In the

United States Court of Appeals

For the Seventh Circuit

Nos. 21-3328 & 22-1004

GEFT OUTDOOR, LLC,

Plaintiff-Appellant/Cross-Appellee,

v.

MONROE COUNTY, INDIANA and MONROE COUNTY BOARD OF ZONING APPEALS,

Defendants-Appellees/Cross-Appellants.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 1:19-cv-1257 — **James R. Sweeney, II**, *Judge*.

ARGUED SEPTEMBER 19, 2022 — DECIDED MARCH 9, 2023

Before WOOD, SCUDDER, and JACKSON-AKIWUMI, *Circuit Judges*.

SCUDDER, *Circuit Judge*. Before us are cross-appeals relating to a permanent injunction preventing Monroe County, Indiana from enforcing some of its zoning laws with respect to signs—including commercial billboards. GEFT Outdoor, a billboard company, sued Monroe County because the County did not allow the installation of a digital billboard along I-69.

The district court agreed with many of GEFT's claims, entering summary judgment in the company's favor and enjoining several provisions of the County's sign ordinance.

On appeal GEFT wants the injunction to go even further by blocking Monroe County from enforcing every last sign regulation on the books. We decline to take this step and agree with the district court's decision to limit the injunction to only the unconstitutional provisions of the County's sign ordinance. For its part, the County cross-appeals to seek reinstatement of its variance procedure, which authorizes the local Board of Zoning Appeals to approve signs on a case-by-case basis that do not meet structural sign restrictions relating to height, size, and digital content. We agree and vacate this portion of the district court's injunction.

I

A

When GEFT filed its lawsuit, anyone in Monroe County wanting to build a sign had to first apply for a permit. See Monroe County, Ind., Code § 807-3 (2019). The County would grant a permit "[i]f the proposed sign [was] in compliance with all of the requirements of th[e] zoning ordinance." *Id.* § 807-3(B). The sign ordinance included size limits, see *id.* § 807-6(D); height restrictions, see *id.* § 807-6(F)(1); setback requirements (so that signs could not be too close to a road), see *id.* § 807-6(F)(3); a ban on changeable-copy (or digital) signs, see *id.* § 807-6(B)(2); and a prohibition on off-premises commercial signs, see *id.* § 807-6(B)(5). The County's ordinance provided exceptions to the permit requirement for government signs and certain noncommercial signs. See *id.* § 807-3(C).

If a proposed sign was ineligible for a permit, the person wanting to erect the sign could apply to the Board of Zoning Appeals for a use variance. To grant a variance, the Board needed to find that:

> (A) the approval will not be injurious to the public health, safety, and general welfare of the community;
> (B) the use and value of the area adjacent to the property included in the variance will not be affected in a substantially adverse manner;
> (C) the need for the variance arises from some condition peculiar to the property involved;
> (D) the strict application of the terms of the Zoning Ordinance will constitute an unnecessary hardship if applied to the property for which the variance is sought; and,
> (E) the approval does not interfere substantially with the [County's] Comprehensive Plan.

Id. § 812-5.

B

GEFT leased property along I-69 in Monroe County on which it wanted to erect a billboard. But GEFT never applied for a permit because it recognized that the County's ordinance disallowed what the company had in mind—a digital billboard that would display off-premises commercial speech. GEFT's desired billboard would have also been too tall, too

large, and not set back far enough from the interstate. So the company jumped to the next stage and, in January 2019, sought a variance from the Board of Zoning Appeals. The Board denied the request two months later.

GEFT then sued the County and the Board under 42 U.S.C. § 1983, alleging that the sign standards, permit procedure, and variance procedure facially violated the First Amendment. The company emphasized that certain sign regulations—those that treated commercial speech differently than noncommercial speech—were impermissibly content based. The County has since removed all of these content-based provisions from its zoning code. See Monroe County, Ind., Ordinance 2021-43 (Nov. 17, 2021). GEFT also contended that the County and the Board of Zoning Appeals had too much discretion over whether to grant permits and variances. The company saw the broad discretion as rendering the permit and variance procedures an unconstitutional prior restraint on speech.

GEFT did not stop at challenging specific provisions of the sign ordinance, however. Its First Amendment challenges went further and alleged that the permit and variance procedures could not be severed from the rest of the ordinance, meaning that if a district court were to enjoin the permit or variance procedures, then the substantive sign standards would fall as well. And that is precisely the relief GEFT requested: a permanent injunction against *all* the County's sign regulations, not just those it specifically challenged as unconstitutional. This outcome matters to GEFT because if the County's substantive sign restrictions on height, size, setback, and digital content fall, then it would be able to erect its desired billboard along I-69 in southern Indiana while also

collecting money damages for the fact that it could not display off-premises commercial speech under the old, content-based regulations.

