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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 non-commercial 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 nondiscretionary 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.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

GEFT OUTDOOR, L.L.C., Plaintiff,	)	
v.	)	No. 1:19-cv-01257-JRS-MPB
MONROE COUNTY, INDIANA, MONROE COUNTY BOARD OF ZONING APPEALS, Defendants.	)	

ORDER GRANTING PERMANENT INJUNCTION

(Filed Nov. 23, 2021)

GEFT Outdoor, L.L.C.'s ("GEFT") Motion for Entry of Permanent Injunction, (ECF No. 93), is GRANTED. The Court finds, concludes, and orders as follows:

1. GEFT buys or leases land upon which to construct, maintain, and/or 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 at 2500 West Industrial Park Drive, Bloomington, Indiana 47404 ("Property") owned by Roger and Sally Watkins. The Property is adjacent to I-69, a major thoroughfare through the County. GEFT proposes to erect a digital billboard ("Digital Billboard") on the Property.

2. GEFT possesses a state permit for the Digital Billboard. GEFT intends to display both commercial and noncommercial speech on the Digital Billboard under the State of 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% noncommercial and 62% commercial speech. GEFT intends for the Digital Billboard to have a similar mix, something which is possible due to the easily changeable nature of digital signs.

3. Chapter 807 of Defendant Monroe County, Indiana's (the, "County") Zoning Ordinance ("Ordinance") sets forth standards and other requirements for signs located within the County's jurisdiction (the "Sign Standards"). A "Sign" is defined as "[a]ny device, fixture, placard, or structure that uses any color, form, graphic, illumination, symbol, or writing to advertise, announce the purpose of, or identify the purpose of a person or entity, or to communicate information of any kind to the public. The definitions of various types of signs that are set forth in this Section may not be interpreted as a limitation on the scope of the foregoing definition of 'sign.'" (Ordinance, Ch. 801-2). The stated purpose of the Sign Standards is to "promote public health, safety, and welfare[.]" (Ord., Ch. 807-1).

4. The Sign Standards provide: "[E]xcept as otherwise provided, no person shall erect, repair, or relocate any sign . . . without first obtaining a permit from the Administrator." (Ord., Ch. 807-3) (the "Permit

Requirement"). Unless exempted, a sign permit is required for all signs.

5. Someone who wants to post a sign that does not comply with the Sign Standards is not wholly without recourse. The Ordinance allows such a person to seek a variance from the limitations set forth in the Sign Standards.

6. The County's Board of Zoning Appeals ("BZA") decides all variance applications, including ones for Signs. (Ord., Ch. 812-1).

7. The BZA is governed by the following provisions in the Ordinance when considering a variance application:

812-5. Standards for Use Variance Approval

> In order to approve a use variance, the Board must 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; the need for the variance arises from some condition peculiar to the property involved;
>
> (C) 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,

> (D) the approval does not interfere substantially with the Comprehensive Plan.
>
> * * * *
>
> 812-6. Standards for Design Variance Approval
>
> In order to approve an application for a design standards variance, the Board must find that the applicant has submitted substantial evidence establishing that, if implemented:
>
> (A) the approval, including any conditions or commitments deemed appropriate, will not be injurious to the public health, safety, and general welfare of the community . . .
>
> (B) the approval, including any conditions or commitments deemed appropriate, would not affect the use and value of the area adjacent to the property included in the variance in a substantially adverse manner, because . . .
>
> (C) the approval, including any conditions or commitments deemed appropriate, is the minimum variance necessary to eliminate practical difficulties in the use of the property, which would otherwise result from a strict application of the terms of the Zoning Ordinance.

(Ord., Ch. 812-5 & Ch. 812-6).

8. If an applicant satisfies the variance standards as stated in the Ordinance, the BZA has the power to approve or deny a variance contingent on any condition imposed "to protect the public health, and for

reasons of safety, comfort, and convenience." (Ord., Ch. 812-7).

9. On January 16, 2019, GEFT sought a variance for construction of the Digital Billboard, which was assigned variance numbers 1901-VAR-02, 03, 04a, 04b, and 04c ("Variance"). The Variance was from both developmental standards and from use restrictions.

10. Specifically, GEFT sought the following variances:

- Changeable Copy/Off-premises Sign (Ch. 807-6(B)(2) & (5));
- Sign Area (Ch. 807-6(D)(2), (3), & (4));
- Sign Height (Ch. 807-6(F)(1));
- Side/Rear Yard Setback (Ch. 807-6(F)(2)); and
- Front Yard Setback (Ch. 807-6(F)(3)).

11. On March 6, 2019, the BZA met, considered GEFT's Variance, and voted unanimously to deny GEFT's Variance.

12. On March 28, 2019, GEFT filed suit against the County and the BZA alleging, in part, that the Sign Standards contain unconstitutional, content-based regulation and that the County's variance and permitting schemes were impermissible prior restraints on speech.

13. On October 26, 2020, GEFT filed its Motion for Partial Summary Judgment, (ECF No. 53), and

supporting brief, (ECF No. 54), requesting the Court to declare Chapters 807 and 812 of the Ordinance unconstitutional in their entirety and to permanently enjoin the County from enforcing either of those chapters against GEFT or any others. GEFT argued that the Permit Requirement and Variance process are impermissible prior restraints on speech and are not severable.

14. On November 23, 2021, the Court issued its Entry, granting in part and denying in part the cross motions for summary judgment and granting GEFT's motion for a permanent injunction.

15. The Court concludes that the Permit Requirement is an impermissible prior restraint on speech because it gives the County too much discretion in granting or denying permits because the standards guiding the permit decision are subjective and vague.

16. That amount of discretion is inconsistent with First Amendment jurisprudence including, without limitation, *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750 (1988).

17. The Court also concludes that the Permit Requirement lacks sufficient procedural safeguards to protect permit applicants.

18. The Court concludes that the Variance process is an impermissible prior restraint on speech because it gives the BZA too much discretion in granting or denying variances for two reasons: (a) the standards guiding the BZA in considering variance applications

are vague, and (b) the BZA's ability to condition approval of a variance on any condition imposed "to protect the public health, and for reasons of safety, comfort and convenience," which does little to constrain the BZA.

19. That amount of discretion is inconsistent with First Amendment jurisprudence including, without limitation, *City of Lakewood*.

20. The Court also concludes that the Variance process lacks sufficient procedural safeguards to protect applicants who participate in that process.

21. The Court concludes that the Permit Requirement is severable from the Sign Standards based in part on the fact that the Ordinance contains a severability clause which evinces strong intent that the County intends the Sign Standards to stand in the face of the unconstitutional provisions.

22. The Court concludes that Variance process is severable insofar as it applies to variances from the Sign Standards. Insofar as it regulates zoning decisions that do not implicate the First Amendment, the Variance process stands.

23. Based on the foregoing, the Court denies GEFT's request to permanently enjoin the County from enforcing Chapters 807 and 812 in their entirety, but grants GEFT's request only as to the Permit Requirement in the Ordinance § 807-3 and as to Chapter 812, but only as to variances from the sign requirements in Chapter 807.

IT IS THEREFORE ORDERED ADJUDGED AND DECREED that Defendant Monroe County, Indiana, is **permanently enjoined** from:

(1) Enforcing the Permit Requirement in the Ordinance § 807-3; and

(2) Applying the variance process in Chapter 812 of the Ordinance to variances from the sign requirements in Chapter 807.

SO ORDERED.

Date: 11/23/2021

/s/ James R. Sweeney II
JAMES R. SWEENEY II, JUDGE
United States District Court
Southern District of Indiana

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

GEFT OUTDOOR, L.L.C., Plaintiff,	)	
v.	)	No. 1:19-cv-01257-JRS-MPB
MONROE COUNTY, INDIANA, MONROE COUNTY BOARD OF ZONING APPEALS, Defendants.	)	

Entry on Motion for Reconsideration, Motion for Permanent Injunction, and Motion to Stay Case

(Filed Nov. 23, 2021)

GEFT Outdoor LLC ("GEFT") sought to erect a digital billboard in Monroe County, Indiana ("County"), but its specific plans did not mesh with the County's sign ordinance. After the County denied GEFT's application for a variance, GEFT filed suit under 42 U.S.C. § 1983, alleging that the sign ordinance violates the First Amendment as incorporated against the states under the Fourteenth Amendment. GEFT moved for partial summary judgment on all claims other than that for damages. (ECF No. 53.) The County moved for summary judgment on all claims. (ECF No. 63.)

On August 10, 2021, the Court issued its Order on Motions for Summary Judgment, granting in part and

denying in part the cross-motions for summary judgment. The Court enjoined the County "from (1) enforcing the exemptions in Ordinance § 807-3(C)(2) and (3)—i.e., continuing to exempt those kinds of signs from the permit requirement—and (2) applying the variance process in Chapter 812 to variances from the sign requirements in Chapter 807." (Order on Motions for Summary Judgment, 42, ECF No. 90.)

On August 18, 2021, GEFT filed a Motion for Permanent Injunction, (ECF No. 93), seeking a separate order permanently enjoining the County as ordered in the Order on Motions for Summary Judgment. GEFT also filed a Motion for Reconsideration, (ECF No. 94), requesting the Court to reconsider portions of the Order on Motions for Summary Judgment and filed an Unopposed Motion to Stay Case Pending Ruling on the motion to reconsider and/or appeal, (ECF No. 107). GEFT correctly states that the Court's decision focused on the commercial aspects of the regulations and did not address GEFT's claim that the permitting scheme was an impermissible prior restraint on speech. Further, since the Court issued its Order on Motions for Summary Judgment, a jurisdictional issue caught the Court's attention. Accordingly, the Motion for Reconsideration is **granted**, the previous Order on Motions for Summary Judgment, (ECF No. 90), is **vacated**, and the Court issues this Entry ruling on the cross-motions for summary judgment.

I. Background

In Monroe County, outdoor signs must comply with the County's sign ordinance ("Sign Standards"). The announced purpose of the Sign Standards is "to promote public health, safety, and welfare. . . ." Ord. § 807-1. More specifically, two of the County's goals in enacting the ordinance were (1) "maintaining and enhancing the aesthetic environment and the County's ability to attract tourism and other sources of economic development and growth," Ord. § 807-1(3), and (2) "improving pedestrian and traffic movement and safety (e.g., maintaining appropriate sight distances at intersections and reducing distractions)," Ord. § 807-1(4). A "sign" includes any "device, fixture, placard, or structure that uses any color, form, graphic, illumination, symbol, or writing . . . to communicate information of any kind to the public." Ord. § 801-2.

Under the Sign Standards, "except as otherwise provided, no person shall erect, repair, or relocate any sign as defined herein without first obtaining a permit from the Administrator." Ord. § 807-3. The Administrator is currently the County Planning Director. (Wilson Dep. Tr. 31:21–23, ECF No. 54-2.) Generally, a speaker wishing to publish a sign must submit an application and pay a fee. Ord. § 807-3(A). The County Planning Director will issue a sign permit only if "the proposed sign is in compliance with all of the requirements of this zoning ordinance." Ord. § 807-3(B). Those requirements include limits on placement, illumination, maintenance, height, setback, and numerosity. Ord. §§ 807-5, 807-6(A), 807-6(C)–(F). The Sign Standards

do not specify a time limit for the County Planning Director to act on any given application.

Not every sign requires a permit, however. The Sign Standards exempt four kinds of signs from the permit requirement:

(1) Any sign of not more than one and one-half (1-1/2) square feet in area; provided, that no more than one sign shall be permitted per zone lot;

(2) Any governmental sign;

(3) Sculptures, fountains, mosaics and design features which do not incorporate advertising or identification;

(4) Temporary noncommercial signs or devices meeting the following criteria:

a) Each zone lot shall be allocated a total of thirty-two (32) square feet of temporary signs or devices[;]

b) Temporary signs or devices may be located no less than ten (10) feet from any other sign or structure;

c) Freestanding temporary signs or devices may not exceed six (6) feet in height; [and]

d) External illumination of temporary signs or devices is prohibited.

However, if banners, streamers, pennants, balloons, propellers, strung light bulbs, or similar devices are used as the

> temporary signs or devices they may only be displayed for a period of no longer than forty-eight (48) hours.

Ord. § 807-3(C). Some of these terms are words of art. A governmental sign is defined as "[t]raffic or other civic signs, signs required by law or emergency, railroad crossing signs, legal notices, and any temporary, or non-commercial signs as are authorized under policy approved by the County, State, or Federal government." Ord. § 801-2. " 'Temporary sign' means any sign that is intended to be displayed for a limited period of time and is not permanently anchored or secured to a building or not having supports or braces permanently secured to the ground, including but not limited to: banners, pennants, or advertising displays including portable signs." *Id.* A "Commercial Message" is "[a]ny sign wording, logo, or other representation that, directly or indirectly, names, advertises, or calls attention to a business, product, service, or other commercial activity." *Id.* And a "Noncommercial Message" is just the opposite: a sign that "carries no message, statement, or expression related to the commercial interests of the . . . person responsible for the sign message." *Id.*

A section of the Sign Standards called "Prohibited Signs," bans certain categories of signs even if the sign would otherwise be allowed:

> (1) Portable signs are prohibited.
>
> (2) All animated or changeable copy signs (including digital billboards), or signs

which move by mechanical means or by the movement of air are prohibited.

(3) Temporary signs or devices consisting of a series of banners, streamers, pennants, balloons, propellers, strung light bulbs, or similar devices are prohibited, except as allowed in 807-3(C)(4).

(4) Snipe Signs[.][1]

(5) Off-Premise Commercial Signs, except as allowed in 807-4(B).[2]

Ord. § 807-6(B). An "Off-Premises Sign" is one that "directs attention to a business, commodity, service or entertainment not conducted, sold or offered on the premises where the sign is located, or which business, commodity, service or entertainment forms only minor or incidental activity upon the premises where the sign is displayed." Ord. § 801-2. In contrast, an "On-Premises Sign" is one that "advertises or directs attention to a business, commodity, or service conducted, offered, or sold on the premises, or directs attention to the business or activity conducted on the premises." *Id.*

Someone who wants to post a noncompliant sign in the County is not wholly without recourse. As the Indiana Code requires whenever a local government

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[1] Though not challenged in this case, a "snipe sign" is a "temporary sign illegally tacked, nailed, posted, pasted, glued, or otherwise attached to trees, poles, stakes, fences, or other objects." Ord. § 801-2.

