No. _____

In The
Supreme Court of the United States

GEFT OUTDOOR, L.L.C.,

Petitioner,

v.

CITY OF WESTFIELD,
HAMILTON COUNTY, INDIANA,

Respondent.

On Petition For Writ Of Certiorari
To The Seventh Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner, GEFT Outdoor, L.L.C., buys and leases land on which to construct, maintain, and operate signs and billboards to be used for the dissemination of both commercial and noncommercial speech. Believing the City of Westfield's regulations of signs to be unconstitutional, GEFT Outdoor, L.L.C. began erecting a digital billboard on land located within the City of Westfield without obtaining a permit. The City of Westfield sought, and obtained, an injunction against GEFT Outdoor, L.L.C., precluding it from any further construction on the billboard. On appeal, the Seventh Circuit affirmed, holding, in part, that GEFT Outdoor, L.L.C., was first required to obtain a court order invalidating the regulations before it could ignore them. (Pet.App. 23a).

The question presented is:

Whether a citizen who seeks to exercise core First Amendment rights must first seek and obtain an order from a court of competent jurisdiction invalidating a facially unconstitutional city ordinance before engaging in protected speech activity and desist completely while the validity of the ordinance remains before the trial court.

PARTIES TO THE PROCEEDINGS

Petitioner GEFT Outdoor, L.L.C. ("GEFT"), was the plaintiff in the district court and appellant in the Seventh Circuit. Respondent City of Westfield, Hamilton County, Indiana (the "City") was the defendant in the district court and the appellee in the Seventh Circuit.

CORPORATE DISCLOSURE STATEMENT

GEFT Outdoor, L.L.C., is a limited liability company. It has no parent corporation and no publicly held corporation owns 10 percent or more of its stock.

LIST OF RELATED PROCEEDINGS

1. *GEFT OUTDOOR, L.L.C. v. City of Westfield, Hamilton County, Indiana*, pending before the Honorable Tanya Walton Pratt in the United States District Court for the Southern District of Indiana bearing cause number 17-cv-04063-TWP-TAB.

    a. Date of Interlocutory Order – September 28, 2018.

2. *GEFT OUTDOOR, L.L.C. v. City of Westfield, Hamilton County, Indiana*, before the Honorable Joel M. Flaum, the Honorable Michael S. Kanne, and the Honorable Michael Y. Scudder in the United States Court of Appeals for the Seventh Circuit bearing cause number 18-3236.

LIST OF RELATED PROCEEDINGS – Continued

a. Date of Judgment – April 25, 2019.

b. Rehearing and Rehearing En Banc Denied – May 23, 2019.

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OPINIONS BELOW

The initial opinion of the United States Court of Appeals for the Seventh Circuit is reported at *GEFT Outdoor, L.L.C. v. City of Westfield*, 922 F.3d 357 (7th Cir. 2019), and was issued on April 25, 2019. The Seventh Circuit's Opinion is reproduced at Pet.App. 1a–27a. The Seventh Circuit affirmed the September 28, 2018 decision from the United States District Court for the Southern District of Indiana granting the City's request for injunctive relief and denying GEFT's request for injunctive relief. The district court's decision is reported at 2018 WL 4658771 and is reproduced at Pet.App. 28a–48a. The Seventh Circuit denied GEFT's Petition for Rehearing and for Rehearing En Banc on May 23, 2019. That denial is reproduced at Pet.App. 49a.

STATEMENT OF JURISDICTION

GEFT invokes this Court's jurisdiction under 28 U.S.C. § 1254(1). The Seventh Circuit rendered its opinion on April 25, 2019. GEFT filed a Petition for Rehearing and for Rehearing En Banc on May 8, 2019. The Seventh Circuit denied the Petition for Rehearing and for Rehearing En Banc on May 23, 2019.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment XIV, Section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case centers on the City's improper, content-based regulation of speech and GEFT's inability to exercise its right to free speech because of (1) unconstitutional regulations and (2) the City's illegal and chilling threats to arrest GEFT's representatives. GEFT buys or leases land on which to construct, maintain, and operate signs to be used for the dissemination

of both commercial and noncommercial speech. GEFT possesses a valid leasehold interest in a portion of property located in Westfield, Indiana ("Property") owned by Esler Properties, LLC. The Property is adjacent to U.S. 31, a major thoroughfare north of Indianapolis, just south of two digital billboards in Westfield that the City allows to display commercial messages.