C

The district court entered partial summary judgment for GEFT. It first determined that several provisions of Monroe County's sign ordinance, such as its treatment of commercial speech, impermissibly restricted speech on the basis of its content. It further agreed with GEFT that the permit and variance procedures operated as unconstitutional prior restraints on speech by affording too much discretion to the County and the Board of Zoning Appeals. The district court then issued a permanent injunction blocking the enforcement of certain content-based restrictions, eliminating the permitting requirement altogether, and preventing the Board from granting any variances with respect to signs.

From there, however, the district court relied on a severability clause in the Monroe County Code, § 102-3, to find the enjoined provisions severable from the rest of the Code. It therefore declined GEFT's invitation to enjoin the County's entire sign ordinance. As a result, the district court recognized that other, constitutional restrictions (such as the ban on digital signs) would still have prevented GEFT from installing its billboard. So it denied the company's request for money damages.

The parties cross-appeal. Monroe County seeks review of the district court's permanent injunction against the variance procedure, while GEFT challenges the district court's severability determination. The County does not appeal the district court's permanent injunction of the permit procedures.

II

We begin with an observation of the limits of our jurisdiction. By repealing several content-based regulations, including its ban on off-premises commercial speech, the County has mooted GEFT's request for an injunction against those provisions of the sign ordinance. See *Ruggles v. Ruggles*, 49 F.4th 1097, 1099 (7th Cir. 2022) ("A matter is moot if it becomes impossible for a federal court to provide 'any effectual relief' to the plaintiff." (quoting *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1660 (2019))). Similarly, the County has mooted GEFT's severability argument based on those provisions, as the company's desired outcome (an injunction against the entire sign ordinance) cannot provide effectual relief from provisions that no longer exist. See *id.*

Of course, Monroe County cannot dodge a claim for money damages by repealing an unconstitutional regulation. But GEFT's damages claim is not properly before us on this interlocutory appeal from an injunction. See 28 U.S.C. § 1292(a)(1) (providing for interlocutory review of district court injunctions); *Star Ins. Co. v. Risk Mkt'g Grp. Inc.*, 561 F.3d 656, 659–60 (7th Cir. 2009) ("The fact that some aspects of [an] order [are] immediately appealable does not alter the interlocutory nature of the district court's decision."); see also *DM Trans, LLC v. Scott*, 38 F.4th 608, 615 (7th Cir. 2022) ("[Section 1292(a)(1)] is a limited exception to the final-judgment rule, and we construe it narrowly."). So we do not—indeed, we cannot—opine on whether the district court was correct to dismiss GEFT's money-damages claim with respect to off-premises commercial speech.

III

Turning to the merits, we first address Monroe County's challenge to the variance injunction. In doing so, we review the district court's decision to grant a permanent injunction for an abuse of discretion, though we conduct an independent review of any underlying legal determinations. See *Lacy v. Cook County*, 897 F.3d 847, 867 (7th Cir. 2018).

A

In assessing the constitutionality of the County's variance procedure, we start with the text of the variance provision itself. By its terms, the provision gives the Board of Zoning Appeals meaningful discretion. The Board must consider such expansive concepts as the general welfare of the community, substantial adversity, and unnecessary hardship. See § 812-5. And the Board is not required to grant a variance even if all the regulatory standards are met—though it cannot grant a variance unless they all are met. See *id.*

GEFT contends that the Board's discretion is so broad as to be constitutionally problematic—tantamount to a prior restraint on speech. As GEFT sees it, the variance provision operates as a prior restraint because no one can speak (by erecting a billboard that violates the substantive sign requirements) until they apply for and receive a variance. And because prior restraints on speech are "highly disfavored," *Weinberg v. City of Chicago*, 310 F.3d 1029, 1045 (7th Cir. 2002), there must be "adequate standards to guide the official's decision." *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323 (2002). Standards are adequate if they are "narrow, objective, and definite." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150–51 (1969). GEFT contends that Monroe County's variance

provision fails this test by conferring open-ended discretion on the Board.

The County responds that the variance procedure cannot be a *prior* restraint because a variance is after-the-fact relief from a zoning restriction. But that view elevates form over substance. We see no real difference between a city saying "you may not march in a parade unless you get a permit" and "you may not build a digital billboard unless you get a variance." In the former context, the permit requirement is clearly a prior restraint, see generally *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), and Monroe County acknowledges as much. But it resists the corollary conclusion that its variance procedure functions as a prior restraint.

