In the

United States Court of Appeals

For the Seventh Circuit

Nos. 20-2915 & 20-3101

GEFT OUTDOOR, LLC,

Plaintiff-Appellee,

v.

CITY OF WESTFIELD, *et al.*,

Defendants-Appellants.

Appeals from the United States District Court for the
Southern District of Indiana, Indianapolis Division.
No. 1:17-cv-04063 — **Tanya Walton Pratt**, *Chief Judge*.

ARGUED SEPTEMBER 28, 2021 — DECIDED JULY 11, 2022

Before FLAUM and SCUDDER, *Circuit Judges*.*

SCUDDER, *Circuit Judge*. Before us for the second time in three years is an appeal in long-running litigation brought by GEFT Outdoor to challenge billboard regulations promulgated by the City of Westfield, Indiana. The district court, in

*Circuit Judge Kanne died on June 16, 2022, and did not participate in the decision of this case, which is being resolved under 28 U.S.C. § 46(d) by a quorum of the panel.

the face of a due process challenge, previously declined to enjoin the regulations on a preliminary basis but this time around, upon considering claims brought under the First Amendment, entered a permanent injunction precluding the City's enforcement of certain provisions.

The Supreme Court's recent decision in *City of Austin v. Reagan National Advertising of Austin* bears heavily upon GEFT's challenge to the City of Westfield's regulatory scheme. It is only appropriate to allow the district court to revisit its prior rulings in light of *City of Austin*. On remand the district court also will be able to consider other dimensions of this appeal not adequately developed in prior proceedings or the parties' briefing on appeal.

I

A

In 2017 the City of Westfield, like many other cities and towns, adopted an ordinance governing the design, placement, and maintenance of signs within city limits. It then amended that ordinance—called the Unified Development Ordinance—in April 2018. Out of a stated concern for public safety and aesthetics, the ordinance requires those wishing to install a sign or billboard to apply for a permit, which, in turn, requires showing that the proposed sign meets certain enumerated guidelines. Some signs are altogether prohibited while others are allowed with a permit or pursuant to express exceptions within the ordinance. The limitations imposed on billboards are demanding, requiring them to be of limited size and kept in good repair.

The ordinance's sign standards impose special and particular rules for two categories of signs important to the issues

before us. One category excepts from the ordinance (and its permitting requirement) certain signs, including, for example, directional signs, scoreboards, particular flags, and notices on gas pumps and vending machines. See Westfield-Washington Twp., Ind. Unified Development Ordinance art. 6.17(D). A second category altogether prohibits certain types of signs, including those on poles and those advertising ideas, products, or services not offered on the same premises (so-called off-premises signs). See *id.* art. 6.17(E).

Under the language of the City's permitting scheme, if a proposed sign complies with the requirements of the ordinance, then "a sign permit shall be issued." *Id.* art. 6.17(C). But those seeking to install a non-compliant sign are not without recourse, as the ordinance allows them to appeal the denial of a permit or, if necessary, request a variance from the Board of Zoning Appeals. See *id.* art. 10.3, 10.14.

GEFT Outdoor, a company specializing in the construction and operation of billboards, applied for a permit to build a large digital billboard on private property along U.S. Highway 31 in Westfield. But because of the proposed sign's non-compliance with Westfield's ordinance, including its off-premises location and use of a pole, the City denied GEFT's application and subsequent variance request. In November 2017 GEFT then invoked 42 U.S.C. § 1983 and brought this action against the City of Westfield alleging that the City's sign ordinance, including its permitting and variance provisions, violated the First Amendment. In an amended complaint, GEFT added allegations that the City's actions to stop installation of its proposed billboard along Highway 31 violated the Due Process Clause of the Fourteenth Amendment.

In September 2018 the district court denied GEFT's motion for a preliminary injunction against the City's enforcement of the ordinance. Alongside that denial, the district court granted the City's motion for a restraining order compelling GEFT to cease any and all actions to install its proposed billboard pending the outcome of the litigation. We upheld the district court's ruling in a prior appeal. See *GEFT Outdoors, LLC v. City of Westfield*, 922 F.3d 357 (7th Cir. 2019).

The litigation then resumed and in time led to the district court considering the merits of GEFT's First Amendment claims. In doing so, it entered summary judgment in the company's favor and permanently enjoined the City from enforcing many aspects of its ordinance.

B

Relying on the Fifth Circuit's decision in *Reagan National Advertising of Austin, Inc. v. City of Austin*, 972 F.3d 696 (5th Cir. 2020), the district court concluded that much of the City's ordinance governing sign standards—including its exceptions, permitting scheme, and off-premises ban—regulated speech on the basis of its content and therefore was subject to strict scrutiny. These aspects of the ordinance could not survive that exacting degree of review because, in the district court's view, Westfield could not show the regulations were narrowly tailored to advance the City's stated interests of enhancing aesthetics and promoting public safety.

