No. _____

In the
Supreme Court of the United States

RORY DOUGLAS WILSON,
PETITIONER,

v.

IDAHO,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF IDAHO

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent Moscow, Idaho has an ordinance prohibiting "any notice, sign, announcement, or other advertising matter" in the public square without the property owner's permission. Signs and other messages—including political messages such as "F*** Trump," "Gegen Nazis," and "Pride" art—nonetheless blanket downtown Moscow. In keeping with these signs, petitioner Rory Wilson posted removable vinyl stickers critical of Moscow's response to the COVID-19 pandemic: the words "Soviet Moscow," a reference to the U.S.S.R.'s authoritarian government, juxtaposed against the public-health slogan Moscow adopted in connection with its restrictive COVID-19 policies: "Enforced Because We Care."

In response, Moscow enforced its ordinance for the first and only time in the ordinance's decade-plus history against Wilson. Moscow singled out Wilson because officials disagreed with his message; as the arresting officer told Wilson's father, "I don't agree with the messaging." And to add constitutional insult to constitutional injury, Wilson's sentence, if left to stand, requires him to write an essay explaining why he was wrong—that is, sentencing Wilson to compelled speech as punishment for disfavored speech. The question presented is:

Whether Moscow's ordinance or prosecution of Wilson violates the First or Fourteenth Amendments.

PARTIES TO THE PROCEEDINGS

Petitioner Rory Wilson was the defendant in the district court and the defendant-appellant in the Idaho Court of Appeals.

Respondent the State of Idaho was the plaintiff in the district court and the plaintiff-appellee in the Idaho Court of Appeals.

SUMMARY OF RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *Idaho v. Wilson*, No. 50802-2023, Supreme Court of the State of Idaho. Petition for review denied October 8, 2024.
- *Idaho v. Wilson*, No. 50802, Court of Appeals of the State of Idaho. Judgment entered June 25, 2024.
- *Idaho v. Wilson*, No. CR29-20-2114, District Court of the Second Judicial District of the State of Idaho, in and for the County of Latah. Judgment entered April 5, 2023.
- *Idaho v. Wilson*, No. CR29-20-2114, Magistrate Court of the Second Judicial District of the State of Idaho, in and for the County of Latah. Withheld judgment entered May 16, 2022.
- *Wilson v. City of Moscow*, No. 3:22-cv-421-BLW, United States District Court for the District of Idaho. Complaint filed October 6, 2022.

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF AUTHORITIES

Cases—Continued: Page(s)

Cases—Continued: Page(s)

Cases—Continued: Page(s)

Cases—Continued: Page(s)

Constitutional Provisions:

Statutes, Rules and Regulations:

Other Authorities:

PETITION FOR WRIT OF CERTIORARI

There is a recurring problem in cities across the country: cities enact ostensibly neutral requirements to obtain permission before posting written messages in the public square, but then officials enforce such requirements only against those with whom they disagree. This case presents a particularly egregious example. Petitioner is the first and only person ever prosecuted under Moscow, Idaho's total ban on placing any unauthorized sign in the public square for any duration.

In 2009, Moscow enacted an ordinance criminalizing the posting of "any notice, sign, announcement, or other advertising matter" in the public square without the property owner's permission. Notwithstanding this ordinance, Moscow is chock full of such postings and has been for well over a decade. The City brought its first and only prosecution under that ordinance against Rory Wilson in 2020 because Wilson posted removable vinyl stickers that juxtaposed "Soviet Moscow," a reference to the former U.S.S.R.'s authoritarian government, with the slogan Moscow, Idaho popularized in defense of its COVID-19 restrictions: "Enforced Because We Care." When a police officer spoke to petitioner's father after detaining petitioner, the officer acknowledged that petitioner's message had garnered police attention because, as the officer put it, he "d[id]n't agree with the messaging." App. 183a.

The City's unprecedented and viewpoint-discriminatory prosecution presents important questions under the First and Fourteenth Amendments. As interpreted by the Idaho Court of Appeals, Moscow's ordinance provides no safeguard against viewpoint-based prosecution; indeed, nothing prevented the City from actually

discriminating against petitioner. In any case, the ordinance under which petitioner was convicted imposed a vague, overbroad, prohibited prior restraint on speech by requiring a speaker to seek permission before posting a sign critical of the government anywhere in the public square at any time and for any duration.

Review is essential to address recurring, important issues underlying Moscow's selective prosecution of Wilson and the ordinance's extraordinary and constitutionally intolerable breadth. The lower courts inconsistently apply differing tests when confronted with discriminatory prosecutions under ostensibly neutral restrictions on written messages on property comprising the public square, like the one in this case. The viewpoint-discriminatory enforcement of ostensibly neutral speech restrictions chills—and is designed to chill—disfavored political speech. No practice more gravely offends the First Amendment's free-speech guarantee, and only this Court's intervention can end such practices once and for all.

OPINIONS BELOW

The order of the Supreme Court of Idaho denying review (App. 1a-2a) is unreported. The opinion of the court of appeals (App. 3a-17a) is reported at 556 P.3d 450. The district court's appellate opinion (App. 18a-52a) is unreported. The magistrate judge's order (App. 57a-84a) is also unreported.

JURISDICTION

The Supreme Court of Idaho denied a timely petition for review on October 8, 2024. App. 1a-2a. On December 6, 2024, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including February 5, 2025. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL & ORDINANCE PROVISIONS

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.

The Fourteenth Amendment to the United States Constitution provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Id.* amend. XIV.

Moscow City Code section 10-1-22 is reproduced in the appendix. App. 85a.

STATEMENT

The City of Moscow aggressively limited the public activities of its citizens in response to the COVID-19 pandemic. CR.105-09. In March 2020, the City Council granted the Mayor broad emergency powers to respond to COVID-19, and the Mayor exercised those powers in a series of sweeping orders that shut down countless businesses and gatherings. CR.106-09. These orders, which included mask mandates and obligatory social-distancing rules, proved unpopular; in an attempt to shore up public support for its COVID-19 measures, Moscow deployed signage with the slogan "Enforced Because We Care." CR.110. Petitioner testified before the Moscow City Council in opposition to the COVID-19 restrictions, but to no avail. ER.481-82.

Petitioner's grandfather, Douglas Wilson, is the leader of Moscow's Christ Church, which experienced animosity from Moscow city leaders before and after the COVID-19 pandemic. App. 148a-149a. The Moscow City Prosecutor has called members of Christ Church "religious idiots," "religious zealots," and "nuts" who were "wrecking [her] sanity." App. 148a-149a. By September

2020, members of Christ Church, including petitioner, were deeply frustrated by Moscow's COVID-19 policies and by the City's enactment of those policies despite overwhelming community objection. CR.109.

In protest, Christ Church members organized a religious "psalm sing" outside city hall. Petitioner attended that event with his family. ER.487-88. City officials told attendees that they had to stand in circles painted on the ground and that they would be arrested if they stood too close to anyone outside their household. CR.109. Even though Moscow's emergency orders disclaimed any restriction on associative, expressive, and religious activities, CR.106-07, three attendees were arrested and several more were issued citations, CR.110.

The charges against all attendees were eventually dropped, but the City Prosecutor continued to express her disapproval of Christ Church and its members, saying it was "just obnoxious that people are trying to turn [the arrests] into a religious persecution thing." CR.533. She even told her father a few months later, when President Trump tweeted in support of the church, "[s]*** from these religious idiots is hitting the fan," and that "these Christ church a**h***s are pulling these illegal stunts constantly." CR.534. After the City Prosecutor dismissed the charges, the attendees who were arrested filed suit against various city leaders. CR.535. Ultimately, Moscow paid a settlement of $300,000 to the arrestees.[1]

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[1] Casey Frizzell, *Moscow Settles Civil Suit Filed by Church Group over Mask Protest*, KREM2 (July 14, 2023), https://www.krem.com/article/news/local/moscow-settles-civil-suit-f-church-group-over-mask-protest/293-ace6f357-8023-49e0-86b3-df70810ce3e2.

In 2009, Moscow enacted an ordinance restricting signage in the city, Moscow City Code section 10-1-22. CR.103-04. The ordinance provides that no person shall "attach or cause to be attached, any notice, sign, announcement, or other advertising matter to any . . . property not belonging to said person without first obtaining the consent of the owner or lessee of such property," or on public property "without prior approval, in writing." App. 85a; Moscow City Code § 10-1-22(A)-(B). Moscow has never had any process, guidance, or standards for applying for permission under this ordinance, nor does it have any record of ever receiving such an application or granting or refusing permission to any applicant. CR.104-05. And it has no record of any citation being issued pursuant to this law prior to this case. CR.105. In other words, from 2009 to 2020, Moscow's ordinance went not only unenforced, but effectively unimplemented.

As might be expected given Moscow's neglect of its ordinance, political messages, such as "Immigrants Welcome," "Gegen Nazis," "F*** Trump," and "Pride" art have proliferated across Moscow. *See* App. 191a, 194a, 198a, 209a, 213a-214a. In addition to numerous stickers placed on light poles, stoplights, sign poles, street signs, building facades, and the like, App. 185a-186a, 189a-202a, many ostensibly prohibited signs feature advertisements for shops, App. 187a, promotions for events, App. 200a, and lost dog and cat notices, App. 212a, 216a. These materials often identify the posting's promoter and provide addresses, phone numbers, and other identifying information. App. 187a, 200a, 213a, 215a. Nevertheless, Moscow has never taken legal action against anyone for violating the ordinance, even when violators were easily identifiable.

Outraged by how Moscow responded to his church's psalm sing, petitioner decided to exercise his right to political speech in a similar way to the numerous signs posted across downtown Moscow through small, removable, vinyl stickers. CR.110-11; App. 152a-153a. The stickers included a graphical representation of a crossed hammer and sickle and had printed on them the words "Soviet Moscow" and the well-known slogan the City used to support its COVID-19 restrictions: "Enforced Because We Care." CR.110-11; App. 152a-153a.

Based on a nondescript report of "suspicious males" in downtown Moscow, city police officers made contact with petitioner and his brother. CR.110-11. After handcuffing petitioner and interrogating both boys, the officers called their father, who responded to the scene. CR.111-12. The officer in charge rejected the boys' offer to remove the stickers, saying it was "[t]oo late for that." CR.112. He released the boys without citation but told the boys' father, "I don't agree with the messaging." CR.112-13; App. 183a.

A few days later, after law enforcement consulted with the City Prosecutor regarding whether to charge petitioner, officers went to petitioner's residence and issued citations for violations of section 10-1-22. CR.113. Notwithstanding that Moscow had never before prosecuted violators, the police told petitioner's father that this "crime" was "most often committed with lost cat posters and yard sale signs." CR.113. Petitioner was charged with violating section 10-1-22. CR.338.

In March 2021, petitioner moved to dismiss the charges. App172a. He argued that the ordinance's plain language did not and could not criminalize his use of removable vinyl stickers for political speech, and, alternatively, that the ordinance was ambiguous about the scope

of "any notice, sign, announcement, or other advertising matter," CR.113-16, and, based on principles of lenity and constitutional avoidance, that the ordinance was understood as restricting only commercial advertisements. He additionally argued that the ordinance and its enforcement violated the First and Fourteenth Amendments. App. 174a-180a. A state magistrate judge denied petitioner's motion. App. 57a-84a.

Petitioner later moved for reconsideration of that denial based on evidence that Moscow prosecuted him to punish his disfavored viewpoint regarding the city's COVID-19 restrictions. CR.531-40. That motion included text messages uncovered in the psalm sing arrestees' suit against city officials, including those containing the City Prosecutor's caustic statements regarding Christ Church members like petitioner. CR.545-65. In addition to challenging his selective prosecution, App. 155a-157a, petitioner requested that the City Prosecutor be disqualified, App. 158a-161a. The magistrate judge denied that motion. CR.834-35.

Petitioner was convicted after a jury trial and appealed to the district court.[2] App. 53a-56a; CR.958-60. Petitioner explained again why the ordinance was vague and how Moscow unconstitutionally singled him out for disfavored treatment based on his viewpoint. App. 145a-150a. Nevertheless, the district judge rejected petitioner's arguments, affirmed the magistrate judge's denial of petitioner's motion to dismiss, and affirmed petitioner's conviction. App. 18a-52a.

After petitioner appealed the district court's judgment, the Idaho Supreme Court referred the case to the

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[2] The Idaho District Courts have appellate jurisdiction over all cases from their respective Magistrate Divisions. Idaho Code § 1-705.

Idaho Court of Appeals for review.[3] In the Idaho Court of Appeals, petitioner argued that his conviction was constitutionally infirm because the ordinance is unconstitutionally vague, App. 126a-129a, 132a-134a, that it is overbroad, App. 130a-132a, that it exceeded permissible time, place, and manner prior restraints, App. 131a, and that Moscow discriminated against his posting of political speech, *see* App. 126a-134a. The Court of Appeals affirmed the district court's appellate opinion in June 2024. App. 3a-17a. Concluding that the ordinance unambiguously prohibited posting all signs on property without express permission, the Idaho Court of Appeals upheld petitioner's conviction. App. 8a-11a.

In July 2024, petitioner timely petitioned for review in the Idaho Supreme Court. He raised vagueness, viewpoint discrimination, overbreadth, and time, place, and manner challenges to Moscow's ordinance, which operated as an unconstitutional prior restraint on his speech. App. 89a-110a. That court denied review in an unpublished order in October 2024. App. 1a-2a. Petitioner timely filed a motion to extend the time to file a petition for a writ of certiorari in this Court, which Justice Kagan granted in December 2024. *Wilson v. Idaho*, No. 24A556 (S. Ct.).

Petitioner also sought and obtained a stay of his sentence. *Idaho v. Wilson*, No. CR29-20-2114 (Latah Cnty. Mag. Ct., entered Nov. 15, 2024). That sentence included fines, restitution, probation, and, strikingly, an order

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[3] Although the Idaho Supreme Court has appellate jurisdiction over all appeals from the final judgments of the Idaho District Courts, Idaho Code § 1-204, it may refer cases to the Idaho Court of Appeals for "error review and correction," *id.* § 1-2406. A party challenging a decision of the Idaho Court of Appeals may petition the Idaho Supreme Court for discretionary review. *Id.* § 1-2409.

that petitioner "[w]rite a 3-5 page paper on what appropriate civil discourse is [and] what [he] would have done differently in this case." App. 55a. That requirement is suspended pending this Court's review. Barring this Court's intervention, Moscow will punish petitioner's disfavored speech by compelling speech that it finds more agreeable.

REASONS TO GRANT THE PETITION

The Idaho Court of Appeals wrongly upheld petitioner's conviction under a previously unenforced ban on posting unauthorized signs in the public square notwithstanding rules against punishing individuals for speech expressing disfavored viewpoints and imposing prior restraints on speech. Granting review to remedy the grave chill on political dissent is warranted for three reasons.

First, petitioner's conviction violates the First and Fourteenth Amendments. Nowhere does this Court scrutinize speech restrictions more strictly than in the two scenarios implicated here: where the government excludes a disfavored viewpoint from the marketplace of ideas while allowing others' similarly expressed viewpoints to flourish, and where the government prohibits people from speaking without preapproval. The Idaho Court of Appeals thus decided an important federal question in a way that drastically departs from this Court's First Amendment and Fourteenth Amendment precedents. S. Ct. R. 10(c). Review is needed to ensure that the law is read and applied consistently.

Second, the issue is recurring and important. This Court's guidance will provide much-needed clarity on questions that recur in enforcing restrictions on written messages, which lower courts have approached inconsistently and with inconsistent results. The resolution of those questions is particularly important in this case

because of the consequences that will befall petitioner if his conviction stands: not only will he be fined for criticizing the government, a state court stands ready to compel petitioner's speech by forcing him to write an essay explaining the error of his protest.

Third, this case is an appropriate vehicle to review the questions presented. Moscow's ordinance has been conclusively interpreted by the Idaho Court of Appeals, meaning that this Court need not construe state law to reach any federal question. And petitioner's dispositive constitutional arguments are appropriately presented for plenary review or, alternatively, summary reversal.

I. This Court's Review Is Warranted to Correct the Idaho Court of Appeals' Drastic Departure from This Court's Precedents.

Moscow indisputably enforced its no-sign ordinance against petitioner in a viewpoint-discriminatory manner. The city brought its first and only prosecution under an ordinance that imposes an unlawful prior restraint by demanding permission to post messages in the public square. That attempt should have been rejected as unconstitutional under the First Amendment because the government cannot selectively punish speech with which it disagrees. Alternatively, the ordinance is unconstitutionally vague because it provided no safeguard against viewpoint-based criminal prosecution. If the ordinance truly required plaintiff to obtain permission before adding his message to countless others in the public square, then the only principle guiding the City's enforcement of the ordinance against him was whether law enforcement disagreed with the viewpoint of his message.

The Idaho Court of Appeals treated the ordinance's breadth as a virtue, not a vice, and in doing so brought its decision in conflict with this Court's precedent

requiring an ordinance to clearly state not only what is proscribed, but how offenders should be selected for prosecution in a viewpoint-neutral manner.

Moreover, by upholding criminal penalties for posting signs without permission, the ordinance runs headlong into prior-restraint doctrine. While this Court upholds some content-neutral restraints on the time, place, and manner of speech, criminalizing all signs posted without permission extends far beyond any arguable legitimate governmental interest and completely occludes a popular avenue for political protest. The Idaho Court of Appeals' no-limits interpretation of the ordinance conflicts with these principles. But the decision below also merits review because it would render the ordinance fatally overbroad: it criminalizes a substantial amount of core First Amendment speech and therefore impermissibly chills participation in the marketplace of ideas.

A. The Idaho Court of Appeals' decision drastically departs from this Court's precedents prohibiting viewpoint-discriminatory prosecutions.

Moscow sanctioned petitioner for speech it disfavored under the guise of an ostensibly neutral sign ban. This Court has squarely and recently held that such viewpoint-discriminatory prosecutions are absolutely forbidden. The Idaho Court of Appeals' contrary decision upholding petitioner's conviction so drastically departs from this Court's clear guidance that the exercise of this Court's supervisory power over that court is warranted. S. Ct. R. 10(c).

As this Court reiterated only last year, "the critical takeaway is that the First Amendment prohibits government officials from wielding their power selectively to punish or suppress" speech. *Nat'l Rifle Ass'n of Am. v.*

Vullo, 602 U.S. 175, 198 (2024). Just as recently, this Court reiterated that prosecutors may not press political vendettas by singling out individuals for prosecution through charges that are almost never brought. *Gonzalez v. Trevino*, 602 U.S. 653, 655, 658 (2024) (per curiam) (citing *Nieves v. Bartlett*, 587 U.S. 391, 406-07 (2019)). Indeed, this Court took particular note of the petitioner in *Gonzalez* providing "evidence . . . that no one has ever been arrested for engaging in a certain kind of conduct," particularly given that the "criminal prohibition" in question "is longstanding and the conduct at issue is not novel." *Id.* at 658.

Moscow's prosecution of Wilson leaves little doubt on either point. Below, Moscow conceded that between 2009 and its prosecution of Wilson in 2020, it had never prosecuted anyone under its ordinance, despite the countless times it had been violated. App. 147a-148a; CR.112-13; CR.140-159; CR.533-35. As one officer said candidly, the ordinance had been constantly violated, most often "with lost cat posters and yard sale signs." App. 183a. Many such postings contain information identifying the violator, and they frequently include contact information for the violator. For example, posters for "Dante's Deals Pop-Up" were plastered across Moscow when petitioner placed his stickers. App. 200a, 212a, 216a. Those posters provided law enforcement officials with information about when and where the event would take place and about how to contact the organizers through social media. Similarly, lost-pet flyers with contact information are commonplace in Moscow. App. 213a, 215a.

But equally clear was that Moscow permitted political opinions that it found congenial—just not Wilson's. For example, numerous political messages covered downtown Moscow government property, including

signs declaring "F*** Trump," App. 209a, as well as expressions about policies and social issues, such as "Immigrants Welcome," "Gegen Nazis," and "pride" art, App. 194a, 198a, 214a. At no point did Moscow prosecute the speakers behind these messages. Unique among all Moscow residents, Wilson was arrested because, in the words of the arresting officer, "[f]irst of all, [he didn't] agree with [Wilson's] messaging" and it was "too late" to voluntarily remove the stickers. App. 183a; CR.112-13, CR.533. Moscow's prosecuting attorney likewise left little doubt as to her contempt for Wilson's message and belief that disfavored speech should be prosecuted. CR.534 (prosecutor's statement that "these Christ church a**h***s are pulling these illegal stunts constantly").

Neither *Vullo* nor *Gonzalez*'s core teachings should have surprised observers of this Court's First Amendment decisions: this Court has maintained for decades that viewpoint-discriminatory governmental actions to punish a speaker or to discriminate against disfavored message are an "egregious form of content discrimination" and are therefore "presumptively unconstitutional." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828-39 (1995). Similarly, this Court has long recognized that a government official's exercise of his broad enforcement discretion to punish a speaker or message with which the government disagrees is an especially intolerable constitutional wrong. *See City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 758 (1988).

But Moscow's refusal to permit Wilson's easily removable message in the face of hundreds of similar postings also flatly contradicts this Court's instructions in *Shurtleff v. City of Boston*, 596 U.S. 243 (2022). There,

Boston allowed any person or group, after providing notice and clearing the city's scheduling conflicts, to raise a flag outside city hall. *Id.* at 249-50. Boston never refused a group's request to fly a flag of its choosing until a religious organization wanted to raise a Christian flag. *Id.* at 248, 250. Primarily because the city had never rejected a proposed flag before, the Court recognized that the flag raisings were private speech, *id.* at 256-58, and easily concluded that Boston's unprecedented rejection of the Christian group's flag violated the First Amendment as obvious viewpoint discrimination, *id.* at 258-59. The Court emphasized that "the city had nothing—no written policies or clear internal guidance—about what flags groups could fly." *Id.* at 257. The absence of such guidance both encouraged and enabled prosecutors' constitutionally forbidden viewpoint discrimination.

As in *Shurtleff*, Moscow has proliferated "nothing—no written policies or clear internal guidance," or even *any* guidance, "about what [messages] groups could" promote through a sign. Boston took advantage of a comparable absence of guidance, singling out the director of a religious organization "solely because the Christian flag he asked to raise promoted a specific religion." *Id.* at 258 (cleaned up). Moscow has proven even more brazen than Boston: not only has Moscow not proliferated clear guidance as to what stickers may remain and for how long, it has not even created a process to approve or disapprove of requests to post messages on public property. That lapse compounds constitutional infirmity upon constitutional infirmity.

To enforcement discretion, the Idaho Court of Appeals responded only that Moscow's preapproval regime was facially neutral and thus presumably insulated from viewpoint discrimination. App. 9a-11a. But protestations

that Moscow's statute was facially neutral cannot salvage Moscow's discriminatory prosecution any more than it could in *Vullo*, *Gonzalez*, or *Shurtleff*: Moscow's viewpoint-discriminatory actions render Wilson's prosecution and conviction unconstitutional, facial neutrality or no. The Idaho Court of Appeals' decision to the contrary cannot be reconciled with *Vullo*, *Gonzalez*, or *Shurtleff*—and so grave a misapprehension of so many of this Court's recent precedents necessitates this Court's direct intervention.

B. The Idaho Court of Appeals' decision drastically departs from this Court's settled precedents regarding vagueness, overbreadth, and prior restraints.

While the errors noted above are reason enough to warrant review, the decision below drastically departs from this Court's vagueness, overbreadth, and prior-restraint precedent. Each ground independently highlights the need for this Court's intervention.

1. If Moscow's prosecution itself did not violate the First Amendment, then alternatively the ordinance was unconstitutionally vague as applied to petitioner's political speech. A statute authorizes an impermissible degree of enforcement discretion—and is thus void for vagueness—where it does not "set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent 'arbitrary and discriminatory enforcement.'" *Smith v. Goguen*, 415 U.S. 566, 573 (1974) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)). The success of a challenge "rests not on whether the [official] has exercised his discretion [unlawfully], but whether there is anything in the ordinance preventing him from doing so." *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 133 n.10 (1992).

Here, Moscow's ordinance lacks any sort of guidelines to prevent the arbitrary or viewpoint-discriminatory enforcement of the ordinance—let alone the kind of "clear guidelines" that save an ordinance from constitutionally impermissible vagueness. *Goguen*, 415 U.S. at 573. Petitioner had no notice that the viewpoint of his message would subject him to punishment where posters were allowed to express other viewpoints in the same medium.

The Idaho Court of Appeals rejected petitioner's vagueness challenge by simply construing Moscow's ordinance to prohibit any sign posted without permission, full stop. Put differently, that court treated the breadth of Moscow's blanket posted-speech restriction as a virtue rather than a vice. The Idaho Court of Appeals misunderstood the relevant inquiry, limiting its analysis only to whether the ordinance provided petitioner with fair notice of what materials were encompassed by the ordinance. App. 10a-11a. This analysis was wrong several times over.

First, the Idaho Court of Appeals' vagueness analysis ran headlong into petitioner's First Amendment arguments. *See* App. 126a-130a. Below, petitioner argued that the ordinance improperly "target[ed] all speech, including political speech." App. 130a. But the Idaho Court of Appeals mentioned Petitioner's argument only in passing—in a footnote distinguishing a First Amendment overbreadth challenge from a Fourteenth Amendment vagueness challenge, which "'does not turn on whether a law applies to a substantial amount of protected expression,'" App. 10a n.2 (quoting *Holder v. Humanitarian L. Project*, 561 U.S. 1, 20 (2010)). The Idaho Court of Appeals thus incorrectly understood petitioner as attacking the ordinance only on limited vagueness grounds—a

claim it rejected because "the ordinance is plain and unambiguous" and petitioner was "on notice that his conduct was prohibited"—to the exclusion of the First Amendment. App. 11a.

But legislation need not be ambiguous to imbue law enforcement with unconstitutional latitude for prosecuting speech. The First Amendment prohibits speech regulations that potentially stifle too much protected speech relative to the speech the government may legitimately regulate, as well as speech regulations which allow for arbitrary or viewpoint-discriminatory enforcement. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-13 (1975); *Grayned*, 408 U.S. at 114. Even where the First Amendment permits tailored restrictions on speech, such restrictions are constitutional only when they are viewpoint neutral and are neither in theory nor practice a tool with which the government may suppress speech that it disfavors. *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45-46 (1983). "[T]he government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject." *Cornelius v. NAACP*, 473 U.S. 788, 806 (1985); *see also Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 (2001) ("[S]peech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint."). Moscow's history of non-enforcement in allowing favored speakers' messages to proliferate illustrates that the ordinance would have practical effect only as a tool to stifle speech the government disfavors.

Even though the Idaho Court of Appeals reasoned that the ordinance unambiguously prohibited postings of any type, that open-ended prohibition is precisely the

problem that petitioner challenged: if the ordinance criminalizes all speech posted in the public square without permission, then enforcement was left solely to Moscow's viewpoint-based discrimination. The ordinance contains no "reasonably clear guidelines for law enforcement officials." *Goguen*, 415 U.S. at 573. And it sweeps so broadly as to allow "policemen, prosecutors, and juries to pursue their personal predilections." *Kolender v. Lawson*, 461 U.S. 352, 358 (1983). As petitioner argued below, App. 126a-127a, such a regime impermissibly "operat[es] to inhibit the exercise" of fundamental First Amendment freedoms. *Grayned*, 408 U.S. at 109.

Second, as the Idaho Court of Appeals interpreted it, the ordinance still fails to provide notice of what it prohibits. This vagueness problem lies not in whether the literal meaning of Moscow's ordinance is clear, but in whether such a meaning extends far beyond what the city could have constitutionally intended. *Cf. City of Chicago v. Morales*, 527 U.S. 41, 57 (1999) (Stevens, J., plurality opinion) ("Since the city cannot conceivably have meant to criminalize each instance a citizen stands in public with a gang member, the vagueness that dooms this ordinance is not the product of uncertainty about the normal meaning of 'loitering,' but rather about what loitering is covered by the ordinance and what is not."). Because the ordinance provides no permission mechanism, a poster has no notice that his political stickers will be treated differently than the countless other political stickers that Moscow has allowed to proliferate.

The standard reflects a person of "ordinary intelligence." *Hill v. Colorado*, 530 U.S. 703, 732 (2000). A reasonable person in Moscow would be aware of the numerous signs and other messages posted in the public square that the City has countenanced for more than a decade.

CR.104-05, App. 185a-216a. Many were advertisements for shops or events, App. 187a, 200a, forms of commercial speech that have previously triggered lesser constitutional scrutiny in some of this Court's cases, *see, e.g.*, *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 504-12 (1981). That person could thus reasonably believe that Moscow was not enforcing its ordinance given the strict scrutiny for content-based speech restrictions generally. *See, e.g.*, *Reed v. Town of Gilbert*, 576 U.S. 155, 171-72 (2015). Such a person would likewise be aware that officials cannot restrict expression because of its message or viewpoint, *see Police Dep't of City of Chi. v. Mosley*, 408 U.S. 92, 95 (1972), and that "the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others," *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984).

Thus, even an ostensibly neutral prohibition on posting must be enforced without "bias or censorship" and cannot be "applied to [individuals] because of the views that they express." *Id.* A reasonable person would expect local officials to allow access to the public square on at least as favorable terms as those who had posted other political stickers, without respect to the speaker's viewpoint. *See Shurtleff*, 596 U.S. at 258. A person of ordinary intelligence would not read a law that prohibits the posting of any "notice, sign, announcement, or other advertising matter" to ban self-evident political satire where the City had allowed other messages to proliferate via a similar form of expression. The Idaho Court of Appeals erred by construing Moscow's ordinance to the contrary.

2. Because Moscow's ordinance requires permission to post any message in the public square, it is an unlawful prior restraint. *See Lovell v. City of Griffin*, 303 U.S. 444,

451-52 (1938). The ordinance purports to require permission before posting any sign in Moscow. Prior restraints on speech are almost uniformly constitutionally invalid, as "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969).

When, as here, a regulation touches traditional public fora, such as streets, sidewalks, and other areas constituting the public square, some conditions on the time, place, and manner of speech may be allowed. But such restrictions must satisfy a rigorous three-part test under the First Amendment. *See Perry*, 460 U.S. at 45. The law must (1) be content neutral, (2) be narrowly tailored to serve a significant governmental interest, and (3) leave open ample alternatives for communication. *See Burson v. Freeman*, 504 U.S. 191, 197 (1992); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

Per the Idaho Court of Appeals, however, the ordinance is a blanket command that "one cannot 'post, paint, tack, tape or otherwise attach or cause to be attached, any" written speech on any property without permission. App. 11a. Although that reading ostensibly makes the ordinance content-neutral, the remaining elements are absent.

First, no significant governmental interest justifies a universal preapproval regime. An interest in suppressing speech is never legitimate. *See Moody v. NetChoice, LLC*, 603 U.S. 707, 740-42 (2024). This Court has recognized legitimate interests for sign regulations; for example, so long as it does so viewpoint neutrally, a city may regulate publicly posted materials to avoid aesthetic damage. *See, e.g.*, *Taxpayers for Vincent*, 466 U.S. at 805.

But Moscow never asserted such a justification for its ordinance—for good reason, as Moscow allowed countless signs to be posted for more than a decade.

