what measures were appropriate for content-neutral time, place, and manner restrictions until 1988. In *Riley v. National Federation of the Blind*, 487 U.S. 781, 802, 108 S. Ct. 2667, 2680-81 (1988), the Court held that even a content-neutral "time, place, and manner restriction . . . must provide that the licensor 'will, within a specified brief period, either issue a license or go to court.'" 487 U.S. at 802, 108 S. Ct. at 1680 (quoting *Freedman*, 380 U.S. at 59, 85 S. Ct. at 739). The Court reviewed license requirements for professional fundraisers and found that, although the regulations were not at all based upon content, time limits had to be in place to ensure prompt action. *Id.*

The third *Freedman* requirement – that the government proceed to court to vindicate the denial of any speech permit – is particularly onerous and is less important where the speech applicant has the financial incentive to appeal permit denials. In light of these practical issues, in 1990 this Court established a second tier of restrictions that needed only to include the first two *Freedman* safeguards.

> The core policy underlying *Freedman* is that the license for a First Amendment-protected business must be issued within a reasonable period of time, because undue delay results in the

> unconstitutional suppression of protected speech. Thus, the first two safeguards are essential: the licensor must make the decision whether to issue the license within a specified and reasonable time period during which the status quo is maintained, and there must be the possibility of prompt judicial review in the event that the license is erroneously denied.

FW/PBS, 493 U.S. at 228, 110 S. Ct. at 606. In *FW/PBS*, this Court held that where permit schemes did "not present the grave 'dangers of a censorship system,' we conclude that the full procedural protections set forth in *Freedman* are not required." *Id.* (citations omitted). The Court emphasized that Dallas' content-neutral permitting mechanism was markedly different from Maryland's censorship board because the city did not review content, but rather reviewed the general qualifications of each application. 493 U.S. at 229, 110 S. Ct. at 606-07. Based on these differences, Justice O'Connor wrote:

> that the First Amendment does not require that the city bear the burden of going to court to effect the denial of a license application or that it bear the burden of proof once in court. *Limitation on the time within which the licensor must issue the license as well as the availability of prompt judicial review satisfy the "principle that the freedoms of expression must be ringed about with adequate bulwarks."*

493 U.S. at 230, 110 S. Ct. at 607 (emphasis added). Three justices – Brennan, Marshall, and Blackmun – concurred in the judgment but vociferously objected to Justice O'Connor's opinion in as much as it removed the third *Freedman* safeguard for content-neutral licensing schemes. 493 U.S. at 238-42, 110 S. Ct. at 611-13. The concurring justices argued that the matter had been settled by the *Riley* decision:

> Two Terms ago, in *Riley,* this Court applied *Freedman* to a professional licensing scheme because the professionals involved, charity fundraisers, were engaged in First Amendment-protected activity. We held that, even if North Carolina's interest in licensing fundraisers was sufficient to justify such a regulation, it "must provide that the licensor 'will, within a specified brief period, either issue a license or go to court.'" The North Carolina statute did not so provide, and we struck it down. In *Riley,* this Court, to be sure, discussed the failure of the North Carolina statute to set a time limit for actions on license applications, but it also held that the *licensor* must be required to go to court, not the would-be fundraiser.

493 U.S. at 240, 110 S. Ct. at 612. Although the *FW/PBS* decision left some doubt as to the status of *Freedman*'s third safeguard, there could be no doubt that, whenever speech activity is subject to a permit, the first two safeguards must be in place. In other words, whether a regulation is content-based or is

merely a time, place, and manner restriction, it must require government officials to grant or deny the application within a specific, brief time frame and provide for expeditious appeal.