[2] Section 807-4(B) is a grandfather clause.

adopts a zoning ordinance,[3] the County has established a Board of Zoning Appeals ("BZA") and a process for obtaining use and design variances. The BZA makes all variance decisions for the County, including variances from the requirements of the Sign Standards. Ord. § 812-1. After the BZA receives an application for a variance, within thirty days, the BZA must schedule and announce a date and time for a public hearing. Ord. § 812-3(A). The variance approval procedure lists several notice requirements for interested parties. Ord. §§ 812-3(D)–(F). After the hearing, the BZA must approve the application, approve the application with conditions, or deny the application. Ord. § 812-3(H); *see also* Ord. § 812-7 (BZA has authority to make approval contingent on any condition imposed "to protect the public health, and for reasons of safety, comfort and convenience"). But, beyond scheduling a hearing within a certain timeframe, there is no enumerated time limit within which the BZA must act on any given variance application. (Defs.' Ans. 1st Interrogs. ¶ 8, ECF No. 54-5.)

To approve a use variance, the BZA must 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

[3] *See* Ind. Code § 36-7-4-901 ("As a part of the zoning ordinance, the legislative body shall establish a board of zoning appeals."); Ind. Code § 36-7-4-918.4 (board of zoning appeals must decide use and design variances).

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 Comprehensive Plan. Especially, the five (5) principles set forth in the Monroe County Comprehensive Plan[.][4]

Ord. § 812-5.

To approve a design variance, the BZA must find that the applicant has adduced "substantial evidence establishing that, if implemented:"

(A) the approval, including any conditions or commitments deemed appropriate, will not be injurious to the public health, safety, and general welfare of the community, because:

(1) it would not impair the stability of a natural or scenic area;

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[4] The Comprehensive Plan is the "inclusive physical, social, and economic plans and policies . . . for the development of the County. . . ." Ord. § 801-12.

(2) it would not interfere with or make more dangerous, difficult, or costly, the use, installation, or maintenance of existing or planned transportation and utility facilities;

(3) the character of the property included in the variance would not be altered in a manner that substantially departs from the characteristics sought to be achieved and maintained within the relevant zoning district. . . . and,

(4) it would adequately address any other significant public health, safety, and welfare concerns raised during the hearing on the requested variance;

(B) the approval, including any conditions or commitments deemed appropriate, would not affect the use and value of the area adjacent to the property included in the variance in a substantially adverse manner, because:

(1) the specific purposes of the design standard sought to be varied would be satisfied;

(2) it would not promote conditions (on-site or off-site) detrimental to the use and enjoyment of other properties in the area . . . ; and,

(3) it would adequately address any other significant property use and

> value concerns raised during the hearing on the requested variance; and,
>
> (C) the approval, including any conditions or commitments deemed appropriate, is the minimum variance necessary to eliminate practical difficulties in the use of the property, which would otherwise result from a strict application of the terms of the Zoning Ordinance.

Ord. § 812-6.

GEFT is a limited-liability company that buys or leases land and builds, maintains, and operates signs on its properties. (Lee Aff. ¶ 3, ECF No. 54-1.) GEFT leases part of the property at 2500 West Industrial Park Drive in Bloomington, Indiana (part of Monroe County). (*Id.* ¶ 4.) That property is right next to I-69, a major thoroughfare in the County. (*Id.*) GEFT wants to build a digital billboard on the property, (*id.* ¶ 5)—a billboard that exhibits digital images and text, which GEFT can control by computer—to display all sorts of commercial and noncommercial speech, (*id.* ¶ 7). On its other billboards, GEFT has tended to display a mix of 62 percent commercial speech and 38 percent noncommercial speech. (*Id.* ¶ 8.) It has the requisite state permit from the Indiana Department of Transportation that it needs to erect digital billboards. (*Id.* ¶ 6.)

On January 16, 2019, GEFT sought variances from the Sign Standards for a digital billboard to be built at the Bloomington property. Specifically, the variances were from the changeable copy ban, Ord.

§ 807-6(B)(2); the off-premises commercial sign ban, Ord. § 807-6(B)(5); the sign area standards, Ord. § 807-6(D); height requirements, Ord. § 807-6(F)(1); side/rear yard setback requirements, Ord. § 807-6(F)(2); and front yard setback requirements, Ord. § 807-6(F)(3). The BZA held a hearing on March 6, 2019, and it unanimously denied GEFT's application. (Lee Aff. ¶ 11, ECF No. 54-1.)

On March 28, 2019, GEFT filed suit against the County, invoking 42 U.S.C. § 1983 and a state statute. GEFT challenges the Sign Standards as an unlawful content-based regulation and an unlawful prior restraint, both allegedly in violation of the First Amendment as it is incorporated against the states. The parties have moved for summary judgment. (ECF Nos. 53, 63.) The Court has reconsidered its previous decision and now issues this Entry.

II. Legal Standards

Two standards apply here: the standard for summary judgment and the standard for reconsideration. Summary judgment is appropriate if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The movant bears the initial burden of production. *Modrowski v. Pigatto*, 712 F.3d 1166, 1168 (7th Cir. 2013). That initial burden consists of either "(1) showing that there is an absence of evidence supporting an essential element of the non-moving party's claim; or (2) presenting affirmative

evidence that negates an essential element of the non-moving party's claim." *Hummel v. St. Joseph Cnty. Bd. of Comm'rs*, 817 F.3d 1010, 1016 (7th Cir. 2016) (citing *Modrowski*, 712 F.3d at 1169). If the movant discharges its initial burden, the burden shifts to the nonmovant, who must present evidence sufficient to establish a genuine issue of material fact on all essential elements of his case. *See Lewis v. CITGO Petroleum Corp.*, 561 F.3d 698, 702 (7th Cir. 2009). The Court must construe all facts and any reasonable inferences arising from them in favor of the nonmovant. *See Blow v. Bijora, Inc.*, 855 F.3d 793, 797 (7th Cir. 2017) (citation omitted).

Any order "that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties . . . may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." Fed. R. Civ. P. 54(b). A motion to reconsider "serve[s] a limited function: to correct manifest errors of law or fact or to present newly discovered evidence." *Lockhart v. ExamOne World Wide, Inc.*, 904 F. Supp. 2d 928, 951 (S.D. Ind. 2012) (quoting *State Farm Fire & Cas. Co. v. Nokes*, 263 F.R.D. 518, 526 (N.D. Ind. 2009)). A motion to reconsider is appropriate where the Court has misunderstood a party, where the Court has made a decision outside the adversarial issues presented to the Court by the parties, where the Court has made an error of apprehension (not of reasoning), where a significant change in the law has occurred, or where significant new facts have been discovered." *Id.* A motion to

reconsider is also appropriate to request the Court to consider an argument that the Court overlooked. *Patel v. Gonzales*, 442 F.3d 1011, 1015–16 (7th Cir. 2006). Here, in its decision on the summary judgment motions, the Court overlooked GEFT's argument about the presence of non-commercial speech and overlooked parts of GEFT's prior restraint arguments regarding the permitting scheme.

Moreover, the Court failed to consider GEFT's Article III standing to challenge the Sign Standards. "When a requirement goes to subject-matter jurisdiction, courts are obligated to consider *sua sponte* issues that the parties have disclaimed or have not presented." *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012). "[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). For these reasons, reconsideration is appropriate.

III. Discussion

"Congress shall make no law . . . abridging the freedom of speech. . . ." U.S. Const. amend I. According to GEFT, the Sign Standards violate the First Amendment because they are an unlawful content-based regulation and because they amount to a prior restraint that lacks procedural safeguards. The Court addresses each charge in turn.

A. Count I: Content-Based Regulation

The parties have not addressed Article III standing. But "[w]hen a requirement goes to subject-matter jurisdiction, courts are obligated to consider *sua sponte* issues that the parties have disclaimed or have not presented." *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012).

1. Standing

"[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "[T]he irreducible constitutional minimum of standing contains three elements." *Id.* at 561. "The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citations omitted).

GEFT brings a facial challenge to the County's ordinance. Facial challenges on First Amendment grounds lie where a statute "substantially suppresses otherwise protected speech vis-à-vis its plainly legitimate sweep." *Bell v. Keating*, 697 F.3d 445, 456 (7th Cir. 2012) (cleaned up). The question of standing becomes somewhat complicated in the context of a facial challenge to a statute on First Amendment grounds. That is because "[f]acial challenges to overly broad statutes are allowed not primarily for the benefit of the litigant, but for the benefit of society—to prevent the statute

from chilling the First Amendment rights of other parties not before the court." *Secretary of State of Md. v. Munson*, 467 U.S. 947, 958 (1984).

Still, the Seventh Circuit has made clear that the requirement that a plaintiff prove standing in every case is not "elided" simply because a plaintiff seeks to facially attack a statute. *Harp Advert. Ill., Inc. v. Village of Chicago Ridge*, 9 F.3d 1290, 1291 (7th Cir. 1993). In *Harp*, the plaintiff brought a facial challenge to a sign ordinance on First Amendment grounds but failed to challenge an equally applicable zoning code's size restriction that would have independently blocked the plaintiff's large sign from being built. *Id.* at 1291–92. The Seventh Circuit wrote, "An injunction against the portions of the sign and zoning codes that it has challenged would not let it erect the proposed sign; the village could block the sign simply by enforcing another, valid, ordinance already on the books." *Id.* at 1292. In other words, victory in the lawsuit would not redress the plaintiff's alleged injury in not being able to erect its proposed sign. *Id.* Accordingly, the Seventh Circuit held that the plaintiff lacked standing to challenge the sign ordinance under the First Amendment.

Likewise, in *Leibundguth Storage & Van Service, Inc. v. Village of Downers Grove*, 939 F.3d 859 (7th Cir. 2019), the plaintiff brought as-applied and facial challenges to a municipality's sign ordinance, urging the ordinance amounted to a content-based regulation. *Id.* at 860. But the plaintiff failed to show that the physical standards its sign violated were impermissible time, place, and manner restrictions. *Id.* at 862.

Bypassing the main issue briefed by the parties—both here and in *Leibundguth*, as to the interaction between *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), and *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980)—the Seventh Circuit held that the plaintiff failed to show that success in the suit would redress the noncompliance of its sign. 939 F.3d at 861. Although its brief opinion did not speak in terms of standing, the court wrote, "Leibundguth's problems come from the ordinance's size and surface limits, not from any content distinctions." *Id.*

Many courts applying *Harp* have found that severability of an ordinance is properly addressed during the jurisdictional inquiry for purposes of analyzing the redressability prong of standing. *See Paramount Media Grp., Inc. v. Village of Bellwood*, No. 13-C-3994, 2017 WL 590281, at *6 (N.D. Ill. Feb. 14, 2017), *aff'd on other grounds*, 929 F.3d 914 (7th Cir. 2019); *Covenant Media of Ill., L.L.C. v. City of Des Plaines*, 476 F. Supp. 2d 967, 984 (N.D. Ill.), *decision vacated in part on reconsideration*, 496 F. Supp. 2d 960 (N.D. Ill. 2007); *Lockridge v. Village of Alsip*, No. 03 CV 6720, 2005 WL 946880, at *2 (N.D. Ill. Apr. 18, 2005); *see also Advantage Media, L.L.C. v. City of Eden Prairie*, 456 F.3d 793, 801 (8th Cir. 2006) ("The district court properly considered the provisions of the sign code to be severable in making its overbreadth standing determination.").

Putting this all together, the Court finds GEFT has failed to establish Article III standing as to Count

I. The only provision of the County's Sign Standards GEFT really attacks in its briefs is the off-premises commercial sign ban. *See* Ord. § 807-6(B)(5). Put aside that the ban is likely constitutionally sound given the continued vitality of squarely on-point Supreme Court authority, holding that the ban is unconstitutional would not solve GEFT's problems.[5]

2. Severability

Even if the Court were to find that the off-premises commercial sign ban violates the First Amendment, the ban would be severable. The Supreme Court has remarked before that "[s]everability of a local ordinance is a question of state law. . . ." *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 772 (1988) (citing *Mayflower Farms, Inc. v. Ten Eyck*, 297 U.S. 266, 274 (1936)).[6] Severability concerns "whether the infirm

[5] *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507–12 (1981) (upholding sign code's distinction between on-premises and off-premises commercial signs); *see also Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."); *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000) ("This Court does not normally overturn . . . earlier authority sub silentio.").

[6] It is not clear why this is so, especially when—as here—a challenged law does not involve a limiting construction imposed by state courts. Severability is simply a question of statutory interpretation. *See Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2349 (2020) (framing inquiry as determining "Congress's 'actual intent' as to severability"). And basic rules of

provision of a statute is severable, leaving the remainder intact." *City of Hammond v. Herman & Kittle Props., Inc.*, 119 N.E.3d 70, 87 (Ind. 2019) (citation omitted). That inquiry may be broken down into two questions: (1) "whether the statute can stand on its own without the invalid provision," and (2) "whether the legislature intended the remainder of the statute to stand if the invalid provision is severed." *Id.* If the answer to either question is negative, "the offending provision is not severable, and the whole statute must be stricken." *Id.* "The inclusion of a severability clause creates a presumption that the remainder of the Act may continue in effect." *Ind. Ed. Emp. Rels. Bd.*, 365 N.E.2d at 762. The Indiana Supreme Court has noted before that a severability clause is "only one indication of legislative intent." *Id.* at 761. However, under the currently prevailing modes of statutory interpretation,

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statutory interpretation generally do not change from jurisdiction to jurisdiction. Perhaps that is why *American Association of Political Consultants* favorably cited a case in which the Supreme Court severed, without reference to state severability doctrine, "discriminatory wine-and-cider amendments" from an underlying state statute generally prohibiting the manufacture of alcohol. *See id.* at 2353 (citing *Eberle v. Michigan*, 232 U.S. 700, 704–05 (1914)). In any event, the state severability law versus federal severability law issue need not be resolved here. Indiana's law of severability is not unique. And, in analyzing severability, Indiana courts draw from Supreme Court caselaw on severability in federal statutes. *See*, *e.g.*, *Ind. Ed. Emp. Rels. Bd. v. Benton Cmty. Sch. Corp.*, 365 N.E.2d 752, 761–62 (Ind. 1977) (relying on *Carter v. Carter Coal Co.*, 298 U.S. 238 (1935), which reviewed a federal law). The Court therefore draws on both state court cases and the Supreme Court's most recent discussions of severability.

> When Congress includes an express severability or nonseverability clause in the relevant statute, the judicial inquiry is straightforward. At least absent extraordinary circumstances, the Court should adhere to the text of the severability or nonseverability clause. That is because a severability or nonseverability clause leaves no doubt about what the enacting Congress wanted if one provision of the law were later declared unconstitutional.

Am. Ass'n of Pol. Consultants, 140 S. Ct. at 2349 (7-2 holding on this point). The Supreme Court added that presence of a severability clause thus creates a "strong presumption of severability." *Id.* at 2356.