Second, Moscow's ordinance leaves open no ample alternative channels for communication. This time-place-manner test is essential to ensure the free flow of information and the preservation of the right to speak freely in the public square. *See Heffron v. Int'l Soc. For Krishna Consciousness, Inc.*, 452 U.S. 640, 655 (1981). Here, the ordinance prohibits all public written expression absent permission with only the alternative of loitering with hand-held signs. That is a fundamentally different and more limited means of expression compared to posting signage or other material—it requires more than one person to distribute a message at scale, limits the duration of the expression, and eliminates the possibility of anonymous dissent. Said differently, it forecloses durable, written public dissent. And, importantly, it limits the speaker's ability to parody the government's own slogans and signage.

3. If, as the Idaho Court of Appeals believed, the ordinance is best understood as prohibiting all unauthorized signage, then the decision upholding petitioner's conviction cannot stand because it violates the First Amendment. But the Idaho Court of Appeals' ruling conflicts with this Court's precedent another way that highlights the need for review: it renders the ordinance overbroad.

The overbreadth doctrine prohibits enforcement of speech restrictions that, while having some legitimate applications, also restrain and therefore chill an intolerably large amount of protected speech. *See Broadrick v. Oklahoma*, 413 U.S. 601, 610-13 (1973). When a statute or ordinance "prohibits a substantial amount of

protected speech relative to its plainly legitimate sweep," it is overbroad. *United States v. Hansen*, 599 U.S. 762, 770 (2023) (cleaned up).

As interpreted below, the ordinance is overbroad because "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010) (citation omitted). When understood as forbidding all unauthorized messages posted in the public square, regardless of their duration or whether the speech falls into a category that the First Amendment does not protect, the ordinance prohibits broad categories of protected speech, including core political speech.

Particularly, the ordinance stifles political dissent. As discussed below, political protest lies at the heart of the First Amendment and receives particular respect and protection. Petitioner chose stickers as a medium for silent, anonymous protest after witnessing the fate that befell the members of his church who had tried to protest Moscow's COVID-19 policies in person. The First Amendment has long protected the right to speak anonymously, especially when communicating a message unpopular with the government. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-43 (1995). When an unpopular expression confronts a government policy perceived by to be authoritarian and oppressive, as petitioner believed about Moscow's COVID-19 policies, the right is all the more important. *Id.* at 342. Here, Moscow singled petitioner out despite its tolerance of countless other messages. After all, the responding police officer told petitioner's father that he disagreed with the message petitioner espoused.

The Idaho Court of Appeals made no attempt to cabin the ordinance to unprotected conduct or speech.

Moscow might regulate speech falling within categories traditionally lacking First Amendment protection, such as incitement, defamation, obscenity, and true threats. *Counterman v. Colorado*, 600 U.S. 66, 73-74 (2023). These "traditional and historical categories" of speech are deemed unprotected because they are "of such slight social value as a step to truth" that "social interest in their proscription" outweighs "any benefit that may be derived from them." *Id.* But outside those limited categories, the First Amendment severely restricts a government's ability to prohibit speech, let alone criminally. Moscow's ordinance impermissibly does so by reaching a vast array of protected expressions relative to potentially unprotected activity that a narrower ordinance perhaps legitimately might have addressed.

The First Amendment does not allow Moscow to so cavalierly trammel speech rights. Moscow cannot make laws suppressing fundamental First Amendment rights "simply because [their] exercise may be 'annoying' to some people." *Coates v. City of Cincinnati*, 402 U.S. 611, 615 (1971). "[A] function of free speech under our system of government is to invite dispute"—especially when some in power may view the content of the speech unfavorably. *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949).

C. The Idaho Court of Appeals' decision is an appropriate candidate for summary reversal.

Alternatively, the grave misapplication of First and Fourteenth Amendment principles warrants summary reversal. This Court has invoked certiorari jurisdiction to correct erroneous rulings that threaten the exercise of fundamental First Amendment rights like petitioner's. *See* SHAPIRO ET AL., SUPREME COURT PRACTICE § 4.13, at 272 (10th ed. 2013) (including First Amendment cases

among those "in which the Court seems to have granted certiorari predominantly to correct an erroneous ruling on the particular facts").

Given the Idaho Court of Appeals' interference with petitioner's fundamental speech rights, the Court should do so here. The viewpoint-discriminatory prosecution of a heretofore-unenforced criminal prohibition on unauthorized posting contravenes the First and Fourteenth Amendments as noted above. But the Idaho Court of Appeals did not have the benefit of all of this Court's most recent precedent. For instance, that court did not have the benefit of *Gonzalez*, and this Court's observations about inferences to be drawn from selective prosecution under previously unenforced laws. 602 U.S. at 655-58; *see also infra* Part II.B. The Court can remedy the disparity by granting summary reversal.

II. This Court's Intervention Is Necessary to Settle Important, Recurring Questions Vexing the Lower Courts.

This Court's intervention is further warranted because the lower courts are vexed by how to address claims at the intersection of viewpoint-discriminatory enforcement and ostensibly neutral statutes restricting speech. This Court regularly takes up issues with enforcing speech restrictions evenhandedly, and this case exemplifies the importance of uniformity in dealing with such restrictions.

A. Lower courts apply differing tests when confronting ordinances like Moscow's, resulting in inconsistent outcomes.

The Idaho courts resolved this case in a manner that materially differs from two recent federal appellate decisions confronting substantially similar ordinances and

enforcement actions. In *Frederick Douglass Foundation, Inc. v. District of Columbia*, a unanimous panel of the D.C. Circuit agreed that plaintiffs could challenge officials' viewpoint-discriminatory prosecution of anti-abortion protestors for chalking "Black Pre-Born Lives Matter" on a public sidewalk. 82 F.4th 1122, 1131 (D.C. Cir. 2023). Police declined to arrest numerous protesters in the summer of 2020 for writing "Black Lives Matter" on countless streets and sidewalks. *Id.* That Court specifically explained that it "would undermine the First Amendment's protections for free speech if the government could enact a content-neutral law and then discriminate against disfavored viewpoints under the cover of prosecutorial discretion" or protecting property. *Id.* at 1142-43. The D.C. Circuit's approach—both correct and in keeping with this Court's precedents—irreconcilably conflicts with the Idaho Court of Appeals' decision: the Idaho court rejected Wilson's comparable discrimination-based vagueness challenge because Moscow's ordinance was, in its view, "plain and unambiguous" and thus not amenable to complaints about enforcement discretion. App. 11a.

Yet the Ninth Circuit took a different approach still, recently lifting an injunction against the City of Seattle's broad ordinance that criminalizes intentionally writing, painting, or drawing on property without express permission. *Tucson v. City of Seattle*, 91 F.4th 1318, 1324 (9th Cir. 2024). The individuals in *Tuscon* were arrested for chalking political messages on sidewalks under an ordinance ostensibly aimed at the unprotected conduct of damaging property. *Id.* at 1322-23. The district court initially enjoined Seattle from enforcing it law on facial overbreadth and facial vagueness grounds. *Id.* at 1322. Given the potential legitimate applications of the

ordinance to destruction of private property, the Ninth Circuit reversed for the district court to consider vagueness as applied to the challengers' political speech. *Id.* at 1328-30. As with the D.C. Circuit, this conclusion is irreconcilable with the Idaho courts' approach, which applied Moscow's permission scheme globally regardless of whether prosecutors disfavored one message over countless others.

Other local officials also struggle with these freedoms in practice. In another similar example, the City of Burlington, Vermont, selectively enforced a scarcely used sign-ban ordinance to punish a speaker with whom it disagreed.[4] There, like here, other messages proliferated in the public square.[5] But officials disagreeing with the speaker's views about sex and gender cited him for unauthorized posting.[6] While city officials eventually dropped their prosecution last year,[7] the damage was done by the chill imposed under the ordinance. The speaker, and untold others intimidated by prospective punishment, had already been put to the intolerable choice of whether to persist in advocating for their beliefs or remain silent. This Court should not hesitate to prevent "the loss of First Amendment freedoms, for even minimal periods of time." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (cleaned up) (addressing the irreparable-harm standard).

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[4] Courtney Lamdin, *Graffiti Ordinance Sparks First Amendment Concerns in Burlingont*, SEVEN DAYS (Nov. 6, 2024), https://www.sevendaysvt.com/news/graffiti-ordinance-sparks-first-amendment-concerns-in-burlington-42210860.

[5] *Id.*

[6] *Id.*

[7] *Id.*

B. The issues presented in this case are important.

This Court has regularly intervened to correct errors that result in the infringement of First-Amendment rights. Indeed, the Court's guidance has often concerned laws that are overbroad, vague laws that facilitate viewpoint-based discrimination, and thorny questions concerning signage regulation and the public square. This Court's review of vague or overbroad speech restrictions is necessary because such laws operate via discretion and invite the kind of uneven, discriminatory enforcement that can transform a facially neutral law into inappropriate content regulation, as occurred in Moscow.

For example, in *Minnesota Voters Alliance v. Mansky*, the Court invalidated a Minnesota statute prohibiting the wearing of "a 'political badge, political button, or other political insignia'" in a polling place. 585 U.S. 1, 23 (2018). The law was unconstitutional because "the unmoored use of the term 'political' . . . combined with haphazard interpretations the State has provided" offered no "objective, workable standards" for enforcers of the law. *Id.* at 16, 21. Because "an indeterminate prohibition carries with it '[t]he opportunity for abuse, especially where [it] has received a virtually open-ended interpretation,'" the law's lack of objective standards risked "unfair or inconsistent enforcement of the ban." *Id.* at 21, 22 (citation omitted).

Importantly, this Court addresses risks from vague or overbroad laws that invite retaliation for disfavored speech. For example, in *Gonzalez*, the Court reexamined whether a plaintiff must prove the absence of probable cause in a retaliatory-arrest claim. The Fifth Circuit "thought Gonzalez had to provide very specific comparator evidence—that is, examples of identifiable people

who [acted] the same way Gonzalez did but were not arrested." 602 U.S. at 658. This Court clarified that "the demand for virtually identical and identifiable comparators goes too far." *Id.* To protect First Amendment activities, the Court held instead that victims of retaliation for those activities may proceed with evidence that "makes it more likely that an officer *has* declined to arrest someone for engaging in [the same kind of] conduct in the past." *Id.* In other words, objective evidence that "officers have probable cause to make arrests, but typically exercise their discretion not to do so"—as exists throughout Moscow—can be sufficient to show a retaliatory, selective, or discriminatory prosecution. *Id.* (quoting *Nieves*, 587 U.S. at 402).

Shurtleff is again instructive. Although the ordinance was facially content-neutral, the city had "no written policy limiting use of the flagpole based on the content of a flag." 596 U.S. at 248. Thus, after allowing "hundreds" of flags without rejection, Boston could not disallow a Christian flag. *Id.* This Court held that Boston's rejection of the Christian flag constituted unconstitutional viewpoint discrimination. *Id.* at 259.

Review is doubly essential because this Court's "First Amendment decisions have created a rough hierarchy in the constitutional protection of speech" in which "[c]ore political speech occupies the highest, most protected position." *R.A.V. v. St. Paul*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring). If the ordinance requires the public to seek permission to place written messages about essentially any matter in the public square, as Idaho's Court of Appeals determined, then the ordinance criminalizes the core political speech that this Court has long sought to protect.

The ordinance's potential for suppression of political discourse is precisely what the Free Speech Clause was intended to prevent. The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957); *see also Hill*, 530 U.S. at 787 (Kennedy, J., dissenting) ("Laws punishing speech which protests the lawfulness or morality of the government's own policy are the essence of the tyrannical power the First Amendment guards against").

This Court has accordingly treated political speech—concerning the topics of government, our representatives, the policies they enact, the values those policies advance, and how those policies shape our civil society—as all but absolutely protected from government interference. That principle, above all else, is the "fixed star in our constitutional constellation." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (Jackson, J.). These principles apply with their greatest force when the speech a government seeks to suppress is critical of that government, its policies, or its officials. After all, "it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions." *Bridges v. California*, 314 U.S. 252, 270 (1941). Thus, we have come to a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

These First-Amendment principles cannot be squared with Moscow's ordinance, which effectively gives law enforcement a veto on viewpoints in the public

square. What is more, the punishment awaiting petitioner—a mandatory essay expressing "appropriate civil discourse" and "what [petitioner] would have done differently," App. 55a—does further violence to the Free Speech Clause. This Court has regarded infringements on speech rights as an especially grave constitutional harm numerous times: those harms remain as substantial as ever, and they particularly justify this Court's review here.

C. This case presents an appropriate vehicle for this Court's review.

This case presents an appropriate vehicle to address the important and unsettled constitutional issues described above. No vehicle problems frustrate the Court's review of the questions presented. The Idaho courts rejected petitioner's alternative construction of Moscow's ordinance that would have obviated its First and Fourteenth Amendment problems. That led those courts to reach whether Moscow's prosecution of petitioner comported with the Constitution. Thus, there are no state-law impediments to addressing the First and Fourteenth Amendment questions presented, which were also preserved below and sufficiently presented for review.

1. The Idaho trial and intermediate appellate courts interpreted the ordinance to prohibit the posting of *any* written materials on public property. In so doing, they rejected petitioner's alternative, narrower interpretation of the statute that would have limited the ordinance's reach to commercial advertisements (and thus, would have excluded petitioner's conduct from the ordinance's ambit). *See* App. 22a-30a; 111a-119a.

Because the Idaho Supreme Court declined to disturb those holdings, there is no dispute as a matter of Idaho law that the ordinance encompasses petitioner's

conduct. *See West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 237 (1940) (a federal court may not disregard an intermediate state court holding "unless it is convinced ... that the highest court of the state would decide otherwise."). As this Court has instructed, even "trial court interpretations, such as those given in jury instructions, constitute 'a ruling on a question of state law that is as binding on [this Court] as though the precise words had been written into the ordinance.'" *City of Houston v. Hill*, 482 U.S. 451, 470 (1987) (citation omitted). With no state-law questions left open, the only remaining issue is whether Moscow's prosecution violated the Constitution. *See New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 361 (1989) (exercising jurisdiction when the federal claims were not "entangled in a skein of state-law that must be untangled before the federal case can proceed.").

That ruling brought Moscow's ordinance into conflict with the Constitution, as it could not be defended on the grounds that certain commercial speech may trigger lesser constitutional scrutiny. *See, e.g.*, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 553-54 (2001). Moreover, the limiting construction the state court rejected is the only arguable limiting construction relevant to this case. For example, the decision to prosecute petitioner for posting on public property confirms that countervailing private-property rights are not at issue here. True, private property owners are not entirely foreclosed from "exercising editorial discretion over speech and speakers on their property." *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 813 (2019). But Moscow did not attempt to narrow its ordinance on that basis. CR.347-51; CR.1037-43. For good reason: the law can never reflect an effort to suppress a viewpoint merely because

the government disagrees with it, *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677-78 (1998); *Perry*, 460 U.S. at 46.

2. Moreover, petitioner's constitutional issues are dispositive and sufficiently presented. There is no dispute that petitioner's criminal conviction cannot stand if Moscow violated the First or Fourteenth Amendment in prosecuting or convicting him under its sign-ban ordinance. And petitioner preserved those arguments below. In cases that arrive at this Court directly from state courts, the parties are not confined "to the same arguments which were advanced in the courts below upon a federal question there discussed." *Dewey v. City of Des Moines*, 173 U.S. 193, 197-98 (1899). Rather, there need only "be something in the case before the state court which, at least, would call its attention to the federal question" raised in this Court. *Id.* at 198-99; *see also Hemphill v. New York*, 595 U.S. 140, 161 (2022) (Thomas, J., dissenting).

Petitioner met that standard. He initially challenged Moscow's ordinance as an unlawful prior restraint. App. 176a-179a. He also raised a First Amendment challenge to Moscow's prosecution in trial court on the grounds that Moscow enforced its ordinance against him in a viewpoint-discriminatory manner. CR.121; App. 145a-150a. He then elaborated on these points before the Idaho Court of Appeals, explaining that vague laws may authorize and encourage discriminatory enforcement, App. 127a; that heightened vagueness concerns apply to speech protected by the First Amendment, App. 127a-128a; and that the arresting "officer decided to punish Mr. Wilson because he disagreed" with the content, App. 129a. Indeed, petitioner took pains to note concerns of a constitutional dimension both with Moscow's

"standardless enforcement" and prosecutorial decisions "based upon political speech." App. 128a. Petitioner argued that no one would have "fair warning that engaging in core First Amendment political speech" was "punishable by a criminal sanction." App. 134a. Petitioner then urged the issue again in the Idaho Supreme Court, in addition to challenging viewpoint discrimination. App. 90a-110a. Because the Idaho courts rejected claims that petitioner's conviction violated the First and Fourteenth Amendments, this case is an appropriate vehicle to address the questions presented.

CONCLUSION

The Court should grant a writ of certiorari and reverse the judgment of the Idaho Court of Appeals on plenary review, or to summarily reverse the decision below.

Respectfully submitted.

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FEBRUARY 2025

APPENDIX

TABLE OF APPENDICES

Page

Table of Appendices

Table of Appendices

APPENDIX A — ORDER OF THE SUPREME COURT OF THE STATE OF IDAHO, DATED OCTOBER 8, 2024

IN THE SUPREME COURT
OF THE STATE OF IDAHO

Docket No. 50802-2023

Latah County District Court No. CR29-20-2114

STATE OF IDAHO,

Plaintiff-Respondent,

v.

RORY DOUGLAS WILSON,

Defendant-Appellant.

ORDER DENYING PETITION FOR REVIEW

The Appellant having filed a Petition for Review on July 16, 2024, and a supporting brief on August 27, 2024, seeking review of the Published Opinion of the Court of Appeals released June 25, 2024; therefore, after due consideration,

IT IS ORDERED that Appellant's Petition for Review is denied.

Appendix A

Dated October 08, 2024.

By Order of the Supreme Court

/s/ Melanie Gagnepain
Melanie Gagnepain
Clerk of the Courts

APPENDIX B — OPINION OF THE COURT OF APPEALS OF THE STATE OF IDAHO, FILED JUNE 25, 2024

IN THE COURT OF APPEALS OF
THE STATE OF IDAHO

Docket No. 50802

STATE OF IDAHO,

Plaintiff-Respondent,

v.

RORY DOUGLAS WILSON,

Defendant-Appellant.

Appeal from the District Court of the Second Judicial District, State of Idaho, Latah County. Hon. John Judge, District Judge. Hon. Megan E. Marshall, Magistrate.

Decision of the district court, on intermediate appeal from the magistrate court, affirming a withheld judgment for posting on fences or buildings or poles on public property or private property without consent, affirmed.

LORELLO, Judge

June 25, 2024, Filed

Appendix B

Rory Douglas Wilson appeals from a decision of the district court, on intermediate appeal from the magistrate court, affirming a withheld judgment for posting on fences or buildings or poles on public property or private property without consent. We affirm.

I.

FACTUAL AND PROCEDURAL BACKGROUND

On October 6, 2020, at approximately 3:18 a.m., officers received a report of two males placing stickers on property in the city of Moscow downtown area. Officers observed two individuals wearing full-face coverings and saw one of them place a sticker on a city directory sign. Officers identified Wilson as one of the individuals and found in his possession stickers with the words "Soviet Moscow" and "Enforced Because We Care." Officers conducted a search and discovered eighty-nine of the same stickers had been placed throughout the city on both public and private property.

Wilson was charged with the misdemeanor crime of no posting on fences or buildings or poles under Moscow City Code (M.C.C.) § 10-1-22(A). Wilson filed a motion to dismiss arguing that: (1) the conduct at issue was not prohibited under the ordinance; (2) the ordinance was unconstitutionally vague; (3) the ordinance and the prosecution under the ordinance violated his First Amendment rights under the U.S. Constitution; and (4) the prosecution of the case violated his right to equal

protection under the Fourteenth Amendment to the U.S. Constitution. The magistrate court denied the motion. The magistrate court granted the State's motion in limine which prohibited Wilson from arguing at trial that the stickers were outside the reach of the ordinance because they were not advertising matter. The magistrate court also denied Wilson's mistake-of-fact jury instruction and excluded several of his proposed exhibits.

Following a jury trial, Wilson was found guilty and appealed. On intermediate appeal before the district court, Wilson argued: (1) the magistrate court erred in denying his motion to dismiss based upon an incorrect interpretation of the ordinance; (2) if the magistrate court's interpretation of the ordinance was correct, it was void for vagueness; (3) the magistrate court erred in denying his motion to suppress statements he made to officers; (4) the magistrate court violated his constitutional right to present a defense by prohibiting him from arguing the stickers were outside the purview of the ordinance because they were not advertising matter; (5) the magistrate court abused its discretion when it excluded his exhibits; (6) the magistrate court erred in refusing to give his mistake-of-fact jury instruction; and (7) there was insufficient evidence for the jury to find him guilty because, based on his interpretation of the ordinance, the State was required to prove the stickers he posted were advertising matter. The district court affirmed the magistrate court's decisions and concluded there was sufficient evidence to support Wilson's conviction. Wilson appeals.

Appendix B

II.

STANDARD OF REVIEW

For an appeal from the district court, sitting in its appellate capacity over a case from the magistrate court, we review the record to determine whether there is substantial and competent evidence to support the magistrate court's findings of fact and whether the magistrate court's conclusions of law follow from those findings. *State v. Korn*, 148 Idaho 413, 415, 224 P.3d 480, 482 (2009). However, as a matter of appellate procedure, our disposition of the appeal will affirm or reverse the decision of the district court. *State v. Trusdall*, 155 Idaho 965, 968, 318 P.3d 955, 958 (Ct. App. 2014). Thus, we review the magistrate court's findings and conclusions, whether the district court affirmed or reversed the magistrate court and the basis therefor, and either affirm or reverse the district court.

III.

ANALYSIS

A. Motion to Dismiss

Wilson contends the magistrate court erred in denying his motion to dismiss. First, Wilson argues that the magistrate court erred because the plain language of the ordinance provides that it only prohibits the attachment of advertising matter and the stickers he attached were not advertising matter. Alternatively, Wilson argues

the ordinance is ambiguous, the rule of lenity applies, and this Court should construe the ordinance in his favor. Wilson further argues that, even if the ordinance includes his conduct, the ordinance is unconstitutionally vague. The State responds that the lower courts correctly rejected Wilson's interpretation of the ordinance as only encompassing advertising matter. Wilson has failed to show error in the district court's decision affirming the magistrate court's rulings rejecting his challenges to the ordinance.

1. Plain Language Challenge

Wilson argues that M.C.C. § 10-1-22(A) only prohibits the attachment of advertising material. We disagree. Moscow City Code Section 10-1-22(A) provides:

> No person shall post, paint, tack, tape or otherwise attach or cause to be attached, any notice, sign, announcement, or other advertising matter to any fence, wall, building, tree, bridge, awning, post, apparatus or other property not belonging to said person without first obtaining the consent of the owner or lessee of such property or their agent(s) or representative(s). No person shall post, paint, tack, tape or otherwise attach or cause to be attached any notice, sign, announcement, or other advertising matter to any telephone or electric pole within the City.

Appendix B

Rules for the construction of ordinances are the same as those applied to the construction of statutes. *State v. Freitas*, 157 Idaho 257, 261, 335 P.3d 597, 601 (Ct. App. 2014). This Court exercises free review over the application and construction of statutes. *State v. Reyes*, 139 Idaho 502, 505, 80 P.3d 1103, 1106 (Ct. App. 2003). Where the constitutionality of a statute is challenged, we review the trial court's decision de novo. *State v. Cobb*, 132 Idaho 195, 197, 969 P.2d 244, 246 (1998); *State v. Martin*, 148 Idaho 31, 34, 218 P.3d 10, 13 (Ct. App. 2009). Where the language of a statute is plain and unambiguous, this Court must give effect to the statute as written, without engaging in statutory construction. *State v. Burnight*, 132 Idaho 654, 659, 978 P.2d 214, 219 (1999); *State v. Escobar*, 134 Idaho 387, 389, 3 P.3d 65, 67 (Ct. App. 2000). The language of the statute is to be given its plain, obvious, and rational meaning. *Burnight*, 132 Idaho at 659, 978 P.2d at 219. If the language is clear and unambiguous, there is no occasion for the court to resort to legislative history or rules of statutory interpretation. *Escobar*, 134 Idaho at 389, 3 P.3d at 67. For undefined terms in a statute, we look to dictionary definitions to provide ordinary meaning. *State v. Damiani*, 169 Idaho 348, 351, 496 P.3d 521, 524 (Ct. App. 2021). Provisions should not be read in isolation, but rather within the context of the entire statute to give effect to all words so that none will be void or superfluous. *State v. Smalley*, 164 Idaho 780, 784, 435 P.3d 1100, 1104 (2019).

The plain language of M.C.C. § 10-1-22(A) prohibits the attachment of "any notice" or "sign" or "announcement" or "other advertising matter." The use of the word "other" in the phrase reflects that while some "advertising matter"

may be prohibited within the definition of "notice," "sign" or "announcement," the ordinance also prohibits "advertising matter" not otherwise expressly prohibited. Thus, the stickers Wilson placed throughout the city did not need to constitute "advertising matter" to be subject to the prohibition in the ordinance. Because we reject Wilson's argument that the ordinance only prohibits advertising matter, we need not address his alternative argument that the ordinance is ambiguous and the ambiguity requires application of the rule of lenity.[1]

2. As-applied vagueness challenge

Wilson has failed to show M.C.C. § 10-1-22(A) is unconstitutionally vague. Appellate courts are obligated to seek an interpretation of a statute or ordinance that upholds its constitutionality. *Freitas*, 157 Idaho at 261, 335 P.3d at 601; *Martin*, 148 Idaho at 34, 218 P.3d at 13. The party attacking an ordinance on constitutional grounds bears the burden of proof and must overcome a strong presumption of validity. *See Freitas*, 157 Idaho

1. Even if the phrase "other advertising matter" modifies "notice," "sign" and "announcement," such a modification would not exclude Wilson's stickers from the purview of the ordinance. We disagree with Wilson's argument that "advertising" only applies to something commercial in nature. As noted by the district court, advertising includes matters "outside commercial sales." For example, an advertisement may be "designed to persuade or educate the public" or "call the public's attention to community events." Wilson's narrow view of "advertising" is inconsistent with the plain meaning and was properly rejected by both the magistrate court and district court.

at 261, 335 P.3d at 601. An ordinance may be challenged as unconstitutionally vague on its face or as applied to a defendant's conduct. *See Martin*, 148 Idaho at 35, 218 P.3d at 14. A vagueness challenge is predicated on the due process requirement that the statute or ordinance plainly and unmistakably provide fair notice of what is prohibited and what is allowed in language persons of ordinary intelligence will understand. *State v. Kavajecz*, 139 Idaho 482, 486, 80 P.3d 1083, 1087 (2003). Moreover, an ordinance may be void for vagueness if it invites arbitrary and discriminatory enforcement. *See Freitas*, 157 Idaho at 261, 335 P.3d at 601. An ordinance is not void for vagueness if it can be given any practical interpretation. *See id.* at 261-62, 335 P.3d at 601-02.

Wilson argues that if M.C.C. § 10-1-22(A) was read correctly by the magistrate and district courts, the "ordinance is vague for voidness as applied."[2] To succeed on an as-applied vagueness challenge, Wilson must show that the ordinance failed to provide fair notice that his conduct was prohibited or failed to provide sufficient guidelines such that police had unbridled discretion in

2. Wilson's brief contains language that suggests he is also raising a facial vagueness challenge to the ordinance based on First Amendment principles. To the extent Wilson is raising such a claim, it fails. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 20, 130 S. Ct. 2705, 177 L. Ed. 2d 355 (2010) (distinguishing between an overbreadth claim under the First Amendment and a Fifth Amendment vagueness challenge and noting that the Court's "precedents make clear that a Fifth Amendment vagueness challenge does not turn on whether a law applies to a substantial amount of protected expression").

determining whether to arrest him. *See State v. Pentico*, 151 Idaho 906, 915, 265 P.3d 519, 528 (Ct. App. 2011).

Because we conclude that the ordinance is plain and unambiguous, it clearly sets forth the prohibited conduct and does not allow unbridled discretion in enforcement, Wilson's claim that it is void for vagueness necessarily fails. *See Martin*, 148 Idaho at 36, 218 P.3d at 15 (concluding statute was not unconstitutionally vague because it clearly set forth prohibited conduct and did not allow arbitrary and discriminatory enforcement). As noted, M.C.C. § 10-1-22(A) makes clear that one cannot "post, paint, tack, tape or otherwise attach or cause to be attached, any notice, sign, announcement, or other advertising matter" in specified places without consent. That Wilson chose to place the stickers during the early morning hours while wearing a full-face covering belies his after-the-fact assertion that he was not on notice that his conduct was prohibited. Wilson's as-applied vagueness challenge fails and he has failed to show error in the denial of his motion to dismiss.

B. Right to Present a Defense

Wilson argues that the magistrate court denied him his constitutional right to present a defense when it prohibited him from arguing that he was not guilty because the stickers he placed were not advertising matter and were thereby outside the scope of the ordinance. The State responds that, because the magistrate court correctly interpreted the ordinance as applicable to Wilson's conduct, he was not denied his right to present

a defense by making an argument contrary to that interpretation. We agree with the State.

The right to present a defense is protected by the Sixth Amendment to the United States Constitution and made applicable to the states through the Due Process Clause of the Fourteenth Amendment. *State v. Ogden*, 171 Idaho 258, 272, 519 P.3d 1198, 1212 (2022); *see also Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). In a jury trial, it is for the jury to determine adjudicative facts. *State v. Adkins*, 171 Idaho 254, 256, 519 P.3d 1194, 1196 (2022). The determination of legal fact, i.e., what the law is, is unquestionably the role of the courts. *Id.* at 256-57, 519 P.3d at 1196-97.

Wilson sought to argue the definition and interpretation of the ordinance before the jury in a manner contrary to the magistrate court's interpretation of the ordinance in denying Wilson's motion to dismiss. Wilson was not entitled to circumvent the magistrate court's pretrial ruling under the guise of his right to present a defense. Wilson has failed to show his right to present a defense was violated.

C. Mistake-of-Fact Jury Instruction

Wilson contends that the magistrate court erred in refusing to instruct the jury on a mistake of fact based upon his implied-consent defense. Wilson's requested jury instruction was based on his argument that observing other materials posted in various locations around the city led him to believe that the property owners had

impliedly consented to him attaching materials. According to Wilson, this belief was a mistake of fact entitling him to a jury instruction and not a mistake of law as found by the magistrate court. The State responds that the magistrate court correctly rejected Wilson's requested jury instruction because it was not pertinent since the alleged mistake of fact did not disprove Wilson's criminal intent. We hold that Wilson was not entitled to a mistake-of-fact jury instruction in this case.

Whether the jury has been properly instructed is a question of law over which we exercise free review. *State v. Severson*, 147 Idaho 694, 710, 215 P.3d 414, 430 (2009). When reviewing jury instructions, we ask whether the instructions as a whole, and not individually, fairly and accurately reflect applicable law. *State v. Bowman*, 124 Idaho 936, 942, 866 P.2d 193, 199 (Ct. App. 1993). A trial court presiding over a criminal case must instruct the jury on all matters of law necessary for the jury's information. I.C. § 19-2132; *Severson*, 147 Idaho at 710, 215 P.3d at 430. In other words, a trial court must deliver instructions on the rules of law that are material to the determination of the defendant's guilt or innocence. *State v. Mack*, 132 Idaho 480, 483, 974 P.2d 1109, 1112 (Ct. App. 1999). Each party is entitled to request the delivery of specific instructions. *State v. Weeks*, 160 Idaho 195, 198, 370 P.3d 398, 401 (Ct. App. 2016). However, such instructions will only be given if they are "correct and pertinent." I.C. § 19-2132. A proposed instruction is not correct and pertinent if it is: (1) an erroneous statement of the law; (2) adequately covered by the other instructions; or (3) not supported by the facts of the case. *Severson*, 147 Idaho at 710-11, 215 P.3d at 430-31; *Weeks*, 160 Idaho at 198, 370 P.3d at 401.

