No. _____

In The

Supreme Court of the United States

GEFT OUTDOOR, L.L.C.,

Petitioner,

v.

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

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

After unsuccessfully attempting to obtain a variance from Respondent, the Monroe County Board of Zoning Appeals, to erect a digital billboard, Petitioner, GEFT Outdoor, L.L.C. sued Respondents, Monroe County, Indiana, and the Monroe County Board of Zoning Appeals, alleging, in part, that Monroe County's Zoning Ordinance contained unconstitutional prior restraints on speech.

After the parties filed cross-motions for summary judgment, the district court found that Monroe County's Zoning Ordinance's variance process contained unconstitutional prior restraints on speech, but refused to grant GEFT Outdoor, L.L.C.'s request to erect the digital billboard, finding that the unconstitutional provisions were severable. Pet.App. 62-65. On appeal, the Seventh Circuit affirmed, in part, holding that the district court's severance analysis was correct and, following *Thomas v. Chicago Park Dist.*, 534 U.S. 316 (2002), reversed, in part, holding that Monroe County, Indiana's Zoning Ordinance's variance process did not contain unconstitutional prior restraints on speech. Pet.App. 9-15, 18-21.

The questions presented are:

1. Can a governmental entity escape 42 U.S.C. § 1983 liability for failing to have procedural safeguards in its speech licensing scheme by—only after being sued

QUESTIONS PRESENTED—Continued

for those violations—amending its regulations to remove any content-based speech regulations therein?

2. Are definitive, objective standards required to be contained in speech licensing schemes that lack content-based regulations, but also lack any standards setting forth the bases for denying a license to speak?

PARTIES TO THE PROCEEDING

Petitioner GEFT Outdoor, L.L.C. ("GEFT"), was the plaintiff in the district court and appellant/cross-appellee in the Seventh Circuit. Respondents Monroe County, Indiana (the "County") and the Monroe County Board of Zoning Appeals ("BZA") were the defendants in the district court and the appellees/cross-appellants in the Seventh Circuit.

CORPORATE DISCLOSURE STATEMENT

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

LIST OF PROCEEDINGS

1. *GEFT Outdoor, L.L.C. v. Monroe County, Indiana, Monroe County Board of Zoning Appeals*, pending before the Honorable James R. Sweeney II in the United States District Court for the Southern District of Indiana bearing cause number 19-cv-01257-JRS-MPB.

    a. Date of Interlocutory Order—November 23, 2021.

2. *GEFT Outdoor, LLC v. Monroe County, Indiana and Monroe County Board of Zoning Appeals*, before the Honorable Diane P. Wood, the Honorable Michael Y. Scudder, Jr., and the Honorable Candance Jackson-Akiwumi in the United States

LIST OF PROCEEDINGS—Continued

Court of Appeals for the Seventh Circuit bearing cause number 21-3328.

a. Date of Judgment—March 9, 2023.

3. *GEFT Outdoor, LLC v. Monroe County, Indiana and Monroe County Board of Zoning Appeals*, before the Honorable Diane P. Wood, the Honorable Michael Y. Scudder, Jr., and the Honorable Candance Jackson-Akiwumi in the United States Court of Appeals for the Seventh Circuit bearing cause number 22-1004.

a. Date of Judgment—March 9, 2023.

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The initial opinion of the United States Court of Appeals for the Seventh Circuit is reported at *GEFT Outdoor, L.L.C. v. Monroe County, Indiana, et al.*, 62 F.4th 321 (7th Cir. 2023), and was issued on March 9, 2023. The Seventh Circuit's Opinion is reproduced at Pet.App. 1-21. The Seventh Circuit affirmed in part and reversed in part the November 23, 2021, decision from the United States District Court for the Southern District of Indiana, which reconsidered parts of an August 10, 2021, order on the parties' cross-motions for summary judgment. The district court's summary judgment order is reported at 2021 WL 3514155 and is reproduced at Pet.App. 70-120. The district court's reconsideration order is reported at 2021 WL 5494483 and is reproduced at Pet.App. 30-69.

JURISDICTION

GEFT invokes this Court's jurisdiction under 28 U.S.C. § 1254(1). The Seventh Circuit rendered its opinion on March 9, 2023.

STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the

people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

This case centers on the County's improper content-based regulation of speech, the County's unconstitutional prior restraints on speech, and GEFT's inability to exercise its right to free speech for nearly three years due to these improper regulations and regulatory procedures. GEFT buys or leases land upon which to construct, maintain, and/or operate signs to be used as a conduit/vehicle/means for the dissemination of both commercial and noncommercial speech. GEFT possesses a valid leasehold interest ("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 Monroe County.

GEFT intended to place a digital billboard on the Property but alleged it was precluded by the County's unconstitutional prior restraints on speech. GEFT filed its Complaint against the County and the BZA in April 2019, alleging, in part, that the Ordinance contains unconstitutional, content-based regulations and unconstitutional prior restraints on speech. GEFT sought, in part, a declaration that the County's regulations are unconstitutional, an order precluding the County from enforcing those unconstitutional

regulations against GEFT, and damages. Jurisdiction is proper in the district court pursuant to 28 U.S.C. §§ 1331, 1343(a)(3), and 1367.