Here, the County's zoning ordinance contains a severability clause, which states,

> The provisions of this ordinance are separable. If any part or provision of these regulations or the application thereof to any person or circumstances is adjudged invalid by a court of competent jurisdiction, such judgment shall be confined in its operation to the part, provision, or application directly involved in the controversy in which such judgment shall have been rendered and shall not affect or impair the validity of the remainder of these regulations or the application thereof to other persons or circumstances. The County hereby declares that it would have enacted the remainder of these regulations even without any such part, provision or application.

Ord. § 800-6(D). "[F]irm adherence to the text of severability clauses," *Am. Ass'n of Pol. Consultants*, 140 S. Ct. at 2356, leads the Court to the conclusion that the clause is all but dispositive of the County's legislative intent: that invalid provisions be severed. Moreover, the ban on off-premises commercial signs is just one provision of a comprehensive sign code. The scheme does not seem facially unworkable without the ban. Rather, the Court thinks the permit scheme can "stand on its own without the invalid provision[.]" *Herman & Kittle Props.*, 119 N.E.3d at 87.

Thus, the ban on off-premises commercial signs, even if unconstitutional, would be severable. Beyond that ban, GEFT has utterly failed to challenge the other grounds for its proposed digital billboard being noncompliant. Its billboard violates the ban on changeable copy, Ord. § 807-6(B)(2), sign area limits, Ord. § 807-6(D), height limits, Ord. § 807-6(F)(1), side/rear setback rules, Ord. § 807-6(F)(2), and front setback rules, Ord. § 807-6(F)(3). GEFT has not challenged these provisions as invalid time, place, and manner requirements, and they would easily pass muster even if GEFT had done so. *See*, *e.g.*, *Leibundguth*, 939 F.3d at 862 (finding size and presentation rules in sign ordinance passed scrutiny under *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). Accordingly, "[GEFT] lacks standing to challenge . . . the sign code, because it could not put up its sign even if it achieved total victory in this litigation." *Harp*, 9 F.3d at 1291. Count I must be dismissed for lack of subject-matter jurisdiction.

B. Count II: Prior Restraint

In Count II, GEFT argues that the County's sign scheme is a prior restraint that lacks the substantive and procedural safeguards required of prior restraints. The County counters that those requirements are either fulfilled or unnecessary.

1. Standing

A First Amendment challenge to a permitting or variance scheme "does not involve the conventional standing requirements." *Weinberg v. City of Chicago*, 310 F.3d 1029, 1043 (7th Cir. 2002) (concluding book peddler had standing to bring prior restraint claim against City based on licensing ordinances he believed gave City unbridled discretion). "In the area of freedom of expression . . . [a plaintiff] has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, whether or not [its] conduct could be proscribed by a properly drawn statute, and whether or not [it] applied for a license." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 756 (1988) (quoting *Freedman v. Maryland*, 380 U.S. 51, 56 (1965)). In *Freedman*, the Supreme Court explained that "standing in such cases was appropriate 'because of the danger of sweeping and improper application in the area of First Amendment freedoms.'" *Southworth v. Bd. of Regents of Univ. of Wis. Sys.*, 307 F.3d 566, 575 (7th Cir. 2002) (quoting *Freedman*, 380 U.S. at 56). GEFT has standing to bring a facial challenge to the permitting and

variance provisions of the Sign Standards as unconstitutional prior restraints. If GEFT can show that the permitting and variance provisions are unconstitutional, GEFT could put up its proposed billboard as long as it otherwise complies with the constitutional provisions of the ordinance.

2. Legal Rule

A prior restraint is any law "forbidding certain communications when issued in advance of the time that such communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550 (1993) (citation omitted). Prior restraints are "highly disfavored and presumed invalid." *Weinberg v. City of Chicago*, 310 F.3d 1029, 1045 (7th Cir. 2002) (citations omitted). But a prior restraint is not per se unconstitutional, and it may pass muster under the First Amendment if it meets one of several exceptions "carved out" by the courts. *Stokes v. City of Madison*, 930 F.2d 1163, 1168–69 (7th Cir. 1991).

The County's sign regulations resemble a prior restraint. The general rule of the Sign Standards is that no sign may be published unless the County first issues a permit. Ord. § 807-3. The Sign Standards therefore "[give] public officials the power to deny use of a forum in advance of actual expression." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975).

As the Sign Standards meet the definition of a prior restraint, the Court must evaluate the constitutional status of the restraint. As relevant here, two

lines of cases have sprouted around prior restraints: one focused on substantive limits on official discretion and one focused on procedural safeguards. Which limits on discretion are required depend on whether the law in question is content-neutral or content based. *See Thomas v. Chicago Park Dist.*, 534 U.S. 316, 322 (2002). All prior restraints—even content-neutral time, place, and manner regulations[7]—must substantively "contain adequate standards to guide the official's decision and render it subject to effective judicial review." *Id.* at 323.

A content-based law, however, must also contain the stringent procedural protections announced in *Freedman v. Maryland*, 380 U.S. 51, 58 (1965). *See Thomas*, 534 U.S. at 322. In *Freedman*, the Supreme Court held that a state's film-review scheme was unconstitutional because it lacked three procedural safeguards: "(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 once in court." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 227 (1990) (citing *Freedman*, 380 U.S. at

[7] GEFT has not argued that the County's ordinance fails to satisfy other requirements of time, place, and manner jurisprudence, under which a permit scheme "must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication." *Thomas*, 534 U.S. at 323 n.3 (citations omitted). Accordingly, the Court will not address those other requirements.

58–60). Similarly, *FW/PBS* involved a licensing scheme that "target[ed] businesses purveying sexually explicit speech," 493 U.S. at 224, prompting the Supreme Court to require of the challenged regulation variants of two of the *Freedman* safeguards, *see Thomas*, 534 U.S. at 322 n.2. *FW/PBS* clarified that the first two *Freedman* safeguards included a requirement that a "license for a First Amendment-protected business must be issued within a reasonable period of time. . . ." 493 U.S. at 228. According to GEFT, the Sign Standards, specifically the permitting and variance processes, fail to comply with any of these prior-restraint principles.

Since the procedural side of these prior-restraint rules only comes into play when a regulation is "content-based," *Thomas*, 534 U.S. at 322, the Court must determine what the term "content-based" means in the context of prior restraints. In the Court's original summary judgment decision, the Court focused on the commercial aspects of the speech GEFT intends to communicate on its billboard without evaluating the noncommercial aspects. Yet, the Sign Standards apply to both commercial and noncommercial speech.

The first step in deciding whether a law is content based or content neutral, is "determining whether the law is content neutral on its face." *Reed v. Town of Gilbert*, 576 U.S. 155, 165 (2015). A regulation of speech is facially content based if it draws distinctions "based on the message a speaker conveys," *id.* at 163, or "singles out specific subject matter for differential treatment," *id.* at 169. For example, "a law banning the use of

sound trucks for political speech—and only political speech—would be a content-based regulation, even if it imposed no limits on the political viewpoints that could be expressed." *Id.* (citing *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993)).

Reed and *Barr v. American Association of Political Consultants, Inc.*, 140 S. Ct. 2335 (2020), illustrate how this test for facial content neutrality works. At issue in *Reed* was a sign code that defined different types of signs based on the subject matter of the sign—temporary directional signs, political signs, ideological signs, and more—and subjected each category to different size and location restrictions. 576 U.S. at 164. The sign code was obviously content based on its face, the Supreme Court said, since the government invariably had to look at the content of the sign to determine how the sign was to be regulated. *Id.* Likewise, *American Association of Political Consultants* concerned a general ban on robocalls to cell phones, from which robocalls to collect government debt were exempted. 140 S. Ct. at 2346. The Supreme Court said this:

> Under § 227(b)(1)(A)(iii), the legality of a robocall turns on whether it is "made solely to collect a debt owed to or guaranteed by the United States." A robocall that says, "Please pay your government debt" is legal. A robocall that says, "Please donate to our political campaign" is illegal. That is about as content-based as it gets. Because the law favors speech made for collecting government debt over

> political and other speech, the law is a content-based restriction on speech.

Id.

Turning to the case at hand, two sections of the Sign Standards are content based. First, the County's ordinance exempts four categories of signs from the general requirement that a permit be obtained before any sign is published: (1) small signs, (2) governmental signs, (3) "sculptures, fountains, mosaics and design features which do not incorporate advertising or identification," and (4) temporary noncommercial signs. Ord. § 807-3(C). GEFT does not challenge exemption (1) for small signs. The other three exemptions are plainly content based under *Reed*. The ordinance defines governmental signs, design features not incorporating "advertising or identification," and temporary noncommercial signs in § 801-2, and it regulates those sign categories differently in § 807-3(C). The County has no way to tell what regulations to apply to a sign unless it reads the content of the sign's message and categorizes it. "The restrictions in the Sign Code that apply to any given sign thus depend entirely on the communicative content of the sign." *Reed*, 576 U.S. at 164.

The off-premises advertising ban also makes the sign ordinance content based under *Reed*. The County prohibits off-premises commercial signs but allows on-premises commercial signs that meet certain objective requirements. *See* Ord. § 807-6(B)(5). Distinctions between off-premises and on-premises signs are

inherently content based because the government must evaluate the content of the sign (that is, whether the sign relates to activities occurring on-site) to determine whether the sign is an on-premises sign that is subject to the permit requirement or an off-premises sign that is almost always prohibited. "The fact that a government official has to read a sign's message to determine the sign's purpose is enough, under *Reed,*" to make the law content based. *GEFT Outdoor, LLC v. City of Westfield*, 491 F. Supp. 3d 387, 405 (S.D. Ind. 2020) (collecting cases and finding that a city's on-premises/off-premises distinction was content based); *see also GEFT Outdoor, LLC v. Consol. City of Indianapolis*, 187 F. Supp. 3d 1002, 1016 (S.D. Ind. 2016) (same).

In its briefs, the County disclaims any intent to engage in content-based discrimination. The County says the lack of such a purpose is sufficient to show that the ordinance is content-neutral. For that proposition, the County cites *Hill v. Colorado*, 530 U.S. 703 (2000), where the Supreme Court upheld a statute banning the "knowing approach" for the purpose of "oral protest, education, or counseling" within eight feet of a non-consenting person who is within 100 feet of a healthcare facility. *Hill* describes the government's content-neutral purpose as the "principal inquiry" in deciding whether a regulation is content based. 530 U.S. at 719 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). But the Supreme Court in *Reed* squarely rejected the idea that a law is content-neutral so long as the legislature did not *intend* to discriminate

on the basis of content. *See Reed*, 576 U.S. at 165 ("A law that is content based on its face is subject to strict scrutiny *regardless* of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." (emphasis added)); *id.* at 168 ("We have repeatedly rejected the argument that discriminatory treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas." (cleaned up)). To be sure, that is not the only part of *Hill*'s reasoning that no longer carries water. *Compare Hill*, 530 U.S. at 721 ("We have never held, or suggested, that it is improper to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct."), *with Reed*, 576 U.S. at 164 (suggesting that examining the content of speech to determine how it should be regulated made the challenged ordinance content based).

Even if the County lacked any invidious motive in enacting the sign ordinance, the ordinance distinguishes between speech based on the speech's subject matter and regulates each category of speech differently. The sign ordinance is therefore facially content based because it contains exemptions (2)–(4) and the on-premises/off-premises commercial sign distinction. Therefore, the Sign Standards are subject to the *Freedman* procedural safeguards, *see Thomas*, 534 U.S. at 322, as well as substantive limits on official discretion.

3. Application

The first question is whether the Sign Standards contain the *Freedman* procedural safeguards. They do not. *See* Ord. § 807, 812. The Sign Standards do not require that a permit or variance be issued within a reasonable period of time. *See FW/PBS*, 493 U.S. at 228. Nor do the Sign Standards place on the County the burden of going to court to suppress the speech. *See id.* at 227. Instead, an applicant may appeal the denial of a permit or variance; however, "there is no telling how long that case will take to get through the legal system." (Wilson Dep. 55:14–17, ECF No. 54-2.) Thus, the Sign Standards do not provide for prompt judicial review. *See*, *e.g.*, *XXL of Ohio, Inc. v. City of Broadview Heights*, 341 F. Supp. 2d 765, 802 (N.D. Ohio 2004) (observing that if an applicant seeks an injunction to prevent enforcement of the sign ordinance, the burden of proof is on the party seeking the injunction); *3708 N. Ave. Corp. v. Village of Stone Park*, No. 94 C 7267, 1996 WL 82465, at *6 (N.D. Ill. Feb. 23, 1996) (concluding that the mere fact that a license applicant whose application has been "tabbed" can sue for injunctive relief was insufficient to provide an avenue for prompt judicial review).

The next question is whether the Sign Standards substantively run afoul of the requirement that any prior restraint "contain adequate standards to guide the official's decision and render it subject to effective judicial review." *Thomas*, 534 U.S. at 322. Put another way, any prior restraint must bound the government's discretion using "narrow, objective, and definite

standards." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969).

Starting with the permitting process, GEFT says the off-premises commercial sign prohibition gives the County too much discretion. Recall that the sign ordinance defines an off-premises commercial sign as any commercial sign that "directs attention to a business, commodity, service or entertainment not conducted, sold or offered on the premises where the sign is located, or which business, commodity, service or entertainment forms only minor or incidental activity upon the premises where the sign is displayed." Ord. § 801-2. By its terms, the Court does not see how this definition is so broad that it gives the County "unbridled discretion." *Plain Dealer Publ'g Co.*, 486 U.S. at 757. If a standard like "unreasonable danger" is narrow enough for the Supreme Court, *see Thomas*, 534 U.S. at 324, then the County's comparably specific definition of "off-premises commercial sign" here is certainly narrow enough for this Court. In its briefs, GEFT posits three examples of purportedly ambiguous signs under that definition. (*See* Pl.'s Reply Br. at 25–26, ECF No. 68.) But the Court has no trouble categorizing those examples as either off-premises commercial signs or other types of signs.

In further support of its argument, GEFT points to County Planning Director Larry Wilson's alleged description of the off-premises sign definition as "muddy" and Mr. Wilson's practice of sometimes referring to counsel the question of whether a certain sign constitutes an off-premises commercial sign. (*See* Wilson

Dep. Tr. 23:23–26:16, ECF No. 54-2.) For one, GEFT's citations to the record here are misleading. Mr. Wilson did not say that the question of whether a given sign constitutes an off-premises commercial sign is "muddy"; he said, "[T]he *constitutional law* in this area is muddy. Even the *Reed* case is muddy." (*Id.* at 25:24–25 (emphasis added).) The Court can hardly disagree that *Reed* has muddied the waters of First Amendment law. *See generally* Section III.A. Additionally, Mr. Wilson says he sometimes refers tough sign-classification questions to the County's attorneys because Mr. Wilson is not a lawyer. (*Id.* Wilson Dep. Tr. 26:14–16, ECF No. 54-2.) The Court struggles to see why that practice is at all objectionable. In any event, whether an ordinance contains sufficiently "narrow, objective, and definite standards," *Shuttlesworth*, 394 U.S. at 151, is a question of law for the Court, and Mr. Wilson's deposition testimony does not change the Court's conclusion that the sign ordinance's definition of "off-premises commercial sign" does not come close to granting unbridled discretion to the County.