Wilson requested a mistake-of-fact jury instruction because he contends that M.C.C. § 10-1-22(A) includes an implied knowledge element. Wilson thus contends that the State had to prove he had knowledge that he did not have consent to attach the material. Idaho Code Section 18-114 provides that, "in every crime or public offense there must exist a union, or joint operation, of act and intent, or criminal negligence." The intent required by I.C. § 18-114 is not the intent to commit a crime but, rather, the intent to knowingly perform the prohibited act. *State v. Fox*, 124 Idaho 924, 926, 866 P.2d 181, 183 (1993). Moscow City Code Section 10-1-22(A) does not expressly require any mental element; and thus, the offense only requires a general intent as provided by I.C. § 18-114.

The record reveals that Wilson placed approximately eighty-nine stickers on both public and private property and that at least some of the stickers placed by Wilson were on property containing no other posted material. Wilson's argument that he believed he had implied consent to post the materials is not supported by the facts of the case; as such, a mistake-of-fact jury instruction was not pertinent. The jury instructions that were provided fairly and accurately reflected the applicable law. Accordingly, Wilson has failed to show error in the refusal to give his proposed mistake-of-fact jury instruction.

D. Excluded Exhibits

Wilson asserts the magistrate court abused its discretion by excluding his proposed exhibits showing other material attached to property around the city.

Specifically, Wilson argues the magistrate court failed to "recognize the complete relevance" that the exhibits had "to the implied consent defense" and did not find the probative value was substantially outweighed by a danger of misleading the jury. The State responds that the magistrate court did not abuse its discretion in excluding the exhibits because the exhibits were not relevant. We hold that Wilson's proffered exhibits depicting other postings were properly excluded.

When a trial court's discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine whether the trial court: (1) correctly perceived the issue as one of discretion; (2) acted within the boundaries of such discretion; (3) acted consistently with any legal standards applicable to the specific choices before it; and (4) reached its decision by an exercise of reason. *State v. Herrera*, 164 Idaho 261, 270, 429 P.3d 149, 158 (2018).

The magistrate court correctly perceived the decision whether to admit the proposed exhibits as one of discretion and acted within the boundaries of such discretion. The magistrate court found that none of the photos offered as exhibits showed locations the same or similar to where Wilson posted his stickers. The magistrate court further found that the exhibits were only offered to show that, in surrounding areas of the city, there were other stickers posted. The magistrate court also concluded the probative value of the proffered exhibits was outweighed by the danger of misleading and confusing the issues before the jury as to whether Wilson posted the stickers without

first obtaining the consent of the owner of the property. This was not an abuse of discretion. Wilson has failed to show that the magistrate court abused its discretion by refusing to admit the exhibits.

E. Sufficiency of the Evidence

Finally, Wilson argues that, under his interpretation of the ordinance, the State failed to prove all of the elements of the crime beyond a reasonable doubt because the State failed to prove that Wilson attached some type of "advertising matter." Because we have rejected Wilson's interpretation of the statute, his sufficiency of the evidence argument necessarily fails.

IV.

CONCLUSION

Wilson has failed to show error in the decision to deny his motion to dismiss because the plain language of the ordinance prohibited Wilson's conduct and the ordinance is not unconstitutionally vague. Wilson has also failed to show his constitutional right to present a defense was violated when he was prevented from arguing his own interpretation of the ordinance at trial in a manner contrary to the magistrate court's pretrial ruling regarding the proper interpretation and application of the ordinance. Wilson has also failed to show error in the refusal to give a mistake-of-fact jury instruction, which was predicated on an implied-consent claim not

supported by the evidence, or error in the exclusion of exhibits that were irrelevant. Finally, Wilson has failed to show error in the determination that there was sufficient evidence to find the State established every element of the offense. Accordingly, the decision of the district court, on intermediate appeal from the magistrate court, affirming Wilson's withheld judgment for posting on fences or buildings or poles on public property or private property without consent, is affirmed.

Chief Judge GRATTON and Judge TRIBE, **CONCUR**.

APPENDIX C — APPELLATE OPINION IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH, FILED APRIL 5, 2023

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

Case No. CR29-20-2114

STATE OF IDAHO,

Plaintiff/Respondent,

vs.

RORY D. WILSON,

Defendant/Appellant.

Filed: April 5, 2023

APPELLATE OPINION

I. INTRODUCTION

This case addresses the applicability of Moscow City Code § 10-1-22(A) to posting stickers on City of Moscow and private property without the consent of the property owners. Rory D. Wilson ("Wilson"), Defendant/Appellant, claims the ordinance does not apply to his conduct and that he was prosecuted for violating MCC § 10-1-22(A) only because the messaging on his stickers opposed the City of

Moscow COVID-19 mask mandate. However, this case is not about free speech, the First Amendment, or violations of civil rights. Instead, this case is a straightforward application of the ordinance to the established facts.

In interpreting the ordinance, the magistrate judge found that MCC § 10-1-22 is unambiguous and covered Wilson's conduct. This Court agrees with and affirms the magistrate's ruling. The ordinance is content-neutral and applies to all types of postings, whether for a commercial purpose, a political purpose, or some other purpose.

Other issues raised in this appeal include whether Wilson was in custody for purposes of *Miranda*, whether Wilson's trial exhibits D-11 were improperly excluded, and whether the jury should have been given a mistake-of-fact instruction. This Court affirms the magistrate's rulings on each issue.

II. BACKGROUND

This is an appeal brought by Wilson. The facts of the case are not in dispute. On October 6, 2020, at around 3:18 a.m., the Moscow Police Department received a report of two college-aged males placing stickers on property in the downtown Moscow area. Tr. Vol. I, p. 72. Two officers responded on foot and observed two males wearing full face coverings. *id.* One of the males was seen "smack[ing] a City of Moscow directory sign," and officers later confirmed the male had placed a "Soviet Moscow" sticker on the sign. *Id.* One of the officers asked the males to come speak with him. *Id.* at 73. About the same time, a

third officer arrived on scene in a patrol vehicle. *Id.* The patrol vehicle's lights and siren were not activated. *Id.* At that point, one of the males, identified as Wilson's minor brother, was sent to speak with the third officer. *Id.*

While one officer spoke with the *minor*, the other two officers spoke with Wilson. They asked Wilson to identify himself. He initially refused telling the officers he did not believe he was required to identify himself. *Id.* at 74. Wilson "appeared very nervous, shaky, fidgety, and was looking over his shoulder toward the other male. . . . [The officers] believed he might run." *Id.* at 75. "The officers attempted to grab [Wilson's] arm and he tried to pull away and stiffen up akin to someone trying to resist or flee law enforcement. Ultimately [the officer] placed [Wilson] in handcuffs and ordered him to sit on the ground. He asked whether what he was doing was wrong for which he was informed he was detained and being investigated for malicious injury to property. He said he didn't think that what he was doing was illegal, and it was a form of legal protest." *Id.* at 75.

At some point while handcuffed, Wilson identified himself. Officers then asked Wilson if he would be compliant if they removed the handcuffs. Wilson agreed and the handcuffs were removed. In total, Wilson was handcuffed for about five to six minutes. *Id.* at 75.

Wilson was carrying a pail and consented to it being searched. Officers found red vinyl stickers with the words "Soviet Moscow" or "Soviet Moscow: Enforced Because We Care." *Id.* at 75-76. The same stickers were also found

in the possession of Wilson's minor brother. About 20 minutes after the officers initially contacted Wilson and his brother, their father, who was called by the officer detaining the minor, arrived on scene. *Id.* at 75-75. Both Wilson and his brother were released to their father. *Id.* at 76. Officers then searched the area and found 89 of the stickers that had been placed on City of Moscow property and private property. *Id.* at 77.

On October 10, 2020, Wilson was charged with the misdemeanor crime of No Posting on Fences or Buildings or Poles under MCC § 10-1-22(A). The case proceeded through a jury trial and Wilson was found guilty. Wilson now appeals.

Wilson contends the magistrate judge erred in denying his motion to dismiss based on an incorrect interpretation of MCC § 10-1-22. Wilson also argues that there was insufficient evidence for the jury to convict him of violating MCC § 10-1-22 because, based on his interpretation of the ordinance, the State was required to prove the stickers he posted were "advertising matter." Wilson argues, in the alternative, that if the magistrate's interpretation of the ordinance is correct, the ordinance is void for vagueness as applied.

Wilson also argues that the magistrate erred in denying his motion to suppress statements he made to officers because he was interrogated by officers without first receiving *Miranda* warnings.

Wilson additionally argues that the magistrate committed several errors at trial. First, Wilson argues that his constitutional right to present a defense was violated because he was not allowed to argue to the jury that the stickers were protected political speech under the First Amendment and not "advertising matter" and, therefore, outside the purview of the ordinance. Further, Wilson argues that his trial exhibits D-II, which depicted numerous flyers, signs, and other postings throughout downtown Moscow in October 2020, were improperly excluded. Finally, Wilson argues the magistrate improperly denied his mistake-of-fact jury instruction.

Argument on Wilson's appeal was heard on February 24, 2023. Wilson was not present but was represented by Dennis Benjamin. The State was represented by Reed Brevig, Moscow City Prosecutor's Office.

III. ANALYSIS

A. The magistrate judge did not err in denying Wilson's motion to dismiss based on the plain language of MCC § 10-1-22.

The interpretation of a statute is a question of law over which an appellate court exercises free review. *State v. Schulz*, 151 Idaho 863, 865, 264 P.3d 970, 972 (2011).

Wilson filed a motion to dismiss arguing that MCC § 10-1-22 did not prohibit him from posting the "Soviet Moscow" stickers, among other arguments. The trial court denied Wilson's motion, finding that the ordinance was

unambiguous and provided sufficient clarity that Wilson's conduct was prohibited.

MCC § 10-1-22(A), titled No Posting on Fences or Buildings or Poles, reads,

> No person shall post, paint, tack, tape or otherwise attached or cause to be attached, any notice, sign, announcement, or other advertising matter to any fence, wall, building, tree, bridge, awning, post, apparatus or other property not belonging to said person without first obtaining the consent of the owner or lessee of such property or their agent(s) or representative(s). No person shall post, paint, tack, tape or otherwise attach or cause to be attached any notice, sign, announcement, or other advertising matter to any telephone or electric pole within the City.

MCC § 10-l-22(A).

The trial court found,

> The term "'other" within the phrase, "'or other advertising matter," means further or additional, and the phrase is disjunctive; the use of "or" as opposed to "and" expresses a choice between the items listed. Thus, under MCC § 10-1-22, the subject matter to be displayed may appear as a notice or a sign or an announcement or some other advertising matter, but it doesn't

> have to encompass all . . . While there is an argument that the clause "any notice, sign, announcement, or other advertising matter," is redundant and potentially unnecessary, the intent of the ordinance and what is prohibited is clear; should a person wish to announce, make publicly known, proclaim, or otherwise call attention to a subject by affixing matter to property not belonging to them, they must first obtain permission from the owner. The plain language of MCC § 10-1-22 is unambiguous and provides sufficient clarity for a reasonable person to know what material and conduct are prohibited.
>
> Moreover, there is no requirement that the subject matter displayed by means of a notice, sign or announcement be for the commercial advertisement of "goods, services, or entities" as the Defendant asserts. Just because the Defendant claims the ordinance is ambiguous and the posted materials must include commercial advertisements, does not render it ambiguous. As discussed above, the disjunctive phrase supports a finding that the plain language of the ordinance only requires the matter be notice, sign, announcement[,] or other advertising matter.

Mem. Decision Denying Def.'s Mot. to Dismiss at 6-7.

The trial court went on to conclude that Wilson's conduct was prohibited by MCC § 10-1-22: "The Defendant elected to call attention to, publicly make known, announce, or proclaim his dissatisfaction with the mask mandate and a unity of people known as 'Soviet Moscow' who were opposed to the City of Moscow's mask mandate." *Id.* at 8.

On appeal, Wilson contends that the magistrate judge erred in denying his motion to dismiss because the plain, unambiguous language of the ordinance does not cover the charged conduct. Appellant's Br. at 3. Wilson argues he did not violate MCC § 10-1-22 because the ordinance only prohibits the posting of "advertising matter," whether notices, signs, announcements, or some other item, on property not owned by the poster without prior consent by the property owner. *Id.* at 4. Wilson alleges that "[t]he phrase 'or other advertising matter' makes clear that the notices, signs, and announcements previously listed [in the ordinance] are specific examples of types of advertisements. 'Other' is used at the end of the list to show that there are more things of the same type, without being exact about what they are." *Id.* at 5. Wilson argues that "advertising" is narrowly defined, as in Black's Law Dictionary, as "[t]he action of drawing the public's attention to something to promote its sale." As a result, Wilson contends that he did not violate the ordinance because the "Soviet Moscow" stickers were not "advertising matter" since they were not advertising anything for sale. Appellant's Br. at 4.

This Court exercises free review over the construction of MCC § 10-1-22 and over its application to the facts as

found by the trial court. *State v. Dewbre*, 133 Idaho 663, 665, 991 P.2d 388, 390 (Ct. App. 1999).

This Court employs the following principles when interpreting a statute:

> The objective of statutory interpretation is to derive the intent of the legislative body that adopted the act. Statutory interpretation begins with the literal language of the statute. Provisions should not be read in isolation, but must be interpreted in the context of the entire document. The statute should be considered as a whole, and words should be given their plain, usual, and ordinary meanings. It should be noted that the Court must give effect to all the words and provisions of the statute so that none will be void, superfluous, or redundant. When the statutory language is unambiguous, the clearly expressed intent of the legislative body must be given effect, and the Court need not consider rules of statutory construction.

Schulz, 151 Idaho at 866,264 P.3d at 973.

Here, the trial judge determined that MCC § 10-1-22 is unambiguous and that "advertising matter" does not modify "notice, sign, announcement." Mem. Decision Denying Def.'s Mot. to Dismiss at 6-7. The magistrate also found that "there is no requirement that the subject matter displayed by means of a notice, sign, or announcement be for the commercial advertisement of 'goods, services, or entities' as the Defendant asserts." *Id.*

Appendix C

This Court concurs with the magistrate judge that MCC § 10-1-22 is unambiguous and covers the conduct for which Wilson was charged.

First, the magistrate judge correctly found "[t]he term 'other' within the phrase, 'or other advertising matter,' means further or additional, and the phrase is disjunctive; the use of 'or' as opposed to 'and' expresses a choice between the items listed. Thus, under § MCC 10-1-22, the subject matter to be displayed may appear as a notice or a sign or an announcement or some other advertising matter, but it doesn't have to encompass all." Stated differently, MCC § 10-1-22 prohibits the unauthorized posting of notices, signs, announcements, or additional postings promoting the sale of something (as Wilson defines "advertising matter"). If MCC § 10-1-22 were interpreted to only apply to "matter" promoting something for sale, as Wilson suggests, the terms "notice" "sign" and "announcement" would be rendered superfluous. Simply put, MCC § 10-1-22 could have simply read: No person shall post, paint, tack, tape or otherwise attached or cause to be attached, any advertising matter. Instead, the magistrate's interpretation of the statue gives effect to every word in the ordinance.

Second, even if Wilson is correct and "advertising matter" modifies the terms "notice, sign, announcement," this Court disagrees with Wilson's argument that the ordinance only covers "advertising matter" aimed at selling something. Such an interpretation is at odds with the plain, ordinary meaning of advertising. "Advertising" is "the techniques and practices used to bring products,

services, *opinions*, or *causes to public notice for the purpose of persuading the public to respond in a certain way toward what is advertised.* Most advertising involves promoting a good that is for sale, but similar methods are used to encourage people to drive safely, to support various charities, or to vote for political candidates, among many other examples." *Advertising*, Encyclopedia Britannica, http://britannica.com/advertising (last visited February 24, 2023) (emphasis added); *see also Advertising Definition*, Merriam-Webster.com, http://merriam-webster.com/dictionary/advertising (last visited March 31, 2023) ("advertising: *the action of calling something to the attention of the public* especially by paid announcements.) (emphasis added); *see also Advertising Definition*, Dictionary.com, http://dictionary.com/browse/advertising (lasted visited March 31, 2023) ("advertising 1 the act or practice of *calling public attention to one's product, service, need, etc.*, especially by paid announcements in newspapers and magazines, over radio or television, on billboards, etc."); *but see* ADVERTISING, Black's Law Dictionary (11th ed. 2019) ("advertising. 1. The action of drawing the public's attention to something to promote its sale."). While the definition of "advertising" in Black's Law Dictionary is narrow, most sources, which are arguably more widely available and used by the public, define "advertising" broadly and encompass matter outside commercial sales.

In ordinary, plain, everyday exchanges the term "advertisements" or "advertising" is often used to announce something that is not commercial or for sale. For example, "political ads" are a common form of advertising

not designed to sell something but are instead designed to persuade or educate the public. Other examples are advertisements, either flyers or posters, on television or the radio, used to call the public's attention to community events (i.e., a Fourth of July firework show, a county fair, a high school performance). Thus, "advertising matter" is not limited to advertisements for commercial sale.

As the magistrate judge found, "what is prohibited [by MCC § 10-1-22] is clear; should a person wish to announce, make publicly known, proclaim, or otherwise call attention to a subject by affixing matter to property not belonging to them, they must first obtain permission from the owner." Mem. Decision Denying Def.'s Mot. to Dismiss at 7. There is nothing in the ordinance that prohibits only "notice[s], sign[s], announcement[s], or other advertising matter" that promote the sale of something, as Wilson argues. Instead, the ordinance is content-neutral. No matter what one wishes to post about by sign, notice, announcement, or other advertising matter, whether goods for sale, a political purpose, or to bring attention to an event or opinion, the poster must first obtain permission from the property owner.

Wilson argues that the magistrate's interpretation renders the word "other" void or superfluous. This argument is again based on Wilson's belief that "advertising matter" encompasses only the promotion of something for sale and modifies "notice, sign, announcement." However, the magistrate correctly found that MCC § 10-1-22 covers subject matter displayed as a notice or a sign or an announcement or some other advertising matter and

is not limited to commercial advertisements of "goods, services, or entities." Stated differently, any notices, signs, announcement, or other matter "used to bring products, services, opinions, or cause to public notice for the purpose of persuading the public to respond in a certain way" require prior approval of a property owner. *Advertising*, Encyclopedia Britannica, http://britannica.com/advertising (last visited February 24, 2023). This is exactly what the magistrate found: "should a person wish to announce, make publicly known, proclaim, or otherwise call attention to a subject by affixing matter to property not belonging to them, they must first obtain permission from the owner. Thus, the magistrate's interpretation does not render the word "other" superfluous.

The magistrate did not err in denying Wilson's motion to dismiss.

B. There was sufficient evidence for the jury to find Wilson in violation of MCC § 10-1-22.

Wilson argues that "[u]nder the correct reading of the ordinance, the state was required to prove that Mr. Wilson attached some type of advertising matter. . . . The Soviet Moscow stickers are not advertising matter of any type, as they do not attempt to sell anything." Appellant's Br. at 8. Thus, Wilson argues the State failed to establish every element of the ordinance beyond a reasonable doubt.

This argument fails for the reasons articulated above. First, someone can violate the ordinance by posting a sign or a notice or an announcement or advertising

matter. Further, even if "advertising" does modify the other terms in the ordinance, "advertising" is not limited to commercial sales. Instead, "advertising" broadly encompasses "techniques and practices used to bring products, services, opinions, or causes to public notice for the purpose of persuading the public to respond in a certain way toward what is advertised." *Advertising*, Encyclopedia Britannica, http://britannica.com/advertising (last visited February 24, 2023). This includes political advertisements and opinion advertisements. Thus, MCC § 10-1-22 prohibits "'post[ing], paint[ing], tack[ing], tap[ing] or otherwise attach[ing] or caus[ing] to be attached, any notice, sign, announcement, or other advertising matter [to bring products, services, opinions, or causes to public notice for the purpose of persuading the public to respond in a certain way toward what is advertised] . . . without first obtaining the consent of the owner or lessee of such property or their agent(s) or representative(s)." Wilson's posting of stickers is clearly covered by MCC § 10-1-22. The State was not required to prove the stickers were attempting to sell anything.

There was sufficient evidence to prove every element of the offense charge beyond a reasonable doubt.

C. The magistrate judge did not err in finding that MCC § 10-1-22 is unambiguous and not unconstitutionally vague.

When an appellate court considers a claim involving the constitutionality of a statute, it reviews the trial court's ruling *de novo* since it involves purely a question of law. *State v. Cobb*, 132 Idaho 195, 197, 969 P.2d 244, 246 (1998).

Appendix C

"The void for vagueness doctrine is an aspect of due process requiring that the meaning of a criminal statute be determinable." *Id.* "A statute is void for vagueness if it fails to give adequate notice to people of ordinary intelligence concerning the conduct it proscribes, or if it invites arbitrary and discriminatory enforcement." *Id.* "A statute should not be held void for [vagueness] if any practical interpretation can be given it." *Id.* There is a strong presumption that a statute is constitutional, and an appellate court is obligated to seek an interpretation of a statute that upholds its constitutionality. *Id.*

> A statute may be challenged as unconstitutionally vague on its face or as applied to a defendant's conduct. To succeed on an "as applied" vagueness challenge, a complainant must show that the statute, as applied to the defendant's conduct, failed to provide fair notice that the defendant's conduct was proscribed or failed to provide sufficient guidelines such that the police had unbridled discretion in determining whether to arrest him.

State v. Martin, 148 Idaho 31, 35,218 P.3d 10, 14 (Ct. App. 2009) (citation omitted).

Here, the magistrate judge reasoned that,

> The intent of MCC § 10-1-22 is clear; if an individual does not have prior permission from the property owner, they may not attach a notice, sign, announcement, or other advertising matter onto someone else's

property. The statute provides fair notice that when a person affixes matter to property, but does not obtain 'the consent of the owner or lessee of such property or their agent(s) or representative(s)' under subpart (A) or 'prior approval, in writing, from the governmental entity owning or controlling such property or public right-of-way' under subpart (8), he is in violation of the ordinance. Persons of ordinary intelligence can understand the plain language. The ordinance is not void for vagueness if it can be given any practical interpretation. MCC § 10-1-22 identifies a core of circumstances to which it unquestionably can be constitutionally applied, such as the facts in this case where an individual affixes stickers to property not belonging to him without the prior written approval of the consent of the property owner.

Further, the ordinance does not allow law enforcement unbridled discretion to arrest. Law enforcement may enforce the ordinance when an individual posts the subject material to property not belonging to them without first obtaining consent or written permission. It's that simple. If the individual does have consent or written permission, then there is no action to be taken by law enforcement, but if they do not, then law enforcement may utilize their enforcement discretion to arrest. Therefore, MCC § 10-1-22 is not unconstitutionally vague on its face.

Appendix C

The Defendant next argues MCC § 10-1-22 is unconstitutionally vague as applied to the Defendant's conduct. In order to prove this, the Defendant must show that the statute failed to provide fair notice that his conduct was prohibited or failed to provide sufficient guidelines such that police had unbridled discretion in determine whether to arrest him. First, the Defendant has failed to demonstrate how he was not put on notice that such conduct was prohibited. The ordinance is unambiguous. It is misguided for the Defendant to argue that because other people have posed similar material on the same or similar locations, but haven't been prosecuted, that that somehow makes his actions legal or that he didn't have notice that such conduct was prohibited. It is the Defendant's responsibility to know the law and abide by it. Any reasonable person in the Defendant's position would understand affixing stickers or attaching any other matter to property not belonging to them, requires permission from the property owner. Should they not get permission, they may be subject to prosecution under this ordinance. Also, MCC 10-1-22 is located within the 'Police Regulations' title of Moscow City Code where criminal penalties are outlined. The plain language of MCC 10-1-22 provides the Defendant sufficient and fair notice that his actions on October 6, 2022 were prohibited.

Lastly, the Defendant argues that because the State has not prosecuted anyone else under this ordinance and law enforcement didn't immediately cite or arrest the Defendant, but instead, consulted the prosecutor before issuing a citation, that the ordinance allowed for unbridled police discretion. The prosecuting attorney has broad discretion in whether to prosecute a case or not. For purposes of a vagueness challenge, it does not matter whether the State has previously prosecuted a defendant under this ordinance. Prosecutorial discretion is separate from whether the plain language of an ordinance allows for unbridled law enforcement discretion to arrest. As previously stated, the language does not leave open any room for unbridled law enforcement discretion – they can only enforce the ordinance if a person posts on property not belonging to him without prior permission. Here, the Defendant didn't attempt to get permission to post these stickers. Instead, he went out at approximately 3:00 a.m. under the color of night with a full face covering and proceeded to place stickers on approximately eighty nine (89) different locations. These actions appear quite contrary to someone who was acting under the belief that they either had permission or were just putting stickers up around Moscow without knowledge of the law. The Defendant's conduct falls within the core circumstances contemplated under MCC § 10-1-22. The ordinance provides

> fair notice that the Defendant's conduct was prohibited and it does not allow for unbridled law enforcement discretion – in fact, law enforcement utilized their limited discretion to not arrest the Defendant. For these reasons, MCC § 10-1-22 is not unconstitutionally vague as applied to the Defendant.

Mem. Decision Denying Def.'s Mot. to Dismiss at 11.

On appeal, Wilson argues that MCC § 10-1-22 is void for vagueness as applied because 1) there has never been a prosecution under the ordinance in the entire twelve years of its existence, 2) there were many other violations of the ordinance visible on a single day as shown by photographs depicting posting for commercial businesses, lost cats and dogs, and political messages on both City of Moscow property and private property in downtown Moscow, and 3) there was evidence of selective prosecution based on personal text messages the prosecutor sent calling members of Wilson's church "religious idiots," "religious zealots," and "nuts." Wilson asserts that the average person would understand "or other advertising matter" to mean that any notice, sign, or announcement must be advertising matter of a specific type (i.e., a commercial type) and that reading the ordinance to cover notices, signs, and announcements which are not advertisements does not give the reader fair warning that such postings are punishable by a criminal sanction.

As discussed above, MCC § 10-1-22 is unambiguous. The plain, ordinary language of the ordinance, as applied

to Wilson's conduct, provided fair notice that posting 89 stickers on City and private property without prior consent of the property owners was unlawful. If Wilson believed his conduct was lawful and not prohibited, it is hard to understand why Wilson chose to post the stickers in the middle of the night while wearing a face covering.

Further, the ordinance provided sufficient guidelines so that law enforcement did not have unbridled discretion in determining whether to arrest or cite Wilson. Wilson asserts he was only cited and prosecuted under the ordinance because of the content of the "Soviet Moscow" stickers. However, such an argument, and Wilson's arguments regarding the lack of prior prosecutions and the numerous postings in downtown Moscow, fail to consider the circumstances of this case. Wilson and his brother were postings their stickers at 3:18 a.m., they both wore full face coverings, and they were reported to the Moscow Police Department. When police arrived, they investigated. At least one officer saw one of the brothers "smack a City of Moscow directory sign" with a sticker, Wilson and his brother were both found in possession of stickers, and officers ultimately found 89 stickers that had already been posted in various locations. Essentially, Wilson and his brother were caught in the act. Ultimately, law enforcement did exercise their discretion to not arrest Wilson on October 6, 2020, but instead to release him to his father. However, a few days later, after consulting with the prosecutor's office, law enforcement exercised their discretion and cited Wilson for violating MCC § 10-1-22. As the magistrate found, "[l]aw enforcement may enforce the ordinance when an individual posts the subject material

to property not belonging to them without first obtaining consent or written permission. It's that simple." Mem. Decision Denying Def.'s Mot. to Dismiss at 10. If Wilson had established that he had the consent or permission of the property owners to post stickers to their property, law enforcement would not have had any authority to cite him. Further, as to Wilson's arguments regarding the lack of prior prosecutions and the numerous other postings downtown, Wilson has not shown that any of the other signs, notices, or advertisements were posted under similar circumstances or that the other posters did so without permission of property owners.

The magistrate did not err in finding that MCC § 10-1-22 is not unconstitutionally vague, either on its face or as applied.

D. The magistrate judge did not err in declining to suppress Wilson's statements to law enforcement.

When a decision on a motion to suppress is challenged, an appellate court accepts the trial court's findings of fact if they are supported by substantial and competent evidence, but freely reviews the application of constitutional principles to the facts as found. *State v. Wheeler*, 149 Idaho 364, 370, 233 P.3d 1286, 1292 (Ct. App. 2010).

Wilson argues that he was in custody when he was interrogated. Because he was in custody, officers were required to give him *Miranda* warnings, which they did not do. Thus, Wilson argues his statements to law enforcement should have been suppressed.

Appendix C

Following a suppression hearing, the magistrate found:

> The Court find[s] that [the minor] and Rory Wilson were not in custody for purpose of *Miranda.* The law enforcement contact in this case occurred in the early morning hours on a well-lit public street comer in downtown Moscow. When officers responded to the call, suspicious college-aged males placing stickers up around Moscow, they came in contact with two males matching the description with full-face coverings akin to ski masks with only their eyes showing and one with his hand in a pail he was carrying.
>
> It is unclear from the record at what point in the interaction, if any, that the males removed their face coverings. Officer[s] had reasonable suspicion based upon information received from dispatch and their own observations to temporarily detain the males for further inquiry.
>
> During the detention, there were three officers present. While the males were separated so as not to question them together, as both were suspects, they were in close proximity and eye and earshot of one other [sic].
>
> . . .

Appendix C

Rory was not in custody for purpose of *Miranda.* He was placed in handcuffs for approximately five to six minutes. There's no dispute about that. He was informed he was only detained. The handcuffs alone does not rise to the level of formal arrest and the cases hold that.

In this case, he was temporarily handcuffed because he refused to identify himself, and it appeared to law enforcement at that time that he might flee the scene.

Nonetheless, he was released from the handcuffs once he identified himself and assured law enforcement that he would comply. He was never taken to the police station. No service weapons were drawn. The majority of the contact between Officer Nunes was with Rory. Sergeant Gunderson, though, was moving between [the minor's] location and Rory's location and across the street to look at the directory sign.

So the presence of law enforcement was, while there was three altogether with two suspects, there ultimately were two suspects with one-on-one law enforcement contact while sergeant Gunderson was involved in one way or another.

The detention was temporary. It was limited in duration. Officer Nunes did not use coercive conduct. And even though Rory was an adult, he was released to his father – or released once Nathan Wilson arrived on scene.

Appendix C

. . .

> And, again, his inquiry to the officers at the time as far as whether or not he needed to provide his name, additional inquiry saying that he didn't believe what he was doing was wrong or illegal, invites some knowledge that he was able to communicate with law enforcement and could have terminated any contact if he so chose. So viewing the facts and circumstances, Rory was not in custody for purpose of *Miranda*.
>
> Last, any statements made by [the minor] and Rory were voluntary, made during an investigative detention, and were not in violation of their Fifth Amendment rights. The motion to suppress will be denied.