We call a spade a spade: the County's variance procedure operates as a prior restraint. But that does not mean our work here is done. Rather, the critical question is the one that necessarily follows: Is the County's variance procedure an *unconstitutional* prior restraint?

B

"[P]rior restraints are not per se unconstitutional." *GEFT Outdoor, LLC v. City of Westfield*, 39 F.4th 821, 825 (7th Cir. 2022) (quoting *HH-Indianapolis, LLC v. Consol. City of Indianapolis & County of Marion*, 889 F.3d 432, 440 (7th Cir. 2018)). Indeed, prior restraints are constitutionally sound time, place, or manner restrictions as long as they are content neutral, are narrowly tailored to serve a significant government interest, leave open alternative avenues for speech, and do not put too much discretion in the hands of government officials. See *Forsyth County*, 505 U.S. at 130. These limitations are motivated

by one primary concern: censorship. See *Thomas*, 534 U.S. at 323.

The threat of censorship is easiest to see when prior restraints are content based. The classic example comes from the Supreme Court's decision in *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931). Minnesota had passed a law allowing local prosecutors to enjoin the publication of "malicious, scandalous and defamatory" periodicals, though it allowed publishers to avoid injunctions by going to court and showing that "the truth was published with good motives and for justifiable ends." *Id.* at 702–03. The Supreme Court held the law was "of the essence of censorship" and struck it down. *Id.* at 713.

Or consider *Bantam Books, Inc. v. Sullivan*, where the Court invalidated a Rhode Island statute creating a commission to "educate the public concerning any book, picture, pamphlet, ballad, printed paper or other thing containing obscene, indecent or impure language, or manifestly tending to the corruption of the youth." 372 U.S. 58, 59 (1963). The commission also recommended violators for prosecution. See *id.* at 60. The Court explained that the commission served as an unconstitutional "system of informal censorship." *Id.* at 71.

Prior restraints that distinguish speech based on its content directly raise the specter of censorship. So the Court has required extra procedural safeguards in those circumstances to ensure the availability of prompt, meaningful judicial review. See *Freedman v. Maryland*, 380 U.S. 51, 58–59 (1965).

Censorship remains at the heart of the prior-restraint doctrine even where restraints are content neutral on their face. Indeed, the Supreme Court has emphasized that "[w]here the

licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit, there is a risk that he will favor or disfavor speech based on its content." *Thomas*, 534 U.S. at 323; see also *Forsyth County*, 505 U.S. at 130 ("A government regulation that allows arbitrary application is 'inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view.'" (quoting *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981))). These concerns are why content-neutral restraints must have some guardrails to ensure that government officials do not use them to reward favored speech or censor disfavored speech.

Still, content-neutral restraints do not pose the same level of threat that content-based restraints do. For this reason the Court has not insisted on the *Freedman* procedural safeguards when prior restraints are content neutral. See *Thomas*, 534 U.S. at 322. And the Court allows—even welcomes—some discretion where the risk of censorship is low.

This is most evident in *Thomas v. Chicago Park District*, 534 U.S. 316 (2002). There the Court addressed the Chicago Park District's permit scheme, which allowed—but did not require—the Park District to deny permits in some contexts. For example, the Park District could deny a permit if one had been granted to an earlier applicant for the same time and place, if the applicant had previously violated the terms of a prior permit, or if the intended use would pose an unreasonable danger to the health or safety of parkgoers or Park District employees. See *id.* at 318–19 n.1. In no way did the Court criticize the Park District for retaining some discretion; rather, the Court applauded it:

> The prophylaxis achieved by insisting upon a rigid, no-waiver application of the ordinance requirements would be far outweighed, we think, by the accompanying senseless prohibition of speech (and of other activity in the park) by organizations that fail to meet the technical requirements of the ordinance but for one reason or another pose no risk of the evils that those requirements are designed to avoid. On balance, we think the permissive nature of the ordinance furthers, rather than constricts, free speech.

Id. at 325.

Part of the reason why our review of content-neutral prior restraints is more flexible than our review of content-based restraints is that as-applied challenges are available—indeed, preferable—to address abuses of discretion under content-neutral laws. As the Court explained in *Thomas*, "[g]ranting waivers to favored speakers (or, more precisely, denying them to disfavored speakers) would of course be unconstitutional, but we think that this abuse must be dealt with if and when a pattern of unlawful favoritism appears." *Id.* No doubt facial challenges receive warmer judicial reception in the First Amendment context than in others. Compare *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2389 (2021) (explaining that, in the First Amendment context, "[t]he risk of a chilling effect … is enough"), with *United States v. Salerno*, 481 U.S. 739, 745 (1987) (requiring that a facial challenge usually "must establish that no set of circumstances exists under which the [challenged law] would be valid"). But federal courts should be wary of invalidating state and local laws on their face when both state and federal courts are open to as-

applied challenges. As long as the laws at issue do not chill speech, we should prefer that any abuse-of-discretion concerns be resolved through as-applied challenges.