More generally, GEFT argues that the subjective nature of the permitting standards are insufficient to guide the County's permitting decisions and allows the County to reject a sign based on its content. In *Conteers LLC v. City of Akron*, No. 5:20-CV-00542, 2020 WL 5529656 (N.D. Ohio Sept. 15, 2020), the plaintiff applied for a sign permit for a billboard. The city's zoning code permitted a billboard as a conditional use. However, to obtain a permit, the applicable standards required findings, among others, that the proposed use

be "harmonious with and in accordance with the general objectives of the City's Comprehensive Plan," "harmonious and appropriate in appearance," and not be "disturbing to existing or future neighboring uses." *Id.* at *2. The plaintiff's permit application was denied, and the plaintiff sued challenging the ordinance as an unconstitutional prior restraint on speech. The court concluded that the permit standards were "highly subjective," "nebulous and vague" and thus insufficient to guide officials' discretion to grant or deny conditional use permits. *Id.* at *11. The court therefore held that zoning ordinance constituted an unconstitutional prior restraint on speech. *Id.* at *11–12. Numerous other courts have held that ordinances with similar standards conferred overly broad discretion to the issuing authority and thus the permit requirement was unconstitutional. *See*, *e.g.*, *Desert Outdoor Advert., Inc. v. City of Moreno Valley*, 103 F.3d 814, 817–19 (9th Cir. 1996) (standard for permit requiring that a sign "not have a harmful effect upon the health or welfare of the general public and will not be detrimental to the welfare of the general public and will not be detrimental to the aesthetic quality of the community or the surrounding land uses" contained no limit on officials discretion); *CBS Outdoor, Inc. v. City of Royal Oak*, No. 11-13887, 2012 WL 3759306, at *6 (E.D. Mich. Aug. 29, 2012) (holding permit standards requiring that signs and billboards be "harmonious and in accordance with the general objectives of the Master Plan," "harmonious and appropriate in appearance with the existing or intended character of the general vicinity," "not . . . disturbing to existing uses," and "an improvement in

relation to property" were "vague," "ambiguous," and "arbitrary" and an unconstitutional prior restraint on speech). Likewise, the Sign Standards permitting requirements are subjective and vague and do not sufficiently limit the County's discretion to grant or deny a permit, creating an unacceptable risk that the permit decision could be based on the content of the intended speech. The permit requirement runs afoul of the constitutional requirement that prior restraints contain adequate standards to guide official decision making.

GEFT also contends that the variance process associated with the Sign Standards grants unbridled discretion to the County. The Court agrees that the variance process confers too much discretion on the County in two ways.

First, the standards guiding the BZA in considering a variance application are vague. For use variances, these standards include criteria such as whether the variance would be "injurious to the public health, safety, and general welfare"; whether the surrounding property would be "affected in a substantially adverse manner"; whether a denial of a variance would cause "unnecessary hardship"; and whether a variance would "interfere substantially with the Comprehensive Plan." Ord. § 812-5. The design variance standards are comparable. *See* Ord. § 812-6. These factors are "value laden and susceptible to wide and varying differences of opinion." *Bickers v. Saavedra*, 502 F. Supp. 3d 1354, 1362 (S.D. Ind. 2020); *see also Int'l Outdoor*, 974 F.3d at 698 ("The standards for granting a variance contained multiple vague and undefined criteria, such as

'public interest,' 'general purpose and intent of this Chapter,' 'adversely affect[ing],' 'hardship,' and 'practical difficulty.' "); *Shuttlesworth*, 394 U.S. at 159 (striking permit scheme in which permits' issuance was "guided only by [City Commission's] own ideas of 'public welfare, peace, safety, health, decency, good order, morals or convenience' "); *Lakewood*, 486 U.S. at 769–70 (invalidating licensing scheme in which mayor could issue permits if it was "in the public interest"). These kinds of nebulous criteria create too high a risk that the BZA might grant or deny a variance based on whether it likes or dislikes the content or viewpoint of a given sign. Using this subjective variance procedure, the BZA could essentially permit whatever speech it favored, even if such speech appeared on a sign flouting countless design and use standards in Chapter 807, while requiring disfavored speech to abide by every sign standard to a T.

Second, the BZA has the power to approve variances contingent on any condition imposed "to protect the public health, and for reasons of safety, comfort and convenience." Ord. § 812-7. That standard does little to constrain the County. The County could impose essentially whatever conditions it wanted on a sign approved through the variance process, which constitutes impermissibly broad discretion. *See Lakewood*, 486 U.S. at 769–70 (holding unconstitutional part of ordinance giving mayor discretion to impose "such other terms and conditions [he] deemed necessary and reasonable" when granting a news rack permit); *Bickers*, 502 F. Supp. 3d at 1363 (holding

unconstitutional ordinance provision giving city power to condition grant of special-use permit on whatever terms city "deem[s] necessary to protect adjoining property owners").

The County counters that the variance process, which controls regular variances for real property and variances from the sign ordinance alike, should not be considered part of the sign ordinance. The County says the State of Indiana should answer for any constitutional problems inherent to the variance process, since Indiana requires local governments to adopt a variance process whenever they establish a zoning ordinance. *See* Ind. Code § 36-7-4-901. But the County has not pointed out any part of the Indiana Code requiring the County to consult the same criteria governing real-property variances, which usually do not implicate First Amendment interests, when considering variances from the sign ordinance, which much more often implicate the First Amendment. To the contrary, the County could have enumerated a separate set of "narrow, objective, and definite standards," *Shuttlesworth*, 394 U.S. at 151, for the BZA to apply when considering variances from the Sign Standards.

The County also argues that the variance provision cannot be considered a prior restraint because it potentially provides relief from the Sign Standards rather than increasing the amount of suppressed speech. The Sixth Circuit rejected this specific argument in *International Outdoor*, reasoning that "the variance provision of the City of Troy Sign Ordinance . . . is not independent from other provisions of the ordinance,

but rather inextricably linked to them by providing a way of relaxing the very restrictions imposed by the Sign Ordinance." 974 F.3d at 702. The Court agrees with that reasoning. The variance process is not independent of the Sign Standards because the County chose to regulate variances from the Sign Standards using the generalized variance process in Chapter 812. As applied to variances from the Sign Standards, the variance process does not sufficiently constrain official discretion.

4. Severability

In short, the permitting and variance processes substantively confer unbridled discretion on the County and the *Freedman* procedural protections are missing. For substantially the same reasons as stated *supra* in Section III.A.2, the Court credits the severability clause at Ordinance § 800-6(D) and finds that the variance process in Chapter 812 is invalid but severable insofar as it applies to variances from the Sign Standards. Insofar as it regulates zoning decisions that do not implicate the First Amendment, the variance procedure stands.

The permitting process in Chapter 807, that is Ord. § 807-3, is severable, too. While the permitting process is a key part of the Sign Standards, the scheme does not seem facially unworkable without it. Instead of taking place on the front end before a sign is erected, regulation of signs will occur on the back end after a sign has been erected through an ordinance enforcement

procedure. *See* Ind. Code § 36-1-4-11. Striking the permitting process neither broadens the scope of the Sign Standards nor leads to a result unintended by the County. The remaining provisions such as the size, height, and setback requirements and the prohibition on certain types of signs still advance the stated purposes and objectives of the Sign Standards. Thus, without the permitting process, the County nevertheless has a means to control signs that are located in the County. In the Court's view, the Sign Standards can "stand on [their] own without the invalid" permitting and variance processes. *Herman & Kittle Props.*, 119 N.E.3d at 87.

C. Count III: Relief Under Indiana Code

The Court has supplemental jurisdiction to consider the state-law cause of action asserted in Count III. *See* 28 U.S.C. § 1367.

Under Indiana Code §§ 36-7-4-1614(d) and 36-7-4-1615, a court may grant relief from an unlawful zoning decision that causes prejudice. Such court "may" set aside the zoning decision and either (1) remand the case to the applicable board of zoning appeals or, alternatively, (2) "compel a decision that has been unreasonably delayed or unlawfully withheld." Ind. Code § 36-7-4-1615.

Here, neither of these options is appropriate. Remand would accomplish nothing. Because the Court is striking the ordinance's generalized variance provision in Chapter 812 as it applies to variances from the Sign

Standards, there would be no variance mechanism at all on remand, and GEFT's variance application would lead nowhere. For similar reasons, compelling a decision in GEFT's favor would be improper. The standards from which GEFT sought variances—Ordinance §§ 807-6(B)(2), 807-6(B)(5), 807-6(D), 807-6(F)(1), 807-6(F)(2), and 807-6(F)(3)—remain intact after today's decision, so GEFT's proposed sign still does not comport with the Sign Standards. Accordingly, the Court must decline GEFT's request for relief under Indiana Code §§ 36-7-4-1614(d) and 36-7-4-1615.

D. Damages

The remaining issue is the amount of damages GEFT has sustained from the County's denial of its variance application. The County moves for summary judgment on damages, but its briefs did not address GEFT's purported lack of damages beyond arguing that there were none given that the ordinance was constitutional in full. The Court has found otherwise above. Thus, a jury must pass on the issue of damages.

IV. Conclusion

In summary, the motion for reconsideration, (ECF No. 94), is **granted**. The cross-motions for summary judgment, (ECF Nos. 53, 63), are each **granted in part and denied in part**. Count I of GEFT's Complaint is **dismissed for lack of subject-matter jurisdiction**. On Count II, summary judgment is **granted** in favor of GEFT only as to the permitting process and

generalized variance procedure's application to the Sign Standards. On Count III, summary judgment is **granted** in favor of the County. The issue of GEFT's damages must proceed.

GEFT's Motion for Permanent Injunction, (ECF No. 93), is **granted** to the extent that the County will be **permanently enjoined** from (1) enforcing the permit requirement in Chapter 807, section 3; and (2) applying the variance process in Chapter 812 to variances from the sign requirements in Chapter 807. An order granting the injunction will be issued separately.

The infirm provisions of the County's sign ordinance are severable, so the Sign Standards are otherwise enforceable. The variance process may remain in effect as applied to zoning decisions that do not implicate First Amendment-protected speech. No order that the County allow GEFT to erect its digital billboard shall issue, as the proposed sign does not appear to be in compliance with several provisions of the Sign Standards.

Because the Court has now reconsidered its prior decision on the cross-motions for summary judgment, the Motion to Stay Case Pending Ruling, (ECF No. 107), is **denied** without prejudice to filing of a motion to stay pending appeal following the parties' consideration of today's decision.

Because of the impending trial and final pretrial conference, GEFTS's response to Defendants' Motion to Exclude Plaintiff's Expert Paul Wright, (ECF No. 109), is due by **December 3, 2021**, and any reply is

due by **December 10, 2021**. Any other pretrial filing that was due two weeks before the final pretrial conference, (*see* Final Pretrial Conference Order, ECF No. 96), is now due by **December 3, 2021**, and any other pretrial filing that was due one week before the final pretrial conference, (*see id.*), is now due by **December 10, 2021**. In the event that the final pretrial conference is continued, these deadlines shall also be continued commensurate with such continuance.

Finally, the Magistrate Judge is requested to meet with the parties and discuss resolution of the damages claim before the trial.

SO ORDERED.

Date: 11/23/2021

/s/ James R. Sweeney II
JAMES R. SWEENEY II, JUDGE
United States District Court
Southern District of Indiana

Distribution by CM/ECF to registered counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

GEFT OUTDOOR, L.L.C., Plaintiff, v. MONROE COUNTY, INDIANA, MONROE COUNTY BOARD OF ZONING APPEALS, Defendants.	)))))))))	No. 1:19-cv-01257-JRS-MPB

Order on Motions for Summary Judgment

(Filed Aug. 10, 2021)

GEFT Outdoor LLC ("GEFT") sought to erect a digital billboard in Monroe County, Indiana ("County"), but its specific plans did not mesh with the County's sign ordinance. After the County denied GEFT's application for a variance, GEFT filed suit under 42 U.S.C. § 1983, alleging that the sign ordinance violates the First Amendment as incorporated against the states under the Fourteenth Amendment. GEFT moves for partial summary judgment on all claims other than that for damages. (ECF No. 53.) The County moves for summary judgment on all claims. (ECF No. 63.) For the following reasons, the motions are granted in part and denied in part.

I. Background

In Monroe County, outdoor signs must comply with the County's sign ordinance ("Sign Standards"). The announced purpose of the Sign Standards is "to promote public health, safety, and welfare. . . ." Ord. § 807-1. More specifically, two of the County's goals in enacting the ordinance were "maintaining and enhancing the aesthetic environment and the County's ability to attract tourism and other sources of economic development and growth," Ord. § 807-1(3), and "improving pedestrian and traffic movement and safety (e.g., maintaining appropriate sight distances at intersections and reducing distractions)," Ord. § 807-1(4). A "sign" includes any "device, fixture, placard, or structure that uses any color, form, graphic, illumination, symbol, or writing . . . to communicate information of any kind to the public." Ord. § 801-2.

Under the Sign Standards, "except as otherwise provided, no person shall erect, repair, or relocate any sign as defined herein without first obtaining a permit from the Administrator." Ord. § 807-3. The Administrator is currently the County Planning Director. (Wilson Dep. Tr. 31:21-23, ECF No. 54-2.) Generally, a speaker wishing to publish a sign must submit an application and pay a fee. Ord. § 807-3(A). The County Planning Director will issue a sign permit only if "the proposed sign is in compliance with all of the requirements of this zoning ordinance." Ord. § 807-3(B). Those requirements include limits on placement, illumination, maintenance, height, setback, and numerosity. Ord. §§ 807-5, 807-6(A), 807-6(C)–(F). The Sign Standards

do not specify a time limit for the County Planning Director to act on any given application.

Not every sign requires a permit, however. The Sign Standards exempt four kinds of signs from the permit requirement:

(1) Any sign of not more than one and one-half (1-1/2) square feet in area; provided, that no more than one sign shall be permitted per zone lot;

(2) Any governmental sign;

(3) Sculptures, fountains, mosaics and design features which do not incorporate advertising or identification;

(4) Temporary noncommercial signs or devices meeting the following criteria:

a) Each zone lot shall be allocated a total of thirty-two (32) square feet of temporary signs or devices.

b) Temporary signs or devices may be located no less than ten (10) feet from any other sign or structure;

c) Freestanding temporary signs or devices may not exceed six (6) feet in height;

d) External illumination of temporary signs or devices is prohibited.