1. The County Adopts Content-Based Sign Standards.

The County adopted a Zoning Ordinance ("Ordinance"), which regulates land located within the County. Chapter 807 of the Ordinance purports to set forth standards and other requirements for signs located within Monroe 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 stated purpose of the Sign Standards is to "promote public health, safety, and welfare[.]" (Ordinance, Ch. 807-1).

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." (*Id.*, Ch. 807-3) (the "Permit Requirement"). Unless exempted, a sign permit is required for all signs. (*Id.*).

The Sign Standards exempted certain signs from the Permit Requirement (collectively, the "Exemptions" or "Exempt Signs"). (*Id.*, Ch. 807-3(C)). The Exemptions include:

a. Any governmental sign;

b. Sculptures, fountains, mosaics, and design features which do not incorporate advertising or identification; and

c. Temporary noncommercial signs or devices that meet certain criteria.

Although owners of these types of signs are not required to obtain a permit, owners of signs with different content from what is allowed on an Exempt Sign must secure a permit before constructing or changing the content of a sign. (*Id.*, Ch. 807-3). The Exemptions were an integral part of the Sign Standards. If the Exemptions did not exist and every citizen had to have permits for the types of signs that are exempted, there would be a significant administrative burden on the County Planning Department, and it would be impossible for the County's Planning Department to address all the signs that are erected in Monroe County.

2. GEFT's Signs.

GEFT intends to erect a digital billboard on the Property ("Digital Billboard"). GEFT intends to display both commercial and noncommercial speech on any of the 8 digital advertising slots on each side of the Digital Billboard (a total of 16 advertising slots) pursuant to 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 within the 16 transitional advertising slots, which allow for the display of both noncommercial and commercial speech in succession on either side of the Digital Billboard, due to the easily changeable nature of digital signs.

3. The County's Variance Scheme.

The Sign Standards set forth various time, place, and manner restrictions with respect to the erection of signs within the County. For land uses that do not meet the time, place, and manner restrictions in zoning ordinances, Indiana law allows property owners to attempt to obtain relief from those restrictions through the variance process. A "variance" may be granted by a zoning authority to afford relief from strict enforcement of a zoning ordinance. *Boffo v. Boone County Bd. of Zoning Appeals*, 421 N.E.2d 1119 (Ind.Ct.App.1981). 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.

Sign owners are allowed to seek variances for signs under the Ordinance. The BZA decides all variance applications, including those requesting variances for signs. (Ordinance, Ch. 812-1).

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*;

(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.

* * *

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.

(Ordinance, Ch. 812-5 & Ch. 812-6 (emphasis added)). There is nothing in the Zoning Ordinance specifying the bases for denying a variance application nor is there anything in the Zoning Ordinance requiring the BZA to state why it denied a variance application. (*Id.*).

There is no specific time limitation by which the BZA must decide a variance application. (*See* Ordinance, Ch. 812-2). There are also no specific objective criteria for members of the BZA to decide whether to issue a variance. Each of the BZA members that were deposed and two (2) individuals from the County's Planning Department, admitted in their depositions that the standards they used to decide whether to issue a variance are subjective and that their personal judgment and beliefs bear on whether to approve or reject a variance request.

What is more, the County admits that, even if an applicant met the subjective criteria, the BZA could

still deny the application. Finally, for variances relating to signs, there is nothing in the Ordinance that would preclude the BZA from denying a variance for a sign based on the content of a proposed sign or the identity of the person wishing to speak.

If the BZA denies a variance application, the applicant has a right to appeal the decision. The applicant bears the burden of proof on the appeal. But there is no set time by which that appeal must be decided, and, according to Larry Wilson, the County's Zoning Administrator, "there is no telling how long that case is going to take to get through the system[.]"

4. GEFT Seeks Variances, And The BZA Denies Them.

Because GEFT's Digital Billboard did not comply with some of the time, place, and manner restrictions in the Ordinance, GEFT sought a variance to erect the Digital Billboard. 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. 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));
- Height (Ch. 807-6(F)(1));

- Side/Rear Yard Setback (Ch. 807-6(F)(2)); and
- Front Yard Setback (Ch. 807-6(F)(3)).

On March 6, 2019, the BZA met to consider GEFT's Variance. At the March 6, 2019, BZA meeting, the BZA voted unanimously to deny GEFT's Variance without citing any objective criteria, standards, or evidence used by the BZA beyond its reliance on the Staff Report the Planning Department staff drafted in relation to the Variance.

5. The District Court's Order.

On October 26, 2020, GEFT filed its Motion for Partial Summary Judgment and supporting Brief, wherein GEFT requested the district court to, in part, declare Chapters 807 (Sign Standards) and 812 (Variance process) of the Zoning Ordinance unconstitutional in their entirety and to permanently enjoin the Defendants from enforcing either of those chapters against GEFT or any others. Respondents filed a cross-motion for summary judgment, and, in part, argued that the Ordinance's severability clause (Ordinance Ch. 800-6) ("Severability Clause") meant that any unconstitutional provisions in the Ordinance are severable.

On August 10, 2021, in the district court's Order on Motions for Summary Judgment (Dist. Ct. ECF No. 90) ("Order") (Pet.App. 70-120), the district court found that certain parts of Chapters 807 and 812 were

unconstitutional but, relying, in part, on the Severability Clause, denied GEFT's request to permanently enjoin the Defendants from enforcing Chapters 807 and 812 in their entirety. GEFT then moved for reconsideration, arguing that the district court should reconsider the Order because the district court did not fully consider the presence of noncommercial speech in its analysis.