Tr. Vol. I at 83-90.

On appeal, Wilson asks this Court to reverse the order denying his motion to suppress statements, vacate his conviction, and remand for a new trial. Notably, Wilson does not dispute the magistrate's factual findings, or the conclusion that officers had reasonable suspicion to conduct an investigative detention. Wilson only takes issue with the finding that he was detained instead of in custody.

There is not a bright-line test for determining when a seizure "crosses the line from an investigative detention to a full-fledged arrest." *State v. Maahs*, No. 49270, 2023 WL 2375797, at *6 (Idaho Mar. 7, 2023).

> Instead, common sense and ordinary human experience must govern over rigid criteria. An arrest is characterized as a full-scale seizure of the person requiring probable cause. In contrast, [a]n investigative detention is characterized as a seizure of limited duration which, when supported by a reasonable suspicion of criminal activity, falls within a judicially created exception to the probable cause requirement. A determination of whether a seizure amounts to an arrest is measured under the totality of the circumstances.

Id. (internal citations and quotation marks omitted).

Factors courts should consider in determining whether an investigative detention or an arrest has occurred are: 1) length of the stop, 2) location of the stop, 3) seriousness of the crime, 4) conduct of the suspect during the encounter, 5) the reasonableness of the officer's conduct and use of force, including the use of handcuffs, and 6) the law enforcement purpose served by the stop. *Id.* Importantly, "an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Id.* (quoting *Florida v. Royer*, 406 U.S. 491, 500, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983)).

Here, the magistrate judge did not err in concluding that the circumstances surrounding Wilson's interaction

with law enforcement amounted only to an investigatory detention. First, the detention was temporary and lasted only about 20 minutes until Wilson's father arrived. Second, Wilson was detained in a well-lit area in downtown Moscow. The area was not secluded. During the entirety of the stop, Wilson and his minor brother were in earshot of each other and could see one another. Third, the conduct being investigated, posting of stickers, was not serious and the facts, as found by the magistrate, demonstrate the officers acted proportionate to the crime in their response. Fourth, Wilson's conduct, refusing to identify himself, acting very nervous, shaky, fidgety, and looking over his shoulder toward his brother, during the initial interaction with law enforcement lead officers to believe he might run. Tr. Vol I at 75. "The officers attempted to grab [Wilson's] arm and he tried to pull away and stiffen up akin to someone trying to resist or flee law enforcement." *Id.* Because of Wilson's conduct, he was placed in handcuffs for five to six minutes. Such show of force by the officers, in light of Wilson's conduct, was reasonable. The officers never drew their weapons, and the handcuffs were removed as soon as Wilson agreed to comply with the officer's requests. Finally, the law enforcement purpose served by the stop was to investigate the report of property being stickered, and to put an end to the conduct. As soon as Wilson's father arrived, Wilson was released.

The totality of the circumstances demonstrates that Wilson was not arrested but was only temporarily detained while officers investigated the report they had received about college-aged males placing stickers throughout

downtown Moscow. The detention was temporary, did not last any longer than was necessary for law enforcement to investigate, and the investigation applied the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time.

The magistrate did not err in finding that Wilson was not arrested. Because *Miranda* warnings are only required before interrogating a suspect who is in custody ("a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest"), officers were not required to *Mirandize* Wilson before questioning him. *State v. James*, 148 Idaho 574, 576, 225 P.3d 1169, 1171 (2010) (internal quotation marks and citations omitted). The magistrate did not err in declining to suppress Wilson's statements to officers.

E. The magistrate judge did not err in prohibiting Wilson from arguing to the jury that the stickers were political speech and not "advertising matter" and were, therefore, outside the scope of MCC § 10-1-22.

As discussed above, the magistrate judge correctly held that MCC § 10-1-22 covered Wilson's conduct. MCC § 10-1-22 is unambiguous and does not prohibit only postings that are commercial in nature. It is a content-neutral ordinance that covers postings of all types. Thus. it would have been improper for Wilson to argue to the jury that MCC § 10-1-22 does not apply to "political speech." Such an argument is a question of law that was properly decided by the magistrate, not the jury. The

magistrate did not err by not allowing Wilson to argue his interpretation of the ordinance to the jury.

F. The magistrate did not abuse its discretion in excluding Wilson's trial exhibits D-II nor did the magistrate err in denying Wilson's mistake-of-fact instruction.

The issues addressed in this section are distinct, yet related. At trial, Wilson wished to put on an "implied consent defense." Wilson wanted to argue to the jury that he believed he had implied consent to post the "Soviet Moscow" stickers and such a belief was a mistake of fact that excused him from criminal liability. In support of this defense, Wilson sought to introduce Exhibits D-II, which "are photographs of signs, stickers, and other materials that were posted around downtown Moscow at the same time as the alleged conduct in this case." Appellant's Br. at 20. Essentially, Wilson argued that because of the various other postings downtown, any reasonable person would believe they had implied consent from the property owners to post notices, signs, announcements, or other advertising matter. Wilson also requested the trial court give a mistake-of-fact jury instruction. The magistrate judge excluded Wilson's exhibits D-II and denied his request for a mistake-of-fact instruction. Wilson appeals both rulings.

a. Mistake-of-fact instruction.

An appellate court exercises free review in determining "[w]hether jury instructions fairly and adequately

present the issues and state the applicable law." *State v. Paulson*, 169 Idaho 672, 675, 501 P.3d 873, 876 (2022). "[T]he standard of review of whether a jury instruction should or should not have been given is whether there is evidence at trial to support the instruction, and whether the instruction is a correct statement of the law." *Id.* (quoting *Mackay v. Four Rivers Packing Co.*, 151 Idaho 388,391,257 P.3d 755, 758 (2011)).

MCC § 10-1-22(A) makes postings on private or City property a crime if done "without first obtaining the consent of the owner or lessee of such property or their agent(s) or representative(s)." Wilson argues that he believed he had "implied consent" to post and therefore mistake of fact was an available defense to the allegation that he violated MCC § 10-1-22(A).

The mistake of fact defense is authorized by I.C. § 18-201, which states, in part:

> All persons are capable of committing crimes, except those belonging to the following classes:
>
> 1. Persons who committed the act or made the omission charged, under an ignorance or mistake of fact which disproves any criminal intent.

I.C. § 18-201.

Neither party contests that a violation of MCC § 10-1-22 is a general intent crime. "A general criminal intent

requirement is satisfied if it is shown that the defendant knowingly performed the proscribed acts." *State v. Diaz*, 170 Idaho 79, 507 P.3d 1109, 1118 (2022). Mistake of fact is an available defense to some general intent crimes "when knowledge [is] recognized as a required element of the offense, even though the crime may be characterized as a 'general intent' crime." *Id.* "Thus, a mistake of fact defense is available to negate the intent element in a limited subset of cases." *Id.* Stated differently, "a mistake of fact defense is available only when the offense is one where specific criminal knowledge is an element of the crime. When such knowledge is not an element of the offense, the lack of knowledge or mistake of fact surrounding that element is irrelevant." *Id.*

To put is simply,

> [The mistake of fact defense] is merely a restatement in somewhat different form of one of the basic premises of the criminal law. Instead of speaking of . . . mistake of fact . . . as a defense, it would be just as easy to note simply that the defendant cannot be convicted when it is shown that he does not have the mental state required by law for commission of that particular offense.

Id.

Here, MCC § 10-1-22(A) makes postings on private or City property a crime if done "without first obtaining the consent of the owner or lessee of such property or their

agent(s) or representative(s)." Wilson was not attempting to argue that he believed he had "first obtain[ed] the consent of the owner" before posting his stickers because, for example, he had spoken to someone he believed had the authority to consent to the postings who gave him the go ahead. Instead, Wilson was attempting to argue that he believed he had "implied consent" to post because he saw numerous other postings in the area.

MCC § 10-1-22(A) requires "first obtaining the consent." Similarly, MCC § 10-1-22(B) does not allow notices, signs, announcements, or other advertising matter to be posted on public property or public right-of-way without "prior approval, in writing, from the governmental entity owning or controlling" such property. *Schulz*, 151 Idaho at 866, 264 P.3d at 973 ("The statute should be considered as a whole."). It is clear from the plain, unambiguous language of MCC § 10-1-22, that express consent prior to posting is what is required. Thus, Wilson's belief that he had implied consent and that was enough to not run afoul of MCC § 10-1-22(A) is a mistake of law. Wilson made no showing that he spoke with anyone claiming to have the authority to consent to his postings prior to placing 89 stickers on property belonging to others. Such a showing would have likely warranted a mistake of fact defense.

The magistrate judge correctly concluded that what Wilson was attempting to argue was a mistake of law and not a defense to the crime charged. Wilson did not present any evidence at trial to support a mistake-of-fact instruction. Giving a mistake-of-fact instruction based on

Wilson's belief that he had implied consent would have been an improper statement of the law.

b. Exhibits D-II.

"When reviewing the trial court's evidentiary rulings, this Court applies an abuse of discretion standard." *State v. Hall*, 163 Idaho 744, 773, 419 P.3d 1042, 1071 (2018) (internal quotation marks and citation omitted). "The trial court's broad discretion in admitting evidence will only be disturbed on appeal when there has been a clear abuse of discretion." *Id.* (internal quotation marks and citation omitted). "The Court determines whether the district court abused its discretion by examining: (1) whether the court correctly perceived the issue as one of discretion; (2) whether the court acted within the outer boundaries of its discretion and consistently within the applicable legal standards; and (3) whether the court reached its decision by an exercise of reason." *Id.* (internal quotation marks and citation omitted).

Wilson argued the exhibits were relevant to his implied consent defense because they demonstrated that "any reasonable person in his position would have believed that consent had generally been given for similar postings to be placed in downtown Moscow." Resp. to State's Mot. in Limine at 6. Essentially. Wilson argued because of the various other postings in downtown Moscow he believed he had implied consent to post the "Soviet Moscow" stickers and exhibits D-11 were relevant to proving that defense to the jury. "[W]e submit that provided that the evidence would – would allow for the jury or raises an issue of a

mistake of fact defense, then those exhibits, of course, then become relevant and the jury instruction that we request on mistake of fact should be – should be given." Tr. Vol. II at 247.

The magistrate judge rejected Wilson's argument finding 1) that Wilson's argument did not raise a mistake of fact defense, but instead was a mistake of law issue that was not a defense to the charge, and 2) that the probative value of the exhibits was outweighed by the danger of misleading and confusing the jury on the issues in Wilson's case.

On appeal, Wilson argues the magistrate judge abused her discretion "because the evidence was relevant to the knowledge element of the ordinance." Appellant's Br. at 22. Wilson alleges that the ordinance has an "implied knowledge element" and that the exhibits depicting various postings downtown "made it less likely that Mr. Wilson knew he was acting without consent" and "more likely that Mr. Wilson believed there was implied consent to post because so many others had done so before him." *Id.* Wilson continues to argue that his belief that he had implied consent is a mistake of fact, not a mistake of law.

As outlined above, Wilson's "implied consent defense" was based on a mistake of law, not a mistake of fact. Thus, Wilson's exhibits D-II were not relevant to proving any element of the ordinance. The fact of other postings in downtown Moscow has no relevance to whether Wilson violated the ordinance by posting without consent, and, as the magistrate found, there was a risk that admitting

such exhibits would mislead and confuse the jury. The magistrate judge did not abuse her discretion is excluding Wilson's exhibits D-II. The magistrate (1) perceived the issue as one of discretion; (2) acted within the boundaries of her discretion and consistently within the applicable legal standards; and (3) reached her decision by an exercise of reason.

IV. CONCLUSION

The magistrate did not err in denying Wilson's motion to dismiss based on the interpretation of MCC § 10-1-22. The ordinance is unambiguous and covers Wilson's conduct. Based on the plain, unambiguous language of MCC § 10-1-22, there was sufficient evidence presented for the jury to find Wilson guilty of violating MCC § 10-1-22.

The magistrate did not err in holding that MCC § 10-122 is not unconstitutionally vague.

The magistrate did not err in not allowing Wilson to argue to the jury that he was not guilty because MCC § 10-1-22 applies only to advertisements for the sale of goods or services. Such an argument is a question of law for the court, not the jury.

The magistrate did not err in denying Wilson's motion to suppress. Wilson was not in custody for purposes of *Miranda.* Instead, he was legally temporarily detained, based on reasonable suspicion, while law enforcement investigated.

The magistrate did not err in denying Wilson's request for a mistake-of-fact instruction. Wilson did not present any evidence at trial to support a mistake-of-fact instruction. Giving a mistake-of-fact instruction based on Wilson's belief that he had implied consent to post his stickers would have been an improper statement of the law since such an argument is based in a mistake of law, not a mistake of fact.

Finally, the magistrate did not abuse her discretion in excluding Wilson's exhibits D-II at trial. The exhibits are irrelevant to whether Wilson violated MCC § 10-1-22, and likely would have misled and confused the jury.

For these reasons, the magistrate's decisions are affirmed. The case is remanded to the magistrate court for further proceedings consistent with this opinion.

Dated this 5th day of April 2023.

/s/ John C. Judge
John C. Judge
District Judge

APPENDIX D — JUDGMENT OF THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH, FILED MAY 16, 2022

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

Case No. CR29-20-2114
Citation No. 61831
Agency: Moscow Police Department

STATE OF IDAHO,

vs.

RORY DOUGLAS WILSON
1030 GREEN SEA LANE
MOSCOW, ID 83843

WITHHELD JUDGMENT

Event Code: ORWJ

DOB: 2002 DL#: ID-*****453H

Count	Charge Desc	Disposition	Statute I. C. §
1	Posting on Fences or Buildings or Poles on Public Property or Private Property without Consent	Guilty	M657-10-1-22

Appendix D

DEFENDANT WAS: ☒ Present ☐ Not present ☒ Was represented by counsel ☐ Waived right to counsel

☐ **DEFENDANT** was advised of all constitutional rights and penalties per ICR 5, 11, IMCR 5(f) and 6(c), AND knowingly, voluntarily, and intelligently waived the following rights: right against compulsory self-incrimination, right to confront and cross-examine witnesses, right to a jury trial and any defenses to the charge(s).

COURT ENTERS WITHHELD JUDGMENT AFTER: ☐ Voluntary Guilty Plea ☒ Trial: Found Guilty ☐ Count(s) _____ Dismissed upon State's motion

☐ **DEFENDANT IS ORDERED TO SERVE JAIL TIME AS FOLLOWS:**

Count ____:____ days ____ Credit for time served

☐ ___ hours of community service can be completed by ___ in lieu of ___ days in jail. Community service is to be overseen by Latah County Adult Misdemeanor Probation. and the defendant must pay $0.60 per hour in Workman's Comp prior to participating in community service. Court ordered if the defendant does not file proof of completion of community service with the Clerk's Office by _____, then the defendant must report to jail on _____, and will be released on _____.

☐ **Report to Jail** on _____ to be released on _____.

☐ Good Time and Work Release authorized at the discretion of the Latah County Sheriff.

☒ **DEFENDANT SHALL PAY:** $257.50 due today or due by June 30, 2022. If no action is taken by June 30, 2022, your balance may be sent to a collections agency.

☐ Reimburse Latah County for cost of court-appointed counsel $_____ by _____.

☐ Restitution $ 186.80 by June 30 2022. ☒ Prosecutor to submit Order of Restitution within 30 days.

☒ **PROBATION ORDERED:**

☒ Unsupervised Probation until August 13, 2022, with the following terms and conditions:

☒ Notify Court of change of address within 10 days of the change.

☒ Violate no Federal, State, or local laws greater than a traffic infraction.

☒ Pay all fines, costs, reimbursements and restitution. All amounts owing must be paid prior to being discharged from probation.

☒ Other: Write a 3-5 page paper on what appropriate civil discourse is, what vou would have done differently in this case, and file with the Court by June 30, 2022.

Appendix D

Defendant is notified of the right to appeal this withheld judgment within 42 days of today and the right to court-appointed counsel to assist in the appeal.

By signing this withheld judgment, Defendant has read and fully understands and accepts all conditions, regulations, and restrictions under which judgment is withheld and under which Defendant is being granted probation. Defendant will abide by and conform to them strictly, and fully understands that Defendant's failure to do so may result in the revocation of probation and imposition of sentence. If Defendant has satisfactorily complied with this withheld judgment, Defendant may appear before the Court at the expiration of the probationary period to request their guilty plea be withdrawn and the case dismissed.

By signing this withheld judment, Defendant acknowledges and accepts the above terms and conditions.

In open court 5/16/22
Accepted by Defendant Date

/s/ Megan E. Marshall 5/16/22
Judge # 424 Date

APPENDIX E — MEMORANDUM IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH, FILED JUNE 18, 2021

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

Case No. CR29-20-2114

STATE OF IDAHO,

Plaintiff,

vs.

RORY WILSON,

Defendant.

Filed: June 18, 2021

MEMORANDUM DECISION DENYING DEFENDANT'S MOTION TO DISMISS

This matter came on for hearing on April 16, 2021 on the Defendant's Motion to Dismiss. The hearing was conducted via Zoom pursuant to the Idaho Supreme Court order *In Re: Emergency Reduction in Court Services and Limitation of Access to Court Facilities* entered on October 8, 2020. The State was present on Zoom, represented by Liz Warner, City of Moscow Prosecutor.

The Defendant was not present. Samuel Creason of Creason, Moore, Dokken & Geidl, PLLC, was present on Zoom on behalf of the Defendant. The court heard the testimony of witnesses and received certain exhibits into evidence, and has fully considered the evidence presented, the relevant pleadings, and the arguments of counsel.

I. INTRODUCTION

The Defendant is charged with violating Moscow City Code ("MCC") § 10-1-22. He argues the charge should be dismissed because (1) the conduct at issue is not prohibited under MCC § 10-1-22, (2) the legal and criminal standard in MCC § 10-1-22 is unconstitutionally vague, (3) MCC § 10-1-22 and the prosecution under this ordinance violate the Defendant's rights under the First Amendment to the U.S. Constitution, and (4) the prosecution of this case violates the Defendant's constitutional right to equal protection under the 14th Amendment to the U.S. Constitution. The State argues the Defendant's motion should be denied because (1) the Defendant's conduct is unlawful and in violation of MCC § 10-1-22, (2) MCC § 10-1-22 is neither unconstitutionally vague on its face nor as applied to the Defendant, (3) MCC § 10-1-22 is content neutral and does not violate the Defendant's rights under the First Amendment to the U.S. Constitution, and (4) the prosecution of this case does not violate the Defendant's equal protection rights under the 14th Amendment to the U.S. Constitution. For the reasons stated herein, the court makes the following findings of fact and conclusions of law denying the Defendant's Motion to Dismiss.

Appendix E

II. STATEMENT OF FACTS

The facts relevant to the Defendant's Motion to Dismiss are as follows. Beginning in March 2020, the City of Moscow issued a series of emergency orders to address the COVID-19 pandemic in an effort to protect the community from the spread of COVID-19. Amongst other provisions and similar to many cities, towns, states and even countries across the globe, the emergency orders imposed a mask and social distancing mandate upon individuals present within the City of Moscow. Additionally, signs depicting three colorful face masks and the words "Enforced Because We Care" were installed at or near the entrances to Moscow.

On October 6, 2020 at approximately 3:18 a.m. in Moscow, Latah County, Idaho, Moscow Police Department officers were dispatched to a report of a two males placing "Soviet Moscow" stickers on various property in the downtown area. Upon leaving the police station, Corporal Gunderson observed a male wearing a full face covering smack a City of Moscow directory sign for which he later confirmed the male had placed a "Soviet Moscow" sticker on the sign. At this time, another male wearing a full head and face covering carrying a pail approached the other male's location. Officers made contact with the individuals who were later identified as the Defendant, Rory Wilson, and his juvenile brother, S.W. Upon questioning the males, they informed officers they were placing stickers on property, including signs and poles, as a form of legal protest. The pail carried by Rory Wilson contained two sizes of red vinyl stickers displaying

a hammer and sickle symbol akin to the U.S.S.R. with the words "Soviet Moscow" or "Soviet Moscow: Enforced Because We Care." Similarly, S.W. possessed several of the same stickers in his pockets. He showed the stickers to law enforcement and stated his father, Nathan Wilson, purchased the stickers. Officers searched the area and located approximately 89 of the "Soviet Moscow" stickers on City of Moscow property and private property including on "parking signs, traffic and street signs, benches, newspaper kiosks, crosswalk lights, light poles, historical district signs, bike racks, trees, trash cans, concrete parking barriers, a U.S. Mailbox, and a utility box." After arriving on scene, Nathan Wilson informed officers he was aware his sons were going to put up these stickers, but encouraged them not to place them on private property. The officers allowed Rory Wilson and S.W. to leave the scene with Nathan Wilson, and did not issue a citation or arrest them.

On October 10, 2020, Rory Wilson and S.W. were each charged with the misdemeanor offense, *No Posting on Fences or Buildings or Poles* under MCC § 10-1-22, and Nathan Wilson was charged with *Principle to No Posting on Fences or Buildings or Poles* under MCC § 10-1-22 and Idaho Code § 18-204.

III. ANALYSIS

1. The plain and unambiguous language of MCC § 10-1-22 prohibits the Defendant's conduct.

The rules of statutory interpretation are well established. The court interprets the literal language of

a statute to "give words their plain, usual, and ordinary meanings." *State v. Burke*, 166 Idaho 621, 623 (2020). Where the language is plain and unambiguous, the court must give effect to the statute as written, without engaging in statutory construction. *State v. Burnight*, 132 Idaho 654, 659 (1999). The rules of statutory construction will not be implemented unless the language of the statute is ambiguous. *City of Idaho Falls v. H-K Contractors, Inc.*, 163 Idaho 579, 582 (2018). A statute is ambiguous when the meaning is so doubtful or obscure that "reasonable minds might be uncertain or disagree as to its meaning." *Hickman v. Lunden*, 78 Idaho 191, 195 (1956). "However, ambiguity is not established merely because different possible interpretations are presented to a court. If this were the case then all statutes that are the subject of litigation could be considered ambiguous [A] statute is not ambiguous merely because an astute mind can devise more than one interpretation of it." *Rim View Trout Co. v. Higginson*, 121 Idaho 819, 823 (1992).

When an ambiguity exists and the court must engage in statutory construction, it has the duty to ascertain the legislative intent and give effect to that intent. *State v. Beard*, 135 Idaho 641, 646 (Ct. App. 2001). In doing so, the court examines the literal words of the statute, the context of those words, the public policy behind the statute, and its legislative history. *Id.* A statutory provision is interpreted "within the context of the whole statute" and not in isolation. *Burke*, 166 Idaho 621, 623 (2020). The court must give effect "to all the words and provisions of the statute so that none will be void, superfluous, or redundant." *Id.* A code of statutes relating to one subject,

governed by one spirit and policy, is to be interpreted as intended to be consistent and harmonious in its several parts and provisions. *State v. Huckabay*, 480 P.3d 771, 773 (2020). "It is incumbent upon a court to give an ambiguous statute an interpretation that will not render it a nullity." *State v. Nelson*, 119 Idaho 444, 447 (Ct. App. 1991). If the court finds a criminal statute is ambiguous, the doctrine of lenity applies and the statute must be construed in favor of the accused. *State v. Dewey*, 131 Idaho 846, 848 (Ct. App. 1998). But, when a review of the legislative history makes the meaning of the statute clear, the rule of lenity will not be applied. *State v. Jones*, 151 Idaho 943,947 (Ct. App. 2011).

Here, the Defendant argues the charge against him must be dismissed because MCC §10-1-22 does not proscribe the conduct at issue. More specifically, the stickers displaying a soviet symbol and message "Soviet Moscow: Enforced Because We Care," which were posted by the Defendant on city and private property without permission of the property owner, are not a "notice, sign, announcement, or other advertising matter" prohibited under MCC § 10-1-22. First, the Defendant argues the clause "any notice, sign, announcement, or other advertising matter" is ambiguous because the ordinance does not define what materials qualify as a notice, sign, announcement, or other advertising matter, and secondly, under the canons of statutory construction, the phrase "or other advertising matter" necessarily requires the materials to be posted be for the advertisement of "goods, services, or entities." Contrarily, the State argues "any notice, sign, announcement, or other advertising matter"

is not limited to materials advertising "goods, services, or entities," and the Defendant's stickers constitute a "notice, sign, announcement, or other advertising matter" prohibited under MCC §10-1-22.

The analysis must begin with the plain language of the ordinance. MCC §10-1-22, No Posting on Fences or Buildings or Poles, states:

> A. No person shall post, paint, tack, tape or otherwise attach or cause to be attached, *any notice, sign, announcement, or other advertising matter* to any fence, wall, building, tree, bridge, awning, post, apparatus or other property not belonging to said person without first obtaining the consent of the owner or lessee of such property or their agent(s) or representative(s). No person shall post, paint, tack, tape or otherwise attach or cause to be attached any notice, sign, announcement, or other advertising matter to any telephone or electric pole within the City.
>
> B. *No notice, sign, announcement, or other advertising matter* shall be posted on public property or public right-of-way without prior approval, in writing, from the governmental entity owning or controlling such public property or public right-of-way. This provision shall not apply to property or

> areas which have been otherwise specifically approved for posting of notices, signs, announcements, or other advertising or similar matter by the City or property owner or their agent(s) or representative(s).

(emphasis added). An ambiguity in the plain language, "any notice, sign, announcement, or other advertising matter," must exist before engaging in further statutory construction. "Any notice, sign, announcement, or other advertising matter" must be *so doubtful or obscure* that reasonable minds might be uncertain or disagree as to its meaning to find it ambiguous. As the Court in *Rim View Trout Co.* stated, the language is not ambiguous simply because an astute mind can devise more than one interpretation. Such is the case here.

The plain language of MCC §10-1-22 is unambiguous. The language of the ordinance is not so doubtful or obscure so as to render it ambiguous. While it is unnecessary for the ordinance to define every term, MCC § 4-6-7 (herein "Sign Code") defines twenty-two (22) different kinds of "signs" and defines "sign" as "[a] presentation, display, or representation of words or letters, or of as figure, design, picture, painting, color pattern, logo, emblem, symbol, trademark or other representation so as to give notice, advertise, call attention to, or identify any entity." MCC § 4-6-7(B)(19). The terms "notice," "announcement," and "advertising matter" are not defined within the ordinance. Black's Law Dictionary defines "notice" as "[a] written or printed announcement." NOTICE, Black's Law Dictionary (11th ed. 2019). "Announce" means "[t]o make publicly

known; to proclaim formally." ANNOUNCE, Black's Law Dictionary (11th ed. 2019). "Anouncement" is the act of announcing. "Advertising" is defined as "[t]he action of drawing the public's attention to something to promote its sale." ADVERTISING, Black's Law Dictionary (11th ed. 2019). The term "other" within the phrase, "or other advertising matter," means further or additional, and the phrase is disjunctive; the use of "or" as opposed to "and" expresses a choice between the items listed. Thus, under MCC § 10-1-22, the subject matter to be displayed may appear as a notice or a sign or an announcement or some other advertising matter, but it doesn't have to encompass all. The plain meaning of the words "notice," "sign," "announcement," and "advertising" is a means to an end; meaning, the form in which the matter is communicated. Such notice, sign, announcement or other advertising matter might appear in the form of an adhesive sticker, a piece of cloth, a metal sculpture, a poster board, a paper flyer, as one of the twenty-two (22) different signs defined in the code, etc., so long as it intends to represent, call attention, proclaim, identify, or make publicly known some message. While there is an argument that the clause "any notice, sign, announcement, or other advertising matter," is redundant and potentially unnecessary, the intent of the ordinance and what is prohibited is clear; should a person wish to announce, publicly make known, proclaim, or otherwise call attention to a subject by affixing matter to property not belonging to them, they must first obtain permission from the owner. The plain language of MCC § 10-1-22 is unambiguous and provides sufficient clarity for a reasonable person to know what material and conduct are prohibited.

Moreover, there is no requirement that the subject matter displayed by means of a notice, sign, or announcement be for the commercial advertisement of "goods, services, or entities" as the Defendant asserts. Just because the Defendant claims the ordinance is ambiguous and the posted materials must include commercial advertisements, does not render it ambiguous. As discussed above, the disjunctive phrase supports a finding that the plain language of the ordinance only requires the matter be a notice, sign, announcement or other advertising matter. Some examples that might fall within the ordinance include flyers, signs, or stickers for a lost cat, a yard sale, Rendezvous in the Park, Art Walk, temporary "no parking" along Main Street during the Farmer's Market, etc., which may include either commercial or non-commercial content.

Since MCC § 10-1-22 is clear and unambiguous, it is unnecessary for the court to engage in further statutory construction by looking at the legislative intent of the ordinance or the public policy behind it. However, if the court were required to do so, it would come to the same conclusion. In 2009, the City of Moscow amended the Sign Code in order to move the regulation and enforcement of the Sign Code from Title 6, governed by the City Clerk, to Title 10, Police Regulations, and to clarify that the Sign Code is content neutral and does not favor commercial over non-commercial speech. "The intent and purpose of the Sign Code is to promote the health, safety and welfare of the residents and visitors of the City and to promote visual appeal by regulating and controlling the type, size, location, height, and placement of signs for the following

reasons . . . " MCC § 4-6-7. One reason is "to prevent favoring of commercial over non-commercial speech or any favoring of any particular non-commercial message over any other non-commercial message." *Id.* This specific legislative intent and public policy necessarily suggests that the language "any sign, notice, announcement, or other advertising matter" is not limited to commercial speech as the Defendant asserts. The Defendant further argues MCC § 10-1-22 is intended to regulate political campaign signs; however, the 2009 amendment to the Sign Code did not change the regulation of political campaign signs to Title 10, Police Regulations, as it did other advertising matter. The regulation of the placement, posting and removal of political campaign signs is specifically under MCC § 4-6-7(L), whereas the ordinance at issue here makes no reference to political campaign signs.

The stickers in this case fall within this ordinance. In addition to an image of the "hammer and sickle," the adhesive stickers posted by the Defendant also displayed the words "Soviet Moscow: Enforced Because We Care" or the star above the hammer and sickle with the words "Soviet Moscow" akin to the Soviet Russia flag. The Defendant elected to call attention to, make publicly known, announce, or proclaim his dissatisfaction with the mask mandate and a unity of people known as "Soviet Moscow" who were opposed to the City of Moscow's mask mandate, by posting approximately eighty-nine (89) of these stickers in various locations on property belonging to the City of Moscow and other private businesses. The plain language of the ordinance clearly encompasses the stickers in this case as a "notice, sign, announcement, or

other advertising matter." MCC § 10-1-22 is unambiguous, the Defendant's conduct falls within the conduct prohibited under the ordinance, and the rule of lenity does not apply.

2. Neither Moscow City Code § 10-1-22 nor the prosecution of this matter violate the Defendant's constitutional rights.

There is a presumption in favor of the constitutionality of a challenged statute or regulation. *Stuart v. State*, 149 Idaho 35, 40 (2010). The challenger bears the burden of proof and must overcome a strong presumption of validity. *State v. Cook*, 146 Idaho 261, 262 (Ct. App. 2008). The court is obligated to seek an interpretation of a statute that upholds its constitutionality, and the judicial power to declare legislative action unconstitutional should be exercised only in clear cases. *Leavitt v. Craven*, 154 Idaho 661, 665 (2012) (citing *Stuart*, 149 Idaho at 40.).

a. Moscow City Code §10-1-22 is not unconstitutionally vague and provides sufficient notice to the Defendant of the prohibited criminal conduct.