C

We return to Monroe County's variance provision with the consideration of censorship top of mind. Several characteristics of the variance scheme convince us that the censorship risk is low.

First, the County removed all content-based sign regulations in 2021, so any constitutional concerns must be about discretion, not outright censorship. And the Board of Zoning Appeals has never been able to consider a sign's content when deciding whether to grant a variance. See § 812-5 (imposing five content-neutral requirements that must all be met before the Board can grant a variance); see also *Thomas*, 534 U.S. at 322–23 (recognizing that public-safety considerations, like those in § 812-5, are content neutral).

Second, the County permits ample alternatives for speech, including displays of messages on signs. GEFT could today erect a nondigital billboard within the required size, height, and setback limitations. Contrast that with the plaintiffs in *Forsyth County*, for example, who could not host any kind of march, parade, or procession without applying for and receiving a permit. See 505 U.S. at 130.

Third, the discretion Monroe County affords to the Board is not central to the overarching zoning scheme. The variance procedures only come into play when someone wants to install a sign that violates some substantive standard. If we assume compliance is the norm, there usually will be no need for a variance and no opportunity for discretion to play a role

in the operation of the County's sign regulations. That is a far cry from the censorship regimes of *Near* and *Bantam Books*, which threatened every last Minnesota periodical and Rhode Island publisher.

Fourth, we cannot lose sight of the federalism interests at play here. The Indiana legislature requires local governments like Monroe County to include a variance provision in their zoning codes. See Ind. Code §§ 36-7-4-901, -918.4, -918.5 (2022). No surprise there, for zoning and variances go hand in glove: zoning would be unworkable without the flexibility provided by variances. And Indiana law provides judicial review for zoning decisions, including variance decisions, that are challenged as arbitrary, capricious, or unsupported by the evidence. See *HH-Indianapolis*, 889 F.3d at 440 (citing Ind. Code § 36-7-4-1614(d)). "[T]he Supreme Court has found ordinary state court civil procedures sufficient to protect any First Amendment interests in erroneous zoning determinations." *Id.* (citing *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774, 782 (2004)). The possibility of a state zoning board abusing its limited discretion in ways that might offend the First Amendment is not reason enough for a federal court to step into states' and municipalities' traditional sphere of land-use regulation and facially invalidate zoning laws left and right.

In the end we are convinced that Monroe County's variance provision does not give so much discretion to the Board of Zoning Appeals that it violates the First Amendment. So we reverse the district court's determination that the variance provision is unconstitutional and likewise vacate the permanent injunction of § 812 of the Monroe County Code.

D

GEFT contends that we cannot reach this outcome without putting our circuit at odds with the Sixth Circuit's recent decision in *International Outdoor, Inc. v. City of Troy*, 974 F.3d 690 (6th Cir. 2020). We disagree.

Troy, Michigan—much like Monroe County before the district court enjoined the permit scheme—required anyone wanting to build a sign to apply for a permit or else receive a variance. See *id.* at 695–97. And Troy's variance standards were similar to Monroe County's, invoking considerations like "the public interest" and "hardship or practical difficulty." *Id.* at 695. The Sixth Circuit held that these factors "did not meet the 'narrow, objective, and definite standards' required for constitutionality." *Id.* at 698 (quoting *Forsyth County*, 505 U.S. at 131). So it concluded that Troy's sign ordinance operated as "an unconstitutional prior restraint on speech." *Id.*

GEFT reads *International Outdoor* as establishing that any variance procedure that bestows any amount of discretion on a local zoning board violates the First Amendment. That is too broad a reading of the Sixth Circuit's opinion. A closer reading reveals important differences between Troy's sign ordinance and Monroe County's.

First, Troy's sign ordinance included several content-based distinctions. For example, Troy exempted certain "temporary" signs—such as holiday signs, real-estate signs, and noncommercial signs—from its permit requirement. See *id.* at 707. As a result, signs displaying those kinds of messages did not even need to pass through the permit process, let alone the variance process, increasing the risk that the Troy

Building Code Board of Appeals would "discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers." *Id.* at 698 (quoting *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 759 (1988)). Monroe County, on the other hand, has no content-based sign standards in place today. So whether someone wanting to erect a sign in Monroe County violates the sign ordinance—and thus needs a variance—does not in any way depend on the sign's content. The risk of censorship is therefore diminished.