On November 23, 2021, the district court granted in part and denied in part GEFT's Motion for Reconsideration ("Reconsideration Order") (Pet.App. 30-69), and, on that same day, entered a permanent injunction enjoining the Defendants from (1) enforcing only Chapter 807-3 (rather than the entire chapter as GEFT had argued), and (2) from applying the variance process in Chapter 812 to variances from the Sign Standards set forth in the Chapter 807. (Pet.App. 22-29).

In the Reconsideration Order, on Count I of GEFT's Complaint, which asserted that the Ordinance contained unconstitutional, content-based regulations, the district court never fully reached a decision on whether the Ordinance had unconstitutional, content-based regulations, and, instead, the district court dismissed that Count for lack of subject matter jurisdiction due to lack of standing. Pet.App. 43-46. The district court held that GEFT could not erect the Digital Billboard, even if it won, because multiple time, place, and manner restrictions within Chapter 807 remained intact and otherwise prevented GEFT from erecting the Billboard. *Id.* The district court left those

time, place, and manner restrictions intact because it concluded that the content-based regulations, even if they were unconstitutional, were severable from the remainder of Chapter 807. Pet.App. 46-49. In reaching that decision, the district court relied on the Severability Clause contained in the Ordinance. *Id.*

Concerning Count II, which asserts a claim for unconstitutional prior restraints on speech, the district court found that the County's permitting and variance schemes contained in Chapters 807 and 812 respectively were unconstitutional prior restraints on speech. Pet.App. 58-65. However, the district court refused to strike those Chapters in their entirety. *Id.*, 65-66. Instead, the district court severed the offending provisions relying on the Severability Clause and the district court's belief that the County could still regulate signs without the permitting process because that regulation would take place on the back end, presumably by inspection enforcement after a sign was built without a permit (although the district court does not make this clear) instead of the front end, *i.e.*, through the permitting or variance process before a sign is built. *Id.* In other words, the district court concluded that Monroe County could still control signs within its jurisdiction through post-erection enforcement actions, *i.e.*, after the sign was erected and in the air, if no permit process existed.

GEFT timely filed its Notice of Appeal on December 16, 2021.

6. The Seventh Circuit's Opinion.

On March 9, 2023, the Seventh Circuit affirmed, in part, and reversed, in part, the district court's rulings. First, the Seventh Circuit affirmed the district court's severability analysis. Pet.App. 18-21. Next, with respect to the district court's finding that the County's variance process was an unconstitutional prior restraint, the Seventh Circuit reversed. *Id.*, 13-15, 21.

The Seventh Circuit concluded that the County's variance process, although a prior restraint on speech, was not an unconstitutional prior restraint. The Seventh Circuit's reasoning was primarily twofold:

1. Because the County amended the Ordinance to remove the content-based regulations, the danger for censorship, which is the driving factor unpinning the prior restraint doctrine, is not the same, meaning that some discretion is allowed in the variance scheme; and

2. Because of the County's after-the-fact amendment removing the content-based regulations, the procedural safeguards for licensing schemes set forth in *Freedman v. Maryland*, 380 U.S. 51, 58-59 (1965), are not required.

Pet.App. 9-15.

In reaching these conclusions, the Seventh Circuit primarily relied on *Thomas v. Chicago Park Dist.*, *supra*.

REASONS FOR GRANTING THE PETITION

The First Amendment's protection of speech is one of the most precious rights citizens of this country possess. Federal courts should safeguard speech by diligently monitoring both direct and indirect forms of government censorship. *See Schneider v. State of New Jersey, Town of Irvington*, 308 U.S. 147, 161 (1939). This is especially true with respect to speech that, like GEFT's, occurs on private property. *See City of Ladue v. Gilleo*, 512 U.S. 43, 59 (1994) (O'Connor, J., concurring); *Niemotko v. State of Md.*, 340 U.S. 268, 279-82 (1951) (Frankfurter, J., concurring) (noting that where the speech takes place matters in the constitutional analysis).[1] In the absence of vigilant and vigorous judicial enforcement of First Amendment limitations on government censorship of speech, public debate in the United States simply will not be "uninhibited, robust, and wide-open," *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), and the process of democratic deliberation will be impeded (or stymied entirely). *Cf. Citizens United v. Fed. Elec. Comm'n*, 558 U.S. 310, 340-41 (2010) (holding that "the First Amendment protects speech and speaker, and the ideas that flow from each" and, in consequence, "political speech must prevail against laws that would suppress it, whether by design or inadvertence").

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[1] *See also Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515-16 (1939) (striking down a portion of an ordinance regulating speech on private property because a city may not regulate speech on private property the same way it regulates the use of public property for expressive activities under the First Amendment).

The right to free speech is a right inviolate. As this Court noted in *Schneider*:

> This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties.

308 U.S. at 161 (footnote omitted).[2]

Because of its importance, First Amendment rights must be placed in a preferred position when balanced against the local regulation of land use. *See Saia v. People of State of New York*, 334 U.S. 558, 562 (1948).

Because free speech is a part of our historical fabric, and essential to the use of elections to secure government accountability,[3] this Court consistently has

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[2] The degree of First Amendment protection is not diminished merely because speech is sold rather than given away. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels.*, 413 U.S. 376, 385 (1973). Thus, as this Court has recognized, billboards, like those GEFT erects, maintains, and operates are "a venerable medium for expressing political, social and commercial ideas." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981).