Idaho courts have consistently held,

> Due process requires that all be informed as to what the State commands or forbids and that persons of ordinary intelligence not be forced to guess at the meaning of the criminal law. *State v. Cobb*, 132 Idaho 195, 197 (1998). No one may be required at the peril of loss of

> liberty to speculate as to the meaning of penal statutes. *State v. Freitas*, 157 Idaho 257, 261 (Ct. App. 2014). As a result, criminal statutes must plainly and unmistakably provide fair notice of what is prohibited and what is allowed in language persons of ordinary intelligence will understand. *State v. Kavajecz*, 139 Idaho 482, 486 (2003). A statute is void for vagueness if it fails to give such notice or if it invites arbitrary and discriminatory, enforcement. *Cobb*, 132 Idaho at 197; *Freitas*, 157 Idaho at 261. If a statute identifies a core of circumstances to which the statute or ordinance unquestionably could be constitutionally applied, it is not void for vagueness. *Freitas*, 157 Idaho at 261. Further, a statute should not be held void for uncertainty if it can be given any practical interpretation. *Id.* at 261-62. A statute may be challenged as unconstitutionally vague on its face or as applied to the defendant's conduct. *State v. Kelley*, 159 Idaho 417, 422 (Ct. App. 2015). To succeed on an as applied vagueness challenge, a defendant must show that the statute failed to provide fair notice that the defendant's conduct was prohibited or failed to provide sufficient guidelines such that police had unbridled discretion in determining whether to arrest the defendant. *State v. Pentico*, 151 Idaho 906, 915 (Ct. App. 2011).

State v. Gutierrez, 167 Idaho 315 (Ct. App. 2020).

Appendix E

The Defendant argues MCC § 10-1-22 is unconstitutionally vague because it fails to put a person on notice of what conduct is prohibited and it fails to provide sufficient guidelines such that police have unbridled discretion. The first question is whether MCC § 10-1-22 is unconstitutionally vague on its face. The intent of MCC §10-1-22 is clear; if an individual does not have prior permission from the property owner, they may not attach a notice, sign, announcement or other advertising matter onto someone else's property. The statute provides fair notice that when a person affixes matter to property, but does not obtain "the consent of the owner or lessee of such property or their agent(s) or representative(s)" under subpart (A) or "prior approval, in writing, from the governmental entity owning or controlling such public property or public right-of-way" under subpart (B), he is in violation of the ordinance. Persons of ordinary intelligence can understand the plain language. The ordinance is not void for vagueness if it can be given any practical interpretation. MCC § 10-1-22 identifies a core of circumstances to which it unquestionably can be constitutionally applied, such as the facts in this case where an individual affixes stickers to property not belonging to him without the prior written approval or the consent of the property owner.

Further, the ordinance does not allow law enforcement unbridled discretion to arrest. Law enforcement may enforce the ordinance when an individual posts the subject material to property not belonging to them without first obtaining consent or written permission. It's that simple. If the individual does have consent or written permission,

then there is no action to be taken by law enforcement, but if they do not, then law enforcement may utilize their enforcement discretion to arrest. Therefore, MCC § 10-1-22 is not unconstitutionally vague on its face.

The Defendant next argues MCC § 10-1-22 is unconstitutionally vague as applied to the Defendant's conduct. In order to prove this, the Defendant must show that the statute failed to provide fair notice that *his* conduct was prohibited or failed to provide sufficient guidelines such that police had unbridled discretion in determining whether to arrest *him.* First, the Defendant has failed to demonstrate how he was not put on notice that such conduct was prohibited. The ordinance is unambiguous. It is misguided for the Defendant to argue that because other people have posted similar material on the same or similar locations, but haven't been prosecuted, that that somehow makes his actions legal or that he didn't have notice that such conduct was prohibited. It is the Defendant's responsibility to know the law and abide by it. Any reasonable person in the Defendant's position would understand affixing stickers or attaching any other matter to property not belonging to them, requires permission from the property owner. Should they not get permission, they may be subject to prosecution under this ordinance. Also, MCC § 10-1-22 is located within the "Police Regulations" title of Moscow City Code where criminal penalties are outlined. The plain language of MCC § 10-1-22 provides the Defendant sufficient and fair notice that his actions on October 6, 2020 were prohibited.

Appendix E

Lastly, the Defendant argues that because the State has not prosecuted anyone else under this ordinance and law enforcement didn't immediately cite or arrest the Defendant, but instead, consulted the prosecutor before issuing a citation, that the ordinance allowed for unbridled police discretion. The prosecuting attorney has broad discretion in whether to prosecute a case or not. For purposes of a vagueness challenge, it does not matter whether the State has previously prosecuted a defendant under this ordinance. Prosecutorial discretion is separate from whether the plain language of an ordinance allows for unbridled law enforcement discretion to arrest. As previously stated, the language does not leave open any room for unbridled law enforcement discretion – they can only enforce the ordinance if a person posts on property not belonging to him without prior permission. Here, the Defendant didn't attempt to get permission to post these stickers. Instead, he went out at approximately 3:00 a.m. under the color of night with a full face covering and proceeded to place the stickers on approximately eighty-nine (89) different locations. These actions appear quite contrary to someone who was acting under the belief that they either had permission or were just putting stickers up around Moscow without knowledge of the law. The Defendant's conduct falls within the core circumstances contemplated under MCC § 10-1-22. The ordinance provides fair notice that the Defendant's conduct was prohibited and it does not allow for unbridled law enforcement discretion – in fact, law enforcement utilized their limited discretion to not arrest the Defendant. For these reasons, MCC § 10-1-22 is not unconstitutionally vague as applied to the Defendant.

b. Moscow City Code §10-1-22 does not violate the Defendant's free speech rights under the First Amendment.

The First Amendment to the U.S. Constitution states, "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." The First Amendment applies to states through the Fourteenth Amendment of the U.S. Constitution. *State v. Sanchez*, 165 Idaho 563, 568 (2019). The freedom of speech is also guaranteed under Article 1, Section 9 of the Idaho Constitution. While constitutional provisions establish protected individual rights, "[t]he First and Fourteenth Amendments have never been thought to give absolute protection to every individual to speak whenever or wherever he pleases or to use any form of address in any circumstances that he chooses." *Cohen v. California*, 403 U.S. 15, 19 (1971).

An individual may challenge a statute as unconstitutional under the First Amendment if they are prohibited from exercising their free speech rights and they are exercising those rights on public property. *State v. Korsen*, 138 Idaho 706, 715-16 (2003). In order for a statute to be struck down as unconstitutional in its application under the First Amendment, "there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the court." *Sanchez*, 165 Idaho at 570. "There

are two separate standards for determining the facial constitutionality of a statute under the First Amendment, depending upon if the statute only proscribes speech, or if it proscribes conduct as well." *Id.* at 568. Where conduct is proscribed, the application to protected speech must be substantial in order for it to be unconstitutional. *Id.* If the statute covers a wide range of conduct that is easily identifiable and within the State's power to prohibit, and also includes some constitutionally protected conduct, it will not be found unconstitutional. *Id.*

The State may enforce the time, place, and manner of regulations governing conduct which is content-neutral, is narrowly tailored to serve a significant government interest, and leaves open ample alternative channels of communication. *Frisby v. Schultz*, 487 U.S. 474, 480 (1988). Reasonable time, place, or manner restrictions on speech may be upheld if they are justified without reference to the content of the speech. *State v. Poe*, 139 Idaho 885, 893-894 (2003). An incidental burden on speech may be justified if "[1] it is within the constitutional power of the Government; [2] it furthers an important or substantial governmental interest; [3] the governmental interest is unrelated to the suppression of free expression; and [4] the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *State v. Doe*, 148 Idaho 919 (2010) (citing *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968)). When a government regulation satisfies the *O'Brien* test, it constitutes a reasonable time, place, and manner restriction and will not be invalidated for its incidental effects on protected conduct. *Id.*

Appendix E

Under Article XII, Section 2 of the Idaho Constitution, "[a]ny county or incorporated city or town may make and enforce, within its limits, all such local police, sanitary and other regulations as are not in conflict with its charter or with the general law." The City of Moscow has adopted the Moscow City Code as a governing law within the City, and more specific to this case, the Moscow Sign Code, MCC § 4-6-7(A), which states,

> The intent and purpose of the Sign Code is to promote the health, safety and welfare of the residents and visitors of the City and to promote visual appeal by regulating and controlling the type, size, location, height, and placement of signs for the following reasons . . .
>
> 1. To promote planned and organized signage for each zoning district.
>
> 2. To give all businesses and institutions an equal opportunity within zoning districts to have signage that will help people find the services they need.
>
> 3. To prevent the cluttered effect caused by the number of signs, and to prevent overly-intrusive signage though business corridors and within neighborhoods.
>
> 4. To ensure that pedestrians and motorists are protected from injury and damage which may be caused by the distractions and obstructions

> of overly intrusive or improperly placed signs. Further, it is the intent and purpose of this Sign Code to provide a reasonable balance between the right of business or institution to identify and promote itself with signs and the right of the public to be protected from the potential negative visual impacts and safety hazards which may result from the unrestricted proliferation of signs.
>
> 5. To prevent favoring of commercial speech over non-commercial speech or any favoring of any particular noncommercial message over any other non-commercial message.
>
> 6. To regulate political campaign signage in a reasonable and practical manner which is politically neutral and which is in accordance with local, State, and Federal law and regulations.
>
> . . .

MCC § 10-1-22 was adopted to enforce the Sign Code under police regulations. It is a content-neutral ordinance; it applies to both commercial and non-commercial speech. Further, the ordinance governs speech and conduct, not purely speech. Thus, it lawfully imposes reasonable restrictions on the time, place, and manner of posting content within the City of Moscow.

Appendix E

Under the *O'Brien* test, MCC § 10-1-22 is constitutional. First, the ordinance is within the constitutional power of the government as it was adopted by the City of Moscow pursuant to its authority under Article XII, Section 2 of the Idaho Constitution.

Second, MCC § 10-1-22 furthers an important and substantial governmental interest. The intent of the Sign Code is to promote the health, safety and welfare of the residents and visitors of the City and to promote visual appeal by regulating and controlling the type, size, location, height, and placement of signs to prevent the cluttered effect of signs, and ensure that pedestrians and motorists are protected from injury and damage. When the governed actions are not pure speech, but instead conduct involving the use of public streets and sidewalks, a municipality must rightfully exercise a great deal of control in the interest of traffic regulation and public safety. *Shuttlesworth v. City of Birmingham, Ala.*, 194 U.S. 147, 152 (1969). And, while not specifically stated in MCC § 10-1-22, the State argues the ordinance is also intended to prohibit trespass upon public and private property. "There is no requirement that a substantial interest sufficient to support the constitutionality or validity of an ordinance must appear on the face of the enactment." *Doe*, 148 Idaho at 927. Consequently, the ordinance includes reasonable restrictions on time, place and manner: The place to affix the content is restricted to "any fence, wall, building, tree, bridge, awning, post, apparatus or other property" or other public or private property; The manner in which to affix the content is restricted to "post, paint, tack, tape or otherwise attach or cause to be attached," and the

time to affix the content is upon prior written approval or consent from the property owner. The Defendant argues the State's passive enforcement or non-enforcement of this ordinance when other similar stickers, notices, signs, etc. have been posted in similar places, demonstrates the lack of a significant government interest to be served under this ordinance. Whether or not the State elects to prosecute an individual under this ordinance is not part of the constitutional inquiry under the law. So long as the restrictions are narrowly-tailored to serve a significant government interest, the ordinance is constitutional despite whether or not it is enforced.

Third, these governmental interests are unrelated to the suppression of free expression. The interest in promoting the health, safety and welfare of the residents of Moscow is unrelated to the limited suppression on free speech in this ordinance. In particular, it is the conduct that is governed, not the speech itself. The Sign Code prohibits favoring of commercial speech over non-commercial speech or any favoring of any particular noncommercial message over any other non-commercial message. Nothing prohibits both constitutionally protected and non-protected speech from being displayed in accordance with MCC § 10-1-22, as long as the poster has prior written approval or consent from the property owner.

Lastly, where the restriction incidentally impacts protected conduct rather than speech, and the restriction is content neutral, there is no requirement that the restriction be enacted through the least restrictive means.

Appendix E

The Defendant cites to authority for the position that if a law is subjected to a prior restraint such as obtaining a license, that it is unconstitutional if it doesn't provide "narrow, objective and definite standards to guide the licensing authority." However, that is only true when the particular law governs pure speech and not conduct too. It is sufficient for constitutional purposes if the incidental restriction on the First Amendment freedom is no greater than is essential to the furtherance of the governmental interest. The only restriction within MCC § 10-1-22 is the requirement that the poster get prior written approval or consent from the property owner. Once that criteria is met, the individual is free to affix any content upon the designated property consistent with their First Amendment rights. There is nothing in MCC § 10-1-22 that requires the Defendant obtain a "permit" from the property owner as the Defendant asserts. The only requirement is that the Defendant obtain "the consent of the owner or lessee of such property or their agent(s) or representative(s)" under subpart (A) or "prior approval, in writing, from the governmental entity owning or controlling such public property or public right-of-way" under subpart (B). If the ordinance governed pure speech and not conduct, then it would arguably be unconstitutional because it does not set for a specific process or guidelines to govern obtaining the written approval or consent required. However, the ordinance governs both conduct and speech; therefore, the incidental restriction requiring the poster to obtain permission is minimal and no greater than is essential to further the City of Moscow's interest in promoting the health, safety and welfare of its citizens.

Moreover, the ordinance leaves open ample alternative channels for communication; for example, an individual could stand on the comer and hand out flyers, stickers, notices, signs, or other advertising matter, they could appear in Friendship Square with a megaphone and announce their message, or walk down the sidewalk holding a sign with their intended message, and they can affix a message in the form of a notice, sign, announcement, or other advertising matter to property, so long as they have permission from the owner.

MCC § 10-1-22 does not violate the Defendant's First Amendment rights. The Defendant is being prosecuted for his conduct in posting the stickers, not for his speech or the content of his communication. The First Amendment does not give the Defendant the freedom to trespass upon another's property – to affix something to another's property-without permission. The Defendant is free to display these stickers or similar signs or announcements with the same image and words, so long as he has permission or consent from the property owner. For example, if the Defendant wants to display the stickers on his neighbor's fence, he would need to obtain the "consent" of the neighbor before proceeding to do so. Likewise, if the Defendant wants to display the stickers on the East City Park band stand, he would need to obtain prior approval, in writing, from the City of Moscow. Unfortunately, he did not, and MCC § 10-1-22 prohibits the Defendant from affixing the stickers to property that does not belong to him without prior approval. Because there is no realistic danger that MCC § 10-1-22 itself will significantly compromise recognized First Amendment protections

of parties not before the court, the ordinance is content-neutral, and the application to protected speech is not substantial, MCC § 10-1-22 is constitutional and does not violate the Defendant's First Amendment rights.

c. The prosecution of this case does not violate the Defendant's equal protection rights under the 14th Amendment to the U.S. Constitution.

The 14th Amendment to the U.S. Constitution guarantees people equal protection under the law. " . . . no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S.C.A. Const. Amend. XIV. Under a constitutional challenge based upon equal protection under the 14th Amendment to the U.S. Constitution, the defendant must show "both that the passive enforcement system had a discriminatory effect and that it was motivated by a discriminatory purpose." *Wayte v. U.S.*, 470 U.S. 598, 608-609 (1985). Further, '[D]iscriminatory purpose' . . . implies more than . . . intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.*

In order to prove his equal protection rights have been violated, the Defendant must establish that the passive enforcement of the ordinance had a discriminatory

effect and he is being prosecuted, in part, because of the adverse effects upon him and an identifiable group, and not merely in spite of the effects. To begin, this case serves as the State's first prosecution under MCC § 10-1-22. The record shows there has been one prior instance in which law enforcement removed certain messaging under this ordinance, but no prosecution resulted. As the Defendant's exhibits illuminate, there are other stickers displaying messages that fall within this ordinance, that appear on similar property as where the Defendant allegedly placed some of his stickers. Yet, there is no record of prosecution for such acts. The record clearly shows the State has engaged in passive enforcement of MCC § 10-1-22 until this case. However, despite the passive enforcement, the Defendant has not shown that the State is prosecuting him, in part, *because* of his protest activities. As stated previously, the Defendant is being prosecuted for his conduct not the content of his message. The Defendant can certainly feel unsettled by the personal sentiment that law enforcement voiced about the content of the stickers. However, that alone is insufficient to demonstrate that the prosecuting attorney is prosecuting this case solely based upon the Defendant's belief that he shouldn't have to wear a mask. The Defendant does not have a constitutional right to put stickers, regardless of the message, on property belonging to someone else unless he has consent or written permission to do so by the property owner. The State's decision whether to prosecute this case was based upon the Defendant being caught in the act and the number of materials posted on public and private property without prior written approval or consent. The difference between the Defendant's conduct and others who have posted

similar signs, notices, stickers, announcements or other advertising matter downtown without being charged, is not the message on the Defendant's stickers, it is that the other individuals either had prior permission or weren't caught in the act.

Next, the Defendant must show the prosecution in this case is being done for a discriminatory purpose. The Defendant set forth a lengthy narrative concerning the Moscow mask ordinance and events involving individuals who have expressed their dissatisfaction with the law. He argues he is being prosecuted because "the City and MPD had quite simply had enough of the messaging coming from the Christian community associated with Christ Church." This argument is not support by the record. Nothing in the factual record of this case establish the Defendant is associated with "Christ Church" or a "Christian," let alone establish that is the sole reason for the prosecution of this defendant. Upon first contact with Rory Wilson and S.W., law enforcement did not know their identities. After they requested their identification and Nathan Wilson came to the scene, a personal comment regarding the message on the stickers was made by Officer Waters to Nathan Wilson. At no time did the individuals identify themselves as members of Christ Church, as Christians, or of a particular protected class, nor did the stickers themselves have any symbol or words associating them with a particular group of people besides "Soviet Moscow." The record is devoid of any evidence that "Soviet Moscow" is a particular organized group or the prosecution is being done to discriminate against the Defendant because he is opposed to the mask mandate.

The record shows the stickers were created to convey a message of disagreement with the mask mandate and the Defendant affixed the stickers to property, not belonging to him, without the permission of the property owner. The Defendant has failed to show that the State is prosecuting this case specifically because of his disagreement with the mask mandate and how the reason he is being prosecuted is for a discriminatory purpose. As such, the State has not violated the Defendant's equal protections rights under the 14th Amendment to the U.S. Constitution.

IV. ORDER

For the foregoing reasons, the Defendant's Motion to Dismiss is hereby DENIED.

Date: June 18, 2021

/s/ Megan E. Marshall
Megan E. Marshall
Magistrate Judge

APPENDIX F — PROVISION INVOLVED

Sec. 1-22. No Posting on Fences or Buildings or Poles.

A. No person shall post, paint, tack, tape or otherwise attach or cause to be "attached, any notice, sign, announcement, or other advertising matter to any fence, wall, building, tree, bridge, awning, post, apparatus or other property not belonging to said person without first obtaining the consent of the owner or lessee of such property or their agent(s) or representative(s). No person shall post, paint, tack, tape or otherwise attach or cause to be attached any notice, sign, announcement, or other advertising matter to any telephone or electric pole within the City.

B. No notice, sign, announcement, or other advertising matter shall be posted on public property or public right-of-way without prior approval, in writing, from the governmental entity owning or controlling such public property or public right-of-way. This provision shall not apply to property or areas which have been otherwise specifically approved for posting of notices, signs, announcements, or other advertising or similar matter by the City or property owner or their agent(s) or representative(s).

(Ord. 2009-10, 5/18/2009)

APPENDIX G — DEFENDANT-APPELLANT'S BRIEF IN SUPPORT OF PETITION FOR REVIEW IN THE SUPREME COURT OF THE STATE OF IDAHO, FILED AUGUST 27, 2024

Sup. Ct. No. 50802-2023

Dist. Ct. No. CR29-20-2114

IN THE
Supreme Court of the State of Idaho

STATE OF IDAHO,

Plaintiff-Respondent,

v.

RORY D. WILSON,

Defendant-Appellant.

On Appeal from the District Court of the Second Judicial District of the State of Idaho, in and for the County of Latah

HONORABLE JOHN JUDGE
District Judge

HONORABLE MEGAN MARSHALL
Magistrate Judge

Appendix G

Filed August 27, 2024

DEFENDANT-APPELLANT'S BRIEF IN SUPPORT OF PETITION FOR REVIEW

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and applied in accordance with the First Amendment and the U.S. Supreme Court's consistent teachings regarding the speech rights the First Amendment protects.

Though the Court gives "consideration to the views of the Idaho Court of Appeals . . . , it reviews the district court's decision directly." *Wheeler v. State*, 162 Idaho 357, 359 (2017). And when, as here, the district court sat in an appellate capacity, this Court reviews the magistrate "record to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings." *State v. Dacey*, 169 Idaho 102, 106 (2021) (citation omitted). But, while the determination of this appeal depends on the magistrate's findings and conclusions, it is the decision of the district court that this Court is "procedurally bound to affirm or reverse." *Id.* at 107. So, ultimately, this Court determines whether the magistrate's decision was supported by evidence in the record, and whether it was consistent with the law. *Id.*

Because the decisions below contravene the First Amendment in myriad ways—and unnecessarily so, given the Court of Appeals' rejection of a textually superior narrowing construction—this Court should grant review of the Court of Appeals' decision and reverse the lower courts.

Appendix G

I. The Court of Appeals' Decision Conflicts with Numerous First Amendment Doctrines as Articulated by the U.S. Supreme Court.

As interpreted by the Court of Appeals, the ordinance suffers from several constitutional infirmities. First, the ordinance is vague because, if it truly applies as a blanket requirement to obtain permission before posting *all* signs in the public square rather than just commercial advertisements, the only principle guiding the City's enforcement of the ordinance is whether prosecutors disagree with the viewpoint of the poster's message. The Court of Appeals treated the ordinance's breadth as a virtue, not a vice, and in doing so brought its decision in square conflict with U.S. Supreme Court precedent requiring an ordinance to clearly state not only what is proscribed, but how offenders should be selected for prosecution in a viewpoint-neutral manner.

That conflict is reason enough to grant review. But at least three other conflicts arise from the Court of Appeals' reasoning. One straightforwardly confirms the U.S. Supreme Court's requirement that ordinances must provide clear guidance for their enforcement: absent any such guidance in the ordinance here, the City enforced it against Wilson in a viewpoint-discriminatory manner. The Court of Appeals' no-limits interpretation of the ordinance likewise renders it overbroad: if it applies to *all* signs, it prohibits a substantial amount of core First Amendment-protected speech and therefore impermissibly chills contribution to the marketplace of ideas. Moreover, the ordinance cannot survive the constitutional scrutiny

required by the U.S. Supreme Court for such speech restraints. While the U.S. Supreme Court upholds some content- and viewpoint-neutral restraints that also cabin official discretion in policing the time, place, and manner of speech, a blanket public-signage restriction extends far beyond any arguable legitimate governmental interest and completely occludes a popular avenue for protected speech.

As Wilson argued below and as explained further in Part II, *infra*, these constitutional conflicts were entirely needless: the Court of Appeals could, and should, have interpreted the ordinance as reaching only commercial advertisements—not Wilson's purely political speech. Interpreting the ordinance to cover commercial advertising alone obviates the need to reach these constitutional issues: Wilson's conviction would necessarily fall because the City did not charge Wilson with posting a commercial advertisement, and no reasonable person could construe his political speech—a satirical juxtaposition of an icon of an authoritarian regime with the City's COVID-19 mantra—as a commercial advertisement. While that error independently merits this Court's review, *see infra* Part II, review is appropriate to correct the Court of Appeals' constitutional errors.

A. The Court of Appeals rejected Wilson's vagueness argument in conflict with U.S. Supreme Court precedent.

The Court of Appeals interpreted the ordinance as prohibiting all signs rather than only commercial advertisements and treated the breadth of the City's

speech restriction as a virtue rather than a vice. That view contravenes governing U.S. Supreme Court precedent, which requires that such prohibitions not only clearly articulate what conduct is prohibited, but also provide enforcing officials with enough guidance to preclude arbitrary or viewpoint-discriminatory enforcement of that prohibition. These principles are at their apex—and this Court's review is most urgent—in cases like this one, where "speech is involved," and therefore a "rigorous adherence" to the requirement of a reasonable degree of clarity "is necessary to ensure that ambiguity does not chill protected speech." *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253-54 (2012).

A law may be unconstitutionally vague for either of two reasons: "First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement." *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999); *see Fox*, 567 U.S. at 253. The Court of Appeals misunderstood the relevant inquiry, limiting its analysis only to whether the ordinance provided Wilson with fair notice that the City had criminally prohibited his political speech; the Court of Appeals concluded that the ordinance did so. 2024 WL 3108304 at *3.

This conclusion was twice wrong. First, it pretermitted the second part of the analysis that the U.S. Supreme Court requires: whether the ordinance authorizes discriminatory enforcement. A statute authorizes an impermissible degree of enforcement discretion—and

is thus also void for vagueness—where it does not "set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent 'arbitrary and discriminatory enforcement.'" *Smith v. Goguen*, 415 U.S. 566, 573 (1974) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)). The success of a challenge "rests not on whether the [official] has exercised his discretion [unlawfully], but whether there is anything in the ordinance preventing him from doing so." *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 133 n.10 (1992).

Here, nothing in the ordinance's text prevents a prosecutor from exercising his discretion unlawfully. Even though the Court of Appeals reasoned that the ordinance unambiguously prohibited postings of any type, that open-ended prohibition is precisely the problem: as interpreted by the Court of Appeals, the ordinance bans *all* posted speech, with enforcement left to the City's unguided and arbitrary discretion. Even where the First Amendment permits tailored restrictions on speech, such restrictions are constitutional only when they are viewpoint neutral and are neither in theory nor practice a tool with which the government may suppress speech that it disfavors. *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 46 (1983). "[T]he government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject." *Cornelius v. NAACP*, 473 U.S. 788, 806 (1985); *see also Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 (2001) ("[S]peech discussing otherwise permissible subjects cannot be excluded from a limited

public forum on the ground that the subject is discussed from a religious viewpoint."). The City's ordinance lacks any sort of guidelines to prevent the arbitrary or viewpoint-discriminatory enforcement of the ordinance—let alone the kind of "clear guidelines" that save an ordinance from constitutionally impermissible vagueness. *Goguen*, 415 U.S. at 573.

But not only did the Court of Appeals disregard half of the U.S. Supreme Court's required vagueness analysis, the half-inquiry that it conducted came out wrong. As the Court of Appeals interpreted it, the ordinance does not put a reasonable person on notice of what it prohibits. The standard here is the person of "ordinary intelligence." *Hill v. Colorado*, 530 U.S. 703, 732 (2000). A reasonable person in Moscow would be aware of the numerous signs and other messages that the City has permitted across both public and private property for more than a decade. CR.104-05, CR.140-59. Such a person would likewise be aware that the City lacks the "power to restrict expression because of its message, its ideas, its subject matter, or its content." *Act Now to Stop War & End Racism Coal. v. D.C.*, 846 F.3d 391, 403 (D.C. Cir. 2017) (quoting *Police Dep't of City of Chi. v. Mosley*, 408 U.S. 92, 95 (1972)). Given Moscow's history of non-enforcement, a reasonable person aware of his constitutional rights would not construe the ordinance as prospectively banning all postings in the public square without prior approval. A person of ordinary intelligence would not read a law that prohibits the posting of any "notice, sign, announcement, or other advertising matter" to ban self-evident political satire that neither

provides notice of nor announces anything at all, let alone *advertises* something.

The ordinance lacks any guidance to prevent the City from enforcing it in an arbitrary or discriminatory manner, and a reasonable person would not have viewed the ordinance's prohibition, even if expansive, as prohibiting core political speech. Each of these flaws is separately sufficient to place the Court of Appeals' analysis in irreconcilable conflict with the U.S. Supreme Court's decisions; each urgently requires this Court's intervention.

B. The City impermissibly discriminated based on viewpoint.

Even if the ordinance's text left uncertainty as to whether it permitted arbitrary or viewpoint-discriminatory enforcement, the City's conduct eliminates any doubt. The record here confirms that if the Court of Appeals' textual analysis of the statute is correct, the City enforced the ordinance against Wilson to sanction him for speech with which the City disagreed. That, too, plainly disregards contrary controlling U.S. Supreme Court precedent.

The City does not dispute that it has never before enforced the ordinance, despite more than a decade's worth of opportunities to do so, and the City acknowledges that it has only now enforced the ordinance against a message it dislikes—one critical of its leaders and its policies. Indeed, an officer detaining Wilson remarked that he had done so because, "[f]irst of all, [he didn't] agree with [Wilson's]

messaging." CR.533. As the City has conceded, Moscow is rife with other violations of the ordinance, CR. 113, but the City has declined to prosecute *any* other speaker for *any* other message other than Wilson, CR.104-05. In other words, the City has exercised its standardless authority to criminally sanction speech made through posted signs to suppress only a single message. The Constitution flatly prohibits this kind of viewpoint discrimination, which is an "egregious form of content discrimination" and is therefore "presumptively unconstitutional." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829-30 (1995). The Court of Appeals did not meaningfully analyze this constitutional infirmity, and this Court's review is needed to ensure this State's jurisprudence regarding such viewpoint-discriminatory sanctions accords with the U.S. Supreme Court's mandates.

That Court has long recognized that a government official's exercise of his broad enforcement discretion to punish a speaker or message with which the government disagrees is an especially intolerable constitutional wrong. *See City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 758 (1988). The First Amendment permits neither the application of an ordinance that allows for viewpoint-discriminatory enforcement nor an enforcement action that actually discriminates on the basis of a speaker's or message's viewpoint. Just two years ago, the U.S. Supreme Court rejected a strikingly similar scheme. *See Shurtleff v. City of Boston*, 596 U.S. 243 (2022). There, Boston allowed any person or group, after providing notice and clearing the city's scheduling conflicts, to raise a flag outside city hall. *Id.* at 249-50. Boston never refused a group's request

to fly a flag of its choosing until a religious organization wanted to raise a Christian flag. *Id.* at 250. Primarily because the city had never rejected a proposed flag before, the Court recognized that the flag raisings were private speech, *id.* at 256-58, and easily concluded that Boston's unprecedented rejection of the Christian group's flag violated the First Amendment as obvious viewpoint discrimination, *id.* at 258-59. The Court emphasized that "the city had nothing—no written policies or clear internal guidance—about what flags groups could fly." *Id.* The absence of such guidance there, as here, both encouraged and enabled the constitutionally forbidden viewpoint-discriminatory enforcement.