GEFT intends to place a digital billboard on the Property, but is precluded by the City's unconstitutional regulation of speech and by the City's other actions. GEFT filed its Complaint against the City on November 3, 2017, seeking, in part, a declaration that the City's regulations are unconstitutional and an order precluding the City from enforcing those unconstitutional regulations against GEFT. Jurisdiction is proper in the district court pursuant to 28 U.S.C. §§1331, 1343(a)(3), and 1367.

A. The City Adopts Content-Based Sign Standards.

The City's Unified Development Ordinance (the "UDO") contains a chapter entitled "Sign Standards." A "sign" is defined as "[a]ny display or device placed on property in any fashion which is designed, intended, or used to convey any identification, message, or information other than an address number." The UDO contains a Permit Requirement, which states: "A sign permit shall be required for all signs (including but not limited to changes in Sign Copy), *unless* otherwise exempted herein." (Emphasis added).

The Sign Standards exempt certain signs from the Permit Requirement (collectively, the "Exceptions"). The Exceptions pertinent here include permanent drive-thru menu boards; signs appearing on gasoline pumps and ATMs; private informational signs such as "for sale" or "no trespassing" signs as long as those do not exceed four square feet; political signs; signs appearing on newspaper vending boxes, soda machines, or DVD vending boxes; seasonal decorations that do not include commercial advertising; and flags of commercial or noncommercial institutions as long as certain conditions are met. Although owners of these signs are not required to obtain a permit, owners of signs with different content must secure a permit before constructing or changing the content of a sign. (Jt.App., p. 128).

The Exceptions – which exempt certain types of commercial and noncommercial speech from the Permit Requirement – apply solely based on the topic, idea, or message discussed on a Sign. The City's former Director of Economic and Community Development conceded this point in deposition.

The Sign Standards also prohibit certain types of signs based on content. Chapter 6.17(E)(5) prohibits "Off-Premises Signs," except as otherwise permitted by the UDO ("Off-Premises Ban"). An "Off-Premises Sign" is "[a] Sign directing attention to a specific business, product, service, entertainment, or any other activity offered, sold, or conducted elsewhere than upon the lot where the Sign is displayed."

Under the UDO, an Off-Premises Sign may contain commercial speech, noncommercial speech, or a mix of both. Sign Standards allow businesses to erect on-premises signs that direct attention to a specific business, product, service, entertainment, or any other activity offered, sold, or conducted upon the lot where the sign is displayed, if the sign meets time, place, and manner restrictions.

The Off-Premises Ban draws distinctions between signs that are prohibited and those that are allowed under the UDO, based on the message a speaker conveys. The City conceded the following:

- The only way to determine whether a sign is an Off-Premises Sign is to look at, and analyze, its content.
- Whether a sign constitutes an Off-Premises Sign would, in some instances, require City personnel to analyze the content and make a "judgment call."
- In some instances, the City would have to consult its attorney to determine whether the sign in question falls within the definition of an Off-Premises Sign.

There is no evidence the City would have passed the Sign Standards as part of the UDO without the Off-Premises Ban.

The Sign Standards' stated purposes are to protect the public health, safety, and general welfare of citizens; to enhance the aesthetic environment of the community; to minimize possible adverse effects of signs

on nearby property, etc. The purpose of the Off-Premises Ban is to preserve aesthetics and to avoid visual clutter allegedly associated with Off-Premises Signs.

Although the City claims it wanted to prevent a series of Off-Premises Signs along major thoroughfares to save tourists from visual clutter, it cannot say why an Off-Premises Sign creates more visual clutter – or otherwise adversely affects the City's aesthetics – than a similar on-premises sign.

Additionally, the Sign Standards purport to preserve traffic safety. That is not true. The City has no safety concerns about off-premises or digital signs, and the City has not conducted any studies concerning the safety of off-premises or digital signs.

B. GEFT Erects Signs on The Property.

On or about November 2, 2017, GEFT erected a forty square foot "No Trespassing" sign on the Property. The Sign Standards only allow no trespassing signs to be four square feet. The City has not taken any action in relation to this sign other than posting an invalid Stop Work Notice, which it later updated.

On that same day, GEFT installed a steel pole in the ground on the Property for the purposes of erecting a digital billboard. GEFT possessed a valid state permit for the erection of the digital billboard.