[3] This Court emphasized the centrality of the First Amendment to safeguarding democratic self-government in *Citizens United*: "Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. . . . The right of citizens to inquire, to hear, to speak, and to use

viewed prior restraints on speech with great skepticism—if not outright disdain.[4] Any system of prior restraint on speech comes to a court bearing a heavy presumption against its constitutional validity. *See*, *e.g.*, *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225 (1990) (collecting cases); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70, 83 S.Ct. 631, 639, 9 L.Ed.2d 584 (1963). This Court has described prior restraints as a "core abuse" of freedom of speech. *Thomas*, 534 U.S. at 320.

As a result, this Court's cases addressing prior restraints have identified "two evils" that cannot be tolerated in prior restraint regulatory schemes: (1) a scheme that places unbridled discretion in the hands of a government official or agency and/or (2) a scheme that lacks certain procedural safeguards. *FW/PBS*, 493 U.S. at 225-26. To pass constitutional muster, a law or ordinance subjecting the exercise of First Amendment freedoms to the prior restraint of a license must (1) contain narrow, objective, and definite standards to guide the licensing authority, *Forsyth Cty., Ga. v. Nationalist Movement*, 505 U.S. 123, 131 (1992), and (2) place mandatory time limits on bureaucratic decisionmakers to render decisions regarding the issuance of the required license. *FW/PBS*, 493 U.S. at 226.

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information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it." *Citizens United*, 558 U.S. at 339.

[4] A prior restraint on speech is a law requiring would-be speakers to seek governmental approval before speaking. *See*, *e.g.*, *Alexander v. United States*, 509 U.S. 544, 550 (1993).

Concerning the latter, in *Freedman*, this Court determined that the following three procedural safeguards were necessary to ensure expeditious decision making by the motion picture censorship board: (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. 380 U.S. at 58-60.

Since *Freedman*, this Court has relaxed the procedural safeguard requirement for prior restraints. First, in *FW/PBS*, this Court held that because the regulation at issue did not present the "grave dangers of a censorship system" as presented in *Freedman*, the "full procedural protections" of *Freedman* were not required. *FW/PBS*, 493 U.S. at 228. Then, in *Thomas*, 534 U.S. at 322-23, and *City of Littleton, Colo. v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774, 782 (2004), this Court concluded that the *Freedman* procedural safeguards are not required where the underlying regulations are content-neutral.

Because of the County's post-litigation amendment to the Ordinance, which removed the content-based regulations, the Seventh Circuit placed undue, and unjustified reliance on *Thomas*'s revised prior restraint rules, holding that due to the lack of content-based regulations, that (1) the discretion afforded the BZA is "welcomed" because the risk of censorship is allegedly low and (2) none of the *Freedman* procedural

safeguards are required even during the period before the County adopted the amendment removing the content-based regulations. Pet.App. 9-15.

This ruling misapprehends prior restraint decisions, *Thomas* specifically; eviscerates the procedural protection rules set forth first in *Freedman*; and puts the Seventh Circuit in conflict with numerous decisions from this Court and other circuits. For these reasons and because the freedom of speech is an issue of political and social importance, certiorari is warranted under U.S. Sup. Ct. R. 10(a), 10(c), and/or *Wilkinson v. United States*, 365 U.S. 399, 401 (1961) (a circuit court's misapprehension of a Supreme Court ruling may form sufficient grounds for granting certiorari). Granting certiorari will allow this Court to both reaffirm the existing rules and clarify two ambiguous, but critically important, aspects of the Court's First Amendment jurisprudence: (1) when a zoning scheme that regulates signage is content neutral, under *Thomas* and *Freedman*, this does not vest infinite discretion with local zoning boards to squelch speech without any process whatsoever (including the absence of any obligation to provide a decision, setting forth reasons, based on the record, for an adverse variance decision), and (2) that a local government must respect *Freedman*'s procedural safeguards when it establishes and maintains a content-based zoning scheme that restricts signs based on their message, but amends that scheme only after the plaintiff commences First Amendment litigation challenging the content-based regulations.

I. The Seventh Circuit's Decision Conflicts With This Court's Decisions Providing That The Procedural Safeguards Required By *Freedman* Must Be Present In Content-Based Regulatory Schemes And That As-Applied Challenges Are Not Required In Situations Like This.

The requirement for procedural safeguards in prior restraint schemes has been woven in the fabric of First Amendment jurisprudence for close to sixty (60) years. These procedural safeguards are important because they (1) minimize the time of "compelled silence" inherent in a prior restraint scheme and (2) protect would-be speakers from potentially erroneous decisions. *Freedman*, 380 U.S. at 59; *FW/PBS*, 493 U.S. at 226-28. In *Thomas*, however, this Court relaxed the procedural safeguard requirements when the underlying regulations are not content based. 534 U.S. at 322-24. Where the underlying regulations are not content based, this Court determined that the *Freedman* procedural requirements are not required because the danger of censorship is lacking. *Id.* The question not resolved definitely by this Court, but squarely presented in this litigation, is whether a government regulation may escape the *Freedman* rules by amending a content-based system of prior restraints only after being haled into federal court.