As in *Shurtleff*, the City impermissibly targeted a message with which it disagrees for disfavored treatment in violation of the First Amendment's protection against viewpoint discrimination. Boston singled out the director of a religious organization "solely because the Christian flag he asked to raise promoted a specific religion." *Id.* at 258. Moscow prosecuted Wilson because it did not like his satirical use of the City's COVID-19 slogan and his comparison of the City's policies to Soviet tyranny. CR.113. In both cases, officials reacted to disapprove of speech with which the government disagreed. The fact that Moscow's ordinance can be viewed as facially neutral does not save the City's actions here any more than Boston's claim that its flag regulations were facially neutral saved its refusal to allow a Christian flag. As the U.S. Supreme Court reiterated only three months ago, "the critical takeaway is that the First Amendment prohibits government officials from wielding their power selectively

to punish or suppress" speech. *Nat'l Rifle Ass'n of Am. v. Vullo*, 602 U.S. 175, 198 (2024). That is exactly what transpired here, and this Court's review is needed to right both the Court of Appeals' conflict with the U.S. Supreme Court's directions and the viewpoint-discriminatory wrong that the City has inflicted.

C. As interpreted by the Court of Appeals, the ordinance is also overbroad because it broadly sweeps protected activity within its scope and chills protected expression.

If, as the Court of Appeals believed, the ordinance is best understood as prohibiting *all* unauthorized signage, then it is also overbroad in violation of the First Amendment. The Court of Appeals once again perceived the statute's breadth as a virtue; once again, it proves a vice. The overbreadth doctrine prohibits enforcement of speech restrictions that, while having some legitimate applications, also restrain and therefore chill an intolerably large amount of protected speech. *See Broadrick v. Oklahoma*, 413 U.S. 601, 610-13 (1973). When a statute or ordinance "prohibits a substantial amount of protected speech relative to its plainly legitimate sweep," it is fatally overbroad. *United States v. Hansen*, 599 U.S. 762, 770 (2023) (cleaned up).

The overbreadth doctrine thus "provides breathing room for free expression." *Id.* at 769. The Free Speech Clause preserves the "marketplace of ideas" and vigorously protects society's interest in hearing the broadest and most thorough debate. *Id.* at 770. The First Amendment

therefore prohibits the enforcement of certain laws even though they may have lawful applications to avoid chilling protected speech. *Id.* When there is a "lopsided ratio," as here, the Constitution and U.S. Supreme Court favor protecting more expression rather than less. *Id.* And that is especially true when, as here, the chilled speech criticizes the government.

1. The ordinance is overbroad because it chills public expression of government criticism.

Given the Court of Appeals' incorrectly expansive scope, the ordinance is overbroad because "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010) (citation omitted). When understood as forbidding *all* posted messages, regardless of their duration or whether the speech falls into a category that the First Amendment does not protect (or, at minimum, protects to a lesser extent than core political speech), the ordinance prohibits, formally or functionally, broad categories of protected speech, including political speech and anonymous speech. By contrast, the ordinance's constitutional applications—if any exist—extend to, at most, requiring that speakers remove their posted materials within a reasonable period of time, or prohibiting speakers from publicly posting obscenity, true threats of violence, and similarly unprotected or less-protected communications. An ordinance is overbroad in violation of the First Amendment when, as here, it potentially sanctions large swaths of protected speech in the process of regulating a smaller

subset of cases that, had the City better tailored its law, it could have legitimately regulated.

That is what the ordinance does. As the U.S. Supreme Court requires, the first step in the analysis is to construe the scope of the law, which is necessary to determine whether it reaches too far. *Id.* at 474. As interpreted by the Court of Appeals, the ordinance prevents the public display of any written expression on public property for any duration, regardless of whether the First Amendment protects that speech. It contains no exceptions for messages posted for a limited time, those beneath a certain size, or for those made of easily removable materials, and it in no way singles out one or more unprotected categories of speech, such as obscenity or fighting words, for regulation. Even if the City offered potentially legitimate reasons for the ordinance, such as a desire to time-limit posted messages to ensure that all members of the public enjoy a chance to post their messages in favored locations or a need to prevent vandalism, the ordinance stretches far farther than these more modest potential reasons could support.

After all, the ordinance makes no pretense at narrowing the time, place, or manner of permissible public written messages: it instead formally forbids the hosting of *any* message on public property while providing no process by which a potential speaker could seek permission to post a sign subject to reasonable time, place, or manner restrictions that the City could have instead imposed. Rather than regulating a narrower category of speech or setting time, place, and manner regulations on a content-neutral basis, the ordinance instead exposes

overwhelming amounts of protected speech to punishment at the City's whim, including core political speech such as Wilson's satire. The ordinance likewise impinges on the Moscow public's opportunity to express their ideas anonymously—a First Amendment-protected right whose importance is at its height when communicating a message unpopular with the government. That is especially so when that controversial expression confronts a government policy perceived by to be authoritarian and oppressive, as Wilson clearly believed about the City's COVID-19 policies. The First Amendment's protection of the right to speak anonymously is especially easy to understand here, where the City singled Wilson out for prosecution despite its tolerance of hundreds or thousands of other ordinance violations. After all, the responding police officer informed Wilson's father that he disagreed with the message Wilson espoused. It is hard to imagine a more forthright admission that the City enforced the ordinance against Wilson to punish him for his viewpoint.

Nor was the ordinance tailored to prohibiting unprotected categories of speech; had it been, it could not have reached Wilson's protected political speech. The City may regulate speech falling within categories traditionally lacking First Amendment protection, such as incitement, defamation, obscenity, and true threats. *Counterman v. Colorado*, 600 U.S. 66, 73-74 (2023). These "traditional and historical categories" of speech are deemed unprotected because they are "of such slight social value as a step to truth" that "social interest in their proscription" outweighs "any benefit that may be derived from them." *Id.* But outside those limited categories,

the First Amendment severely restricts a government's ability to prohibit speech, let alone criminally. This ordinance impermissibly does so by reaching a vast array of protected expressions relative to the handful of potentially unprotected expressions that a narrower ordinance could have legitimately forbade. As discussed *infra*, political speech, particularly speech critical of the government and its officials, lies at the core of the First Amendment's purpose and protection.

Without some limitation on the ordinance restricting its application to signs exceeding reasonable time, place, and manner restrictions, the City's ordinance chills all possible protected speech for the sake of—at best—preventing obscenity or clutter. The First Amendment does not allow Moscow to so cavalierly trammel its citizens' speech rights. As the U.S. Supreme Court held in *Coates v. City of Cincinnati*, 402 U.S. 611, 615-16 (1971), the City cannot make laws suppressing fundamental First Amendment rights "simply because [their] exercise may be 'annoying' to some people." "[A] function of free speech under our system of government is to invite dispute"—especially when some may view the content of the speech unfavorably. *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949). Once again, *Shurtleff* is instructive. The City's action here—passing a sweeping ordinance with no standard for enforcement and employing it exclusively to suppress a message with which it disagrees—has been enabled by the disproportionate overreach of the ordinance itself and its fatal overbreadth.

The Court of Appeals failed to confront these problems,

see 2024 WL 3108304 at *2-3, despite Wilson's briefing on overbreadth, Augmented Opening Br. at 12-14. Although Wilson argued that the ordinance improperly "targets all speech, including political speech," *id.* at 14, the Court of Appeals mentioned Wilson's overbreadth challenge only in passing—in a footnote distinguishing an overbreadth challenge from a vagueness challenge, which "'does not turn on whether a law applies to a substantial amount of protected expression,'" 2024 WL 3108304 at *3 n.2 (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 20 (2010)). The Court of Appeals incorrectly understood Wilson as attacking the ordinance on vagueness, but not overbreadth, a claim it rejected because "the ordinance is plain and unambiguous" and Wilson was thus "on notice that his conduct was prohibited." *Id.* at *3. But overbroad legislation need not be vague; indeed, as here, a statute's constitutionally forbidden overbreadth may become plain once it has been conclusively interpreted by an entity entitled to do so. The First Amendment prohibits both speech regulations that potentially stifle too much protected speech relative to the speech the government may legitimately regulate *and* speech regulations which allow for arbitrary or viewpoint-discriminatory enforcement. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-13 (1975), *Grayned*, 408 U.S. at 114. The Court of Appeals' reasoning collapsed these two distinct inquiries into one and in the process wrongly rejected Wilson's overbreadth challenge in conflict with established U.S. Supreme Court precedent. Only this Court can remedy that conflict.

2. The ordinance's chill of political speech is especially troubling because it conflicts with core First Amendment precedent protecting speech criticizing the government.

If the ordinance is best understood as requiring the public to seek the City's permission to speak on public property about essentially any matter, as the Court of Appeals determined, the ordinance necessarily criminalizes core political speech that the U.S. Supreme Court has particularly guarded. As that Court has recognized, the "freedom of thought and speech . . . is the matrix, the indispensable condition, of nearly every other form of freedom." *Palko v. Connecticut*, 302 U.S. 319, 327 (1937), *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784, 794 (1969). After all, the Framers gave the freedom of speech primacy of place among the guarantees enshrined in the Bill of Rights. U.S. Const. amend. I. The historical context in which the Framers conceived the First Amendment informs the breadth of the Amendment's protections, *see N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 22 (2022) (explaining that constitutional analysis should be rooted in "text and history"), and reveals the tyrannical practices that the Framers desired to end.

Chief among those wrongs is the practice of suppressing discourse on matters of politics and government. 1 JOURNALS OF THE CONTINENTAL CONGRESS 108 (1774) (letter to the inhabitants of Quebec). Thomas Jefferson believed political discourse so important that, in his first inaugural

address, he proclaimed that

> having banished from our land that religious intolerance under which mankind so long bled and suffered, we have yet gained little if we countenance a political intolerance as despotic, as wicked, and capable of as bitter and bloody persecutions. . . . *If there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it.*

Thomas Jefferson, First Inaugural Address (1801) (emphasis added), *available at* https://avalon.law.yale.edu/19th_century/jefinau1.asp.

The Framers thought only a despotic government would deny citizens the right to speak on topics that might garner attention in the public square. Va. Declaration of Rights art. XII, *available at* https://avalon.law.yale.edu/18th_century/virginia.asp. They believed that the government of a free state should be guided by public opinion shaped through free individuals seeking to persuade one another of their positions, not by the arbitrary enforcement of a government's preferred dogma. *Whitney v. California*, 274 U.S. 357, 375 (1927), *overruled on other grounds by Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) ("They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth."). Thus, the First Amendment

"was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957).

America's First-Amendment ethos reflects that free discussion protects more surely against "noxious doctrine" than does suppression, "that the greatest menace to freedom is an inert people," and "that public discussion is a political duty." *Whitney*, 274 U.S. at 375. After all, "the fitting remedy for evil counsels is good ones" because "repression breeds hate; [and] that hate menaces stable government." *Id.* The Constitution thus "eschew[s] silence coerced by law." *Id.* at 375-76. Even the freedom to engage in political speech that "a vast majority of . . . citizens believes to be false and fraught with evil consequence" is protected to no lesser degree than any other expression. *Id.* at 374; *United States v. Schwimmer*, 279 U.S. 644, 654 (1929) (Holmes, J., dissenting) ("If there is any principle of the Constitution that more imperatively calls for attachment than any other it is . . . freedom for the thought that we hate.").

The U.S. Supreme Court has accordingly treated political speech—speech concerning the topics of government, our representatives, the policies they enact, the values those policies advance, and how those policies shape our civil society—as all but absolutely protected from government interference. That principle, above all else, is the "fixed star in our constitutional constellation[:] that no official, high or petty, can prescribe what shall be orthodox in politics[or] nationalism . . . or force citizens

to confess by word or act their faith therein." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (Jackson, J.). These principles apply with their greatest force when the speech a government seeks to suppress is critical of that government, its policies, or its officials. After all, "it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions." *Bridges v. California*, 314 U.S. 252, 270 (1941). Thus, we have come to a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

For this reason, the U.S. Supreme Court has long held that "[i]f judges are to be treated as men of fortitude, able to thrive in a hardy climate, surely the same must be true of other government officials, such as elected city commissioners." *Id.* at 273. And in political campaigns and debates "[c]harges of gross incompetence, disregard of the public interest, communist sympathies, and the like usually have filled the air; and hints of bribery, embezzlement, and other criminal conduct are not infrequent." *Id.* at 273 n.14 (quoting Dix W. Noel, *Defamation of Public Officers & Candidates*, 49 Colum. L. Rev. 875 (1949)). Thus, "attempt[s] to emphasize and set forth the shortcomings of men prominent in public life, or political parties, or reform movements against which the writer is seeking to create and adverse public opinion" warrant—and are afforded—jealous constitutional protection. *Weeks v. M-P*

Publ'ns, Inc., 95 Idaho 634, 638 (1973). After all, "public officials in the exercise of their official duties are not immune from the criticism and censure of public debate." *Id.* at 639. Wilson's expressions, critical of the government, are at the core of the First Amendment's protections, and only this Court can vindicate Wilson's fundamental First Amendment right to speak publicly against policies with which he disagrees.

D. If the ordinance covers all speech, it conflicts with U.S. Supreme Court limitations on restraints imposed on the time, place, and manner of speech.

Even though the ordinance's vagueness, the City's viewpoint-discriminatory enforcement, and the ordinance's overbreadth present issues important enough and in deep enough conflict with controlling U.S. Supreme Court precedent to warrant this Court's review, the Court of Appeals' flawed reasoning renders the ordinance unconstitutional in yet another way: it cannot be salvaged as a valid time, place, and manner restriction of speech on public property. A law may restrict the time, place, and manner for expression only under certain circumstances and within limits; the ordinance, given the Court of Appeals' interpretation of its scope, far exceeds the constitutional limits of permissible time, place, and manner speech restrictions.

When, as here, a regulation touches traditional public fora, such as streets, sidewalks, and other areas constituting the public square, a speech restriction must

satisfy a rigorous three-part test to comport with the First Amendment. *See Perry*, 460 U.S. at 45. Such a law must (1) be content neutral, (2) be narrowly tailored to serve a significant governmental interest, and (3) leave open ample alternatives for communication. *Burson v. Freeman*, 504 U.S. 191, 197 (1992); *State v. Medel*, 139 Idaho 498, 501 (2003) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). Here, the Court of Appeals attempted to give the ordinance a content-neutral interpretation by reading it as a blanket command that "one cannot 'post, paint, tack, tape or otherwise attach or cause to be attached, any" written speech on any public property without the City's consent. 2024 WL 3108304 at *3. But the Court of Appeals failed to identify a significant governmental interest that the ordinance, so interpreted, served, let alone that the City narrowly tailored the ordinance to actually serve that significant interest. And the law does not leave open ample opportunities for written or graphical expression in the public square of downtown Moscow.

To pass constitutional muster as a time, place, and manner restriction, the ordinance's prohibition would have to be narrowly tailored to service of a significant governmental interest. *Burson*, 504 U.S. at 197. This requirement has two parts. One, the City must identify a significant (and legitimate) governmental interest that the City passed the ordinance to serve, and second, the ordinance must be narrowly tailored to, and actually advance, that interest. *Id*. An interest in suppressing speech, whether for its own sake or to punish a disfavored viewpoint, is not even legitimate, let alone significant. *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2407 (2024).

The City has never proposed a purpose which this ordinance supposedly serves, let alone one toward which the ordinance is narrowly tailored. The U.S. Supreme Court has identified potential legitimate interests for sign regulations; for example, so long as it does so in a viewpoint-neutral way, a city may regulate publicly posted materials to maintain a location's aesthetic value. *See Members of the City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984). But the City has never asserted such a justification for its ordinance—for good reason, as Moscow has allowed countless signs to be posted throughout the city for more than a decade while prosecuting only one message it disapproved of. No legitimate governmental interest, let alone a significant one, is served by a decade-plus policy of nonenforcement punctuated by a single charge to punish a particular speaker's message. And even if the City claimed an aesthetic basis for the ordinance, it cannot account for the mismatch between, for example, a potentially legitimate need to prevent years of signs from accruing or defacing buildings, and the ordinance's application without regard to the duration, size, appearance, or removability of a potentially prohibited sign. The City did not merely fail to tailor the ordinance to ensure it serves to some significant governmental end: it failed to tailor the ordinance's sweep whatsoever.

Second, the City's ordinance does not leave open ample alternative channels for communication. This element of the time-place-manner test is essential to ensure the free flow of information and the preservation of the right to speak freely in the public square. *See*

Heffron v. Int'l Soc. For Krishna Consciousness, Inc., 452 U.S. 640, 655 (1981). Here, the ordinance prohibits all attempts at written expression on public property absent permission and leaves only one alternative: loitering with a hand-held sign. That is a fundamentally different and more limited means of expression compared to posting signage or other material—it requires more than one person in order to distribute a message in more than one location, and it requires the speaker to be present for the duration of the expression. In other words, it does not leave open an alternative means to speak using durable, written messages posted in public. And, as specifically relevant here, it limits the speaker's ability to criticize the government's own slogans or signage through parody.

That the ordinance regulates posting signs on private property as well as public does not save it: in any circumstance, the ordinance must not reflect an effort to suppress a viewpoint merely because the government disagrees with it, *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677-78 (1998); *Perry*, 460 U.S. at 46, and the ordinance's applications to postings on public property can be justified as time, place, and manner restrictions only to the extent they satisfy the three-part test identified above—which the ordinance cannot. Indeed, the City failed even to attempt to justify the ordinance on that basis. CR.347-51; CR.1037-43. This further constitutional infirmity once again underscores the need for this Court's review.

II. The Court of Appeals Could and Should Have Avoided These Conflicts by Limiting the Ordinance to Commercial Advertising, Which Best Accords with Its Plain Language.

Courts must interpret a law according to its most constitutionally sound reading, not its least. The Court of Appeals deviated from this principle and thus ran headlong into the multiple First Amendment conflicts explained in Part I, *supra*. As noted above, the ordinance in question provides as follows:

> No person shall post, paint, tack, tape or otherwise attach or cause to be attached, any notice, sign, announcement, or other advertising matter to any fence, wall, building, tree, bridge, awning, post, apparatus or other property not belonging to said person without first obtaining the consent of the owner or lessee of such property or their agent(s) or representative(s).

Moscow City Code § 10-1022(A). The language the City employed in the ordinance suggests that covered notices, signs, or announcements are "advertising matters." Understood in conjunction with "other advertising matters," notices and announcements that advertise amount to commercial speech—a category of speech that the U.S. Supreme Court has sometimes permitted governments to regulate to a greater extent than other protected speech and for which that Court employs a lesser degree of scrutiny. The Court of Appeals should therefore have read the ordinance as prohibiting only

commercial advertisements—its most natural, and least constitutionally problematic, reading.

The Court of Appeals' contrary interpretation is manifestly wrong, not only because it renders the ordinance irreconcilable with the First Amendment, but because it contravenes the plain language of the ordinance. Properly understood, the ordinance's reference to "other advertising matter" serves as a catch-all informing the meaning of the larger phrase "notice, sign, announcement, or other advertising matter." Under a proper interpretation of the ordinance, the conduct the City charged Wilson with is not prohibited, and therefore his conviction cannot stand. The Court of Appeals erred in concluding otherwise and created unnecessary and avoidable conflicts with both U.S. Supreme Court First Amendment jurisprudence and this Court's jurisprudence on how the lower courts must interpret state and local law.

A. The Court of Appeals should have interpreted the ordinance as limited to commercial speech to reduce its conflict with the First Amendment.

As this Court has required, Idaho courts must interpret a law when possible in the way that most avoids potential constitutional defects. *Moon v. N. Id. Farmers Ass'n*, 140 Idaho 536, 540 (2004). Additionally, courts presume that legislative bodies, like the Moscow City Council, intend to pass laws that are constitutional. *See Planned Parenthood Great Nw. v. State*, 171 Idaho 374, 439 (2023) ("It is generally presumed that legislative acts are constitutional, [and] that the state legislature has acted within its constitutional powers . . . "). The

Court of Appeals was therefore obligated to interpret the ordinance's scope in the way that most avoided conflicts with the First Amendment. It did the opposite, which this Court should reverse.

On its face, the City's ordinance applies to advertising. The most natural understanding of the word "advertising" refers to material that proposes and seeks a commercial transaction. This Court relies on dictionaries to understand terms that lack a specific legislative definition. *See, e.g.*, *JK Homes, LLC v. Brizzee*, No. 50662, 2024 WL 3818333, at *4 (Idaho Aug. 15, 2024) (relying on Black's Law Dictionary to define "incarceration"). Black's Law Dictionary defines an advertisement as "[a] commercial solicitation; an item of published or transmitted matter made with the intention of attracting clients or customers," and advertising as "[t]he action of drawing the public's attention to something to promote its sale." *Advertisement*, Black's Law Dictionary (10th ed. 2014); *Advertising*, Black's Law Dictionary (10th ed. 2014). Collins Dictionary defines advertisement to be "an announcement . . . about something such as a product, event, or job."[1] The Oxford English Dictionary likewise defines an advertisement as "a public notice or announcement, … esp. one advertising goods or services."[2] The Brittanica Dictionary also defines an "advertisement" as "something . . . that is shown or presented to the public

1. Available at https://www.collinsdictionary.com/us/dictionary/english/advertisement.

2. Available at https:// www.oed.com/search/dictionary/?scope=Entries&q=advertisement.

to help sell a product or to make an announcement."[3] The public would thus view "advertising material" and notices, signs, and announcements like advertising material as speech with an inherently commercial meaning—the ordinary understanding of an advertisement is speech that publicizes a good or service, or some attribute of a good or service, or the price and location at which a good or service is available.

This plain-language understanding minimizes the ordinance's conflicts with the First Amendment. Take the ordinance's vulnerability as a prior restraint: as interpreted by the Court of Appeals, the ordinance imposes a prior restraint on all potential speakers, requiring a poster to receive permission before posting a sign in the public square. This prior restraint likewise fails to impose standards to limit the City's discretion in granting or withholding that permission. Prior restraints on speech are almost uniformly constitutionally invalid, as "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969). But the U.S. Supreme Court treats *commercial* speech differently: while prior restraints may be presumptively unconstitutional for restrictions on public discourse, "commercial speech is, such a sturdy brand of expression that traditional prior restraint doctrine may not apply to it." *Cent. Hudson*

3. Available at https://www.britannica.com/dictionary/advertisement

Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 571 n.13 (1980).

Limiting the ordinance's application to commercial advertising cures other First Amendment ills as well. For one, if limited to *commercial* advertising, the ordinance would be subject only to intermediate scrutiny, rather than the strict scrutiny that applies to other content-based speech restrictions. Moreover, as interpreted to cover only commercial speech, the ordinance is no longer susceptible to a First Amendment overbreadth challenge, as the U.S. Supreme Court has concluded that the First Amendment's guarantees against overbroad speech regulations do not apply to commercial speech restrictions.

1. Because it applies only to commercial speech, the ordinance would be subject to intermediate scrutiny instead of the strict scrutiny that accompanies other content-based First Amendment challenges. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 553-54 (2001) (citing *Cent. Hudson*, 447 U.S. at 566); *see also Lamar Corp. v. City of Twin Falls*, 133 Idaho 36, 41 (1999). Under the *Central Hudson* test, commercial speech is protected if it "concern[s] lawful activity and [is not] misleading." 447 U.S. at 566. A law that regulates such protected commercial speech must "directly advance[]" a "substantial" governmental interest and be no more extensive than necessary. *Id.* To describe a law as regulating only commercial speech is, of course, to acknowledge that it is not a content-neutral speech regulation. Yet the U.S. Supreme Court has historically upheld restrictions on commercial speech that satisfy a more forgiving, intermediate-scrutiny standard, rather than the demanding strict scrutiny that content-based

speech regulations usually face. *See, e.g.*, *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 504-12 (1981).

As the U.S. Supreme Court recently clarified, however, an interpretation of the ordinance that includes *non-commercial* advertisements would expose the ordinance to First Amendment attack as a content-based speech restriction. Unlike commercial-speech regulations, which are reviewed under the less-demanding, but still substantial, intermediate scrutiny, the First Amendment regards content-based speech restrictions as among the hardest to justify. *See, e.g.*, *Reed v. Town of Gilbert*, 576 U.S. 155, 171-72 (2015). The City cannot avoid this problem by proposing that the ordinance applies to all announcements, signs, and notices that advertise, rather than only commercial advertisements; as the Supreme Court has recently cautioned, a law that regulates non-commercial as well as commercial advertisements does not regulate on content-neutral grounds: such a law regulates speech based on its content, namely whether it advertises. *Id.* Instead, such a law no longer qualifies for more lenient commercial-speech treatment, and must be justified under strict scrutiny, which requires "a compelling governmental interest and [that the law] is narrowly tailored to achieve that interest. *Id.* at 171. Aside from the narrow commercial-speech exception, when the "purpose and justification for the law are content based," strict scrutiny applies. *Id.* at 166. An interpretation of the ordinance as reaching noncommercial materials as well as commercial materials therefore creates, rather than alleviates, the ordinance's First Amendment infirmities.

Appendix G

An appropriate strict-scrutiny analysis demands a particularly close fit between a government's claimed (and compelling) ends with its employed (and narrow) means. Hence "a law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction on truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited." *Id.* at 172 (citation and quotation marks omitted). And a government cannot recast a prohibited content-based regulation as a content-neutral one by claiming that it targets speech based on its "function or purpose," as regulations restricting speech on these grounds are also subject to strict scrutiny. *Id.* at 163-64. Here, the City has not even proposed a compelling interest that the ordinance supposedly serves, let alone proven both that the ordinance was in fact passed to advance that interest and that it does so with the requisite demanding ends-means fit. Nor, given its decade of refusal to enforce the ordinance, could the City conceivably show that the ordinance did not "leave[] appreciable damage to that supposedly vital interest unprohibited." *See id.* The Court of Appeals should have presumed that the City did not intend to invite strict scrutiny of the ordinance and should therefore have understood the ordinance as reaching commercial speech and no more—a distinction the ordinance's text justifies.

If this Court concludes that the ordinance reaches only commercial advertisements, it need decide no more than that Wilson's conviction lacked sufficient evidence because his speech was certainly not commercial, nor does the State argue otherwise. That is enough to leave any constitutional concerns underlying the ordinance for a future case.

2. Interpreting the ordinance to cover only commercial speech also avoids any concern that the ordinance is overbroad. The First Amendment's prohibition on overbroad speech regulations does not apply to regulations of exclusively commercial speech. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982) ("[T]he overbreadth doctrine does not apply to commercial speech."); *State v. Newman*, 108 Idaho 5, 11 (1985). Only when "the alleged overbreadth (if the commercial-speech application is assumed to be valid) consists of its application to *non*-commercial speech" will the doctrine come into play. *Bd. of Trs. Of St. Univ. of N.Y. v. Fox*, 492 U.S. 469, 481 (1989); *see also S.O.C., Inc. v. County of Clark*, 152 F.3d 1136, 1143 n.6 (9th Cir. 1998). Thus, if the ordinance only applies to commercial advertisements, the overbreadth doctrine does not apply and the First Amendment problems arising from the ordinance's breadth dissipate entirely.

Given this Court's heavy presumption that legislative bodies intend to pass laws that avoid constitutional conflicts, an interpretation that the ordinance regulates only commercial advertisements gives effect to the language the City actually used, recognizes the presumption that the City intended its law to comport with the U.S. Constitution, and avoids several potential constitutional conflicts that broader interpretations necessarily confront. The Court of Appeals chose the opposite path: it adopted the broadest interpretation, which both subjects the ordinance to numerous insuperable constitutional challenges and implies that the City disregarded these constitutional problems in drafting the ordinance. This Court's guidance is needed to ensure that the lower courts

avoid drawing legislative enactments like the ordinance into constitutional conflicts with well-established First Amendment doctrines.

B. The plain language of the ordinance confirms that the City of Moscow prohibited only the posting of advertisements.

The Court should presume that the Moscow City Council intended a meaning for the ordinance that avoids the constitutional problems described above. That alone is reason enough to grant review and correct the Court of Appeals' contrary interpretation. But as explained below, giving the ordinance its correct interpretation is also necessary to conform the ordinance's plain language to this Court's statutory-interpretation precedents, under which Wilson's conduct plainly falls outside the ordinance's scope. This understanding is confirmed by several of this Court's canons of construction, which are also at odds with the Court of Appeals' interpretation. And if there were any doubt that the ordinance's plain language was intended to regulate only commercial speech, the criminal-law rule of lenity forecloses the Court of

* * *

APPENDIX H — REPLY BRIEF OF APPELLANT IN THE SUPREME COURT OF THE STATE OF IDAHO, FILED JANUARY 16, 2024

IN THE SUPREME COURT OF THE
STATE OF IDAHO

Supreme Court No. 50802-2023
District Court No. CR29-20-2114

STATE OF IDAHO,

Plaintiff-Respondent,

vs.

RORY D. WILSON,

Defendant-Appellant.

Filed: January 16, 2024

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

HONORABLE JOHN JUDGE
District Judge

HONORABLE MEGAN MARSHALL
Magistrate Judge

Appendix H

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construed in favor of defendants." *State v. Olsen*, 161 Idaho 385, 392 (2016), *quoting State v. Anderson*, 145 Idaho 99, 103 (2008). Under the narrow definition of "advertising," the Soviet Moscow stickers are not "advertising material."

Thus, Mr. Wilson has argued that: 1) the statute only forbids the posting of advertising material and 2) has agreed with the magistrate court when it says the Black's definition should be used, while disagreeing when the magistrate court failed to apply that definition. Both bases of the magistrate court's decision denying the motion to dismiss have been addressed.

B. *If the Ordinance is Given the Trial Court's Interpretation, it is Unconstitutionally Vague.*

Another problem with the magistrate court's interpretation of the ordinance is that it renders the

ordinance void for vagueness as it is no longer "plainly and unmistakably" clear about what it prohibits. *State v. Kavajecz*, 139 Idaho 482, 486 (2003). The state never argues that Mr. Wilson's understanding of the ordinance is unreasonable, even if wrong. Reading the statute to only prohibit the posting of "advertising materials" is more than reasonable, as shown above. And the Moscow City Attorney acknowledged at the motion to dismiss hearing that there were varying definitions of advertising and urged the magistrate court to adopt the broader Webster's definition over the Black's Law definition. T (04/16/2021) p. 43, l. 8-16. Thus, the ordinance is not plainly and unmistakably clear that it prohibits the posting of political opinions in addition to "other advertising material." From that, it necessarily follows the ordinance did not give Mr. Wilson "fair warning of the conduct that it makes a crime[.]" *State v. Kavajecz*, at 486, *quoting Bouie v. City of Columbia*, 378 U.S. 347, 350 (1964). "To make the warning fair, so far as possible the line should be clear" *Id., quoting United States v. Lanier*, 520 U.S. 259, 265 (1997). Here it is not. Accordingly, this Court should find the ordinance void for vagueness.

C. *When the Ordinance is Properly Construed, the State Failed to Present Sufficient Evidence to Prove Every Element of the Offense Beyond a Reasonable Doubt.*

The state argues that the ordinance applies to any postings, not just commercial advertising. To the contrary, as shown above, and in the Augmented Opening Brief, the ordinance properly read applies only to commercial

advertising. AOB, p. 6-7, 17-18. But to the extent there is more than one reasonable reading of the term "advertising material," this Court should adopt the more restrictive. "The rule of lenity states that criminal statutes must be strictly construed in favor of defendants." *State v. Olsen*, 161 Idaho 385, 392 (2016), *quoting State v. Anderson*, 145 Idaho 99, 103 (2008). Under that definition, the Soviet Moscow stickers are not advertising material. "Soviet Moscow" was not "used to announce something," "designed to persuade or educate the public" (R 1096), nor did it "call the public's attention to a community event" (*id.*), nor did it encourage people to act in any way, *e.g.*, to send money to an entity called Soviet Moscow, or to vote for political candidates running on the Soviet Moscow ticket. Thus, even using the overboard definition of "advertising matter" applied by the magistrate court, the "Soviet Moscow" stickers do not fall within it.