GEFT intends to display both commercial and noncommercial speech on the digital Billboard as permitted by Indiana's regulations governing digital

billboards. GEFT has erected digital and static Billboards in the past. GEFT's digital billboards maintained, on average, a mix of 38 percent noncommercial and 62 percent commercial speech. GEFT intends for the digital billboard at issue in this case to have a similar mix, which the easily changeable nature of a digital billboard allows.

C. The City Posts "Stop Work Notices" on the Pole, and GEFT Responds.

Shortly after erecting the no-trespassing sign and the pole and shortly after GEFT filed suit, on November 7, 2017, the City placed a Stop Work Notice on the Signs.

The UDO allows "Stop Work Orders," but not "Stop Work Notices," which is how the City styled the notice that it posted at the Property. (Jt.App., p. 508, Ch. 11.5(A).) A Stop Work Order *shall* describe, in writing, the violation, the appeal process, the enforcement provisions including penalties that may be assessed, and *shall* specify a date for compliance. The Stop Work Notice did not contain all the information required by the UDO.

On November 21, 2017, GEFT sent a letter to the City notifying the City that it intended to finish erecting the digital billboard within thirty days. The next day, the City sent a letter to GEFT claiming that GEFT's construction of the pole on the Property violated the UDO because (a) GEFT did not obtain permits to erect the pole and (b) it constitutes a

nonconforming pole sign. The City sent the letter as a "warning" and asked GEFT to remedy the alleged violations by December 23, 2017, to avoid further enforcement action.

D. The City Threatens GEFT with Arrest.

As GEFT said it would do, on December 16, 2017, GEFT "mobilized" a construction team, at a total cost of $39,871.17, for the purpose of putting an advertising "head" on the Pole located at the Property. Between November 21 and December 16, the City did not petition the district court or any other legal authority to prevent the erection of the remainder of the digital billboard.

After GEFT's contractors were on site for a few hours, City officials including Police Sergeant Dine of the Westfield Police Department arrived at the job site and demanded that GEFT stop construction activities. After discussing the matter with the City's representatives, GEFT continued to do work and shortly thereafter, a man who identified himself as the "City Attorney," named Brian Zaiger arrived on site and provided a card showing that he is employed by Krieg DeVault, the City's counsel in this case. Mr. Zaiger then said that GEFT was in violation of the Stop Work Notice, continuing to do work was a nuisance, and the only way to abate the nuisance was to put Jeffrey Lee, the managing member of GEFT, and the contractors on site in jail and then "figure it out from there." Sergeant Dine did not believe Mr. Zaiger had a reasonable basis

to threaten GEFT representatives with arrest on December 16. (Jt.App., pp. 205–06).

Because GEFT's representatives were confronted with threats of going to jail, GEFT halted further construction.

E. The Parties Seek Injunctive Relief.

On December 19, 2017, the City filed a "Motion for Order Restraining Plaintiff from Continued Violation of the Westfield Unified Development Ordinance." The City sought an order precluding GEFT from continuing work on the digital billboard pending the outcome of the litigation.

The next day, GEFT filed a Motion for Preliminary Injunction in which it alleged that the City violated its due-process rights based on the City's actions on December 16, 2017. GEFT sought an order from the district court enjoining the City (and its agents) from (1) taking any further actions to enforce the Stop Work Notice; (2) taking any further actions to prevent GEFT from enjoying the use of its property without due process of law; and (3) threatening GEFT's representatives with imprisonment or imprisoning them for violation of the UDO and Stop Work Notice (or any similar order) as and after GEFT finished construction of the digital billboard.

F. The District Court Enters Its Order.

On March 2, 2018, the District court heard argument from counsel and received evidence. On September 28, 2018, the District court denied GEFT's motion and granted the City's. GEFT was enjoined from continuing "any work on its [pole and digital Billboard] in Westfield until after resolution of this case on the merits." (Pet.App. 47a.)

G. The Seventh Circuit's Opinion.

On April 23, 2019, the Seventh Circuit affirmed the district court. In its opinion, the Seventh Circuit refused to consider the constitutionality of the UDO, stating that GEFT did not request the district court to determine the constitutionality of the UDO. (Pet.App. 11a-12a) ("[O]ur analysis of these motions need not involve any discussion of GEFT's First Amendment challenges to specific Sign Standards provisions."). Despite this pronouncement, the Seventh Circuit's opinion touches on core First Amendment rights.