However, if banners, streamers, pennants, balloons, propellers, strung light bulbs, or similar devices are used as the temporary

> signs or devices they may only be displayed for a period of no longer than forty-eight (48) hours.

Ord. § 807-3(C). Some of these terms are words of art. A governmental sign is defined as "[t]raffic or other civic signs, signs required by law or emergency, railroad crossing signs, legal notices, and any temporary, or non-commercial signs as are authorized under policy approved by the County, State, or Federal government." Ord. § 801-2. " 'Temporary sign' means any sign that is intended to be displayed for a limited period of time and is not permanently anchored or secured to a building or not having supports or braces permanently secured to the ground, including but not limited to: banners, pennants, or advertising displays including portable signs." *Id.* A "Commercial Message" is "[a]ny sign wording, logo, or other representation that, directly or indirectly, names, advertises, or calls attention to a business, product, service, or other commercial activity." *Id.* And a "Noncommercial Message" is just the opposite: a sign that "carries no message, statement, or expression related to the commercial interests of the . . . person responsible for the sign message." *Id.*

There is also a section of the Sign Standards called "Prohibited Signs," which bans certain categories of signs even if the sign would otherwise be allowed:

> (1) Portable signs are prohibited.
>
> (2) All animated or changeable copy signs (including digital billboards), or signs

> which move by mechanical means or by the movement of air are prohibited.
>
> (3) Temporary signs or devices consisting of a series of banners, streamers, pennants, balloons, propellers, strung light bulbs, or similar devices are prohibited, except as allowed in 807-3(C)(4).
>
> (4) Snipe Signs[.][1]
>
> (5) Off-Premise Commercial Signs, except as allowed in 807-4(B).[2]

Ord. § 807-6(B). An "Off-Premises Sign" is one that "directs attention to a business, commodity, service or entertainment not conducted, sold or offered on the premises where the sign is located, or which business, commodity, service or entertainment forms only minor or incidental activity upon the premises where the sign is displayed." Ord. § 801-2. In contrast, an "On-Premises Sign" is one that "advertises or directs attention to a business, commodity, or service conducted, offered, or sold on the premises, or directs attention to the business or activity conducted on the premises." *Id.*

Someone who wants to post a noncompliant sign in the County is not wholly without recourse. As the Indiana Code requires whenever a local government

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[1] Though not challenged in this case, a "snipe sign" is a "temporary sign illegally tacked, nailed, posted, pasted, glued, or otherwise attached to trees, poles, stakes, fences, or other objects." Ord. § 801-2.

[2] Section 807-4(B) is a grandfather clause.

adopts a zoning ordinance,[3] the County has established a Board of Zoning Appeals ("BZA") and a process for obtaining variances. The BZA makes all variance decisions for the County, including variances from the requirements of the Sign Standards. Ord. § 812-1. After the BZA receives an application for a variance, within thirty days, the BZA must schedule and announce a date and time for a public hearing. Ord. § 812-3(A). The variance approval procedure lists several notice requirements for interested parties. Ord. §§ 812-3(D)–(F). After the hearing, the BZA must approve the application, approve the application with conditions, or deny the application. Ord. § 812-3(H); *see also* Ord. § 812-7 (BZA has authority to make approval contingent on any condition imposed "to protect the public health, and for reasons of safety, comfort and convenience"). But, beyond scheduling a hearing within a certain timeframe, there is no enumerated time limit within which the BZA must act on any given variance application. (Defs.' Ans. 1st Interrogs. ¶ 8, ECF No. 54-5.)

To approve a use variance, the BZA must 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

[3] *See* Ind. Code § 36-7-4-901 ("As a part of the zoning ordinance, the legislative body shall establish a board of zoning appeals."); Ind. Code § 36-7-4-918.4 (board of zoning appeals must decide use and design variances).

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 Comprehensive Plan. Especially, the five (5) principles set forth in the Monroe County Comprehensive Plan[.][4]

Ord. § 812-5.

To approve a design variance, the BZA must find that the applicant has adduced "substantial evidence establishing that, if implemented:"

(A) the approval, including any conditions or commitments deemed appropriate, will not be injurious to the public health, safety, and general welfare of the community, because:

(1) it would not impair the stability of a natural or scenic area;

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[4] The Comprehensive Plan is the "inclusive physical, social, and economic plans and policies . . . for the development of the County. . . ." Ord. § 801-12.

(2) it would not interfere with or make more dangerous, difficult, or costly, the use, installation, or maintenance of existing or planned transportation and utility facilities;

(3) the character of the property included in the variance would not be altered in a manner that substantially departs from the characteristics sought to be achieved and maintained within the relevant zoning district. . . .

(4) it would adequately address any other significant public health, safety, and welfare concerns raised during the hearing on the requested variance;

(B) the approval, including any conditions or commitments deemed appropriate, would not affect the use and value of the area adjacent to the property included in the variance in a substantially adverse manner, because:

(1) the specific purposes of the design standard sought to be varied would be satisfied;

(2) it would not promote conditions (on-site or off-site) detrimental to the use and enjoyment of other properties in the area . . . ; and,

(3) it would adequately address any other significant property use and

> value concerns raised during the hearing on the requested variance; and,
>
> (C) the approval, including any conditions or commitments deemed appropriate, is the minimum variance necessary to eliminate practical difficulties in the use of the property, which would otherwise result from a strict application of the terms of the Zoning Ordinance.

Ord. § 812-6.

GEFT is a limited-liability company that buys or leases land and builds, maintains, and operates signs on its properties. (Lee Aff. ¶ 3, ECF No. 54-1.) GEFT leases part of the property at 2500 West Industrial Park Drive in Bloomington, Indiana (part of Monroe County). (*Id.* ¶ 4.) That property is right next to I-69, a major thoroughfare in the County. (*Id.*) GEFT wants to build a digital billboard on the property, (*id.* ¶ 5)—a billboard that exhibits digital images and text, which GEFT can control by computer—to display all sorts of commercial and noncommercial speech, (*id.* ¶ 7). On its other billboards, GEFT has tended to display a mix of 62 percent commercial speech and 38 percent noncommercial speech. (*Id.* ¶ 8.) It has the requisite state permit from the Indiana Department of Transportation that it needs to erect digital billboards. (*Id.* ¶ 6.)

On January 16, 2019, GEFT sought variances from the Sign Standards for a digital billboard to be built at the Bloomington property. Specifically, the variances were from the changeable copy ban, Ord.

§ 807-6(B)(2); the off-premises commercial sign ban, Ord. § 807-6(B)(5); the sign area standards, Ord. § 807-6(D); height requirements, Ord. § 807-6(F)(1); side/rear yard setback requirements, Ord. § 807-6(F)(2); and front yard setback requirements, Ord. § 807-6(F)(3). The BZA held a hearing on March 6, 2019, and it unanimously denied GEFT's application. (Lee Aff. ¶ 11, ECF No. 54-1.)

On March 28, 2019, GEFT filed suit against the County, invoking 42 U.S.C. § 1983 and a state statute. GEFT challenges the Sign Standards as an unlawful content-based regulation and an unlawful prior restraint, both allegedly in violation of the First Amendment as it is incorporated against the states. The parties move for summary judgment. (ECF Nos. 53, 63.)

II. Standard of Review

Summary judgment is appropriate if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The movant bears the initial burden of production. *Modrowski v. Pigatto*, 712 F.3d 1166, 1168 (7th Cir. 2013). That initial burden consists of either "(1) showing that there is an absence of evidence supporting an essential element of the nonmoving party's claim; or (2) presenting affirmative evidence that negates an essential element of the nonmoving party's claim." *Hummel v. St. Joseph Cnty. Bd. of Comm'rs*, 817 F.3d 1010, 1016 (7th Cir. 2016) (citing

Modrowski, 712 F.3d at 1169). If the movant discharges its initial burden, the burden shifts to the nonmovant, who must present evidence sufficient to establish a genuine issue of material fact on all essential elements of his case. *See Lewis v. CITGO Petroleum Corp.*, 561 F.3d 698, 702 (7th Cir. 2009). The Court must construe all facts and any reasonable inferences arising from them in favor of the nonmovant. *See Blow v. Bijora, Inc.*, 855 F.3d 793, 797 (7th Cir. 2017) (citation omitted).

III. Discussion

"Congress shall make no law . . . abridging the freedom of speech. . . ." U.S. Const. amend I. According to GEFT, the Sign Standards violate the First Amendment because they are an unlawful content-based regulation and because they amount to a prior restraint that lacks procedural safeguards. These grounds for invalidity hinge on separate lines of reasoning, so the Court will address each charge in turn.

GEFT brings a facial challenge to the County's ordinance. "Facial invalidation is, manifestly, strong medicine, that is to be used sparingly and only as a last resort." *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998) (cleaned up). Facial challenges on First Amendment grounds lie where a statute "substantially suppresses otherwise protected speech vis-à-vis its plainly legitimate sweep." *Bell v. Keating*, 697 F.3d 445, 456 (7th Cir. 2012) (cleaned up). As will become clear, the Sign Standards here are substantially overbroad

on their face because they contain content-based distinctions and because they, in part, grant excessive discretion to government officials. The Court therefore entertains GEFT's facial challenge.

A. Count I: Content-Based Regulation

In Count I, GEFT contends the sign scheme is a content-based law that fails strict scrutiny. Addressing that contention requires the Court to address several smaller inquiries: (1) whether the ordinance is content-based, (2) what level of scrutiny applies, and (3) whether the ordinance passes the applicable level of scrutiny.[5]

1. Content Neutrality After *Reed v. Town of Gilbert*

The initial question is whether the ordinance is content-neutral or content-based. This area of First

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[5] It may be worth explaining why the Court is framing its analysis of Count I around these three steps. Other courts have said that certain kinds of regulations dealing with lower-value speech, such as commercial-speech regulations, are not subject to strict scrutiny because they are not content-based. *See*, *e.g.*, *Adams Outdoor Advert. Ltd. P'ship v. City of Madison*, No. 17-CV-576-JDP, 2020 WL 1689705, at *11–17, *21 (W.D. Wis. Apr. 7, 2020). This Court believes it is more accurate to say that such regulations *are* content-based as that term is defined in *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), but nevertheless require only a lesser level of scrutiny. *Cf.* 1 Rodney Smolla & Melville Nimmer, *Freedom of Speech* § 2:68 ("Content-based regulation does not always result in the application of heightened scrutiny."). The result of this case is the same under either framing.

Amendment jurisprudence is in flux. Under the Supreme Court's most up-to-date test, the "crucial first step in the content-neutrality analysis" is "determining whether the law is content neutral on its face." *Reed v. Town of Gilbert*, 576 U.S. 155, 165 (2015). A regulation of speech is facially content-based if it draws distinctions "based on the message a speaker conveys," *id.* at 163, or "singles out specific subject matter for differential treatment," *id.* at 169. For example, "a law banning the use of sound trucks for political speech—and only political speech—would be a content-based regulation, even if it imposed no limits on the political viewpoints that could be expressed." *Id.* at 169 (citing *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993)).

Reed and *Barr v. American Association of Political Consultants, Inc.*, 140 S. Ct. 2335 (2020), illustrate how this test for facial content neutrality works. At issue in *Reed* was a sign code that defined different types of signs based on the subject matter of the sign—temporary directional signs, political signs, ideological signs, and more—and subjected each category to different size and location restrictions. 576 U.S. at 164. The sign code was obviously content-based on its face, the Supreme Court said, since the government invariably had to look at the content of the sign to determine how the sign was to be regulated. *Id.* Likewise, *American Association of Political Consultants* concerned a general ban on robocalls to cell phones, from which robocalls to collect government debt were exempted. 140 S. Ct. at 2346. The Supreme Court said this:

> Under § 227(b)(1)(A)(iii), the legality of a robocall turns on whether it is "made solely to collect a debt owed to or guaranteed by the United States." A robocall that says, "Please pay your government debt" is legal. A robocall that says, "Please donate to our political campaign" is illegal. That is about as content-based as it gets. Because the law favors speech made for collecting government debt over political and other speech, the law is a content-based restriction on speech.

Id.

Turning to the case at hand, recall that the County's ordinance exempts four categories of signs from the general requirement that a permit be obtained before any sign is published: (1) small signs, (2) governmental signs, (3) "sculptures, fountains, mosaics and design features which do not incorporate advertising or identification," and (4) temporary noncommercial signs. Ord. § 807-3(C). GEFT does not challenge exemption (1) for small signs. The other three exemptions are plainly content-based under *Reed.* The ordinance defines governmental signs, design features not incorporating "advertising or identification," and temporary noncommercial signs in § 801-2, and it regulates those sign categories differently in § 807-3(C). The County has no way to tell what regulations to apply to a sign unless it reads the content of the sign's message and categorizes it. "The restrictions in the Sign Code that apply to any given sign thus depend entirely on the communicative content of the sign." *Reed*, 576 U.S. at 164.

The off-premises advertising ban also makes the sign ordinance content-based after *Reed*. The County prohibits off-premises commercial signs but allows on-premises commercial signs that meet certain objective requirements. *See* Ord. § 807-6(B)(5). Distinctions between off-premises and on-premises signs are inherently content-based because the government must evaluate the content of the sign (that is, whether the sign relates to activities occurring on-site) to determine whether the sign is an on-premises sign that is subject to the permit requirement or an off-premises sign that is almost always prohibited. "The fact that a government official has to read a sign's message to determine the sign's purpose is enough, under *Reed,*" to make the law content-based. *GEFT Outdoor, LLC v. City of Westfield*, 491 F. Supp. 3d 387, 405 (S.D. Ind. 2020) (collecting cases and finding that a city's on-premises/off-premises distinction was content-based); *see also GEFT Outdoor, LLC v. Consol. City of Indianapolis*, 187 F. Supp. 3d 1002, 1016 (S.D. Ind. 2016) (same).

In its briefs, the County disclaims any intent to engage in content-based discrimination. The County says the lack of such a purpose is sufficient to show that the ordinance is content-neutral. For that proposition, the County cites *Hill v. Colorado*, 530 U.S. 703 (2000), where the Supreme Court upheld a statute banning the "knowing approach" for the purpose of "oral protest, education, or counseling" within eight feet of a non-consenting person who is within 100 feet of a healthcare facility. *Hill* describes the government's

content-neutral purpose as the "principal inquiry" in deciding whether a regulation is content-based. 530 U.S. at 719 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). But the Supreme Court in *Reed* squarely rejected the idea that a law is content-neutral so long as the legislature did not *intend* to discriminate on the basis of content. *See Reed*, 576 U.S. at 165 ("A law that is content based on its face is subject to strict scrutiny *regardless* of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." (emphasis added)); *id.* at 168 ("We have repeatedly rejected the argument that discriminatory treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas." (cleaned up)). To be sure, that is not the only part of *Hill*'s reasoning that no longer carries water. *Compare Hill*, 530 U.S. at 721 ("We have never held, or suggested, that it is improper to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct."), *with Reed*, 576 U.S. at 164 (suggesting that examining the content of speech to determine how it should be regulated made the challenged ordinance content-based).