The Seventh Circuit, relying on that part of the *Thomas* decision, held that GEFT's facial challenge failed because, after the County amended the Ordinance to remove any content-based regulations, the

Freedman procedural safeguards are not required. Pet.App. 11 ("[C]ontent-neutral restraints do not pose the same level of threat that content-based restraints do. For this reason the [Seventh Circuit] has not insisted on the *Freedman* procedural safeguards when prior restraints are content neutral.") (emphasis in original)). However, the Seventh Circuit's approach does not provide the necessary procedural safeguards to those who are subject to a content-based prior restraint scheme, which is directly contrary to *Freedman* and other decisions from this Court.

When this litigation commenced, and when Monroe County denied GEFT and those seeking to propagate both commercial and non-commercial messages using GEFT's outdoor billboard the ability to speak, the county's zoning scheme contained multiple content-based rules.[5] Only after being called to account under the Constitution's First Amendment did the county rewrite its signage rules. On these facts, GEFT and similarly situated First Amendment plaintiffs should be entitled to the benefit of the *Freedman* rules.

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[5] For example, as discussed in the Statement of the Case, the County has always required any person seeking to erect a sign to first obtain a permit. (Ordinance, Ch. 807-3). However, there have been and continue to be exemptions to the general rule. When GEFT initiated this lawsuit, they included (1) any government sign; (2) sculptures, fountains, mosaics and design features which did not incorporate advertising or identification; and (3) temporary signs or devices that contained noncommercial messages. (Ordinance, Ch. 807-3(C)). These Exemptions were facially content-based because a County official could only determine if a sign was exempt by looking to its content.

Unfortunately, however, the Seventh Circuit held precisely the opposite.

The decisions from this Court are clear: when content-based licensing scheme regulating speech exists, it must have procedural safeguards to protect the would-be speaker. *Freedman*, 380 U.S. at 58-59; *FW/PBS*, 493 U.S. at 226-28; *Riley v. National Federation of Blind of N.C., Inc.*, 487 U.S. 781, 802 (1988); *Vance v. Universal Amusement Co.*, 445 U.S. 308, 314-17 (1980). When GEFT sought its Variance, those procedural safeguards were not in place and were only enacted in response to the District Court's initial ruling. That runs contrary to *Freedman, Riley, Vance*, and even *Thomas*. Yet, under the Seventh Circuit's opinion, this government, or any governmental entity, can get away with that violation via a *post hoc* amendment to the ordinance that removes the content-based regulation.

GEFT filed suit at a time when there were no procedural safeguards in place. When a plaintiff initiates litigation challenging a zoning scheme that has content-based elements, the government should not be able to escape the requirements of *Freedman*, by amending the zoning ordinance to excise the impermissible content-based elements. If a city or county government can enact and enforce content-based speech regulations, and then simply amend the zoning rules after being caught and haled into court to remove such provisions after months or years of keeping the content-based regulations on the books, *Freedman* is essentially rendered a nullity.

Taking the Seventh Circuit's approach has the effect of compelling a would-be speaker's silence for an unknown period, and, after compelling that silence, then excuses the government from liability if the government amends the offending ordinance during the pendency of the litigation.

That is not consistent with *Freedman* because the would-be speaker is silenced for an indefinite period, under content-based standards, with a constitutionally defective variance process, while the governmental entity goes through the legislative process of amending the regulation to remove the content-based regulations. Here, that process took almost three (3) years. During that time GEFT, and who knows how many others, had to remain silent because the County's variance scheme did not provide for prompt judicial review.

It is not difficult to imagine a situation where a municipality, which has content-based speech regulations and no *Freedman* safeguards, indefinitely withholds a licensing decision for speech that otherwise should have been allowed because the municipality does not like the speaker and/or speaker's message. In the Seventh Circuit, that municipality could escape any finding of wrongdoing by simply later amending its regulations to remove the content-based law, if and when the law is challenged.

All the while, the would-be speaker's silence is compelled. That compelled silence constitutes an immediate, irreparable harm. *See Elrod v. Burns*, 427 U.S.

347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). Yet, unless the would-be speaker wins the race to judgment before a local government, like Monroe County, amends its zoning rules, this irreparable injury will go unpunished and unremediated.

Thus, because the regulations were content based at the time GEFT sought the Variance, the Free Speech Clause of the First Amendment required the county's variance procedures to be *Freedman* compliant—yet, they were not. Moreover, the County's subsequent amendment of its zoning rules is irrelevant because the irreparable harm took place *before* the enactment of the amendment. It also bears noting that the *post hoc* amendments could not and did not remedy the prior irreparable harm.

To hold otherwise would essentially give local governments the power to nullify *Freedman*'s protections by amending zoning rules only after being sued in federal court. Just as the government cannot escape constitutional liability for operating segregated public schools by simply closing the public schools after being sued, *see Griffin v. County School Board*, 377 U.S. 218, 231-34 (1964), a local government should not be able to avoid First Amendment liability by reforming its ordinances only after being sued. The First Amendment harm occurred prior to the reform of the local zoning rules and the constitutional remedy available to GEFT should fully account for this reality. To hold otherwise would leave the would-be speaker without a remedy,

which is what happened here to GEFT. GEFT's remedy should have been that it be allowed to speak. Instead, it was harmed by a constitutional violation, and is left with no speech.

If that is the law of the land, not only will speech be silenced, but there is no encouragement for municipalities to enact compliant zoning schemes, and no incentive for litigants to challenge them in the first place. This approach turns the First Amendment on its head by giving a local government a potentially endless number of constitutional "mulligans." If allowed to stand, the Seventh Circuit's approach will both encourage and reward constitutional bad behavior.