As part of its holding, the Seventh Circuit, departing from this Court's precedent and opinions from other circuit courts, held that GEFT must follow an unconstitutional law until a court concludes otherwise:

> *Parties who believe that a statute or ordinance is unconstitutional must wait for that to happen before treating the challenged law as nonexistent.* They do not have free rein to invoke a court's jurisdiction over a challenge to an ordinance, but to then act like the law does not

> exist before the court reaches the merits of its challenge.

(Pet.App. 23a) (Emphasis added).

On May 8, 2019, GEFT timely petitioned for rehearing and rehearing en banc. The Seventh Circuit denied that petition on May 23, 2019.

REASONS FOR GRANTING THE PETITION

The First Amendment's protection of speech is one of the most precious rights citizens of this country possess. Government regulation of speech must be closely monitored so that it does not infringe on the fundamental right to speak. This is especially true on speech that, like GEFT's, occurs on private property. *See City of Ladue v. Gilleo*, 512 U.S. 43, 59 (1994) (O'Connor, J., concurring).

When a government regulation, on its face, unconstitutionally infringes on fundamental rights – such as the right to speak – law, practice, and history all align to permit citizens to exercise their right to civil disobedience, disobey a law, and then challenge the law thereafter. *See*, *e.g.*, *Lovell v. City of Griffin*, 303 U.S. 444, 450, 58 S.Ct. 666, 668, 82 L.Ed. 949 (1938). Without the ability to do so, much of the social change in this country, such as the civil rights movement in the 1960s, may not have occurred. *See*, *e.g.*, Harry Kalven, Jr., *The Negro and the First Amendment*, 124–25 (1965) (analyzing the importance of civil disobedience in the civil

rights movement.); Mark Edward DeForrest, *Civil Disobedience: Its Nature and Role in the American Legal Landscape*, 33 Gonz. L. Rev. 653, 654 (1998) ("[C]ivil disobedience has often been instrumental in changing the conventional laws of American society, as evidenced by the civil rights movements of the 1950s and 1960s."). At least one commentator has called civil disobedience "an established form of political protest in American life." Bruce Ledewitz, *Civil Disobedience, Injunctions, and the First Amendment*, 19 Hofstra L. Rev. 67, 71 (1990).

Despite stating that it would not get into First Amendment issues (Pet.App. 11a-12a), the Seventh Circuit did just that. Ignoring precedent from this Court and opinions from other circuit courts, the Seventh Circuit concluded that GEFT must follow an unconstitutional law until a court rules that it is not constitutional:

> GEFT's argument is premised on a misunderstanding about who has the authority to declare a law void; GEFT itself does not have that power. After a court holds that a statute or ordinance is unconstitutional, that legislation is void. *See GEFT Outdoor LLC v. Consol. City of Indianapolis & County of Marion*, 187 F.Supp.3d 1002, 1012 (S.D. Ind. 2016) (noting that because the court had ruled the ordinance at issue was unconstitutional, the plaintiff could derive no rights from it). But the court's ruling that the law is invalid is the crucial trigger for voiding it. *Parties who believe that a statute or ordinance is unconstitutional must wait for that to happen before*

> *treating the challenged law as nonexistent.* They do not have free rein to invoke a court's jurisdiction over a challenge to an ordinance, but to then act like the law does not exist before the court reaches the merits of its challenge.

GEFT Outdoors, LLC v. City of Westfield, 922 F.3d 357, 369–70 (7th Cir. 2019); (Pet.App. 23a) (Emphasis added).

This ruling eviscerates the right to exercise First Amendment rights while a challenge to a facially unconstitutional ordinance is pending. Moreover, this holding conflicts with numerous decisions from this Court and other circuits. The right to take part in civil disobedience is integral to social and political change in this country. Because the Seventh Circuit's ruling conflicts with decisions of this Court and other circuits and because the issue is of such political and social importance, certiorari is proper pursuant to Sup. Ct. R. 10(a) and (c). Granting certiorari will allow this Court to reaffirm what it and several circuit courts have already held: That a person facing a facially unconstitutional law has the right to participate in civil disobedience, ignore that facially unconstitutional law, and challenge that law later, if necessary.

I. The Seventh Circuit's Decision Conflicts with Decisions of This, and Other Courts Providing That a Speaker Can Disregard a Facially Unconstitutional Ordinance with Impunity and Engage with Impunity in the Exercise of the Right of Free Speech.