This Court's subsequent decision in *Thomas* did not overturn any previous decisions. Indeed, the Court went to great pains to show that the decision was in keeping with prior precedent. 534 U.S. at 321-22, 122 S. Ct. at 779. The *Thomas* Court reviewed the Chicago Park District regulation whereby applicants requested to use park facilities for large groups, such as a family reunion, a soccer game, or a political rally. As the Court repeatedly pointed out in the opinion, their analysis was very much dependent on several factors. First, the regulation only applied to speech in a public forum. *E.g.*, 534 U.S. at 317, 122 S. Ct. at 777 ("municipal park ordinance"); 534 U.S. at 322, 122 S. Ct. at 779-80 ("scheme at issue here is . . . content-neutral time, place, and manner regulation of the use of a public forum"); *id.* ("a content-neutral permit scheme regulating speech in a public forum"); *id.* (describing standard for "use of a public forum"). Second, the regulation applied primarily to numerous non-speech-related activities. *Id.* ("the ordinance (unlike the classic censorship scheme) is not even directed to communicative activity as such, but rather to *all* activity conducted in a public park"); *id.* ("[t]he picknicker and the soccer player, no less than the political activist or parade marshal, must apply"). Nevertheless, the Court still held that safeguards must be provided to guard against abuses of official discretion in awarding permits. 534 U.S. at 323, 122 S. Ct. at 780. The Court stated:

> Of course even content-neutral time, place, and manner restrictions can be applied in such a manner as to stifle free expression . . . . We have thus required that a time, place, and manner regulation contain adequate standards to guide the official's decision and render it subject to review.

Id. This is consistent with the *Riley* and *FW/PBS* decisions. This Court next reviewed with approval the procedural safeguards put in place by the Park District. 534 U.S. at 324, 122 S. Ct. at 780. First, "the Park District must process applications within 28 days." *Id.*; *also* 534 U.S. at 318, 122 S. Ct. at 777 ("the Park District must decide whether to grant or deny the application within 14 days unless, by written notice to the applicant, it extends the period an additional 14 days"). Next, there was an "appeal to the General Superintendent" who "must act on the appeal within seven days." 534 U.S. at 319, 324, 122 S. Ct. at 777, 781. Finally, the applicant could appeal a denial by writ of certiorari to state court. *Id.* Based on the fact that the regulation in *Thomas* contained these safeguards, the *Freedman* and *FW/PBS* procedural requirements were satisfied. 534 U.S. at 325, 122 S. Ct. at 781. At no point did the Court say that no procedural safeguards were required in content-neutral regulations. *Id.*

Moreover, subsequent to *Thomas*, this Court has affirmed that municipal zoning ordinances that condition the exercise of protected First Amendment activities on the approval of government officials must at least include: (1) specific time limits on the initial decision-making processes, and (2) provisions

for "'prompt judicial determination' of the applicant's legal claim." *City of Littleton v. Z.J. Gifts D-4, LLC*, 541 U.S. 774, 779-81, 124 S. Ct. 2219, 2223-24 (2004). *Littleton* reaffirmed these requirements:

> The core policy underlying *Freedman* is that the license for a *First Amendment-protected business* must be issued within a reasonable period of time, because undue delay results in the unconstitutional suppression of protected speech. Thus, the first two [*Freedman*] safeguards are essential . . .

541 U.S. at 780, 124 S. Ct. at 2224 (quoting *FW/PBS*, 493 U.S. at 228) (emphasis added).

Given the steps taken by this Court in *Thomas* to adhere to prior precedent involving procedural safeguards in licensing schemes, and in light of *Littleton*, the Fourth Circuit's conclusion that *Thomas* eliminated the need for procedural safeguards in content-neutral speech regulations should be addressed. Otherwise, municipalities will be free to subject other applicants wishing to engage in protected speech to indefinite delays just as the City of North Charleston did in this case.

II. THE FOURTH CIRCUIT'S DECISION IN *NORTH CHARLESTON* WIDENS THE SPLIT AMONG CIRCUIT COURTS AS TO WHETHER PRIOR RESTRAINTS ARE REQUIRED TO CONTAIN PROCEDURAL SAFEGUARDS.

The conclusion reached by the Fourth Circuit in *North Charleston* – that content-neutral prior

restraints are not required to contain procedural safeguards – has also been adopted by three other circuits. *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064, 1082 (9th Cir. 2006); *Granite State Outdoor Adver., Inc. v. City of St. Petersburg*, 348 F.3d 1278, 1281-83 (11th Cir. 2003); *New England Reg'l Council of Carpenters v. Kinton*, 284 F.3d 9, 21 (1st Cir. 2002). In *Granite State*, for instance, the Eleventh Circuit considered whether, post-*Thomas*, a prior restraint on speech was required to contain specific time limits by which an application must be approved or denied. 348 F.3d at 1280-81. After discussing this Court's holdings in *Freedman* and *Thomas*, the Eleventh Circuit concluded that whether a prior restraint required specific time limits depended upon whether it was content-based or content-neutral. *Id.* at 1281. After finding the ordinance at issue to be content-neutral, the Eleventh Circuit concluded that *Thomas* dictated that time limits were not required. *Id.* at 1282-83.