The Seventh Circuit's nod to a remedy appears to be to pursue an as-applied challenge. *See* Pet.App. 12 ("[A]s-applied challenges are available—indeed, preferable—to address abuses of discretion under content-neutral laws."). However, at the time of the injury, the law was content based; it was not content-neutral. Thus, an as-applied challenge is not the preferable approach to remedying the wrong.

This Court has noted that there are inherent difficulties in proving an as-applied challenge when content-based regulations are in issue. *See*, *e.g.*, *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 758 (1988) ("*[P]ost hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable,

expression.") (emphasis in original); *see also id*., at 758-59 ("[W]ithout standards to fetter the licensor's discretion, the difficulties of proof and the case-by-case nature of "as applied" challenges render the licensor's action in large measure effectively unreviewable.").

In *Thomas*, this Court held that certain abuses in licensing schemes, including favoritism in speech decisions, should be dealt with via "as-applied" claims. 534 U.S. at 325. However, *Thomas* is distinguishable on an important ground that should be controlling on the facts in this case. There, the decision maker could deny a permit only for one or more reasons expressly set forth in the ordinance. *Id.*, at 324.

Here, the Ordinance provides the BZA with reasons that it may *grant* a variance. (Ordinance, Ch. 812-5, 812-6). The Ordinance does not contain any criteria for the BZA to *deny* a variance. That sets this case apart from *Thomas*, and it means that the BZA has unbridled discretion to deny a variance.

Without those standards guiding the BZA, the BZA's denial is essentially unreviewable because the BZA can deny a variance for any reason, including the identity of the speaker or the speech a speaker is known to display, and, unless the BZA is incredibly careless, there will almost certainly be no evidence of that animus in the record. In that situation, it makes "it difficult for courts to determine . . . whether the licensor is permitting favorable, and suppressing unfavorable, expression." *City of Lakewood*, 486 U.S. at 758.

If left unaltered, the Seventh Circuit's decision means that would-be speakers seeking a license pursuant to a content-based regulatory scheme are not required to be provided procedural safeguards, if the government later amends the ordinance to remove the content-based regulations. The would-be speaker is then faced with proceeding with only an "as-applied" challenge, which, unless the government is careless, is difficult to prove. The net effect of the Seventh Circuit's opinion is to give governments a constitutional free pass to use unbridled administrative discretion in permitting schemes associated with a content-based ordinance. This approach cannot be reconciled with the applicable, and controlling, First Amendment precedents.

For these reasons, the Seventh Circuit's opinion is contrary to the decisions from this Court, including, *Freedman, FW/PBS, Riley, Vance*, and *City of Lakewood*, which (1) require procedural protections in content-based regulatory schemes or (2) find that "as-applied" challenges are generally not viable where the decision maker has boundless discretion to deny a license.

Certiorari is necessary on this question of exceptional importance because the Seventh Circuit opinion conflicts with opinions of this Court. U.S. Sup. Ct. R. 10(a) & (c).

II. The Seventh Circuit's Decision Misapprehends This Court's Ruling In *Thomas* And Conflicts With This, And Other, Courts' Decisions Requiring Definitive Standards In Licensing Schemes.

A. The Seventh Circuit Misapprehended *Thomas*.

Citing *Thomas*, the Seventh Circuit held that the County's variance scheme did not give so much discretion to the BZA to implicate concerns over censorship. Pet.App. 15. The Seventh Circuit reached this decision based on the County's removal of the content-based regulations and, thus, concluded that the risk for censorship is acceptably low under the county's "new and improved" zoning scheme. *Id.*, 13-14.

However, the Seventh Circuit misapprehended *Thomas* in issuing its opinion. First, the Seventh Circuit failed to appreciate the fact that the ordinance at issue in *Thomas* enumerated the bases on which the decision maker could deny a permit. 534 U.S. at 324.

That was important to this Court in reaching its decision in *Thomas* because, as the Court properly noted, "even content-neutral time, place, and manner restrictions can be applied in such a manner as to stifle free expression." 534 U.S. at 323. However, because "[n]one of the grounds for denying a permit has anything to do with what a speaker might say[,]" 534 U.S. at 322, this Court was not concerned with the decision maker having too much discretion because the risk for censorship was low. *Id.*, at 322-24. Thus, it was the

content-neutrality of the bases for denial that was key to this Court, not the overall content-neutrality of the ordinance, as the Seventh Circuit wrongly concluded.

Here, unlike *Thomas*, the County's Ordinance does not enumerate any criteria on which the BZA can base a denial. Instead, the BZA can deny a variance for *any* reason including content or the identity of the speaker. That outcome has been troublesome for this Court even under *Thomas*. *See Thomas*, 534 U.S. at 323 ("Of course even content-neutral time, place, and manner restrictions can be applied in such a manner as to stifle free expression."); *see also infra*. Thus, the risk for censorship is alive and well in the County's variance scheme and likely in all other variance schemes in municipalities throughout Indiana because those variance schemes are dictated by Indiana law and contain similar, hopelessly subjective criteria. *See* Ind. Code §§ 36-7-4-918.4 & 918.5.