GEFT is in the business of buying and leasing land to erect, maintain, and operate billboards on which it will display commercial and noncommercial speech. As this Court has recognized, billboards, like those GEFT erects, maintains, and operates, are "a venerable medium for expressing political, social and commercial ideas." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501, 101 S.Ct. 2882, 2889, 69 L.Ed.2d 800 (1981).

Laws that burden speech, including those burdening billboards, are looked at with skepticism, and any prior restraint on speech bears "a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70, 83 S.Ct. 631, 639, 9 L.Ed.2d 584 (1963); *see also Schneider v. State of New Jersey, Town of Irvington*, 308 U.S. 147, 161, 60 S.Ct. 146, 150–51, 84 L.Ed. 155 (1939). This is especially true in relation to speech on private property because laws regulating speech "of private citizens on private property or in a traditional public forum is *presumptively impermissible*, and this presumption is a very strong one." *City of Ladue*, 512 U.S. at 59 (O'Connor, J., concurring) (Emphasis added); *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515–16 (1939) (striking down a portion of an ordinance regulating speech on private

property because a city may not regulate speech on private property the same way it does on public property.).

Despite this, the Seventh Circuit's opinion puts additional burdens on the fundamental right to free speech, on both private and public property, by requiring those who are faced with a facially invalid statute to obtain a ruling by a court *before* engaging in protected speech. (*See* Pet.App. 23a ("Parties who believe that a statute or ordinance is unconstitutional must wait [for an order from a court declaring a statute unconstitutional] before treating the challenged law as nonexistent.")).

If left unaltered, the Seventh Circuit's decision means that, before a citizen faced with a facially unconstitutional ordinance may partake in protected speech on private or public property, he must first file suit, petition the court for injunctive or other relief, and then wait for an order from the court. That process could take months to complete, or, in this instance, over a year while the citizen's speech continues to be restricted by its government. The average citizen does not have the resources necessary to navigate a contested federal lawsuit to vindicate his or her right to free speech.

The Seventh Circuit's decision, if permitted to stand by this Court, would mean that a local ordinance that, on its face, permits Democrats, but not Republicans, to use public property for First Amendment activities, would effectively silence those seeking to disseminate pro-GOP messages – effectively sidelining

them from the political marketplace of ideas – until trial and appellate courts definitively resolve the validity of a prior restraint. Such an outcome simply cannot be reconciled with the numerous precedents of this Court and cannot be reconciled with a meaningful commitment to safeguarding free expression in the United States.

Those results conflict with *Lovell* and other precedent from this Court, which hold that one faced with a facially unconstitutional ordinance may ignore it, *Lovell*, 303 U.S. at 452–53, and "engage with impunity in the exercise of the right to free expression for which the law purports to [govern]." *Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 151, 89 S.Ct. 935, 939, 22 L.Ed.2d 162 (1969).

In *Walker v. City of Birmingham*, Justice Douglas stated in his dissenting opinion:

> *The right to defy an unconstitutional statute is basic in our scheme.* Even when an ordinance requires a permit to make a speech, to deliver a sermon, to picket, to parade, or to assemble, *it need not be honored when it is invalid on its face.* . . . By like reason, where a permit has been arbitrarily denied one need not pursue the long and expensive route to this Court to obtain a remedy. The reason is the same in both cases. For if a person must pursue his judicial remedy before he may speak, parade, or assemble, the occasion when protest is desired or needed will have become history and any later speech, parade, or assembly will be futile or pointless.

388 U.S. 307, 336, 87 S.Ct. 1824, 1840, 18 L.Ed.2d 1210 (1967) (Douglas, J., dissenting) (Emphasis added) (citations omitted).

This rule has particular force in the context of content-based speech restrictions. "Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints." *Citizens United v. Federal Election Commission*, 558 U.S. 310, 341 (2010). Requiring a would-be speaker to refrain from speaking for months – perhaps years – based on a facially unconstitutional, content-based ordinance is fundamentally inconsistent with controlling Supreme Court precedent. Additionally, "[i]nnocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech." *Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2229 (2015).[1]

Certiorari is necessary on this question of exceptional importance because the Seventh Circuit opinion

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[1] It bears noting that the Good News Community Church, the plaintiff and petitioner in *Reed*, repeatedly posted unauthorized directional signs in Gilbert, Arizona, rather than first filing suit in federal district court and patiently awaiting its resolution. *See Reed*, 135 S.Ct. at 2225 ("In order to inform the public about its services, which are held in a variety of different locations, the Church began placing 15 to 20 temporary signs around the Town, frequently in the public right-of-way abutting the street."). The First Amendment litigation ensued in federal district court only *after* the town had issued multiple citations against the church's practice of erecting non-conforming directional signs. *Id*. at 2225–26. (Emphasis added).