Even if the County lacked any invidious motive in enacting the sign ordinance, the ordinance distinguishes between speech based on the speech's subject matter and regulates each category of speech differently. The sign ordinance is therefore facially content-based because it contains exemptions (2)–(4) and the on-premises/off-premises commercial sign distinction.

2. Level of Scrutiny

Having found parts of the Sign Standards facially content-based, the Court proceeds to the more difficult question of what level of scrutiny applies to the distinctions the ordinance draws.

In two recent First Amendment cases, the Supreme Court has said without qualification that *all* content-based laws are subject to strict scrutiny: "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. at 163; *see also Am. Ass'n of Pol. Consultants*, 140 S. Ct. at 2347 n.5 (dismissing the more nuanced approach to analyzing content neutrality urged in Justice Breyer's partial dissent). Neither of the controlling opinions in these cases directly addressed exceptions to the general rule.

For over forty years, however, the Supreme Court has applied "an intermediate standard of review that accounts for the subordinate position that commercial speech occupies in the scale of First Amendment values." *Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011) (cleaned up). Commercial speech is any "speech that proposes a commercial transaction." *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 516 (7th Cir. 2014) (citing *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 482 (1989)). When addressing restrictions that burden only commercial speech, the Supreme Court has applied the following standard:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980). The *Central Hudson* test has been described as "intermediate" scrutiny. *See*, *e.g.*, *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 583 (2011) (Breyer, J., dissenting).

What makes the instant case difficult is that the *Reed* rule—that all content-based regulations must pass strict scrutiny, *see* 576 U.S. at 163–64—has no limiting principle. If the rule were applied without reservation, the law governing categories of speech never thought to be subject to First Amendment protection would be upended. For instance, prohibitions of speech amounting to fraud are technically content-based and thus subject to strict scrutiny under the unqualified terms of *Reed*—we have to look at the content of the speech to determine that it is fraud. *See Am. Ass'n of Pol. Consultants*, 140 S. Ct. at 2361 (Breyer, J., concurring in part and dissenting in part) (positing that categories of proscribable speech like obscenity, fraud, and speech integral to criminal conduct would become

content-based and subject to strict scrutiny if the *Reed* rule were strictly applied).

The same is true of commercial speech—we must look at the content of speech to determine whether it is commercial or noncommercial. Thus, if *Reed* is applied without limitation, then nothing remains of the decades-old commercial-speech doctrine. This collision between precedents has led at least one circuit court to hold that, after *Reed*, "the intermediate-scrutiny standard applicable to commercial speech under *Central Hudson* . . . applies only to a speech regulation that is content-neutral on its face."[6] *Int'l Outdoor, Inc. v. City of Troy*, 974 F.3d 690, 703 (6th Cir. 2020). Other circuits have chosen to continue following the commercial-speech doctrine where there is doubt about *Reed*'s application. *See*, *e.g.*, *Vugo, Inc. v. City of New York*, 931 F.3d 42, 44–45 (2d Cir. 2019); *Greater Philadelphia Chamber of Commerce v. City of Philadelphia*, 949 F.3d 116, 136–37 (3d Cir. 2020); *Lone Star Security & Video, Inc. v. City of Los Angeles*, 827 F.3d 1192, 1200 (9th Cir. 2016); *Aptive Env't, LLC v. Town of Castle Rock*, 959 F.3d 961, 981 (10th Cir. 2020). The Seventh Circuit has acknowledged the potential conflict between *Central*

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[6] The Sixth Circuit did not explain how *any* commercial-speech regulation could be content-neutral if *Reed*'s rule were applied unflinchingly. This Court cannot conceive of any way for a government official to determine whether speech is commercial or noncommercial unless the official examines the content of the speech. And if an officer did that, he would appear to "single[ ] out specific subject matter for differential treatment," *Reed*, 576 U.S. at 169, subjecting the commercial/noncommercial distinction to strict scrutiny.

Hudson and *Reed* but has not yet had occasion to resolve it. *See Leibundguth Storage & Van Serv., Inc. v. Vill. of Downers Grove*, 939 F.3d 859, 860 (7th Cir. 2019).

GEFT and the County rigorously debate the fate of *Central Hudson* post-*Reed*. The Court must resolve the conflict to decide what level of scrutiny to apply to the sign ordinance's distinction between on-premises and off-premises commercial signs. But the Court is not writing on a blank slate. The Supreme Court upheld an identical distinction in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507–12 (1981). In *Metromedia*, the Supreme Court applied intermediate scrutiny under *Central Hudson* and rejected the petitioner's argument that an on-premises/off-premises advertising distinction made the challenged billboard regulation unconstitutional. *Id.* In relevant part, the Supreme Court held that "offsite commercial billboards may be prohibited while onsite commercial billboards are permitted." *Id.* at 512 (7-2 holding on this point).

Given the understanding of content neutrality announced in *Reed* and applied in *American Association of Political Consultants*, it is possible that the current Supreme Court would have decided this part of *Metromedia* differently. However, when the reasoning supporting the holding of a Supreme Court case erodes over time, lower courts should generally still credit the case's holding unless and until the Supreme Court expressly overrules the case. *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct

application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."); *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000) ("This Court does not normally overturn . . . earlier authority sub silentio."). It would be improper for the Court to depart from *Metromedia* when the Supreme Court has never expressly overruled it. *Accord GEFT Outdoor, LLC v. Consol. City of Indianapolis*, 187 F. Supp. 3d at 1016–17 (following *Metromedia* rather than *Reed* and applying intermediate scrutiny to an off-premises commercial billboard ban); *Adams Outdoor Advert. Ltd. P'ship v. City of Madison*, No. 17-CV-576-JDP, 2020 WL 1689705, at *11–17 (W.D. Wis. Apr. 7, 2020) (same); *Peterson v. Vill. of Downers Grove*, 150 F. Supp. 3d 910, 928 (N.D. Ill. 2015) (same, but with respect to a different content-based commercial distinction), *aff'd on other grounds*, 939 F.3d 859. *Metromedia* is directly on point. Hence, intermediate scrutiny applies to the on-premises/off-premises commercial sign distinction.

Next, the Court turns to the issue of what level of scrutiny applies to the three content-based exemptions from the ordinance's permit requirement at Ordinance § 807-3(C)(2)–(4). By their terms, exemptions (2) and (3) govern both commercial and noncommercial speech. Governmental speech certainly can be commercial in nature. *See*, *e.g.*, *Am. Ass'n Pol. Consultants*, 140 S. Ct. at 2344 (amendment to Telephone Consumer Protection Act's ban on robocalls excepted robocalls for

the purpose of collecting government debt). Likewise, a design feature incorporating "identification" may be noncommercial—for instance, imagine a church that wants to post a mural identifying the church's name and denomination. And when a content-based distinction could affect both commercial and noncommercial speech, the more stringent level of scrutiny should apply. *See Reagan Nat'l Advert. of Austin, Inc. v. City of Austin*, 972 F.3d 696, 708–09 (5th Cir. 2020) (warning against "parsing" speech-affecting laws and applying strict scrutiny to a billboard regulation that covered both commercial and noncommercial speech); *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1269 n.15 (11th Cir. 2005) (ordinance that applied to both commercial and noncommercial signs had to be analyzed under strict scrutiny rather than *Central Hudson*). Because exemptions (2) and (3) create content-based distinctions of noncommercial speech, they are presumptively unconstitutional and can survive only if they pass strict scrutiny. *See Reed*, 576 U.S. at 163.

What level of scrutiny applies to exemption (4) for temporary noncommercial signs is a tougher question. Exemption (4) draws distinctions in two ways. First, it draws a distinction between temporary commercial and temporary noncommercial signs, subjecting the former to the general permit requirement but not the latter. But favoring noncommercial speech over commercial speech is entirely consistent with the commercial-speech doctrine. *See Metromedia*, 453 U.S. at 513–14 (invalidating parts of billboard regulation that favored commercial speech over noncommercial speech,

stating that regulation "invert[ed]" the hierarchy of First Amendment protections); *cf. Am. Ass'n Pol. Consultants*, 140 S. Ct. at 2346 (invalidating exemption that in effect favored debt-collection speech over political speech). Beyond arguing that *Reed* overturns decades of caselaw sub silentio—which the Court rejects—GEFT points to no authority for the proposition that a noncommercial/commercial distinction in which noncommercial speech is treated more favorably than commercial speech must pass strict scrutiny. At the most, the distinction must pass intermediate scrutiny because it subjects temporary commercial signs meeting certain size and allocation rules to a permit requirement, whereas temporary noncommercial signs of the same size and allocation do not need a permit; in other words, this first distinction created by exemption (4) treats commercial speech less favorably than noncommercial speech.

Second, exemption (4) also draws a distinction between temporary noncommercial signs and noncommercial speech in governmental signs or design features not incorporating advertising or identification. Temporary noncommercial signs must meet different size and allocation standards to be exempted from the permit requirement, whereas noncommercial signs that fall within exemptions (2) and (3) need not. Thus, this distinction is a content-based distinction between different kinds of noncommercial speech, rendering it subject to strict scrutiny under *Reed* if exemptions (2) and (3) survive strict scrutiny. This is consistent with another case out of this district

involving GEFT, in which the Court held that an Indianapolis sign ordinance's permit exemption for "noncommercial opinion signs"—signs expressing some noncommercial viewpoint—created a content-based distinction subject to strict scrutiny. *See Geft Outdoor LLC v. Consol. City of Indianapolis*, 187 F. Supp. 3d at 1014. That holding made sense because the "noncommercial opinion sign" exemption regulated noncommercial viewpoint signs differently from other exempted noncommercial signs. So too here as to exemption (4).

3. Application

The on-premises/off-premises commercial sign distinction easily passes intermediate scrutiny. Indeed, GEFT only analyzed the provision under strict scrutiny and apparently made no effort to argue that the distinction fails intermediate scrutiny. The standard from *Central Hudson* is quoted above and will not be repeated. First, no one disputes that GEFT's intended speech has at least some First Amendment protection—GEFT's speech would not mislead or concern unlawful activity. *See Cent. Hudson*, 447 U.S. at 566. Second, the County's asserted government interests supporting the on-premises/off-premises commercial distinction are aesthetics and traffic safety. *See* Ord. §§ 807-1(3), (4). In *Metromedia*, the Supreme Court endorsed these interests as "substantial" under the *Central Hudson* test. 453 U.S. at 509–11. The Court stated, "It is not speculative to recognize that billboards by their very nature, wherever located and however

constructed, can be perceived as an 'esthetic harm.'" *Id.* at 510 (footnote omitted). Likewise, the Court acknowledged the "accumulated, common-sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety." *Id.* at 509. Thus, the County has substantial interests at stake.[7] Third, the on-premises/off-premises commercial distinction "directly advances" the County's interests in aesthetics and traffic safety, and the distinction is not "more extensive than is necessary to serve that interest." *Cent. Hudson*, 447 U.S. at 566. A local government justifiably "may believe that offsite advertising, with [its] periodically changing content, presents a more acute problem than does onsite advertising." *Metromedia*, 453 U.S. at 511. The Supreme Court wrote,

> San Diego has obviously chosen to value one kind of commercial speech—onsite advertising—more than another kind of commercial speech—offsite advertising. The ordinance reflects a decision by the city that the former interest, but not the latter, is stronger than the city's interests in traffic safety and esthetics. The city has decided that in a limited instance—onsite commercial advertising—its interests should yield. We do not reject that judgment. As we see it, the city could

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[7] Under a regime of intermediate scrutiny, the County need not produce detailed reports or scholarly studies to prove that these interests are substantial. *See Clear Channel Outdoor, Inc. v. City of New York*, 608 F. Supp. 2d 477, 503 (S.D.N.Y. 2009) (collecting cases).

> reasonably conclude that a commercial enterprise—as well as the interested public—has a stronger interest in identifying its place of business and advertising the products or services available there than it has in using or leasing its available space for the purpose of advertising commercial enterprises located elsewhere.

Id. at 512. Following the Supreme Court's lead, then, this Court must conclude that the County's on-premises/off-premises commercial sign distinction survives intermediate scrutiny.

Next are the exemptions to the Sign Standards' permit requirement. Pursuant to strict scrutiny, the County must demonstrate that the exemptions at Ordinance § 807-3(C)(2)–(4) are "narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. at 163, 171 ("[I]t is the Town's burden to demonstrate that the Code's differentiation between temporary directional signs and other types of signs, such as political signs and ideological signs, furthers a compelling governmental interest and is narrowly tailored to that end."). The County seemingly has not attempted to justify the exemptions under strict scrutiny. Presumably, the same two government interests are urged: aesthetics and traffic safety. Assuming *arguendo* that these interests are compelling, the Sign Standards and exemptions are not at all narrowly tailored to those ends. Start with exemption (2) for governmental signs. As far as aesthetics go, a city may just as likely erect a garish billboard as anyone else would. Yet, a community

center would need to obtain a permit for its ugly sign, and the city would not. Relatedly, a city's billboard could be just as distracting to drivers as a church's billboard. Yet, a community center would need a permit for its distracting sign, and the city would not. The same is true of exemption (3) for design features not incorporating advertising or identification. A wordless mosaic would be exempted from the permit requirement, but a mosaic that identifies a community center's name would need a permit. Yet one is not inherently less distracting to drivers or prettier than the other by nature of such identification or lack thereof.

What's left is exemption (4) for temporary noncommercial signs. Since exemptions (2) and (3) are constitutionally infirm but—as explained *infra*—severable, the first content-based distinction created by exemption (4) between different kinds of noncommercial speech is out of the picture. That obviates the need to analyze exemption (4) under strict scrutiny. Rather, the remaining distinction created by exemption (4) is a distinction between temporary noncommercial signs, on the one hand, and commercial signs of any duration that are not otherwise exempted or prohibited, on the other.[8] As previously stated, favoring noncommercial speech over commercial speech is unobjectionable given that commercial speech is a lower

[8] GEFT did not challenge the fourth exemption's distinction between temporary and permanent noncommercial signs as an impermissible time, place, and manner restriction, so the Court will not address that issue.

value speech category in First Amendment jurisprudence. *See Metromedia*, 453 U.S. at 513–14. Accordingly, whether rational-basis review or intermediate scrutiny applies, this commercial/noncommercial distinction passes muster. Again, the County has substantial interests in traffic safety and aesthetics. *See id.*, 453 U.S. at 509–11. The commercial/noncommercial distinction directly advances it by targeting what the County identifies as the biggest economic driver of billboard proliferation: commercial signs. (*See* Br. Opp. Pl.'s Mot. Summ. Judg. at 19, ECF No. 64.) Moreover, the means-ends fit is sufficiently tailored to satisfy intermediate scrutiny.