* * *

APPENDIX I — AUGMENTED OPENING BRIEF OF APPELLANT IN THE SUPREME COURT OF THE STATE OF IDAHO, FILED OCTOBER 4, 2023

IN THE SUPREME COURT OF THE
STATE OF IDAHO

Supreme Court No. 50802-2023
District Court No. CR29-20-2114

STATE OF IDAHO,

Plaintiff-Respondent,

vs.

RORY D. WILSON,

Defendant-Appellant.

Filed: October 4, 2023

AUGMENTED OPENING BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

HONORABLE JOHN JUDGE
District Judge

HONORABLE MEGAN MARSHALL
Magistrate Judge

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would be covered. But that is an absurd reading, as the City Council clearly wanted to regulate advertisements whether they appeared on notices, signs, announcements, or elsewhere. This Court should not read the ordinance in a matter which creates an absurd result. *Moser v. Rosauers Supermarkets, Inc.*, 165 Idaho 133, 137 (2019). The magistrate court's reading of the statute is erroneous and should be rejected by this Court.

Finally, if the Ordinance were ambiguous and capable of the court's reading thereof, this Court should adopt Mr. Wilson's interpretation. "The rule of lenity states that criminal statutes must be strictly construed in favor of defendants." *State v. Olsen*, 161 Idaho 385, 392 (2016), quoting *State v. Anderson*, 145 Idaho 99, 103 (2008).

For the reasons above, this Court should construe the ordinance to regulate advertisements whether appearing

on notices, signs, announcements, or other matter. It should then reverse the court's order dismissing the case and remand for the dismissal of the case.

B. *If the Ordinance is Given the Trial Court's Interpretation, it is Unconstitutionally Vague.*

If the lower court's reading of the ordinance is correct, the ordinance is void for vagueness as applied.

1. *Legal Standards.*

> An ordinance may be void for vagueness because either it (1) fails to give a 'person of ordinary intelligence a reasonable opportunity to know what is prohibited;' (2) 'impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application;' or (3) 'abut(s) upon sensitive areas of basic First Amendment freedoms, [] operat[ing] to inhibit the exercise of (those) freedoms.'

Hunt v. City of Los Angeles, 638 F.3d 703, 710 (9th Cir. 2011), quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). "The United States Supreme Court has repeatedly held that 'a criminal statute must give fair warning of the conduct that it makes a crime[.]'" *State v. Kavajecz*, 139 Idaho 482, 486 (2003), quoting *Bouie v. City of Columbia*, 378 U.S. 347, 350 (1964), and "before a man can be punished as a criminal under the [] law his case

must be 'plainly and unmistakably' within the provisions of some statute." *Id.* quoting *United States v. Gradwell*, 243 U.S. 476, 485 (1917). Due process requires "what Justice Holmes spoke of as 'fair warning . . . in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear'" *Id.*, quoting *United States v. Lanier*, 520 U.S. 259, 265 (1997).

In addition, vagueness may invalidate a criminal law because it may authorize and even encourage arbitrary and discriminatory enforcement. *State v. Larsen*, 135 Idaho 754, 756 (2001), citing *City of Chicago v. Morales*, 527 U.S. 41, 42 (1999). The more important aspect of vagueness doctrine "is not actual notice, but the other principal element of the doctrine – the requirement that a legislature establish minimal guidelines to govern law enforcement." Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (internal citations omitted).

A void for vagueness challenge is more favorably acknowledged and a more stringent vagueness test will be applied where a statute imposes a criminal penalty, or if the law interferes with a substantial amount of conduct protected by the First Amendment. *State v. Cobb*, 132 Idaho 195, 198 (1998) citing *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489 (1982); *Kolender v. Lawson*, *supra*. Here, the ordinance both imposes a

criminal penalty and interferes with a substantial amount of First Amendment conduct. The stickers, expressing disagreement with the Moscow mask mandate and the manner in which it was imposed, are quintessential political speech protected by the First Amendment. *Weeks v. M-P Publications, Inc.*, 95 Idaho 634, 639 (1973) (Even "[p]olitical epithets and hyperbole leveled against the actions of public officials are within the freedom of expression protected by the First Amendment afforded to citizens criticizing the function of their government.").

"Whether a statute is unconstitutionally vague is a pure question of law and therefore reviewed de novo." *State v. Cook*, 165 Idaho 305, 309 (2019).

2. *Why Relief Should be Granted.*

In this case, there were concerns raised over both standardless enforcement and prosecution based upon political speech.

First, Mr. Wilson showed, and the court found that there had never been a prosecution under the ordinance in the entire twelve years of its existence. R 413. Mr. Wilson also presented photographic evidence of many violations of the ordinance visible on a single day. These photographs showed both public and private property. Many of the items posted are for commercial business which are clearly identified on the posting. Others – such as signs seeking the return of lost cats and dogs – have the name and telephone number of the pet owners. R 140-159. Thus, it was entirely possible for the police to call up these

individuals and obtain an admission that they posted the items. A citation for violation of the ordinance could have been issued upon that admission. Yet, that did not happen a single time in twelve years.

What made the Soviet Moscow stickers different was the content. None of the other items were critical of the Moscow City Council in general or of its Covid-19 mask mandate in particular. Other political messages such as Pride, "Immigrants Welcome," "Smash the 'Gegen Nazis,'" or "F*** Trump" all went uncharged. One of the officers at the scene told Mr. Wilson's father that he did not "agree with the messaging" of the stickers. R 138. That viewpoint might explain the officer's rejection of Mr. Wilson's multiple offers to remove the stickers. T Vol. II, p. 508, l. 18-24. The officer decided to punish Mr. Wilson because he disagreed with the content.

Where the law at issue regulates speech in a traditional public forum like public streets and sidewalks, the law is "'subject to the highest scrutiny.'" *Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998), *quoting Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 678 (1992). The law will be upheld only "if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984) (quotation marks omitted).

"In the First Amendment context," the Supreme Court recognizes a unique "type of facial challenge, whereby a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010). To determine whether a law is facially overbroad under the First Amendment, "a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct." *City of Houston, Tex. v. Hill*, 482 U.S. 451, 458 (1987) (internal citation and quotation omitted). "Criminal statutes must be scrutinized with particular care; those that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application." *Id.* (citation omitted). For a facial challenge to proceed, "[t]he law must have a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat of the identified censorship risks." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 759 (1988).

Here, the ordinance, at least as read by the state and court, plainly targets expressive speech in a real and substantial way that infringes upon a person's First Amendment right to free expression. The ordinance criminalizes posting, painting, tacking, taping, or otherwise attaching or causing to be attached, any notice, sign, announcement, or other advertising matter to any fence, wall, building, tree, bridge, awning, post, apparatus or other property. Moscow City Code 10-1-22(A). This targets all speech, including political speech. There is

close enough nexus to protected expression that it poses a real and substantial threat of censorship.

Further, the ordinance – again, as read by the state and court – is not a valid manner restriction. Mr. Wilson acknowledges that "the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), quoting *Clark v. Community for Creative Non–Violence*, 468 U.S. 288, 293 (1984). While the ordinance is facially neutral, it is not narrowly tailored. Any purported need to prevent property destruction or visual clutter could be accomplished without a provision criminalizing speech in public areas without permission. The ordinance could be decriminalized or there could be a requirement to remove postings within a reasonable amount of time. Finally, the ordinance provides no guidance as to how an individual might apply for or obtain "express" permission from the City to engage in the posting of First Amendment protected political speech.

The First Amendment concerns, of course, are cured if the ordinance is limited to advertising matter, the plain reading of ordinance. See *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 496–97 (1982) (holding the overbreadth doctrine does not apply to commercial speech) citing *Central Hudson Gas &*

Electric Corp. v. Public Service Comm'n, 447 U.S. 557, 565, n. 8 (1980).

Moreover, there was also evidence suggesting that the City Prosecutor was frustrated by the behavior of members of Mr. Wilson's church, which controversially held a "psalm sing" at City Hall in protest of the mask mandate. Several church members were arrested at that protest. Mr. Wilson's grandfather, Douglas Wilson, is the Senior Minister at Christ Church. Among other comments, the City Prosecutor referred in text messages to members of Christ Church as "religious idiots," "religious zealots," "nuts," who would pull "illegal stunts constantly" and who were "wrecking [her] sanity." R 552-565.

While the court denied Mr. Wilson's Motion to Dismiss for Selective Prosecution and his Motion to Disqualify the Prosecuting Attorney, the above illustrates the danger of vague statutes which touch on the First Amendment rights of citizens.

To prevail on an "as applied" vagueness challenge, the defendant must show that the statute, as applied to the defendant's conduct, failed to provide fair notice that the conduct was proscribed or failed to provide sufficient guidelines so that law enforcement had unbridled discretion in determining whether to charge him or her. *State v. Cook*, 165 Idaho at 310. However, "[t]he words of a statute alleged to be unconstitutionally vague should not be evaluated in the abstract, but should be considered in reference to the particular conduct of the defendant challenging the statute." *State v. Cook*, *supra*., citing

Larsen, 135 Idaho at 757. Those words "are given their commonly understood, everyday meanings, unless the legislature has provided a definition." *Id.* citing *State v. Richards*, 127 Idaho 31, 38 (Ct. App. 1995).

As explained above, the commonly understood, everyday meaning of the word "other" when used at the end of a serial list of nouns ("notice, sign, announcement") indicates those things of the same type as the final noun in the list, in this case "advertising matter." An average person would understand "or other advertising matter" to mean the preceding list of items must also be advertising matter of a specific type. But if the ordinance is given the court and state's interpretation, it is not unmistakably clear. Indeed, even the court's reasoning in this regard is circular. It first misreads the ordinance and then concludes that its misreading is clear:

> The intent of MCC § 10-1-22 is clear; if an individual does not have prior permission from the property owner, they may not attach a notice, sign, announcement or other advertising matter onto someone else's property. The statute provides fair notice that when a person affixes matter to property but does not obtain "the consent of the owner or lessee of such property or their agent(s) or representative(s)" under subpart (A) or "prior approval, in writing, from the government entity owning or controlling such public property or public right-of-way" under subpart (B), he is in violation of the ordinance.

R 405.

First, the intent of the statute is not relevant if the text is not unmistakably clear. Moreover, the court's analysis omits the text that the matter (or notice, or sign, or announcement) must be advertising. The court's interpretation of the language makes the ordinance unconstitutionally vague because an average person would not "plainly and unmistakably" know that attaching non-advertisements is prohibited merely by reading the text of the ordinance as required by *State v. Kavajecz*, 139 Idaho 482, 486 (2003) and *United States v. Gradwell*, 243 U.S. 476, 485 (1917). The court's reading of the statute renders the word "other" void or superfluous to the sentence read as a whole and does not give the reader fair warning that engaging in core First Amendment political speech by attaching notices, signs, and announcements which are not advertisements is punishable by a criminal sanction.

This Court should declare the ordinance unconstitutionally void-for- vagueness, reverse the conviction, and remand for an order dismissing the case.

C. *When the Ordinance is Properly Construed, the State Failed to Present Sufficient Evidence to Prove Every Element of the Offense Beyond a Reasonable Doubt.*

The appellate court, reviewing a claim of insufficient evidence must determine whether any rational trier of fact viewing the evidence in the light most favorable to the prosecution could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *State v. Gardner*, 169 Idaho 90,

97 (2021). This is one of those rare cases which meets that standard.

Under the correct reading of the ordinance, the state was required to prove that Mr. Wilson attached some type of advertising matter. "Advertising" is defined as "[t]he action of drawing the public's attention to something to promote its sale." R 401 (Court's Memorandum Decision, quoting ADVERTISING, Black's Law Dictionary (11th ed. 2019)); *see also* R 939 (Court's Jury Instruction #13). The Soviet Moscow stickers are not advertising matter of any type, as they do not attempt to sell anything.

* * *

APPENDIX J — REPLY BRIEF OF APPELLANT IN THE DISTRICT COURT FOR THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH, FILED FEBRUARY 21, 2023

IN THE DISTRICT COURT FOR THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

CASE NO. CR29-20-2114

STATE OF IDAHO,

Plaintiff-Respondent,

vs.

RORY D. WILSON,

Defendant-Appellant.

Filed February 21, 2023

REPLY BRIEF OF APPELLANT

APPEAL FROM THE MAGISTRATE COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

HONORABLE MEGAN E. MARSHALL
Magistrate Judge

Appendix J

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* * *

C. If The Ordinance is Given the Trial Court's Interpretation, it is Unconstitutionally Vague.

If the state were correct in its interpretation of the ordinance, the ordinance would be void for vagueness because Mr. Wilson could not have known that his planned actions were "plainly and unmistakably" within the provisions of the ordinance as required by *State v. Kavajecz*, 139 Idaho 482, 486 (2003) and *United States v. Gradwell*, 243 U.S. 476, 485 (1917). That determination is made by an analysis of the text of the ordinance, not by determining what "[m]ost people learn very early in life," as argued by the state. RB, p. 12. Most people learn early in life not to burp loudly and if offered a cookie from a tray to take the one nearest to you, even if it is not the biggest. And it is a "well-known custom" for a gentleman to open the door for the lady he is walking with. But times change and the text of any ordinance attempting to make such early lessons or changeable customs a crime needs

to be unmistakably clear. Similarly, the state's comment that Mr. Wilson "trespassed" (RB, p. 13) when putting up the stickers along a public street might be relevant if this were a trespassing case. As it is, the state's comment is just gratuitous and is not supported by the facts presented at trial, as no one testified there was a trespass.

Here, if the ordinance is given the court and state's interpretation, it is not unmistakably clear. The court's reasoning in this regard is circular. It first misreads the ordinance and then concludes that its misreading is clear:

> The intent of MCC § 10-1-22 is clear; if an individual does not have prior permission from the property owner, they may not attach a notice, sign, announcement or other advertising matter onto someone else's property. The statute provides fair notice that when a person affixes matter to property but does not obtain "the consent of the owner or lessee of such property or their agent(s) or representative(s)" under subpart (A) or "prior approval, in writing, from the government entity owning or controlling such public property or public right-of-way" under subpart (B), he is in violation of the ordinance.

Memorandum Decision, p. 10. This analysis omits the text that the matter (or notice, or sign, or announcement) must be advertising. The court's interpretation of the language makes the ordinance unconstitutionally vague because an average person would not "plainly and unmistakably"

know that attaching nonadvertisements is prohibited merely by reading the text of the ordinance.

The analysis of the text is objective, so the court's comments about what Mr. Wilson's understanding of the statute might have been are not relevant. *See* Memorandum Decision, p. 11; RB, p. 14-15. Moreover, Mr. Wilson testified during the trial, he "was trying to make a political point . . . not to draw attention to [him]self." T Vol III, p. 600, l. 12-22. That explains why he did it late at night. Plus, putting the stickers up during the day would have caused a commotion that would focus unfavorable attention on him and his family and detract from the political message. Thus, the court's speculations that Mr. Wilson's actions showed he knew he was violating the law are not well-founded because they do not take into account that there were other reasons why Mr. Wilson posted the stickers when there was no one else around. Most importantly, however, the speculations are beside the point.

The Court should decline the state's invitation to uphold the constitutionality of the ordinance by clarifying any ambiguity. It is the state's misinterpretation which causes the ambiguity, not the text. "Where the language of a statute is plain and unambiguous, this Court must give effect to the statute as written, without engaging in statutory construction." *State v. Beard*, 135 Idaho 641, 646 (Ct. App. 2001).

In addition, the statute's statutory construction is flawed. While the Court will "look to the other statutes in the title or act relating to the same subject matter and

read them in para materia in an effort to determine what the legislature intended," *Killeen v. Vernon*, 121 Idaho 94, 97 (1991) (emphasis added), the Moscow Sign Code appears in Title 4 (Zoning Code), chapter 6 (Supplementary Regulations) while the No Posting Ordinance appears in Title 10 (Police Regulations), chapter 1 (General Offenses). The City Council removed the No Posting Ordinance from the Moscow Sign Code in 2009. A true and correct copy of Ordinance 2009-10 is attached hereto for the convenience of the Court and counsel. Interestingly, the section of the ordinance which states that the purpose of the Sign Code is "[t]o prevent favoring of commercial speech over non-commercial speech or any favoring of any particular non-commercial message over any other commercial message" was added to the Sign Code at the same time the No Posting Ordinance was stricken. Thus, there is no reason to conclude that the current stated purposes of the Sign Code have anything to do with the purposes of the No Posting Ordinance.

The state fails to address Mr. Wilson's argument that "vagueness may invalidate a criminal law because it may authorize and even encourage arbitrary and discriminatory enforcement. *State v. Larsen*, 135 Idaho 754, 756 (2001), *citing City of Chicago v. Morales*, 527 U.S. 41, 42 (1999)." Opening Brief, p. 9. Instead of addressing the argument, the state merely asserts that its motives were pure in this case. *See* RB , p. 16-20 (Arguments 5.3.1–5.3.2). But, even taken as true, the state's asserted absence of malice does not affect

whether the ordinance permits or encourages such behavior. Thus, the state's response is a strawman argument and no reply is needed.[2]

D. The Court Erred by Denying the Motion to Suppress Statements Because the Evidence Shows Mr. Wilson was In Custody When he was Interrogated Prior to Any Miranda Warnings.

The state argues that the totality of the circumstances show that Mr. Wilson was not in custody for *Miranda* purposes. That is not the case.

First, the state asserts that the police contact occurred "on a well-lit street." RB, p. 23. However, the is no evidence to support the magistrate's finding that the public street corner was "well-lit." T Vol. I, p. 83, l. 24. Thus, this Court should not consider that finding when determining whether Mr. Wilson was in custody. *See*, *State v. Dominguez*, 137 Idaho 681, 682 (Ct. App. 2002) (The Court will defer to the trial court's findings of fact only if they are supported by substantial competent evidence.).

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2 Notwithstanding, the state's assertion that "[t]he non-consensual posting of controversial messages on private property ~~has the potential to~~ [sic] gives theimpression that the private property owners endorse the posted message which could be detrimental to the property owner" (RB, p. 13) stretches beyond the reader's credulity. The stickers were clearly placed by someone other than the owner of the private property. In any case, the vast majority of stickers were on public property.

While the contact was on a public street, there was no one else around. Thus, Mr. Wilson and his brother were alone with the three police officers. The state attempts to place the blame on Mr. Wilson for this fact, writing, "Mr. Wilson's choice to be roaming the streets at that time on his own volition is voluntarily

* * *

APPENDIX K — OPENING BRIEF OF APPELLANT IN THE DISTRICT COURT FOR THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH, FILED DECEMBER 27, 2022

IN THE DISTRICT COURT FOR THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

CASE NO. CR29-20-2114

STATE OF IDAHO,

Plaintiff-Respondent,

vs.

RORY D. WILSON,

Defendant-Appellant.

Filed: December 27, 2022

OPENING BRIEF OF APPELLANT

APPEAL FROM THE MAGISTRATE COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

HONORABLE MEGAN E. MARSHALL
Magistrate Judge

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* * *

advertisements whether appearing on notices, signs, announcements, or other matter. It should then reverse the court's order dismissing the case and remand for the dismissal of the case.

B. ***When the Ordinance is Properly Construed, the State Failed to Present Sufficient Evidence to Prove Every Element of the Offense Beyond a Reasonable Doubt.***

The appellate court, reviewing a claim of insufficient evidence must determine whether any rational trier of fact viewing the evidence in the light most favorable to the prosecution could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *State v. Gardner*, 169 Idaho 90, 97 (2021). This is one of those rare cases which meets that standard.

Under the correct reading of the ordinance, the state was required to prove that Mr. Wilson attached some type of advertising matter. "Advertising" is defined as "[t]he action of drawing the public's attention to something to promote its sale." Memorandum Decision, p. 6, quoting ADVERTISING, Black's Law Dictionary (11th ed. 2019); *see also, Court's Jury Instruction #13.* The Soviet Moscow stickers are not advertising matter of any type, as they do not attempt to sell anything. Consequently, a rational trier of fact could not have found that the state failed to establish every element of the ordinance beyond a reasonable doubt.

This Court should reverse the conviction and remand the case for the entry of a judgment of acquittal.

C. *If The Ordinance is Given the Trial Court's Interpretation, it is Unconstitutionally Vague.*

If the lower court's reading of the ordinance is correct, the ordinance is void for vagueness as applied. "Whether a statute is unconstitutionally vague is a pure question of law and therefore reviewed de novo." *State v. Cook*, 165 Idaho 305, 309 (2019).

"The United States Supreme Court has repeatedly held that 'a criminal statute must give fair warning of the conduct that it makes a crime[.]'" *State v. Kavajecz*, 139 Idaho 482, 486 (2003), *quoting Bouie v. City of Columbia*, 378 U.S. 347, 350 (1964), and "before a man can be punished as a criminal under the [] law his case must be 'plainly and unmistakably' within the provisions

of some statute." *Id. quoting United States v. Gradwell*, 243 U.S. 476, 485 (1917).

> Due process requires "what Justice Holmes spoke of as 'fair warning . . . in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear'"

Id. quoting United States v. Lanier, 520 U.S. 259, 265 (1997).

In addition, vagueness may invalidate a criminal law because it may authorize and even encourage arbitrary and discriminatory enforcement. *State v. Larsen*, 135 Idaho 754, 756 (2001), citing *City of Chicago v. Morales*, 527 U.S. 41, 42 (1999).

> The more important aspect of vagueness doctrine "is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement." Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections."

Kolender v. Lawson, 461 U.S. 352, 358 (1983) (internal citations omitted). A void for vagueness challenge is more

favorably acknowledged and a more stringent vagueness test will be applied where a statute imposes a criminal penalty, or if the law interferes with a substantial amount of conduct protected by the First Amendment. *State v. Cobb*, 132 Idaho 195, 198 (1998) citing *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489 (1982); *Kolender v. Lawson*, *supra*. Here, the ordinance both imposes a criminal penalty and interferes with a substantial amount of First Amendment conduct. The stickers, expressing disagreement with the Moscow mask mandate and the manner in which it was imposed, are quintessential political speech protected by the First Amendment. *Weeks v. M-P Publications, Inc.*, 95 Idaho 634, 639 (1973) (Even "[p]olitical epithets and hyperbole leveled against the actions of public officials are within the freedom of expression protected by the First Amendment afforded to citizens criticizing the function of their government.").

In this case, there were concerns raised over both standardless enforcement and prosecution based upon political speech.

First, Mr. Wilson showed, and the court found that there had never been a prosecution under the ordinance in the entire twelve years of its existence. Memorandum Decision, p. 18.

Mr. Wilson also presented evidence of many violations of the ordinance visible on a single day. These photographs showed both public and private property. Many of the items posted are for commercial business which are clearly

identified on the posting. Others – such as signs seeking the return of lost cats and dogs – have the name and telephone number of the pet owners. Thus, it was entirely possible for the police to call up these individuals and obtain an admission that they posted the items. A citation for violation of the ordinance could have been issued upon that admission. Yet, that did not happen a single time in twelve years.

What made the Soviet Moscow stickers different was the content. None of the other items were critical of the Moscow City Council in general or of its Covid-19 mask mandate in particular. Other political messages such as Pride, "Immigrants Welcome," "Smash the 'Gegen Nazis,'" or "F*** Trump" all went uncharged. *See* Exhibits to Declaration of Nathan D. Wilson.

One of the officers at the scene, told the father that he did not "agree with the messaging" of the stickers. *Id.*, p. 1. That viewpoint might explain Mr. Wilson's multiple offers to remove the stickers. Transcript Vol. II, p. 508, l. 18-24.

Second, there was also evidence suggesting that the City Prosecutor was frustrated by the behavior of members of Mr. Wilson's church, which controversially held a "psalm sing" at City Hall in defiance of the mask mandate. Several church members were arrested at that protest. Mr. Wilson's grandfather, Douglas Wilson, is the Senior Minister at Christ Church. Among other comments, the City Prosecutor referred in text messages to members of Christ Church as "religious idiots," "religious zealots,"

"nuts," who would pull "illegal stunts constantly" and who were "wrecking [her] sanity."[1]

While the court denied Mr. Wilson's Motion to Dismiss for Selective Prosecution and his Motion to Disqualify the Prosecuting Attorney, the above illustrates the danger of vague statutes which touch on the First Amendment rights of citizens.

To prevail on an "as applied" vagueness challenge, the defendant must show that the statute, as applied to the defendant's conduct, failed to provide fair notice that the conduct was proscribed or failed to provide sufficient guidelines so that law enforcement had unbridled discretion in determining whether to charge him or her. *State v. Cook*, 165 Idaho at 310. However, "[t]he words of a statute alleged to be unconstitutionally vague should not be evaluated in the abstract, but should be considered in reference to the particular conduct of the defendant challenging the statute." *State v. Cook*, *supra*., citing *Larsen*, 135 Idaho at 757. Those words "are given their commonly understood, everyday meanings, unless the legislature has provided a definition." *Id*. citing *State v. Richards*, 127 Idaho 31, 38 (Ct. App. 1995).

As explained above, the commonly understood, everyday meaning of the word "other" when used at the end of a serial list of nouns ("notice, sign, announcement")

1. The text messages quoted above are attached to the Declaration of Samuel T. Creason in Support of the Motion for Reconsideration of Motion to Dismiss or, in the Alternative, Disqualify Prosecutor (filed 04/15/2022).

indicates those things of the same type as the final noun in the list, in this case "advertising matter." An average person would understand "or other advertising matter" to mean the preceding list of items must also be advertising matter of a specific type. The court's reading of the statute renders the word "other" void or superfluous to the sentence read as a whole and does not give the reader fair warning that attaching notices, signs, and announcements which are not advertisements is punishable by a criminal sanction.

This Court should declare the ordinance unconstitutionally void-for-vagueness, reverse the conviction, and remand for an order dismissing the case.

D. *The Court Erred by Denying the Motion to Suppress Statements Because the Evidence Shows Mr. Wilson was In Custody When he was Interrogated Prior to Any Miranda Warnings.*

1. *Pertinent Facts.*

Mr. Wilson filed a motion to suppress statements made to the police. He argued that the statements were taken in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), and were also the fruit of an illegal arrest under *State v. Clarke*, 165 Idaho 393 (2019). The court denied the motion after an evidentiary hearing.

The court concluded that Mr. Wilson was not in custody for the purposes of *Miranda* and denied the motion to suppress. T Vol I, p. 88, l. 16 – p. 90, l. 5.

Appendix K

2. *Legal Standards.*

Miranda requires that "an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation." *Miranda v. Arizona*, 384 U.S. 436, 471 (1966). *Miranda* warnings are required before interrogating a suspect who is "in custody," a fact determined by "whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *State v. James*, 148 Idaho 574, 576–77 (2010) citing *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (per curiam). To determine whether custody has attached, a court must examine all of the circumstances surrounding the interrogation. The test is an objective one and the only relevant inquiry is how a reasonable person in the suspect's position would

* * *

APPENDIX L — DISTRICT COURT TRIAL EXHIBITS, FILED MAY 16, 2022

Appendix L

APPENDIX M — MEMORANDUM IN THE DISTRICT COURT FOR THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH, FILED APRIL 15, 2022

IN THE DISTRICT COURT FOR THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

CASE NO. CR29-20-2114

STATE OF IDAHO,

Plaintiff,

vs.

RORY D. WILSON,

Defendant.

DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION OF MOTION TO DISMISS OR, IN THE ALTERNATIVE, DISQUALIFY PROSECUTOR

The Court should reconsider its denial of Defendant Rory Wilson's motion to dismiss or, alternatively, disqualify the handling prosecutor in this matter. Defense counsel recently received evidence that appears to show the handling prosecutor making disparaging comments manifesting improper bias against Christ Church in Moscow and its members. Mr. Wilson and his family

worship at this church and, indeed, it is widely known in Moscow that Mr. Wilson's grandfather, Doug Wilson, is the pastor of this church.

* * *

abandoned by the City when it moved to dismiss the charges on January 8, 2021, based on a supposed lack of clarity about the scope of the City's emergency mandates where First Amendment activity was concerned.[1] Thereafter, Mr. Rench, and others who were arrested at the psalm protests, filed a lawsuit against various individuals, including Ms. Warner, alleging violations of their constitutional rights. Apparently, the text messages attached to this memorandum were produced during discovery in this civil lawsuit and were obtained by one of the undersigned counsel for Mr. Wilson at the end of March 2022. *See* Declaration of Samuel T. Creason dated April 15, 2022.

ARGUMENT

I. The Court Should Reconsider Its June 8, 2021 Decision Denying Mr. Wilson's Motion to Dismiss for Selective Prosecution.

On March 3, 2021, Mr. Wilson filed a Motion to Dismiss that asserted, among other things, that the charges should

1. Press Release, City of Moscow Moves to Dismiss Charges (Jan. 8, 2021) https://www.ci.moscow.id.us/CivicSend/ViewMessage/message/132750.

be dismissed because the prosecution against him had been instituted as a result of the exercise of his First Amendment rights, in violation of the Equal Protection Clause. *See Wayte v. United States*, 470 U.S. 598 (1985). The Court denied the Motion to Dismiss on June 18, 2021, holding with respect to the selective prosecution claim that Mr. Wilson had failed to demonstrate that he was associated with Christ Church or a Christian, or established a link between these affiliations and the prosecution. June 18, 2021 Order at 19. Reconsideration is warranted because, if authenticated, the recently discovered text messages from Prosecuting Attorney Warner demonstrate considerable bias against the "religious zealots," "religious idiots," and "Christ church assholes," constituting a substantial preliminary showing that the prosecution against Mr. Wilson is motivated by the Prosecuting Attorney's disagreement with the message Mr. Wilson sought to communicate and by the Prosecuting Attorney's personal bias against Mr. Wilson's religious affiliations.

A defendant sets forth a claim for selective prosecution where they "show both that the passive enforcement system had a discriminatory effect and that it was motivated by a discriminatory purpose." *Wayte v. United States*, 470 U.S. 598, 608 (1985). Put another way, a defendant must show that "(1) others were not prosecuted for the same conduct, and (2) the decision to prosecute was based upon impermissible grounds." *United States v. Christopher*, 700 F.2d 1253, 1258 (9th Cir. 1983). In its June 18 Order, the Court acknowledged that the State has engaged in passive enforcement of MCC § 10-1-22 up until

the charges associated with this case, satisfying the first prong of the selective prosecution analysis. *See* June 18, 2021 Order at 18. Where the Court held that Mr. Wilson fell short was in demonstrating that the prosecutor (as opposed to police officers at the scene) was prosecuting him for an improper purpose, as opposed to his particular conduct. *See id.* at 18-19.

The newly discovered text messages close the gap in proof that the Court relied on in its June 18, 2021 Order. By the time the citation was issued on October 10, 2020, and in the proceedings thereafter, Prosecuting Attorney Warner surely knew Rory Wilson's relation to his grandfather, Pastor Doug Wilson, and his church. Given her remarks to her father about Christ Church and its activities, the Court can infer that Prosecuting Attorney Warner would have known of this relationship, and if the Court deems it necessary, such knowledge can be conclusively determined through an evidentiary hearing. Prosecuting Attorney Warner's statements disparaging Christ Church and its members, in the context of their expressive activities against the City of Moscow's COVID-19 mandates, provides significant evidence that the decision to prosecute, and the decision to pursue this prosecution for over a year-and-a-half, is motivated by bias against a religious organization and its members who have loudly and conspicuously dissented from the City of Moscow's policies. At the very least, an evidentiary hearing is warranted so that the Court can hear testimony and fully assess the authenticity of the text messages, the Prosecuting Attorney's knowledge at the time the decision was made to issue the citations, and rule on this motion based upon sworn testimony.