conflicts with opinions of this Court and other circuit courts. Sup. Ct. R. 10(a) & (c). The Seventh Circuit's opinion conflicts with the following opinions from this Court and from the circuit courts:

- *Lovell*, 303 U.S. at 452–453 (Woman convicted of a crime for violating a local ordinance was not required to seek a permit or take any other action before acting in defiance of a facially unconstitutional statute; "[s]he was entitled to contest its validity in answer to the [criminal] charge against her.");
- *Shuttlesworth*, 394 U.S. at 151 (Organization had no obligation to comply with facially unconstitutional statute requiring a permit for a parade before challenging it.);
- *Thornhill v. State of Alabama*, 310 U.S. 88, 97, 60 S.Ct. 736, 742, 84 L.Ed. 1093 (1940) ("One who might have had a license for the asking may therefore call into question the whole scheme of licensing [the right to picket] when he is prosecuted for failure to procure it.");
- *Largent v. State of Tex.*, 318 U.S. 418, 422, 63 S.Ct. 667, 669, 87 L.Ed. 873 (1943) (Individual faced with "censorship in the extreme form" may disregard a facially unconstitutional statute requiring a permit to sell wares and challenge its validity later in response to being arrested for violating the statute.);

- *Staub v. City of Baxley*, 355 U.S. 313, 319, 78 S.Ct. 277, 280–81, 2 L.Ed.2d 302 (1958) ("The decisions of this Court have uniformly held that the failure to apply for a license [to solicit new members to join an organization] under an ordinance which on its face violates the Constitution does not preclude review in this Court of a judgment of conviction under such an ordinance.");

- *Jones v. City of Opelika*, 316 U.S. 584, 602, 62 S.Ct. 1231, 1244, 86 L.Ed. 1691, *dissenting opinion adopted per curiam on rehearing*, 319 U.S. 103, 104, 63 S.Ct. 890, 87 L.Ed. 1290 ("It is of no significance that the defendant did not apply for a license [to sell books]. As this Court has often pointed out, when a licensing statute is on its face a lawful exercise of regulatory power, it will not be assumed that it will be unlawfully administered in advance of an actual denial of application for the license.");

- *Smith v. Cahoon*, 283 U.S. 553, 562, 51 S.Ct. 582, 585, 75 L.Ed. 1264 (1931) (Individual arrested for violating a facially unconstitutional statute requiring him to obtain a certificate to operate a vehicle was not required to question the validity of the statute before choosing to disregard it.);

- *Schneider*, 308 U.S. at 161 (Individual arrested for violating a facially unconstitutional statute requiring him to obtain a permit to distribute handbills was not required to question the validity of the statute before choosing to disregard it.);
- *Kunz v. People of State of New York*, 340 U.S. 290, 293–94, 71 S.Ct. 312, 315, 95 L.Ed. 280 (1951) (Individual arrested for violating a facially unconstitutional statute requiring him to obtain a permit before conducting a religious meeting was not required to question the validity of the statute before choosing to disregard it.);
- *Ass'n of Cmty. Organizations for Reform Now, (ACORN) v. Municipality of Golden, Colo.*, 744 F.2d 739, 744 (10th Cir. 1984) ("Applying for and being denied a license or an exemption is not a condition precedent to bringing a facial challenge to an unconstitutional law.");
- *Grid Radio v. F.C.C.*, 278 F.3d 1314, 1320 (D.C. Cir. 2002) ("[T]he illegality of his unlicensed [radio] operations cannot, as the Commission implies, entirely preclude him from raising his constitutional claims."); and
- *United States v. Dickinson*, 465 F.2d 496, 510 (5th Cir. 1972) ("In fact, in certain situations, intentional disobedience to the statute may be the only means of

> obtaining a judicial determination of its constitutionality.").

Second, if the Seventh Circuit's opinion is unaltered, neither individuals nor groups located in the Seventh Circuit will be able to lawfully choose to ignore a facially unconstitutional ordinance and argue against its validity at a later date if municipal authorities choose to enforce rather than revise it.[2] Such an individual or group must first yield to the demands of the unconstitutional law, file suit seeking a declaration of invalidity, and wait for an order from the court for an indeterminable amount of time. Requiring a speaker to seek a court order before speaking places impermissible prior restraints on speech in direct contravention of this Court's precedent. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990) ("[A] prior restraint that fails to place limits on the time within which the decisionmaker must issue the license is impermissible.").