To summarize: The off-premises commercial sign prohibition passes intermediate scrutiny. The exemptions at Ordinance § 807-3(C)(2) and (3) do not survive strict scrutiny; and, once those are struck, the exemption at § 807-3(C)(4) survives both rational-basis review and intermediate scrutiny.

4. Severability

Having found parts of the Sign Standards constitutionally infirm, the Court must decide how to remedy the constitutional violation: by striking the problematic portions of the ordinance or striking the permitting scheme in whole. GEFT wants the Sign Standards struck in whole, and the County urges otherwise. Because severability as to Count I may obviate the need for certain legal inquiries with respect to Count II, the Court engages in the severability analysis piecemeal.

The Supreme Court has remarked before that "[s]everability of a local ordinance is a question of state law. . . ." *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 772 (1988) (citing *Mayflower Farms, Inc. v. Ten Eyck*, 297 U.S. 266, 274 (1936)). It is not clear why that is so, especially when—as here—a challenged law does not involve a limiting construction imposed by state courts. Severability is simply a question of statutory interpretation. *See Am. Ass'n of Pol. Consultants*, 140 S. Ct. at 2349 (framing inquiry as determining "Congress's 'actual intent' as to severability"). And basic rules of statutory interpretation generally do not change from jurisdiction to jurisdiction. Perhaps that is why *American Association of Political Consultants* favorably cited a case in which the Supreme Court severed, without reference to state severability doctrine, "discriminatory wine-and-cider amendments" from an underlying state statute generally prohibiting the manufacture of alcohol. *See id.* at 2353 (citing *Eberle v. Michigan*, 232 U.S. 700, 704–05 (1914)). In any event, the state severability law versus federal severability law issue need not be resolved here. Indiana's law of severability is not unique. And, in analyzing severability, Indiana courts draw from Supreme Court caselaw on severability in federal statutes. *See*, *e.g.*, *Ind. Ed. Emp. Rels. Bd. v. Benton Cmty. Sch. Corp.*, 365 N.E.2d 752, 761–62 (Ind. 1977) (relying on *Carter v. Carter Coal Co.*, 298 U.S. 238 (1935), which reviewed a federal law). The Court therefore draws on both state court cases and the Supreme Court's most recent discussions of severability.

Severability concerns "whether the infirm provision of a statute is severable, leaving the remainder intact." *City of Hammond v. Herman & Kittle Props., Inc.*, 119 N.E.3d 70, 87 (Ind. 2019) (citation omitted). That inquiry may be broken down into two questions: (1) "whether the statute can stand on its own without the invalid provision," and (2) "whether the legislature intended the remainder of the statute to stand if the invalid provision is severed." *Id.* If the answer to either question is negative, "the offending provision is not severable, and the whole statute must be stricken." *Id.* "The inclusion of a severability clause creates a presumption that the remainder of the Act may continue in effect." *Ind. Ed. Emp. Rels. Bd.*, 365 N.E.2d at 762. The Indiana Supreme Court has noted before that a severability clause is "only one indication of legislative intent." *Id.* at 761. However, under the currently prevailing modes of statutory interpretation,

> When Congress includes an express severability or nonseverability clause in the relevant statute, the judicial inquiry is straightforward. At least absent extraordinary circumstances, the Court should adhere to the text of the severability or nonseverability clause. That is because a severability or nonseverability clause leaves no doubt about what the enacting Congress wanted if one provision of the law were later declared unconstitutional.

Am. Ass'n of Pol. Consultants, 140 S. Ct. at 2349 (7-2 holding on this point). The presence of a severability clause thus creates a "strong presumption of severability." *Id.* at 2356.

Here, the County's zoning ordinance contains a severability clause, which states,

> The provisions of this ordinance are separable. If any part or provision of these regulations or the application thereof to any person or circumstances is adjudged invalid by a court of competent jurisdiction, such judgment shall be confined in its operation to the part, provision, or application directly involved in the controversy in which such judgment shall have been rendered and shall not affect or impair the validity of the remainder of these regulations or the application thereof to other persons or circumstances. The County hereby declares that it would have enacted the remainder of these regulations even without any such part, provision or application.

Ord. § 800-6(D). "[F]irm adherence to the text of severability clauses," *Am. Ass'n of Pol. Consultants*, 140 S. Ct. at 2356, leads the Court to the conclusion that the clause is all but dispositive of the County's legislative intent: that exemptions (2) and (3) be severed.

GEFT argues at length that the County would not have enacted the Sign Standards without all of the exemptions. Although the exemptions were not a trivial part of the permitting scheme, the Court cannot simply ignore that the County has expressly stated its intent that "it would have enacted the remainder of these regulations even without any [constitutionally unsound] part, provision or application." Ord. § 800-6(D).

GEFT also argues that severing the infirm exemptions without striking the entire scheme would make administering the ordinance unduly burdensome by subjecting more speech to the permit application process. County Planning Director Larry Wilson did testify that, without the exemptions, "[i]t would be impossible to address all the signs that are out there." (Wilson Dep. Tr. 32:14–19, ECF No 54-2.) For one, Mr. Wilson seems to be discussing a resource problem—one that could be addressed by hiring more staff or, if that fails, by future as-applied challenges. Additionally, the Court is only invalidating two of the four exemptions, mitigating administrability concerns. The permitting scheme does not seem facially unworkable without exemptions (2) and (3), and GEFT has not attempted to show that removing those exemptions would empirically cause an unworkable inundation of sign applications. And, as far as constitutionality, the Court thinks the permit scheme can "stand on its own without the invalid provision," *Herman & Kittle Props.*, 119 N.E.3d at 87, because removing exemptions (2) and (3) fully addresses the constitutional deficiencies in the Sign Standards, at least with respect to Count I.

The exemptions in § 807-3(C)(2) and (3) are therefore severable.

B. Count II: Prior Restraint

In Count II, GEFT argues that the County's sign scheme is a prior restraint that lacks the substantive and procedural safeguards required of prior restraints.

The County counters that those requirements are either fulfilled or unnecessary.

1. Legal Rule

A prior restraint is any law "forbidding certain communications when issued in advance of the time that such communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550 (1993) (citation omitted). Prior restraints are "highly disfavored and presumed invalid." *Weinberg v. City of Chicago*, 310 F.3d 1029, 1045 (7th Cir. 2002) (citations omitted). But a prior restraint is not per se unconstitutional, and it may pass muster under the First Amendment if it meets one of several exceptions "carved out" by the courts. *Stokes v. City of Madison*, 930 F.2d 1163, 1168–69 (7th Cir. 1991).

The County's sign regulations resemble a prior restraint. The general rule of the Sign Standards is that no sign may be published unless the County first issues a permit. Ord. § 807-3. The Sign Standards therefore "[give] public officials the power to deny use of a forum in advance of actual expression." *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975).

As the Sign Standards meet the definition of a prior restraint, the Court must evaluate the constitutional status of the restraint. As relevant here, two lines of cases have sprouted around prior restraints: one focused on substantive limits on official discretion and one focused on procedural safeguards. Which specific limits on discretion are required depend on

whether the law in question is content-neutral or content-based. *See Thomas v. Chi. Park Dist.*, 534 U.S. 316, 322 (2002). All prior restraints—even content-neutral time, place, and manner regulations[9]—must substantively "contain adequate standards to guide the official's decision and render it subject to effective judicial review." *Id.* at 323. A content-based law, however, must also contain the stringent procedural protections announced in *Freedman v. Maryland*, 380 U.S. 51, 58 (1965). *See Thomas*, 534 U.S. at 322. In *Freedman*, the Supreme Court held that a state's film-review scheme was unconstitutional because it lacked three procedural safeguards: "(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 once in court." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 227 (1990) (citing *Freedman*, 380 U.S. at 58–60). Similarly, *FW/PBS* involved a licensing scheme that "target[ed] businesses purveying sexually explicit speech," 493 U.S. at 224, prompting the Supreme Court to require of the challenged regulation variants of two of the *Freedman* safeguards, *see*

[9] GEFT has not argued that the County's ordinance fails to satisfy other requirements of time, place, and manner jurisprudence, under which a permit scheme "must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication." *Thomas*, 534 U.S. at 323 n.3 (citations omitted). Accordingly, the Court will not address those other requirements.

Thomas, 534 U.S. at 322 n.2. *FW/PBS* clarified that the first two *Freedman* safeguards included a requirement that a "license for a First Amendment-protected business must be issued within a reasonable period of time. . . ." 493 U.S. at 228. According to GEFT, the Sign Standards fail to comply with any of these prior-restraint principles.

Since the procedural side of these prior-restraint rules only comes into play when a regulation is "content-based," *Thomas*, 534 U.S. at 322, the Court must determine what the labyrinthine term "content-based" means in the context of prior restraints. The *Freedman* procedural safeguards only apply to the Sign Standards if *Freedman* applies to a prior restraint that is content-based by reason of an on-premises/off-premises commercial-speech distinction.[10] Neither GEFT nor the County addressed two questions that the Court believes are important to this inquiry: (1) whether prior-restraint doctrine applies at all to a regulation of commercial speech, and (2) whether the *Freedman* doctrine applies to a "content-based" regulation of commercial speech.

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[10] Recall that the Court is considering severability piecemeal (i.e. immediately after it finds any given provision constitutionally infirm). *See supra* Section III.A.4. Had exemptions (2) and (3)—content-based distinctions of noncommercial speech—survived strict scrutiny, the *Freedman* safeguards would certainly be necessary in order for the Sign Standards to also survive as a permissible prior restraint. Since the Court has already severed the infirm exemptions, however, the Court will proceed to the question of whether a content-based *commercial-speech* regulation triggers the *Freedman* requirements.

The Seventh Circuit has not decided whether prior-restraint jurisprudence applies at all to regulations of commercial speech. The circuits that have weighed in disagree. *Compare Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 532 (6th Cir. 2012) (declining to apply prior-restraint doctrine to commercial-speech regulation, noting that Supreme Court had never done so), *with In re Search of Kitty's East*, 905 F.2d 1367, 1371–72 & n.4 (10th Cir. 1990) (holding prior-restraint analysis was applicable to commercial-speech regulation but skimping on any explanation why), *and N.Y. Magazine v. Metro. Transp. Auth.*, 136 F.3d 123, 131 (2d Cir. 1998) (requiring "procedural safeguards" in state agency's exercise of prior restraint when speech at issue was both commercial and political in nature). *See also Bellion Spirits, LLC v. United States*, 393 F. Supp. 3d 5, 28 (D.D.C. 2019) (noting that "it seems reasonably clear that the prior-restraint doctrine does not even apply to commercial speech"). Even those circuits that have analyzed commercial-speech restrictions as prior restraints have not consistently imposed the *Freedman* procedural safeguards. *See Nutritional Health All. v. Shalala*, 144 F.3d 220, 228 (2d Cir. 1998) (not mentioning *Freedman* and considering only whether the challenged commercial-speech regulation substantively conferred unbridled discretion on government officials).

The Supreme Court has never said whether prior-restraint rules apply to commercial-speech regulations, but it has winked and nudged. Start with *Central Hudson.* In dicta, the Court said it had previously

"observed that commercial speech is such a sturdy brand of expression that traditional prior restraint doctrine may not apply to it." *Cent. Hudson*, 447 U.S. at 571 n.13 (citing *Va. Pharmacy Bd. v. Va. Citizens Consumer Council*, 425 U.S. 748, 771–772 n.24 (1976)); *see also Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio*, 471 U.S. 626, 668 n.13 (1985) ("The Court previously has noted that, because traditional prior restraint principles do not fully apply to commercial speech, a State may require a system of previewing advertising campaigns to insure that they will not defeat state restrictions." (citations omitted)). Not only is commercial speech more "sturdy" than other varieties of speech, but it also "occurs in an area traditionally subject to [state and local] government regulation," the Supreme Court said. *Cent. Hudson*, 447 U.S. at 562 (citation omitted). Notably, *Central Hudson* and its predecessors dealt with "prophylactic bans on speech," but none of those cases engaged in a prior-restraint analysis. *See Discount Tobacco*, 674 F.3d at 532 n.7.

Also relevant is *Metromedia*. *Metromedia*—which, again, is good law until the Supreme Court expressly states otherwise, *see supra* Section III.A.2—did not require regulations distinguishing between on-premises and off-premises commercial signs to comport with *Freedman*, even though that distinction is in some sense content-based. Like *Central Hudson, Metromedia* did not engage in a prior-restraint analysis. The decision's only mention of *Freedman* is in passing as part of a footnote about severability. *See Metromedia*, 453 U.S. at 521 n.26.

Moreover, the Court considers that the Supreme Court has tended to backpedal from the procedural safeguards first announced in *Freedman*. In *FW/PBS*, the controlling plurality opinion only applied variants of two of the original three safeguards, finding the third, regarding a "prompt final judicial decision," unnecessary. *See FW/PBS*, 493 U.S. at 228 ("Because the licensing scheme at issue in these cases does not present the grave dangers of a censorship system, we conclude that the full procedural protections set forth in *Freedman* are not required." (cleaned up)). And, as previously stated, *Thomas* held that *none* of the *Freedman* protections was necessary to a content-neutral time, place, and manner regulation. *See Thomas*, 534 U.S. at 322. The last time the Supreme Court substantively addressed the *Freedman* procedures was in *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004). There, too, the Court retreated from *Freedman*. *See id.* at 781 ("Littleton, in effect, argues that we should modify *FW/PBS*, withdrawing its implication that *Freedman*'s special judicial review rules apply in this case. And we accept that argument.").

Having reviewed all of these cases, this Court tends to agree with those courts that have refused to apply the full panoply of prior-restraint safeguards to regulations of commercial speech. First, the Court will continue to credit the characterization of commercial speech as a "sturd[ier]" form of expression than other kinds of speech. *Cent. Hudson*, 447 U.S. at 571 n.13. As previously stated, a district court is not at liberty to assume that Supreme Court cases have been overruled

sub silentio. *See Rodriguez de Quijas*, 490 U.S. at 484. Second, the "the paradigmatic standards characterizing prior restraints generally involve amorphous benchmarks about public welfare or morality." *Bellion Spirits*, 393 F. Supp. 3d at 29 (citations omitted). "The standards regulators apply to commercial speech, conversely, are typically susceptible to clearer enforcement criteria." *Id.* That is certainly true in this case—the on-premises/off-premises commercial sign distinction is objective, not "amorphous." *See* Section III.B.2. Thus, "laws that might otherwise be prior restraints applied in the commercial-speech context present less of a risk of chilling protected expression—the concern that undergirds" the Supreme Court's analysis of prior restraints of noncommercial speech. *Bellion Spirits*, 393 F. Supp. 3d at 29 (citing *Se. Promotions, Ltd.*, 420 U.S. at 558–59). Third, "because nearly all human action—and so state regulation—operates through communication, the First Amendment possesses near total deregulatory potential," Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 176 (2016), if all prophylactic regulations of commercial speech are subjected to the stringent *Freedman* procedures. Furthermore, if the Court were to require every commercial regulation resembling a prior restraint to comply with *Freedman*, it would call into question the states' longstanding traditional police power to regulate businesses and intrastate commerce. All this is to say that the Court does not believe that the full prior-restraint safeguards are required in the commercial-speech context.