Second, *Thomas* involves a law regulating speech in a public park. That is an important distinction because *where* speech occurs is an important factor to consider when making First Amendment decisions. *See City of Ladue*, 512 U.S. at 59 (O'Connor, J., concurring); *Niemotko*, 340 U.S. at 279-82 (Frankfurter, J., concurring) (noting that where the speech takes place matters in the constitutional analysis).[6]

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[6] Many of the prior restraint decisions from this Court relate to regulation of speech/expression on public land. *See*, *e.g.*, *Kunz v. People of State of New York*, 340 U.S. 290, 294 (1951) ("[W]e have consistently condemned licensing systems which vest in an

The right to use one's private property as one sees fit is a right that extends back to the Founding Fathers. The free enjoyment of one's property is subject to the government's police powers. However, those police powers may not abridge the individual liberties secured by the Constitution, including the right to free speech. *See Schneider*, 308 U.S. at 160. Thus, the exercise of free speech on private property must be analyzed differently to keep the freedoms of the First Amendment "in a preferred position." *Saia*, 334 U.S. at 562.

The County's variance regulations apply to private property and are required by Indiana law to provide a relief valve for citizens to use their private property as they see fit, assuming they can satisfy the criteria for variance approval. Neither the County nor the State of Indiana have limited a citizen's right to seek a variance for speech to take place on private property. Thus, when weighing the variance interests at stake, courts should be careful to be mindful of the location of the speech and the fact that the First Amendment must be placed in a preferred position, even in the face of a locality's police powers.

Yet, the Seventh Circuit did not look at it this way. Instead, the Seventh Circuit applied *Thomas* without

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administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper *regulation of public places*.") (emphasis added); *see also Saia*, 334 U.S. at 560-61; *Hague*, 307 U.S. at 518; *Thomas*, 534 U.S. at 322; *Lovell v. City of Griffin, Ga.*, 303 U.S. 444, 448-49 (1938); *Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 152-53 (1969).

considering or weighing the various rights at issue with respect to the variance scheme. Put simply, the Seventh Circuit misapprehended this Court's holding in *Thomas* in applying that case to the County's variance scheme.

B. The Seventh Circuit's Decision Conflicts With This, And Other, Courts' Decisions Requiring Definitive Standards In Licensing Schemes.

Prior restraints on speech are a "core abuse" against the right to free speech. *Thomas*, 534 U.S. at 320. Thus, for more than seventy (70) years, this Court has specifically required governments to provide narrowly drawn, reasonable, and definite standards to those who make decisions with respect to licenses to speak. *See*, *e.g.*, *Niemotko*, 340 U.S. at 271-72.

The purposes of this requirement are to (1) take discretion out of the hands of the decision maker to lessen the potential for censorship and (2) diminish the potential for self-censorship which is endemic to a standardless licensing scheme. *See*, *e.g.*, *City of Lakewood*, 486 U.S. at 757-61. Thus, there must be limits on the reasons that a decision maker can give for denying the right to speak. *Id.*, at 770. Those limits must be made explicit in the licensing scheme, and it is improper to assume that the decision maker will act in good faith, *e.g.*, not consider content or the identity of the speaker, in making licensing decisions. *Id.*

In fact, the lack of definitive standards results in unfettered administrative discretion, which "sanctions a device for suppression of free communications of ideas." *Saia*, 334 U.S. at 562. In that situation, the lack of definitive standards allow "licensing officials to roam essentially at will, dispensing or withholding permission to speak, assemble, picket, or parade according to their own opinions regarding the potential effect of the activity in question on the 'welfare,' 'decency,' or 'morals' of the community." *Shuttlesworth*, 394 U.S. at 153.

Here, the BZA, unlike the licensing authority in *Thomas*, can deny a variance for any reason, even if the would-be speaker proves all the subjective criteria set forth in the Zoning Ordinance. In other words, the would-be speaker can do everything the speaker is required to do under Indiana law to obtain relief from the strict application of time, place, and manner restrictions, but the BZA can still deny the variance *for any reason*, because, as members of the BZA and government officials testified to under oath, the standards they use to decide whether to issue a variance are subjective and their personal judgment and beliefs bear on whether to approve or reject a variance request. That result is not consistent with *Thomas* or many other decisions from this Court or other circuit courts.

The BZA can also cloak that denial as a failure to satisfy the subjective criteria given to support the approval of a variance. For instance, the BZA may not like the speaker or the speaker's message before it. Because the criteria for approving a variance, such as

"public health, safety, and general welfare of the community," are subjective, the BZA can deny a variance from a citizen known to voice unpopular opinions under the guise that the proposed sign would not be in the best interest of the general welfare of the community. Or, given the lack of any legal requirement imposing a duty to explain an adverse variance decision related to signage, the BZA could deny a variance for no reason at all and simply at its whim. Such power to censor is not acceptable to this Court. *See Saia*, 334 U.S. at 562 ("In this case a permit is denied because some persons were said to have found the sound annoying. In the next one a permit may be denied because some people find the ideas annoying. *Annoyance at ideas can be cloaked in annoyance at sound.* The power of censorship inherent in this type of ordinance reveals its vice.") (emphasis added); *Shuttlesworth*, 394 U.S. at 151 ("For in deciding whether or not to withhold a permit, the members of the Commission were to be guided only by their own ideas of 'public welfare, peace, safety, health, decency, good order, morals or convenience.' ").