The net result of the Seventh Circuit's opinion is that a governmental entity in the Seventh Circuit can quash speech on public or private property for months

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[2] Violations of a facially unconstitutional ordinance present municipal authorities with an important and salutary opportunity to reconsider it (rather than simply enforce it). When citizens disregard facially invalid enactments that violate well-established First Amendment rights, municipal officials face an important choice. In some communities, constitutionally conscientious municipal officials will choose to repeal or amend constitutionally problematic rules rather than simply enforcing them after constitutionally sanctioned acts of civil disobedience force the issue on to a city's policy agenda.

if not years without having to prove that a facially unconstitutional ordinance is, in fact, constitutional. That turns the burden of proof on its head and provides a procedural framework (lengthy litigation) that will chill free speech generally and quash it completely for all but those who can afford to litigate in federal court. Granting certiorari will allow the Court to realign the Seventh Circuit with this Court and the circuit courts that specifically allow civil disobedience of a facially unconstitutional law.

A. Speakers Like GEFT Do Not Have To Wait for a Court Order before Disregarding a Facially Unconstitutional Ordinance.

In *Lovell*, Ms. Lovell, a Jehovah's Witness, disregarded a Griffin, Georgia, ordinance that required a permit as a precondition to distributing leaflets on the streets or sidewalks of the city. The ordinance provided, "That the practice of distributing, either by hand or otherwise, circulars, handbooks, advertising, or literature of any kind, whether said articles are being delivered free, or whether same are being sold, within the limits of the City of Griffin, without first obtaining written permission from the City Manager of the City of Griffin, such practice shall be deemed a nuisance, and punishable as an offense against the City of Griffin." *Lovell*, 303 U.S. at 447.

Lovell ignored this ordinance and proceeded to distribute religious literature. She was arrested and convicted of violating the ordinance. She appealed.

This Court held that the ordinance was void on its face: "We think that the ordinance is invalid on its face. Whatever the motive which induced its adoption, its character is such that it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship." *Id*. at 451. Accordingly, Ms. Lovell had no obligation to comply with the ordinance at all because "[a]s the ordinance is void on its face, it was not necessary for appellant to seek a permit under it. She was entitled to contest its validity in answer to the charge against her." *Id.* at 452–53.

As a result, Lovell had a constitutional right to proceed with her speech activity without complying with the void-on-its-face ordinance. *Id.*[3] The Seventh

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[3] *See also Thornhill*, 310 U.S. at 97 ("One who might have had a license for the asking may therefore call into question the whole scheme of licensing when he is prosecuted for failure to procure it."); *Largent*, 318 U.S. at 422 (Individual faced with "censorship in the extreme form" may disregard a facially unconstitutional statute and challenge its validity later in response to being arrested for violating the statute.); *Staub*, 355 U.S. at 319 ("The decisions of this Court have uniformly held that the failure to apply for a license under an ordinance which on its face violates the Constitution does not preclude review in this Court of a judgment of conviction under such an ordinance."); *Jones*, 316 U.S. at 602, *dissenting opinion adopted per curiam on rehearing*, 319 U.S. 103, 104, 63 S.Ct. 890, 87 L.Ed. 1290 ("It is of no significance that the defendant did not apply for a license. As this Court has often pointed out, when a licensing statute is on its face a lawful exercise of regulatory power, it will not be assumed that it will be unlawfully administered in advance of an actual denial of

Circuit's opinion found the opposite: GEFT had to obtain a court order invalidating the UDO prior to exercising its constitutionally protected right to free speech. *GEFT Outdoors, LLC*, 922 F.3d at 369–70; (Pet.App. 20a–21a). That decision runs directly contrary to this Court's precedent and opinions from other circuit courts. This Court should grant certiorari on this important free speech issue to resolve the circuit split and the conflict with this Court's holdings.

Shuttlesworth is also instructive. In that case, Birmingham, Alabama, required a parade permit for public demonstrations on the city's streets, sidewalks, and parks, but the ordinance failed to limit the city commission's discretion in granting or denying an application for a permit. *See* 394 U.S. at 149–50 ("The commission shall grant a written permit for such parade, procession or other public demonstration, prescribing the streets or other public ways which may be used therefor, unless in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused. It shall be unlawful to use for such purposes any other streets or public ways than those set out in said permit."). Mr. Shuttlesworth was convicted for violating this ordinance. He appealed, claiming the ordinance was unconstitutional.