The next question is whether that answer changes when a prophylactic regulation of commercial speech is "content-based." *Thomas*, 534 U.S. at 322. The on-premises/off-premises commercial sign distinction at § 807-6(B)(5) makes the Sign Standards partially "content-based," at least as that phrase is understood in *Reed*. *See supra* Section III.A.1. Unfortunately, the Supreme Court's unqualified statements in *Reed* about content-based regulations, obliquely reformulating the content-neutrality test,[11] make it hard to tell how *Reed* and *Thomas* interact. GEFT argues that *Reed*'s updated definition of "content-based" retroactively requires content-based regulations of commercial speech to contain the arduous *Freedman* procedures. Content-based is content-based, no matter whether commercial speech is at issue, GEFT says.

Thomas and *Reed*, read in isolation, indeed suggest that content-based prior restraints of commercial speech must contain the full *Freedman* procedures. *Thomas* involved a city's park-use ordinance that required individuals to obtain permits before hosting events of fifty persons or more. 534 U.S. at 322. Previewing *Reed, Thomas* implied that "subject-matter censorship" was a form of content-based regulation. *Id.*

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[11] To be sure, *Reed* did upend the circuit courts' understanding of content neutrality. *See*, *e.g.*, *Free Speech Coal., Inc. v. Att'y Gen. U.S.*, 825 F.3d 149, 160 n.7 (3d Cir. 2016) (describing *Reed* as a "drastic change in First Amendment jurisprudence"); *Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293, 1332–33 (11th Cir. 2017) (en banc) (Tjoflat, J., dissenting) (noting that "*Reed* announced a sea change in the traditional test for content neutrality under the First Amendment").

In finding that *Freedman* did not apply to the park-use ordinance, *Thomas* distinguished the park-use ordinance—an obviously content-neutral regulation of conduct—from regulations that appear to target speech, like those in *Freedman* (licensing scheme targeting obscene films) and *FW/PBS* (licensing scheme targeting adult businesses). *See id.* at 322–23. Here, because the County's sign ordinance directly targets signs—indisputably speech—rather than generalized conduct, the County's sign ordinance is arguably more like the challenged laws in *Freedman* and *FW/PBS* than the park-use ordinance in *Thomas*.

Nevertheless, it is not immediately clear why a government's act of disfavoring off-premises commercial messages should raise as severe a free-speech concern as the seemingly more sinister act of disfavoring films or businesses carrying messages to which such government morally objects. It is critical to remember what *Thomas* and *Reed* did not say: They did not say commercial speech is of equal value to noncommercial speech, and they did not say that every prophylactic regulation distinguishing between different kinds of commercial speech needs the procedural safeguards in *Freedman*. That being so, it simply strains belief that the Supreme Court in *Reed* meant to implicitly extend the judge-made *Freedman* doctrine to situations where such procedural safeguards have never been required. GEFT essentially asks this Court to (1) ignore the Supreme Court's warnings that lower courts should not read its cases to implicitly overrule older cases, (2) find that the Supreme Court implicitly overruled several

decades' worth of commercial-speech cases, and (3) find that the Supreme Court also implicitly broadened *Freedman* to reach all prophylactic regulations under which a government must examine the subject matter of a message to decide how to regulate the message. The Court must decline that invitation.[12]

In sum, the Court will not require the Sign Standards—although they may be in a sense content-based under *Reed* because of the on-premises/off-premises commercial sign distinction—to comport with the *Freedman* procedural rules. To do so would be to create new law when GEFT has not persuasively justified its position. At most, prophylactic content-based commercial-speech regulations must contain substantive limits on official discretion.

2. Unbridled Discretion

Since the Court finds that *Freedman*'s procedural safeguards are not mandatory here, the only question is whether the Sign Standards substantively run afoul of the requirement that any prior restraint "contain adequate standards to guide the official's decision and render it subject to effective judicial review." *Thomas*, 534 U.S. at 322. Put another way, any prior restraint must bound the government's discretion using

[12] *Accord Adams Outdoor Advert.*, 2020 WL 1689705, at *21 ("Adams Outdoor's assertion that these regimes must meet the standards articulated in *Freedman* is incorrect. . . . [S]ign regulations that draw distinctions between off-premises commercial signs and other kinds of signs are not considered content based under *Metromedia*.").

"narrow, objective, and definite standards." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969).

GEFT first says the off-premises commercial sign prohibition gives the County too much discretion. Recall that the sign ordinance defines an off-premises commercial sign as any commercial sign that "directs attention to a business, commodity, service or entertainment not conducted, sold or offered on the premises where the sign is located, or which business, commodity, service or entertainment forms only minor or incidental activity upon the premises where the sign is displayed." Ord. § 801-2. By its terms, the Court does not see how this definition is so broad that it gives the County "unbridled discretion." *Plain Dealer Publ'g Co.*, 486 U.S. at 757. If a standard like "unreasonable danger" is narrow enough for the Supreme Court, *see Thomas*, 534 U.S. at 324, then the County's comparably specific definition of "off-premises commercial sign" here is certainly narrow enough for this Court. In its briefs, GEFT posits three examples of purportedly ambiguous signs under that definition. (*See* Pl.'s Reply Br. at 25–26, ECF No. 68.) But the Court has no trouble categorizing those examples as either off-premises commercial signs or other types of signs.

In further support of its argument, GEFT points to County Planning Director Larry Wilson's alleged description of the off-premises sign definition as "muddy" and Mr. Wilson's practice of sometimes referring to counsel the question of whether a certain sign constitutes an off-premises commercial sign. (*See* Wilson

Dep. Tr. 23:23–26:16, ECF No. 54-2.) For one, GEFT's citations to the record here are misleading. Mr. Wilson did not say that the question of whether a given sign constitutes an off-premises commercial sign is "muddy"; he said, "[T]he *constitutional law* in this area is muddy. Even the *Reed* case is muddy." (*Id.* at 25:24–25 (emphasis added).) The Court can hardly disagree that *Reed* has muddied the waters of First Amendment law. *See generally* Section III.A. Additionally, Mr. Wilson says he sometimes refers tough sign-classification questions to the County's attorneys because Mr. Wilson is not a lawyer. (*Id.* at 26:14–16.) The Court struggles to see why that practice is at all objectionable. In any event, whether an ordinance contains sufficiently "narrow, objective, and definite standards," *Shuttlesworth*, 394 U.S. at 151, is a question of law for the Court, and Mr. Wilson's deposition testimony does not change the Court's conclusion that the sign ordinance's definition of "off-premises commercial sign" does not come close to granting unbridled discretion to the County.

GEFT also contends that the variance process associated with the Sign Standards grants unbridled discretion to the County. The Court agrees that the variance process confers too much discretion on the County in two ways.

First, the standards guiding the BZA in considering a variance application are vague. For use variances, these standards include criteria such as whether the variance would be "injurious to the public health, safety, and general welfare"; whether the surrounding property would be "affected in a

substantially adverse manner"; whether a denial of a variance would cause "unnecessary hardship"; and whether a variance would "interfere substantially with the Comprehensive Plan." Ord. § 812-5. The design variance standards are comparable. *See* Ord. § 812-6. These factors are "value laden and susceptible to wide and varying differences of opinion." *Bickers v. Saavedra*, 502 F. Supp. 3d 1354, 1362 (S.D. Ind. 2020); *see also Int'l Outdoor*, 974 F.3d at 698 ("The standards for granting a variance contained multiple vague and undefined criteria, such as 'public interest,' 'general purpose and intent of this Chapter,' 'adversely affect[ing],' 'hardship,' and 'practical difficulty.' "); *Shuttlesworth*, 394 U.S. at 159 (striking permit scheme in which permits' issuance was "guided only by [City Commission's] own ideas of 'public welfare, peace, safety, health, decency, good order, morals or convenience' "); *Lakewood*, 486 U.S. at 769–70 (invalidating licensing scheme in which mayor could issue permits if it was "in the public interest"). These kinds of nebulous criteria create too high a risk that the BZA might grant or deny a variance based on whether it likes or dislikes the content or viewpoint of a given sign. Using this subjective variance procedure, the BZA could essentially permit whatever speech it favored, even if such speech appeared on a sign flouting countless design and use standards in Chapter 807, while requiring disfavored speech to abide by every sign standard to a T.

Second, the BZA has the power to approve variances contingent on any condition imposed "to protect the public health, and for reasons of safety, comfort and

convenience." Ord. § 812-7. That standard does little to constrain the County. The County could impose essentially whatever conditions it wanted on a sign approved through the variance process, which constitutes impermissibly broad discretion. *See Lakewood*, 486 U.S. at 769–70 (holding unconstitutional part of ordinance giving mayor discretion to impose "such other terms and conditions [he] deemed necessary and reasonable" when granting a newsrack permit); *Bickers*, 502 F. Supp. 3d at 1363 (holding unconstitutional ordinance provision giving city power to condition grant of special-use permit on whatever terms city "deem[s] necessary to protect adjoining property owners").

The County counters that the variance process, which controls regular variances for real property and variances from the sign ordinance alike, should not be considered part of the sign ordinance. The County says the State of Indiana should answer for any constitutional problems inherent to the variance process, since Indiana requires local governments to adopt a variance process whenever they establish a zoning ordinance. *See* Ind. Code § 36-7-4-901. But the County has not pointed out any part of the Indiana Code requiring the County to consult the same criteria governing real-property variances, which usually do not implicate First Amendment interests, when considering variances from the sign ordinance, which much more often implicate the First Amendment. To the contrary, the County could have enumerated a separate set of "narrow, objective, and definite standards," *Shuttlesworth*,

394 U.S. at 151, for the BZA to apply when considering variances from the Sign Standards.

The County also argues that the variance provision cannot be considered a prior restraint because it potentially provides relief from the Sign Standards rather than increasing the amount of suppressed speech. The Sixth Circuit rejected this specific argument in *International Outdoor*, reasoning that "the variance provision of the City of Troy Sign Ordinance . . . is not independent from other provisions of the ordinance, but rather inextricably linked to them by providing a way of relaxing the very restrictions imposed by the Sign Ordinance." 974 F.3d at 702. The Court agrees with that reasoning. The variance process is not independent of the Sign Standards because the County chose to regulate variances from the Sign Standards using the generalized variance process in Chapter 812. As applied to variances from the Sign Standards, the variance process does not sufficiently constrain official discretion.

3. Severability

In short, the Sign Standards do not need the *Freedman* procedural protections, but the variance process does substantively confer unbridled discretion on the County. For substantially the same reasons as stated *supra* in Section III.A.4, the Court credits the severability clause at Ordinance § 800-6(D) and finds that the variance process in Chapter 812 is invalid but severable insofar as it applies to variances from the

Sign Standards. Insofar as it regulates zoning decisions that do not implicate the First Amendment, the variance procedure stands.

C. Count III: Relief Under Indiana Code

The Court has supplemental jurisdiction to consider the state-law cause of action asserted in Count III. *See* 28 U.S.C. § 1367.

Under Indiana Code §§ 36-7-4-1614(d) and 36-7-4-1615, a court may grant relief from an unlawful zoning decision that causes prejudice. Such court "may" set aside the zoning decision and either (1) remand the case to the applicable board of zoning appeals or, alternatively, (2) "compel a decision that has been unreasonably delayed or unlawfully withheld." Ind. Code § 36-7-4-1615.

Here, neither of these options is appropriate. Although GEFT's facial challenge to the ordinance succeeds in part, remand would accomplish nothing. Because the Court is striking the ordinance's generalized variance provision in Chapter 812 as it applies to variances from the Sign Standards, there would be no variance mechanism at all on remand, and GEFT's variance application would lead nowhere. For similar reasons, compelling a decision in GEFT's favor would be improper. The standards from which GEFT sought variances—Ordinance §§ 807-6(B)(2), 807-6(B)(5), 807-6(D), 807-6(F)(1), 807-6(F)(2), and 807-6(F)(3)—remain intact after today's decision, so GEFT's proposed sign still does not comport with the Sign Standards.

Accordingly, the Court must decline GEFT's request for relief under Indiana Code §§ 36-7-4-1614(d) and 36-7-4-1615.

D. Damages

The remaining issue is the amount of damages GEFT has sustained from the County's denial of its variance application. The County moves for summary judgment on damages, but its briefs did not address GEFT's purported lack of damages beyond arguing that there were none given that the ordinance was constitutional in full. The Court has found otherwise above. Thus, a jury must pass on the issue of damages.

IV. Conclusion

In summary, *Reed* opened a can of worms in the sense that it announced a general rule that the Supreme Court has not yet had the chance to refine. But the Court will not read that case as extensively as GEFT urges.

The cross-motions for summary judgment, (ECF Nos. 53, 63), are each **granted in part** and **denied in part**. On Count I, summary judgment is granted in favor of GEFT only as to the exemptions at Ordinance § 807-3(C)(2) and (3). On Count II, summary judgment is granted in favor of GEFT only as to the generalized variance procedure's application to the Sign Standards. The ban on off-premises commercial signs survives GEFT's facial challenge, as does the exemption

at Ordinance § 807-3(C)(4). On Count III, summary judgment is granted in favor of the County. The issue of damages must proceed.

The County is hereby **permanently enjoined** from (1) enforcing the exemptions in Ordinance § 807-3(C)(2) and (3)—i.e., continuing to exempt those kinds of signs from the permit requirement—and (2) applying the variance process in Chapter 812 to variances from the sign requirements in Chapter 807.

The infirm provisions of the County's sign ordinance are severable, so the Sign Standards are otherwise enforceable. The variance process may remain in effect as applied to zoning decisions that do not implicate First Amendment-protected speech. No order that the County allow GEFT to erect its digital billboard shall issue, as the ordinance comports with the First Amendment after today's decision.

Finally, the Magistrate Judge is invited to meet with the parties and discuss resolution of the damages claim short of trial.

SO ORDERED.

Date: 8/10/2021

/s/ James R. Sweeney II
JAMES R. SWEENEY II,
JUDGE
United States District Court
Southern District of Indiana

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