Turning to the City's pole sign ban, the district court found it content neutral and from there applied intermediate scrutiny but found the restriction lacked sufficient tailoring. What troubled the district court was the exception the ordinance afforded to particular flag poles. The scope of that flag pole

exception, the district court concluded, showed that the City's ordinance regulated speech with too much breadth to be narrowly tailored. So the court declared the entirety of the pole sign ban unconstitutional.

The district court went on to discuss GEFT's other claims, including its challenge to Westfield's variance provision. GEFT sees the variance allowance as problematic because of the vast discretion it vests in the City's Board of Zoning Appeals, effectively allowing the Board to pick and choose favored and disfavored speakers. Beyond recognizing GEFT's contention, however, the district court stopped short of ruling on the challenge, perhaps owing to the fact that the summary judgment record included very few facts about how the City has applied the variance provision.

In the end, then, the court invalidated and enjoined the entirety of the permitting scheme (see Unified Development Ordinance art. 6.17(C)), the off-premises and pole sign bans (see *id.* art. 6.17(E)(4–5)), and the exception afforded particular signs (see *id.* art. 6.17(D)).

The City appealed.

II

A

Following oral argument, we entered an order deferring decision until the Supreme Court decided *City of Austin v. Reagan National Advertising of Austin, LLC*. That decision came on April 21, 2022. See *City of Austin*, 142 S.Ct. 1464 (2022).

In *City of Austin*, the Court considered whether a municipal prohibition on off-premises signs and billboards—much like the one in the City of Westfield's ordinance—constituted

a content-based regulation. The Fifth Circuit had answered that question yes, concluding that "because the City's on-/off-premises distinction required a reader to inquire 'who is the speaker and what is the speaker saying,' 'both hallmarks of a content-based inquiry,' the distinction was content based" and therefore subject to strict scrutiny. *Id.* at 1470 (quoting *Reagan National Advertising*, 972 F.3d at 706).

The Supreme Court rejected that approach, explaining that speech regulation is only content based if it "'target[s] speech based on its communicative content'—that is, if it 'applies to particular speech because of the topic discussed or the idea or message expressed.'" *Id.* at 1471 (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015)). The fact that the City must read a sign to evaluate its conformity with a regulation is not alone determinative—rather, the decisive issue is whether the regulation "single[s] out any topic or subject matter for differential treatment." *Id.* at 1472.

Applying that standard to the challenged off-premises regulation, the Supreme Court held that the City of Austin had not prohibited any sign based on its political or ideological message and, instead, drew regulatory lines only based on whether a given sign was located on "the same premises as the thing being discussed or not." *Id.* at 1472–73. Because "the City's off-premises distinction require[d] an examination of speech only in service of drawing neutral, location-based lines" and was "agnostic as to content," the Court concluded that the regulation was content neutral on its face and did not warrant strict scrutiny absent evidence of an impermissible, content-based purpose or justification. *Id.* at 1471.

B

City of Austin—which, of course, the district court did not have the benefit of at the time of its decision—makes plain that the City of Westfield's off-premises ban does not (at least at the facial level) impose a content-based speech restriction requiring application of strict scrutiny. Indeed, the Supreme Court altogether rejected the Fifth Circuit's reasoning that a need-to-read requirement—one in which a City official must read a message displayed on a sign to answer whether the communication is on-premises or off-premises—necessarily shows regulation based on the content of speech. This reasoning was at the heart of the district court's conclusions that Westfield's off-premises ban, and indeed its entire permitting scheme (including all exceptions), imposed impermissible content-based restrictions on speech. This same rationale also seems to explain, as best we can tell, why the district court viewed these aspects of the Westfield ordinance as imposing prior restraints on speech.

The only responsible course is to remand to allow the district court to revisit its prior rulings within the intermediate scrutiny framework articulated in *City of Austin*. In doing so we leave to the district court's sound discretion whether to permit the parties to supplement the existing summary judgment record to inform, for example, whether challenged provisions of the City of Westfield's ordinance, although content neutral on their face, operate in practice in ways that show impermissible restrictions on speech based on its content.

A cautionary observation also seems in order. The district court appeared to view the entirety of the City of Westfield's permitting scheme as reflecting an impermissible prior restraint on speech. It is possible the district court saw this

conclusion as following from its determinations that certain exceptions from the ordinance were content based—a position that requires revisiting after *City of Austin*. Whatever the rationale, everyone on remand should remember that "prior restraints are not per se unconstitutional," and can be "constitutionally legitimate if they are proper time, place, or manner restrictions." *HH-Indianapolis, LLC v. Consol. City of Indianapolis and County of Marion, Ind.*, 889 F.3d 432, 440 (7th Cir. 2018) (internal citations and quotation marks omitted). In short, we know of no precedent categorically—root and branch—disallowing a municipality from requiring permits for particular activities, including certain forms of speech, to occur within city limits.