Second, no one could build any sign in Troy—even one that abided by all the city's substantive sign standards—without first getting a permit. This mattered to the Sixth Circuit, which emphasized that "the variance provision … is not independent from other provisions of the ordinance [including the permit requirement], but rather inextricably linked to them by providing a way of relaxing the very restrictions imposed by the Sign Ordinance." *Id.* at 702. Monroe County, by contrast, no longer has an operative permitting process for signs because the district court enjoined it altogether. That means anyone (even GEFT) could walk outside and, without first obtaining a permit, put up a sign as long as it meets the content-neutral substantive sign standards. Such signs would not be subject to prior restraint—or any restraint at all.

Do not overread this observation. In no way are we suggesting that permits and variances can never be used hand-in-hand. Instead, we simply highlight the importance of readily accessible alternative avenues for speech. A wholly non-discretionary land-use permit scheme that moves quickly to provide applicants with permits (and, thus, an opportunity to speak) is unlikely to pose constitutional problems even when

operating alongside a variance scheme that affords limited discretion to local officials.

IV

One issue remains. Recall that the district court enjoined both the permitting scheme and the variance scheme, and because Monroe County appealed only the latter, the district court's injunction stands as to the permitting scheme. GEFT asserts that the permitting scheme is not severable from the rest of the County's sign ordinance, which would mean the district court should have enjoined the entire ordinance. That would fit right into GEFT's desired outcome—wholesale invalidation of the substantive sign standards.

"Severability of a local ordinance," the Supreme Court has explained, "is a question of state law." *City of Lakewood*, 486 U.S. at 772. Indiana law requires us to ask two questions to determine if a provision is severable: "whether the statute can stand on its own without the invalid provision, and whether the legislature intended the remainder of the statute to stand if the invalid provision is severed." *City of Hammond v. Herman & Kittle Props., Inc.*, 119 N.E.3d 70, 87 (Ind. 2019). If the answer to either question is no, "the offending provision is not severable, and the whole statute must be stricken." *Id.*

We conclude that Monroe County's substantive sign standards do not need a permitting scheme to function. Indiana law provides that local government entities can enforce their own ordinances, see Ind. Code § 36-1-4-11, and Monroe County, if it so chooses, can do so through civil penalties or injunctions. See Monroe County, Ind., Code § 817-3 to -4. The County, in short, would still be able to enforce the substantive

sign standards and address violations without a permitting scheme.

As for Monroe County's intent, the County has codified a severability clause, which states:

> The provisions of County ordinances, resolutions, orders and rules are separable and if any part or provision thereof or the application thereof to any person or circumstances is adjudged invalid by a court of competent jurisdiction on procedural or any other grounds, such judgment shall be confined in its operation to the part, provision or application directly involved in the controversy in which the judgment shall have been rendered and shall not affect or impair the validity of the remainder of the ordinance, resolution, order or rule or the application thereof to other persons or circumstances.

§ 102-3.

Although such a severability clause is not controlling, see *Indiana Educ. Emp. Rels. Bd. v. Benton Cmty. Sch. Corp.*, 365 N.E.2d 752, 761–62 (Ind. 1977), it does create a presumption in favor of severability, see *City of Hammond*, 119 N.E.3d at 89. Attempting to rebut that presumption, GEFT asserts that Monroe County could not have wanted sign standards without a permitting regime. Requiring permits is surely easier than after-the-fact enforcement of nonconforming signs, but both are preferable to allowing nonconforming signs to pop up all over the place. Taking the County at its word in its

severability clause, we agree with the district court that the sign ordinance is severable.

In a final plea to avoid severability, GEFT resorts to first principles. Relying on Justice Gorsuch's separate opinion in *Barr v. American Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335 (2020), the company asserts that severability should not operate to deprive plaintiffs of their desired remedies. See *id.* at 2365–66 (Gorsuch, J., concurring in the judgment in part and dissenting in part) ("What is the point of fighting this long battle … if the prize for winning is no relief at all?"). But the Court's opinion in *Barr*, which we must follow, did not reach the outcome GEFT wants. See *id.* at 2351 (majority opinion) ("Constitutional litigation is not a game of gotcha … where litigants can ride a discrete constitutional flaw in a statute to take down the whole, otherwise constitutional statute."). And when we are tasked with reviewing state and local laws, principles of federalism further caution against using isolated constitutional missteps to invalidate entire chapters of state and local codes root and branch—especially when the state or locality expressly tells us not to.

V

We REVERSE the district court's finding that the variance provision is unconstitutional and VACATE the district court's permanent injunction on those grounds; we AFFIRM the district court's severability determination; and we REMAND for further proceedings consistent with this opinion.