In the
United States Court of Appeals
For the Seventh Circuit

No. 23-1182

GEFT OUTDOOR, LLC,

Plaintiff-Appellant,

v.

CITY OF EVANSVILLE, INDIANA,

Defendant-Appellee.

Appeal from the United States District Court for the
Southern District of Indiana, Evansville Division.
No. 3:19-cv-00141-JRS-MPB — **James R. Sweeney II**, *Judge*.

ARGUED DECEMBER 6, 2023 — DECIDED AUGUST 1, 2024

Before FLAUM, EASTERBROOK, and BRENNAN, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. Evansville, Indiana, distinguishes between on-premises and off-premises signs. Evansville Ordinances Ch. 18.140. A district court held this distinction to be a form of content discrimination that violates the First Amendment, applied to the states by the Fourteenth Amendment. While the City's appeal was pending, the Supreme Court held in *Austin v. Reagan National Advertising of Austin, LLC*, 596 U.S. 61 (2022), that such a distinction is not a

form of content discrimination. We vacated the district court's decision and remanded for reconsideration.

Back in the district court GEFT Outdoor, the plaintiff, refocused its suit as a challenge to the way the ordinance handles permits and allows exceptions to (variances from) the height, spacing, and placement rules for off-premises signs. In administering the ordinance, GEFT insisted, the City was likely to take into account the message of any proposed sign. Yet before issuing a permit the City does not ask for information about a proposed sign's message, as opposed to its size, its location, and the space between it and other signs, and none of the ordinance's criteria for variances has anything to do with the sign's message. Evansville Ordinances Ch. 18.165.010. GEFT applied for (and did not receive) a variance for a particular sign, which did not meet the criteria because it was too tall and too close to other signs; GEFT insists that this decision is unconstitutional.

The district court this time rejected GEFT's arguments and dismissed the complaint. 650 F. Supp. 3d 660 (S.D. Ind. 2023). It observed that GEFT's problems stem from the fact that its proposed sign would violate all of the ordinance's size and location rules, which the court deemed valid. See *Leibundguth Storage & Van Service, Inc. v. Downers Grove*, 939 F.3d 859 (7th Cir. 2019) (sustaining a similar ordinance against a similar challenge). Indeed, GEFT has not challenged the size and placement rules. The court also concluded that the criteria for granting variances are sufficiently specific that they are not bound to be a smokescreen for content or viewpoint discrimination.

GEFT appealed again. For a second time, developments undercut GEFT's arguments. *GEFT Outdoor, LLC v. Monroe*

County, 62 F.4th 321 (7th Cir. 2023), holds that functionally identical criteria for variances from another jurisdiction's sign ordinance do not violate the First Amendment as too vague. Most laws are uncertain at their borders, but even in challenges under the First Amendment the existence of some subjective criteria does not make them invalid. *Thomas v. Chicago Park District*, 534 U.S. 316, 324–25 (2002).

Nonetheless, GEFT insisted that even after *Monroe County* there remains a potential for content or viewpoint discrimination, which renders the ordinance invalid. GEFT observes that some of the ordinance's rules do not apply to political signs and some other categories of non-commercial messages, e.g., Evansville Ordinances Ch. 18.140.030(C), which it sees as a clue that Evansville has content on its collective mind—even though the provisions that block GEFT's proposed sign apply to commercial and non-commercial billboards alike.

For a third time, intervening developments sank GEFT's arguments. *Moody v. NetChoice, LLC*, 144 S. Ct. 2383 (2024), reiterates the principle that a facial challenge—even one under the First Amendment—fails unless the plaintiff shows that a substantial portion of the law's applications are unconstitutional. Substantial invalidity must be measured against the law's legitimate scope. Yet GEFT has not even *argued* that most of the sign ordinance is invalid or that any potentially invalid parts are substantial compared with the law's legitimate applications. It has focused on the criteria used to determine variances and the fact that zoning officials used those criteria to rule against it. GEFT has not challenged the size and location rules. This strategy effectively concedes that the main sweep of the ordinance is valid. By focusing on its quest for a

variance, GEFT disqualified itself from making a facial challenge.

GEFT's reply brief chastises the district court and the City for ignoring its as-applied challenge to the ordinance. Here the problem is simple. GEFT has not contested how the City applied the ordinance to it. That is to say, it has not argued that the City held the sign's message against it. GEFT has argued throughout that the ordinance is defective by its terms and cannot be applied to *any* sign. That's a facial challenge. When asked at oral argument how it had preserved an as-applied contest, GEFT's counsel lacked a clear answer. We did not find an answer ourselves.

We have so far treated the district court's decision as resolving the merits of GEFT's challenge. Actually that's not what happened. Instead the judge wrote that any unconstitutional features of the ordinance could be severed. As the judge saw it, this meant that any injury was not redressable and knocked out standing to sue. 650 F. Supp. 3d at 667–68. We do not follow the reasoning. Deeming some parts of the ordinance invalid could not be a reason why GEFT lacks standing; it would instead be a decision in GEFT's favor (in part) on the merits. Yet the district court decided against GEFT (in full) on the merits.

A plaintiff has standing when it suffers an injury, caused by the defendant and redressable by a judgment in the suit. See, e.g., *Murthy v. Missouri*, 144 S. Ct. 1972 (2024) (citing many other decisions to the same effect). GEFT has suffered an injury (inability to erect its sign) caused by the ordinance and redressable by an injunction against the implementation of that ordinance. *Harp Advertising Illinois, Inc. v. Chicago Ridge*, 9 F.3d 1290 (7th Cir. 1993), on which the district court

relied, arose from a situation in which one contested ordinance had been repealed and another that blocked the proposed sign had not been challenged, so that an injunction would not have helped the plaintiff. The Evansville ordinance, by contrast, remains in effect, and any constitutional problem could be redressed by equitable relief.

GEFT's problem is not the lack of standing but the fact that it waged a facial challenge when it should have tried an as-applied challenge—and even that would have failed (for this sign) because GEFT did not argue (let alone show) that the City held the proposed content of the sign against it. GEFT contends that its request for a variance was denied because its billboard would have competed against local businesses, yet it is undisputed that GEFT could have put a smaller billboard with the same language many places in Evansville. Whether there are potential problems in the criteria used for variances is a subject for a different case in which the arguments have been preserved as applied to a particular sign.

The district court's judgment is modified to make clear that GEFT loses on the merits rather than for lack of standing, and as so modified the judgment is affirmed.