The Ninth Circuit in *G.K. Ltd.* recently issued a similar holding. 436 F.3d at 1082. There, the Ninth Circuit addressed the constitutionality of a sign ordinance that was being challenged by a local business on the grounds that it was an unconstitutional regulation of commercial speech and was unconstitutionally vague. *Id.* at 1068. The plaintiff contended that the ordinance constituted an invalid prior restraint on speech. *Id.* at 1081. In response to the argument that the ordinance failed to contain the necessary procedural safeguards, such as a process for a swift appeal, the Ninth Circuit concluded that because the ordinance was content-neutral, *Thomas* dictated that such procedural safeguards were not necessary. *Id.* at 1082.

Ultimately, the Ninth Circuit found that because "the Sign Code is content neutral, the procedural requirements of the prior restraint doctrine need not be satisfied." *Id.* (citing *Southern Ore. Barter Fair v. Jackson County*, 372 F.3d 1128, 1138 (9th Cir. 2004)); *but see Tollis, Inc. v. County of San Diego*, --- F.3d ---, 2007 WL 2937012 (9th Cir. Oct. 10, 2007) ("A licensing requirement for protected expression is patently unconstitutional if it imposes no time limits on the licensing body").

While the First, Fourth, Ninth, and Eleventh Circuits have interpreted *Thomas* to eviscerate the procedural safeguard requirements for content-neutral prior restraints, several circuit courts of appeal have held that *Thomas* did not end the requirement that procedural safeguards be in place for content-neutral permitting schemes. *E.g.*, *Lusk v. Village of Cold Spring*, 475 F.3d 480, 492-93 (2d Cir. 2007); *Encore Videos, Inc. v. City of San Antonio*, 330 F.3d 288, 296 n.12 (5th Cir. 2002); *Southworth v. Board of Regents*, 307 F.3d 566, 589 (7th Cir. 2002); *also Doctor John's, Inc. v. City of Roy*, 465 F.3d 1150, 1163 (10th Cir. 2006) (acknowledging that "a licensing scheme with no limit on the time to decide matters affecting the license 'risk[s] . . . indefinitely suppressing speech,'" but declining to reach merits because ordinance in question allowed conditional operation).

The Fifth Circuit in *Encore Videos* found that *Thomas* was limited to a public forum analysis:

> The relevance of *FW/PBS* is not affected by *Thomas* which held that the procedural requirements of *Freedman* . . . do not apply to "a licensing scheme . . .

> [that] is not subject-matter censorship but content-neutral time, place, and manner regulation of the use of a public forum." *The present case does not concern "regulation of the use of a public forum."*

330 F.3d at 296 n.12 (emphasis added) (citations omitted). The court stated, "*Thomas* did not overrule *FW/PBS* or even hint that its scope has been narrowed." *Id.*; *see also Mardi Gras of San Luis Obispo v. City of San Luis Obispo*, 189 F. Supp. 2d 1018, 1028 n.9 (C.D. Cal. 2002) (finding that "*Thomas* Court addressed a content-neutral permit scheme regulating speech in a public forum" and "*Thomas* is more limited than Defendant suggests").

Likewise, in *Southworth*, the Seventh Circuit – the circuit from which *Thomas* itself arose – acknowledged that the finding in *Thomas* was based on the presence of procedural safeguards:

> In upholding the Chicago ordinance, the Court also *relied on the fact that the ordinance included a deadline for processing applications, required the city to explain the reasons for any denial, and provided for an appeal of the decision to the General Superintendent of the Park District.*

Id. at 589 (emphasis added). More recently in *Lusk*, the Second Circuit rejected a municipality's attempt to extend *Thomas* to a sign ordinance that required a permit in advance of posting signs outside of one's home. 475 F.3d at 487. In order to post a sign in the village, an applicant was required to first obtain a

permit or certificate of appropriateness, a process that could take up to 75 days. *Id.* at 491-92. The Second Circuit found that

> Where, as here, a property owner wishes to take a public position on a pressing public issue, for example, or on the qualifications of a candidate for public office in an imminent election, the time required to obtain approval may prevent the property owner from doing so until after the public issue is settled or the election is over. Such belated approval is of little consolation to Lusk and those like him in this regard, and of little use to their neighbors or the political process . . . . In the end, the approval process itself renders the regulatory scheme invalid.