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application for the license."); *Smith*, 283 U.S. at 562 (Individual arrested for violating a facially unconstitutional statute was not required to question the validity of the statute before choosing to disregard it.); *Schneider*, 308 U.S. at 161 (same); *Kunz*, 340 U.S. at 293–94 (same).

This Court agreed and found the ordinance facially unconstitutional. *Id.* at 150–51. The Court also held that, because the permitting scheme was facially unconstitutional, Mr. Shuttlesworth had no obligation to comply with it:

> And our decisions have made clear that a person faced with such an unconstitutional licensing law may ignore it and engage *with impunity* in the exercise of the right of free expression for which the law purports to require a license. "The Constitution can hardly be thought to deny to one subjected to the restraints of such an ordinance the right to attack its constitutionality, because he has not yielded to its demands."

Id. at 151 (citations and footnote omitted) (Emphasis added).

The Seventh Circuit's opinion conflicts with *Shuttlesworth*. Instead of being able to ignore facially unconstitutional ordinances and immediately engage in free speech, citizens and groups in the Seventh Circuit, including GEFT, must first "yield to the demands" of the unconstitutional ordinance, file suit, and await a decision from the court. That could take many months or, as it did in this case, close to a year. While waiting for the decision from the court, GEFT's and others' fundamental right to free speech is being suppressed for an indeterminable amount of time. This suppression of speech is in direct conflict with precedent from this Court and several circuit courts.

B. The Seventh Circuit's Opinion Places Impermissible Prior Restraints on Speech.

Having to wait for a court order for an indeterminable amount of time is, in itself, an improper prior restraint on speech, and is impermissible under established precedent from this Court. *See FW/PBS, Inc.*, 493 U.S. at 225 ("[A] prior restraint that fails to place limits on the time within which the decisionmaker must issue the license is impermissible."). As a result, the Seventh Circuit's Opinion directly contravenes this Court's precedent, and certiorari is necessary to secure uniformity of the law on an issue of exceptional importance.

Although not binding on this Court, Justice Douglas's dissent in *Walker* illustrates why the Seventh Circuit's opinion is erroneous:

> The right to defy an unconstitutional statute is basic in our scheme. Even when an ordinance requires a permit to make a speech, to deliver a sermon, to picket, to parade, or to assemble, *it need not be honored when it is invalid on its face. . . .*
>
> By like reason, where a permit has been arbitrarily denied one need not pursue the long and expensive route to this Court to obtain a remedy. The reason is the same in both cases. For if a person must pursue his judicial remedy before he may speak, parade, or assemble, the occasion when protest is desired or needed will have become history and any later speech, parade, or assembly will be futile or pointless.

Walker, 388 U.S. at 336 (Douglas, J., dissenting) (citations omitted) (Emphasis added).

Since December 16, 2017, GEFT has not been able to speak on the Property. Over a year and a half has passed. If the Seventh Circuit's opinion stands, GEFT's inability to speak will continue. GEFT has lost, and will lose in the future, the ability to timely exercise its constitutional rights under the First Amendment to speak on political and nonpolitical issues alike.

Because of the importance of being able to speak in a timely manner, the loss of the right to speak presumptively constitutes irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 2690, 49 L.Ed.2d 547 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). This is no longer the case in the Seventh Circuit if its opinion stands. The loss of the right to speak will be acceptable for indeterminable periods of time while a judicial challenge percolates through the various district courts and courts of appeal.

CONCLUSION

Freedom of speech is among the fundamental personal rights and liberties protected by the First and Fourteenth Amendments. *Lovell*, 303 U.S. at 450. By requiring would-be speakers to first challenge a facially unconstitutional ordinance and then wait an indefinite period for rulings from both a trial and appellate court

before being able to speak lawfully, the Seventh Circuit's opinion has placed additional, unconstitutional barriers on the exercise of First Amendment rights, notably including the freedom of speech, in direct contravention of this Court's binding precedents and also creates a conflict with the case law of the other circuits on this crucially important question of civil disobedience and free speech. Granting certiorari will allow this Court to realign the Seventh Circuit with this Court and other circuit courts.

For the reasons stated herein, Petitioner GEFT Outdoor, L.L.C. respectfully requests the Court to grant review of the important questions of law presented by this Petition.

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