III

We also remand to allow the district court to reconsider its ruling on the City's pole sign ban. To be sure, the district court correctly concluded that the ban, which prohibits signs "supported by one or more poles, posts, or braces upon the ground, in excess of six (6) feet in height, not attached to or supported by any building," is a content-neutral time, place, and manner restriction. But the district court then found, without any accompanying citations to legal authority, that the exception afforded to certain flag poles—a type of pole sign—showed that the broader pole sign ban lacked the narrow tailoring necessary to meet Westfield's stated interests in promoting community aesthetics and safety.

Intermediate scrutiny is not an overly demanding standard, as it does not require a perfect or least restrictive fit. All the City must show is that its pole sign ban furthers its stated interests without burdening substantially more speech than necessary. See *Ward v. Rock Against Racism*, 491 U.S. 781, 798–

99 (1989). We have a difficult time seeing how the exception for flag poles renders the broader pole sign prohibition unconstitutional. The pole ban, even with an exception for flag poles, likely furthers the City's interests in reducing visual clutter that could occur by permitting a broader range of pole signs, including billboards. See *id.* at 800 ("So long as the means chosen are not substantially broader than necessary to achieve the government's interest … the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative.").

At this point, though, we are reluctant to reach any conclusion on the constitutionality of the pole sign ban because the district court has not yet considered all relevant aspects of it. Seemingly as a result of an underdeveloped record, the district court reserved judgment on GEFT's challenge to the City's variance scheme, which it says allows the Board of Zoning Appeals to exercise "unbridled discretion in approving or denying variance requests, including GEFT's variance," because it "lack[s] objective criteria of any type for the approval or denial of a variance."

We see this unaddressed variance issue as relevant to, if not inseparable from, GEFT's other First Amendment claims, including its challenge to the pole sign ban. A variance scheme conferring unbridled discretion on the Board might call into question the validity of the ordinance's regulations. As the Supreme Court cautioned in *City of Austin*, "evidence that an impermissible purpose or justification underpins a facially content-neutral restriction" may render a rule content based or affect its ability to show narrow tailoring. 142 S.Ct. at 1475–76. Of course, the existence of a variance scheme on

its own is not enough to justify the wholesale invalidation of the pole sign ban. Rather, the district court needs to consider how the allowance for variances affects, if at all, the pole sign ban.

IV

Finally, remand is necessary because the record before us remains undeveloped on other material points. The parties' briefs, for instance, offer competing versions of advertising the City may be allowing to occur at Westfield High School. According to GEFT, and from what we can discern, the City allows the high school to maintain two large digital billboards on the side of its football stadium that display off-premises advertisements—signs typically prohibited under the ordinance. Aside from these few details, there is little else we can ascertain about the signs at or near the high school.

The district court also seemed to be aware that the City of Westfield was allowing some commercial advertising, perhaps among other displays, at its high school but never analyzed its significance or lack thereof. This omission strikes us as significant. To our eye, GEFT seems to be arguing that by allowing the high school to display off-premises signs, the City is "pick[ing] and choos[ing] which speakers get to speak and what messages citizens hear." The City itself—including its public high school—operates as a favored speaker, while GEFT suffers as a non-favored speaker subject to greater restrictions. In addition, GEFT contends that the City defeats its own alleged interests in avoiding visual clutter and promoting public safety by allowing the high school to maintain signs that others may not.

We raised the issue at oral argument but the City declined to engage, pointing instead to the high school's zoning status as a "Planned Unit Development" or what it calls a "PUD." The City tells us that, as of July 2019, Westfield High School sits within this PUD and, as a result, is no longer subject to the ordinance, or at least major parts of it. That may be an accurate description of how far the ordinance extends. But what continues to confuse us—and remains unexplained from everything we see on appeal—is how and why the City's redesignation of a certain geographical area as a PUD is of First Amendment relevance. We know the City is not arguing that it can violate the U.S. Constitution with impunity within an area it determines to be a PUD. But nowhere does the City move beyond that easy observation by explaining how its decision to place Westfield High School within a PUD defeats GEFT's contention of discrimination. The alleged speech discrimination is occurring within city limits, whether within or outside a PUD, and that constitutional allegation needs to be grappled with on remand.

* * *

On remand, the district court will have broad discretion to structure the proceedings as it sees fit. Our only message to all involved is to take care to make a thorough and complete record, one that will allow us in any future appeal to better follow the record evidence, the scope of the issues presented for decision, and the basis for any ruling on those issues.

For these reasons, we VACATE the district court's permanent injunction and REMAND for further proceedings consistent with this opinion.