Thus, if the Seventh Circuit opinion stands, boards of zoning appeals across Indiana are empowered to discriminate against would-be speakers based on their personal judgment and beliefs regarding the content of speech and/or the identity of a speaker. For example, suppose a citizen that is running for Mayor owns a house high above a road and suppose that the local municipality does not allow citizens to display messages on signs with one exception: a citizen may display messages on signs that are no more than four (4) square

feet in size and that are located on the citizen's primary residence. The candidate wants to display messages in support of his campaign, but, because of the location of the candidate's home, would-be voters driving on the road far below the candidate's house cannot see messages displayed on the four (4) square foot sign displayed high above the road.

Also suppose that the local board of zoning appeals are all appointed by the current Mayor and that the local variance scheme is the same as set forth in the Zoning Ordinance. As things stand, if the opposition mayoral candidate seeks a variance for a larger sign that meets all the criteria set forth in the local ordinance, the BZA can still stifle the opposition candidate's speech simply because the BZA knows that the candidate will post speech in opposition to the current Mayor. That type of censorship is unconstitutional under any number of opinions from this Court. *See supra and infra.*

What is more, such a regulatory scheme could also lead to the opposition candidate's own self-censorship because the opposition candidate may find it futile to seek a variance from a board whose members were appointed by the current Mayor.

It is this threat of censorship that the prior restraint doctrine is meant to combat. *See*, *e.g.*, *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940); *see also supra*. However, as things stand, the Seventh Circuit has sanctioned this open door to largely standardless government censorship of speech.

As a result, the Seventh Circuit's opinion conflicts with multiple opinions from this Court and from other circuit courts. Certiorari is necessary on this question of exceptional importance for that reason. U.S. Sup. Ct. R. 10(a) & (c).

The Seventh Circuit's opinion conflicts with, at a minimum, the following opinions from this Court and from the circuit courts:

- *City of Lakewood*, 486 U.S. at 769-72 (an ordinance that did not limit a Mayor's reasons for denying a license violated the prior restraint doctrine);

- *Saia*, 334 U.S. at 562 ("In this case a permit is denied because some persons were said to have found the sound annoying. In the next one a permit may be denied because some people find the ideas annoying. *Annoyance at ideas can be cloaked in annoyance at sound*. The power of censorship inherent in this type of ordinance reveals its vice.") (emphasis added);

- *Shuttlesworth*, 394 U.S. at 151 ("The terms of the Birmingham ordinance clearly gave the City Commission extensive authority to issue or refuse to issue parade permits on the basis of broad criteria entirely unrelated to legitimate municipal regulation of the public streets and sidewalks.");

- *Kunz*, 340 U.S. 290, 293-95 ("We are here concerned with suppression—not punishment. It is sufficient to say that New York

cannot vest restraining control over the right to speak on religious subjects in an administrative official where there are no appropriate standards to guide his action.");

- *Niemotko*, 340 U.S. at 272 ("The right to equal protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments, has a firmer foundation than the whims or personal opinions of a local governing body.");

- *Poulos v. State of N.H.*, 345 U.S. 395, 407-08 (1953) ("[T]he ordinances were held invalid . . . because they left complete discretion to refuse [speech] in the hands of officials . . . [W]e have consistently condemned licensing systems which vest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation[.]") (citations and quotations omitted);

- *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975) ("Invariably, the Court has felt obliged to condemn systems in which the exercise of such authority was not bounded by precise and clear standards. The reasoning has been, simply, that the danger of censorship and of abridgment of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use. Our distaste for censorship—reflecting the natural distaste of a free people—is deep-written in our law.");

- *Staub v. City of Baxley*, 355 U.S. 313, 325 (1958) ("It is undeniable that the ordinance authorized the Mayor and Council of the City of Baxley to grant 'or refuse to grant' the required permit in their uncontrolled discretion. It thus makes enjoyment of speech contingent upon the will of the Mayor and Council of the City, although that fundamental right is made free from congressional abridgment by the First Amendment and is protected by the Fourteenth from invasion by state action.");

- *Café Erotica of Fla., Inc. v. St. Johns Cnty.*, 360 F.3d 1274, 1284-85 (11th Cir. 2004) (variance scheme with similar language lacked appropriate constitutional limits on the decision maker's discretion);

- *Int'l Outdoor, Inc. v. City of Troy, Michigan*, 974 F.3d 690, 698 (6th Cir. 2020) (same); and

- *Desert Outdoor Advert., Inc. v. City of Moreno Valley*, 103 F.3d 814, 818-19 (9th Cir. 1996) (same).

CONCLUSION

Freedom of speech is among the fundamental personal rights and liberties protected by the First and Fourteenth Amendment. *Lovell*, 303 U.S. at 450. It also plays a central, and critical, role in facilitating the process of democratic deliberation that is essential to our ongoing experiment in democratic self-government. By

allowing the government to avoid liability for failing to provide *Freedman* procedural safeguards by simply amending the ordinance after being called on the constitutional carpet and by allowing boards of zoning appeals across Indiana to exercise an unbridled power to censor, the Seventh Circuit's opinions are at odds with multiple decisions from this Court and the other circuits. Granting certiorari will allow this Court to realign the Seventh Circuit with this Court and other circuit courts, as well as to clarify an important but unanswered question in this Court's prior restraint doctrine, namely whether amending a content-based zoning scheme after the commencement of First Amendment litigation in the federal courts, renders a variance process that squarely violates the *Freedman* standards constitutionally acceptable.

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

Respectfully submitted,

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