Id. at 492. In reaching this conclusion, the court explicitly rejected the argument that *Thomas* absolved the ordinance from having brief, specific time limits because it was content-neutral. *Id.* at 492 n.14. Ultimately, the Second Circuit concluded *FW/PBS* controlled based on its holding that "a prior restraint that fails to place limits on the time within which the decisionmaker must issue the license is impermissible." *Id* (citing *FW/PBS*, 493 U.S. at 226).

The Third Circuit's decision in *Riel v. City of Bradford*, 485 F.3d 736, 756-57 (3d Cir. 2007), recognized this principle as well. Despite finding the sign ordinance at issue content-neutral, when faced with the question of whether the ordinance required sufficiently prompt decisions on applications, the Third Circuit noted, "'[a] scheme that fails to set

reasonable time limits on the decision maker creates the risk of indefinitely suppressing permissible speech.'" *Id.* at 756 (citing *FW/PBS,* 493 U.S. at 227). The court found that the ordinance passed constitutional muster because it specifically required a permitting decision within 30 days. *Id.* It is clear from the Third Circuit's analysis, however, that it found *FW/PBS* controlling rather than concluding that *Thomas* freed the ordinance from containing any safeguards because it was content-neutral.

The contrast between the analysis advocated by the First, Fourth, Ninth, and Eleventh Circuits and the approach adopted by the Second, Third, Fifth, and Seventh could not be more clear. For example, had Covenant's claim been before the Third Circuit, under *Riel* the fact that the North Charleston Sign Regulations contained absolutely no time limits would have resulted in a finding that the ordinance was an invalid prior restraint. Instead, the Fourth Circuit upheld the Regulations because *Thomas* purportedly freed content-neutral licensing schemes from the need to impose *any* safeguards. This disparate treatment is not speculative but has actually occurred in dozens of instances since 2002. Thus, certiorari should be granted to bring uniformity to the circuits on this critical issue.

CONCLUSION

The Fourth Circuit's conclusion that because the North Charleston Sign Regulations were content-neutral they did not need to impose any time limits on the processing of applications was based on an erroneous interpretation of *Thomas.* Given this Court's many precedents establishing procedural

requirements and the overt factual distinctions between the code at issue in *Thomas* – which contained specific time limits – and the one enforced by North Charleston – which lacked any time limits whatsoever – the Fourth Circuit should be reversed.

The Fourth Circuit is not alone in its interpretation of *Thomas*. Decisions from the First, Ninth, and Eleventh Circuits have also held that content-neutral regulations need not contain any procedural safeguards. These holdings are in stark contrast to case law from the Second, Third, Fifth, and Seventh Circuits, which have refused to apply *Thomas* in this fashion, opting instead to continue to apply *FW/PBS* to content-neutral licensing schemes.

By interpreting *Thomas* to eliminate the requirement that governments have procedural safeguards to ensure prompt decision-making within content-neutral speech restrictions, four circuits have given city and county officials free reign to impose a "pocket veto" on any speech they disfavor. It is not difficult to illustrate how this violates the plain intent of *Freedman* and its progeny. For example, it is commonplace to require a permit before parades, demonstrations, and door-to-door canvassing or soliciting. Many such regulations do not inquire about content. Allowing officials to simply hold such applications indefinitely, and thereby delay speech, ignores the rationale for procedural safeguards. Time-sensitive speech truly is lost once an application is held for more than a brief time. *Thomas* did not alter this analysis. It was not a radical or controversial decision, indeed it was a unanimous decision. Thus, the Court should take this opportunity to put an end to the perversion of *Thomas* by an increasing number of federal courts.

DATED this 1st day of November, 2007.

Respectfully submitted,

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