II. In the Alternative, the Prosecuting Attorney and Her Office Should be Disqualified from Prosecuting this Case.

If the Court does not dismiss this case, it should disqualify Prosecuting Attorney Warner and the Moscow City Attorney's Office from prosecuting this case. Prosecuting Attorney Warner's comments regarding Mr. Wilson's church and her disparaging remarks regarding his religion manifest at the very least an appearance of impropriety that the decision to pursue the prosecution of Mr. Wilson is motivated by improper bias.

Under the Idaho Rules of Professional Conduct, "[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence . . . " Idaho Rule of Professional Conduct Rule 3.8, Comment 1 (2014). Rule 3.8(f) provides that a prosecutor must "refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused . . . " *Id.* at Rule 3.8(f). Likewise, the ABA Standards Relating to the Prosecution Function[2] state that a prosecutor "should

2. The Idaho Rules of Professional Conduct note that the ABA Standards "are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense," Idaho Rule of Professional Conduct Rule 3.8, Comment 1 (2014), and the Idaho Supreme Court has favorably cited the ABA Standards. *See State v. Garcia*, 100 Idaho 108, 111, 594 P.2d 146, 149 (1979).

avoid an appearance of impropriety in performing the prosecution function," Standard 3-1.2(c) Functions and Duties of the Prosecutor, and "should not manifest or exercise, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, gender identity, or socioeconomic status. A prosecutor should not use other improper considerations, such as partisan or political or personal consideration, in exercising prosecutorial discretion," Standard 3-1.6(a) Improper Bias Prohibited. Where a prosecuting attorney is disqualified, "that disqualification may be imparted to the office when there is an appearance of impropriety in permitting anyone else in the office to proceed." *State v. Gonzales*, 138 N.M. 271, 273, 119 P.3d 151, 153 (N.M. 2005).

Prosecuting Attorney Warner's statements create, at the very least, the appearance of impropriety, that the prosecuting decisions in this case are influenced by Prosecuting Attorney Warner's manifest bias against Christ Church and persons associated with it. Prosecuting Attorney Warner called members of Christ Church who protested the City of Moscow's COVID19 mandates, and who were charged by her office with crimes, "religious zealots," "religious idiots," and "Christ church assholes." Mr. Wilson is the grandson of Christ Church's well-known pastor and is affiliated with Christ Church. While it is highly unlikely that Prosecuting Attorney Warner did not know that Mr. Wilson was related to Christ Church's pastor, which could be determined by the Court following a hearing on this motion, Prosecuting Attorney Warner's comments raise at the very least the appearance of impropriety. They raise the specter that the very first

prosecution for violation of Moscow's sign ordinance, wielded against two young men protesting the City of Moscow's treatment of peaceful protesters dissenting from City policies, who are related to and affiliated with members of a group that opposes these policies on religious grounds, is motivated by the Prosecuting Attorney's religious and political bias against a disfavored church group that is deeply opposed to the policies of the government for which the Prosecuting Attorney works. Prosecuting Attorney Warner's statements speak to a personal disdain for and bias against members of Christ Church, a bias that gives the appearance of infecting the prosecution function.

In addition to the appearance of impropriety, the course of these criminal proceedings suggests actual prejudice as the result of Prosecuting Attorney Warner's bias, to be explored further at an evidentiary hearing. Indeed, the Prosecuting Attorney has persisted in the prosecution of Mr. Wilson even after the prosecutions against the other members of Christ Church engaged in the September 23, 2020 psalm protest were abandoned. Although this Court has held that Mr. Wilson's conduct was not protected by the First Amendment, there can be no doubt that his conduct was meant to communicate a message about a matter of public importance during a time of great public controversy in the community. At the very least, Mr. Wilson should be afforded an evidentiary hearing to determine whether improper bias against his church and its political activities underlie this prosecution.

Appendix M

CONCLUSION

For the foregoing reasons, Mr. Wilson respectfully requests that the Court reconsider its decision denying his motion to dismiss and enter an order dismissing the charge against him. In the alternative, Mr. Wilson requests that the Court issue an order disqualifying Prosecuting Attorney Warner and the City of Moscow's City Counsel Office.

DATED this 15th day of April, 2022.

NEVIN, BENJAMIN & McKAY LLP

/s/ Scott McKay
Scott McKay

Samuel T. Creason
CREASON, MOORE, DOKKEN & GEIDL PLLC

Attorneys for Defendant

APPENDIX N — REPLY MEMORANDUM IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH, FILED APRIL 9, 2021

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

Case No. CR29-20-2114

STATE OF IDAHO,

Plaintiff,

v.

RORY D. WILSON,

Defendant.

Filed April 9, 2021

REPLY MEMORANDUM

RE: MOTION TO DISMISS

I. Introduction

The City alleges that in the early morning of October 6, 2020, the Moscow Police Department stopped two youths placing stickers on objects throughout Moscow's downtown. The City does not deny that its downtown was

covered with stickers of various commercial, political, and cultural messages. The City does not deny that the stickers in question were vinyl stickers that could be removed with ease and without damage. The City even contends that the young men offered to remove all the stickers. But the Moscow Police Department and the City have decided that it was "too late for that." Instead, the City scoured its ordinances to find an ordinance, any ordinance, that might be used to charge these young men with a crime.

* * *

B. The Charges against Rory Wilson should be dismissed because the legal, criminal standard is unconstitutionally vague.

The prohibited conduct must be "clearly defined," leaving no one "to speculate as to the meaning" of the prohibition. *See State v. Cook*, 165 Idaho 305, 309, 444 P.3d 877, 881 (2019). "[C]riminal statutes must ***plainly*** and ***unmistakably*** provide fair notice of what is prohibited and what is allowed in language persons of ordinary intelligence will understand." *State v. Harper*, 163 Idaho 539, 543, 415 P.3d 948, 952 (Ct. App. 2018) (emphases added). The standard must be sufficiently definite such that it "'does not encourage arbitrary and discriminatory enforcement.'" *State v. Knutsen*, 158 Idaho 199, 202, 345 P.3d 989, 992 (2015) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). "The more important aspect of the doctrine is the requirement that the legislature provide minimal guidelines to govern law enforcement." *State v. Olsen*, 161 Idaho 385, 389, 386 P.3d 908, 912 (2016).

Appendix N

The requirement for clarity and definiteness is heightened when, as here, the legal standard impacts "sensitive areas of basic First Amendment freedoms" because the lack of clear and strict standards "operates to inhibit the exercise of (those) freedoms." *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (internal quotation marks and citations omitted). "If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply." *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 499 (1982) (citing *Grayned*, 408 U.S., at 109 and *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972). In such cases, the Court must require even "more precision in drafting." *Parker v. Levy*, 417 U.S. 733, 756 (1974).

This case involves a restriction of rights protected by the First Amendment and, therefore, Moscow City Code § 10-1-22 must satisfy the heightened and more stringent requirements for notice, precision, and definiteness. The issue is not whether the City believes someone "should have known" that the City would try to prosecute the alleged conduct, but rather whether the ordinance in question passes constitutional muster. It does not.

As set forth above, the Ordinance is particularly *imprecise* and *indefinite* in its explanation of just what materials may only be posted with the permission of the City. The language of the ordinance cannot survive even the lesser standard of "plain" and "unmistakable" language, let alone the heightened and stringent standard that must be applied by the Court in this case. Furthermore,

the inadequacy of the language of the ordinance is not ameliorated by any guidance, established process, or published standards for obtaining or issuing permission to post political protest signs. The City concedes that it has no such guidance or standards. Finally, the fact that the City maintains that it need not establish any sort of *mens rea* for a criminal conviction under the Ordinance, strongly favors a finding of unconstitutional vagueness. *City of Chicago v. Morales*, 527 U.S. 41, 55 (1999).[8]

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8. The City cites to *Skilling v. United States*, 561 U.S. 358, 402-403 (2010), for the proposition that this court must "construe, not condemn" the Ordinance. *Response to Defendant's Motion to Dismiss*, 8. This statement was made by the Court in response to an attempt by the criminal defendant to invalidate a well-established and upheld criminal statute enacted by the United States Congress. *Skilling*, 561 U.S. at 403-04. In *Skilling*, the Court noted that there was a circuit split on the interpretation of the statute, but that the circuit courts had uniformly upheld the statute. *Id.* at 407. The city ordinance in this case has never been enforced or adjudicated, and its language stands in stark contrast to the clarity of the criminal statute passed by the United States Congress.

The City also relies upon *United States v. Williams*, 553 U.S. 285, 305-306 (2008), for the proposition that simply because close cases can be envisioned, that does not render a statute unconstitutionally vague. *Response to Defendant's Motion to Dismiss*, 8. In *Williams*, the Court noted that the test for vagueness does not rely upon whether a fact might be proved at trial, but upon the uncertainty of just what facts would satisfy a conviction. *Williams*, 553 U.S. at 304-07.

Finally, the City quotes the Idaho State Court of Appeals opinion of *State v. Simpson*, 137 Idaho 813, 817 (Ct. App. 2002), for the proposition that any vagueness in the Ordinance should be excused because "the burden is placed upon the actor to ascertain at his peril whether his deed is within the prohibition

C. The Charges against Rory Wilson should be dismissed as an improper restraint on the Constitutional right to freedom of speech.

The City has an undeniable history of tacitly approving the posting of stickers throughout its downtown area (that is, until the City hurriedly attempted to remove all evidence of stickers after this case came to the public's attention). This is not only an area that has been historically covered with stickers of all kinds, it is an area that the U.S. Supreme Court has described as "the archetype of a traditional public forum." *Frisby v. Schultz*, 487 U.S. 474, 480 (1988). The City has never tried to enforce this Ordinance in an effort to compel removal of political statements, advertisements, yard sale signs, or stickers criticizing the Christian community associated with Christ Church. The City was, apparently, fine with those signs. It was not until someone posted signs criticizing City government that the City decided criminal charges must be pursued. The City is relying upon an unused Ordinance, of questionable application, to try and punish speech that did not differ in the manner of posting or the burden to the community. It only differed in message.

When it comes to issues involving constitutional rights and the freedom of expression, the Court can and

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of the statute." *Response to Defendant's Motion to Dismiss*, 8. This final citation is wholly and patently inapplicable to the Court's analysis. The rule of law cited by the City is applicable to defenses of "mistake of fact" and "good intentions." It is ***not*** applicable to a vagueness analysis.

must candidly assess the government's motivations to act in a manner that discriminates based upon the content of speech. *Sloman v. Tadlock*, 21 F.3d 1462, 1469-70 (9th Cir. 1994). "State action designed to retaliate against and chill political expression strikes at the very heart of the First Amendment." Id. *at* 1469-70 (internal citation and quotation marks omitted). The reality is that the City was frustrated. It was frustrated with the opposition to the mask mandate; frustrated with the criticism; frustrated with the public gatherings in opposition; and frustrated with what it perceived as an orchestrated offensive by the Christian community associated with Christ Church. In the middle of a Moscow night, officers of the Moscow Police Department responded to yet more criticism, and they had had enough. It was at that point that Officer Waters blurted out the exact sentiment shared throughout the City government: they "don't agree with the messaging." The City would like the Court to ignore the words of Officers Waters and the sentiment behind them; but to ignore the City's frustration and motivation is to ignore the truth of what occurred in this case.

The City now argues that the purpose of the Ordinance is not to regulate speech,[9] but rather to regulate trespass. The City does not cite the Court to ***any*** record, authority, or source that can support a finding that the Ordinance

9. The City maintains that the gravamen of the Ordinance does not regulate speech, while simultaneously arguing that the Ordinance should be interpreted as prohibiting the posting of *any* material of *any* kind, that call the public's attention to *any* subject, without permission from the City. *Response to Defendant's Motion to Dismiss*, 5-11.

was intended to regulate trespass. While the City can now argue that the regulation of trespass "could" have been a justification for the Ordinance, the public record establishes that trespass was not, as a matter of fact, the justification for the Ordinance. It was intended to regulate speech. In arguing that the Ordinance was intended to regulate trespass, the City engages in the very *post hoc* rationalization that the Supreme Court observed (a) are common in attempting to defend improper and vague restraints on speech, and (b) must be rejected by the courts. *See City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 758 (1988); See also, *OSU Student All. v. Ray*, 699 F.3d 1053, 1061–62 (9th Cir. 2012).[10]

The City next tries to excuse its improper use of the Ordinance by arguing that the alleged conduct in this case was just "so bad" that it could not be tacitly approved in the same manner as the other stickers.[11] This excuse is similarly unavailing. First, the City's opinion regarding the propriety of the extent of political protest does not excuse an unconstitutional ordinance.

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10. The City charged this case as *posting without a permit*, and even produced a sample permit in discovery. Now, the City appears to argue that it never maintained that the Wilson boys needed a permit, only consent. Such an interpretation only renders the Ordinance more ambiguous. It also constitutes further evidence that the City never had the sort of "guideposts" in the form of "narrow, objective, and definite standards" required for Ordinances that may restrain speech. *City of Lakewood*, 486 U.S. at 758. *Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 150-51 (1969). *See also OSU Student All.*, 699 F.3d at 1061–62.

11. *Response to Defendant's Motion to Dismiss*, 7-9.

It makes no difference whether the unconstitutional ordinance was violated one time or one million times; the ordinance remains unconstitutional and the City cannot use it to obtain criminal convictions. Second, the City fails to present the Court with any admissible evidence of past standards or enforcement based upon certain "thresholds." The City simply asserts that no poster has made postings of a similar magnitude, and then requests this Court base its constitutional analysis on that bare assertion.[12] Rory, on the other hand, has presented the Court with uncontroverted evidence that there exists only a single police report that referenced that some signs were removed pursuant to the ordinance.

Third, the City fails to recognize the discriminatory nature of its conduct. In October 2020, Moscow downtown was plastered with stickers and signs of all nature. The City cannot provide any evidence that it took any action in response to those postings at any time.[13] The City took no action despite the fact that multiple signs contained critical and sometimes hateful rhetoric about conservatives and, in particular, about the Christian community associated with Christ Church. Here, the boys are alleged to have posted multiple signs critical of the City government in and around the same locations where these other signs were posted. The City has decided that one group of criticism is not worth their time and efforts to protect "trespass"; but

12. *Response to Defendant's Motion to Dismiss,* 13.

13. That is, until the City engaged in spoliation by quickly removing such evidence once these cases came to the public's attention.

the other group of criticism must be pursued to criminal conviction. It is no coincidence that the messages which must be prosecuted are the messages critical of the government.

Perhaps the current City government is currently worried about things such as trespass and traffic safety. Perhaps the current City government currently believes that there should be an ordinance on the books to stop the behavior alleged in this case. Perhaps, it wishes that it had acted sooner in adopting specific guideposts that provided narrow, objective, and definite standards, so that it might enforce the current ordinances. This City has tools at its disposal for addressing these concerns in the future. What the City must not do—and what it constitutionally cannot do—is dust off an unused, ambiguous, and vague ordinance to try and punish political speech critical of the City government's actions.

D. The Charges against Rory Wilson should be dismissed as a violation of Rory Wilson's rights to equal protection under the law.

The City attempts to justify enforcement in this case, but there exists no justification so persuasive that it can excuse retaliatory conduct for means of suppressing speech. *See Lozman v. City of Riviera Beach, Fla.*, 138 S. Ct. 1945, 1953 (2018). "[A]lthough prosecutorial discretion is broad, it is not unfettered. Selectivity in the enforcement of criminal laws is subject to constitutional constraints." *Wayte v. United States*, 470 U.S. 598, 608 (1985) (internal citations, quotation marks and alterations

omitted). Where prosecution is based upon the exercise of a constitutional right, the prosecution itself is a violation of the equal protection clause. *Id.*

The City offers several alternative justifications for its prosecution of this case under MCC § 10-1-22(A). However, those justifications are alternative to what actually occurred in this situation. The question before the Court is not *if* the City can develop an alternative justification, but whether the prosecution was motivated by the defendant's exercise of a constitutional right. The City fails to address the established case law that where prosecution is based upon the exercise of a constitutional right, the prosecution itself is a violation of the equal protection clause.[14]

III. Conclusion

The Court never acts more valiantly than when it protects the rights of an individual in the face of determined prosecution and heated public debate. The duty falls upon the Court to protect citizens not only against the government subverting the law but also against the government applying the law in a manner to punish political dissent. This duty requires the Court exercise heightened vigilance in such cases; not simply to the letter of the law, but also to the spirit of the law, the history of the law, and the dynamics that gave rise to its prosecutions. Rory Wilson asks that this Court dismiss the charges against him.

* * *

14. *Wayte*, 470 U.S. at 608 (1985).

APPENDIX O — MEMORANDUM IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH, FILED MARCH 3, 2021

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

Case No. CR29-20-2114

STATE OF IDAHO,

Plaintiff,

v.

RORY D. WILSON,

Defendant.

Filed: March 3, 2021

MEMORANDUM IN SUPPORT
RE: MOTION TO DISMISS

I. Introduction

In the early morning hours of October 6, 2020, an officer of the Moscow Police Department not only encountered two youths, Rory and Seamus Wilson, he encountered vinyl, political protest stickers that he did not like. He encountered a message with which he

did not agree; a message critical of the recent actions of the Mayor, the City Council, and the Moscow Police Department. Through the hours and days that followed, the City would identify an ordinance of questionable applicability that had never been enforced, and pursue criminal charges. The only substantive difference between the individuals charged and the countless others who had posted political messages through the City: the charged individuals posted signs of protest. As set forth herein, the City does not have a legal foundation on which to base these charges and it has not conducted itself in a manner

* * *

MCC4-6-7(19) (formerly MCC 4-6-13-B(18)) (emphasis added).[36] Irrespective of the rule of lenity, both of these definitions support an interpretation of the ordinance in favor of Mr. Wilson. Therefore, the charges against Mr. Wilson should be dismissed.

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36. The legislative intent for the ordinance also dictates a similar interpretation. The statement of purpose adopted by the City Council as part of the enactment of Ordinance No. 2009-10 evidences that, in addition to organizing the code and transferring responsibility for enforcing that portion of the code, the ordinance was intended to regulate "political campaign signs" and to address the treatment of "commercial speech." Similarly, the relevant recitals to the ordinance discuss the need to address political campaign signs. There is nothing in the ordinance to support a finding that the Council intended the ordinance to act as a regulation on general political speech.

B. The Charges against Mr. Wilson should be dismissed because the legal, criminal standard is unconstitutionally vague.

The vagueness doctrine arises out of the defendant's protections under the Due Process Clause of the Constitution. "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). "A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement. As [the U.S. Supreme] Court has explained, a regulation is not vague because it may at times be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved." *Id.* (internal quotation marks and citations omitted). The prohibited conduct must be "clearly defined," leaving no one "to speculate as to the meaning" of the prohibition. *See State v. Cook*, 165 Idaho 305, 309, 444 P.3d 877, 881 (2019). "[C]riminal statutes must ***plainly*** and ***unmistakably*** provide fair notice of what is prohibited and what is allowed in language persons of ordinary intelligence will understand." *State v. Harper*, 163 Idaho 539, 543, 415 P.3d 948, 952 (Ct. App. 2018) (emphases added). "A statute may be challenged as unconstitutionally vague on its face or as applied to a defendant's conduct." *State v. Kelley*, 159 Idaho 417, 422, 361 P.3d 1280, 1285 (Ct. App. 2015). "To succeed on an as-applied vagueness challenge, a defendant must show that

the statute failed to provide fair notice that the defendant's conduct was prohibited or failed to provide sufficient guidelines such that police had unbridled discretion in determining whether to arrest the defendant." *Id.*

As set forth above, this Court cannot find that Moscow City Code § 10-1-22 "plainly" and "unmistakably" provides notice that the posting of the vinyl protest stickers was prohibited by that ordinance. In contrast to the required standard that the prohibition be "plain and unmistakable," the ordinance appears to give notice that such conduct ***is permitted*** under that particular ordinance, unless one is attempting to advertise goods, services, or entities. Nor can the City identify any "sufficient guidelines" that limited police discretion on enforcement. As set forth above, the City concedes that it has no guidance, established process, or standards for obtaining or issuing a permit to post political protest signs.

The facts of this case further support a finding that the charges should be dismissed on grounds of vagueness. The law may hold fast to the doctrine that ignorance of the law is no excuse, but here even those trained in the law did not know that posting vinyl protest stickers might run afoul of Moscow City Code § 10-1-22. Instead, it took several days and "guidance from the City Prosecutor" before this charge could be identified. The identified ordinance was discovered despite the fact there exist no records of it ever being used or enforced. The charges against Mr. Wilson must be dismissed pursuant to the vagueness doctrine.

C. The Charges against Mr. Wilson should be dismissed as an improper restraint on the Constitutional right to freedom of speech.

The First Amendment generally prevents the government from proscribing speech because of disapproval of the ideas expressed. *Watters v. Otter*, 981 F. Supp. 2d 912, 927 (D. Idaho 2013). "As the Supreme Court has stated, the 'enduring lesson' of First Amendment law is "that the government may not prohibit expression simply because it disagrees with its message[.]"" *Gonzales on behalf of A.G. v. Burley High Sch.*, 404 F. Supp. 3d 1269, 1288 (D. Idaho 2019) (quoting *Texas v. Johnson*, 491 U.S. 397, 416 (1989)). "To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 515 (1981).

The courts protection of free speech is heightened when the government tries to proscribe speech in traditionally public fora. Public streets and sidewalks are "the archetype of a traditional public forum." *Frisby v. Schultz*, 487 U.S. 474, 480 (1988). "No particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora." *Id.* at 481. For the City to enforce a content-based restriction in this public forum, it must prove the restriction is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. *Id.* For the City to enforce a content-neutral restriction in this public forum,

it must prove the restriction is narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. *Id.* Even if the Court applies this lesser standard—narrowly tailored to serve a significant government interest—the City cannot meet its burden in this case.

The significant government interest identified in the ordinances is the regulation and enforcement of (a) commercial signs; and (b) political campaign signs in an effort, one assumes, to preserve the aesthetics of the community. The ordinance is not narrowly tailored to meet that interest. While the City may argue that the interest is the regulation of signs, in general, such an argument would be a *post hoc* justification that is unsupported by the legislative history.

If the City argues that there exists a content-neutral compelling government interest addressed by Moscow City Code § 10-1-22, then the Court must question why such little attention was paid to this part of the Code over the past 12 years. There has been essentially no implementation, guidance, or enforcement. As a matter of historical fact, the City never treated Moscow City Code § 10-1-22 as protecting an important interest until it encountered the critical speech of the vinyl protest stickers. "State action designed to retaliate against and chill political expression strikes at the very heart of the First Amendment." *Sloman v. Tadlock*, 21 F.3d 1462, 1469-70 (9th Cir. 1994) (internal citation and quotation marks omitted).

Finally, Moscow City Code § 10-1-22 violates the First Amendment because it creates a prior restraint, allowing the governmental authority to grant or deny applications for permits without creating standards to limit the government's discretion, without established decision-making criteria. "[A] law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." *Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 150-51 (1969) (footnote omitted). Here, it is undisputed that (A) the City claims a permit was required for posting of political speech; (B) the City has absolutely **no guidance, established process, or standards for obtaining or issuing a permit to post political protest signs**; (C) City has ***no records*** evidencing a permit has ever been given or denied; (D) the City has ***no records*** regarding warnings and/or citations that have been issued for a violation of the ordinance; and (E) the City has ***no records*** regarding warnings and/or citations that have been issued regarding the ordinance, at all. Similarly, the Moscow Police Department could not provide any such records, only a single police report that referenced that some signs were removed pursuant to the ordinance. This lack of reporting stands in stark contrast to the historic and *current* practice of Moscow residents to place political messages nearly everywhere around town.

If the City wishes to regulate speech through a permitting process (as it argues it does in this case), then it must have express and objective standards for the permitting process:

> [T]he absence of express standards makes it difficult to distinguish, "as applied," between a licensor's legitimate denial of a permit and its illegitimate abuse of censorial power. Standards provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech. Without these guideposts, *post 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.

City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 758 (1988). *See also OSU Student All. v. Ray*, 699 F.3d 1053, 1061–62 (9th Cir. 2012). The lack of "guideposts" in the form of "narrow, objective, and definite standards" compels a ruling by the Court that the ordinance is unconstitutional at the very least as to the charges against Mr. Wilson and, therefore, the case must be dismissed.

D. The Charges against Mr. Wilson should be dismissed as a violation of Mr. Wilson's rights to equal protection under the law.

The constitutional mandate on vagueness and freedom of speech require that this Court hold Moscow City Code § 10-1-22 unenforceable in this case, *even if the Court were not presented with discriminatory application*. Even if the City could justify enforcement in this case,

that justification does not excuse exploiting a lawful power for means of suppressing speech. *See Lozman v. City of Riviera Beach, Fla.*, 138 S. Ct. 1945, 1953 (2018). "[A]lthough prosecutorial discretion is broad, it is not unfettered. Selectivity in the enforcement of criminal laws is subject to constitutional constraints." *Wayte v. United States*, 470 U.S. 598, 608 (1985) (internal citations, quotation marks and alterations omitted). Where prosecution is based upon the exercise of a constitutional right, the prosecution itself is a violation of the equal protection clause. *Id.*

Here, Mr. Wilson has significant evidence that the arrest, investigation, and prosecution are a retaliation based upon the political message on the vinyl protest stickers. The undisputed evidence shows that Moscow had a passive enforcement system of non- enforcement. The City has no records of enforcement. On October 6, 2020, the town was veritably festooned with signs from every corner of the commercial, personal, and political spectrum—well all corners except one: there were no signs criticizing and protesting the conduct of the Mayor, City Council, and Moscow Police Department. It was not until those signs were posted that arrests were made, citations were issued, and criminal charges pursued. In the recorded history of Moscow, this citation is something to which no other similarly situated person has ever been subjected. The City cannot be permitted to maintain ordinances without enforcement at their leisure, and then attempt to enforce ordinances against political opponents at their whim.

IV. Conclusion

The truth of this case is that the Moscow Police Department and the City are pursuing a criminal conviction because, in the words of Officer Waters, they "don't agree with the messaging." While political discourse and protest may be passionate and heated, the government never acts more nobly than when it treats political dissidents in the same manner as it treats political supporters. It strains credulity to argue that Mr. Wilson would be prosecuted had the vinyl stickers read "Yard Sale" or "Back the Blue" or "We love the City Council and MPD". One cannot credibly argue that prosecution would have resulted from "Masks Save Lives" or "F*ck Trump" or "Immigrants Welcome" or "GEGEN Nazis"—all of which remained on the same locations at issue in this case. Even if such stickers had been removed, which they were not, we need not wonder whether criminal charges would have arisen from their posting, because they have not and will not. When the government fails to honor its noble calling of equal treatment for dissidents, it places the Court in the undesirable position of having to check the overreach of the government. It places the burden on the Court to declare that the political speech—no matter how offensive some may find it—was not properly proscribed by the government and, therefore, the speaker may not be made a criminal. That is the exact position in which this Court finds itself. Mr. Wilson asks that this Court remind the City of the constitutional protections due its residents, and dismiss the charges against him.

APPENDIX P — DECLARATION OF NATHAN D. WILSON IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH, FILED MARCH 3, 2021

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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

Case No. CR29-20-2114

STATE OF IDAHO,

Plaintiff,

v.

RORY D. WILSON,

Defendant.

Filed March 3, 2021

Appendix P

DECLARATION OF NATHAN D. WILSON

I, NATHAN D. WILSON, am over the age of eighteen and competent to offer testimony.

1. On the morning of October 6, I received a call on my cell phone from an officer with the Moscow Police Department. He asked me to come downtown, where he was holding my sons, Rory and Seamus. When I arrived, one of the first things Officer Waters told me was "First of all, I don't agree with the messaging."

2. When I arrived at the scene, the Moscow Police Department would not allow me to go and speak with my sons.

3. On or about October 10, 2020, Officer Waters and another officer arrived at my house. They informed us that they would be issuing citations for posting without a permit Officer Waters said something like "This is the crime most often committed with lost cat posters and yard sale signs." When I asked if such past violations had ever required someone to be interrogated while in handcuffs on the sidewalk, Officer Waters replied "I had nothing to do with that"

4. Attached hereto are a variety of photos taken of the various poles, trees and signs in Moscow, Idaho containing stickers, advertisments, political signs, that fairly and accurately depict the scenes shown in the photographs as of late November 2020.

Appendix P

I certify (or declare) under penalty of perjury pursuant to the law of the State of Idaho that the foregoing is true and correct.

DATED March 3, 2021

/s/_____
Nathan D. Wilson

Appendix P

TREES

10:50PM 11/25/20

1296-1314 Mountain View Rd

Taken by Nathan Wilson

Appendix P

ASSORTED STICKERS/ADS: PIZZA HUT

5:43PM 11/25/20

Junction: Highways 8 & 95

Taken by Nathan Wilson

Appendix P

RECURRING REVOLVER AD 1

5:42PM 11/25/20

Junction: Highways 8 & 95

Taken by Nathan Wilson

Appendix P

RECURRING REVOLVER AD 2

5:41PM 11/25/20

Junction: Highways 8 & 95

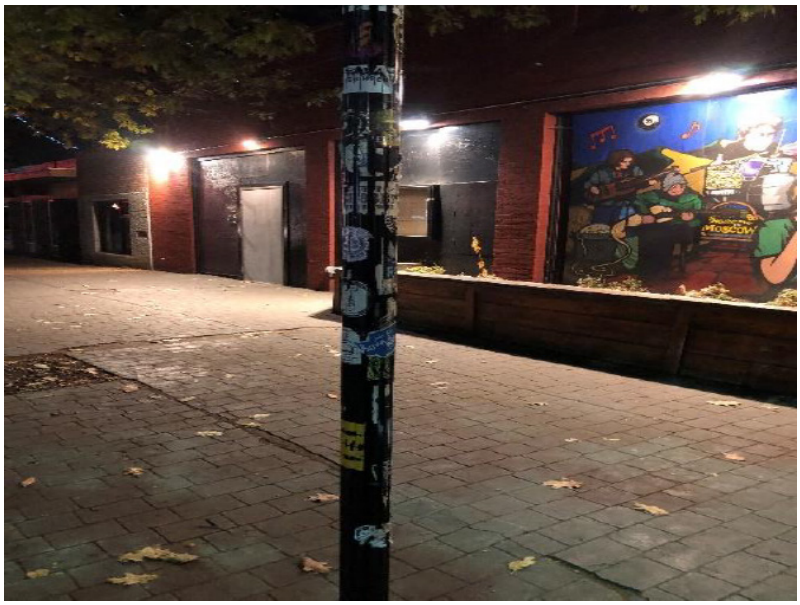
Taken by Nathan Wilson

Appendix P

100+ ASSORTED STICKERS/ADS/POLITICAL:
JOHN'S ALLEY 1

10:45PM 10/31/20

151-199 E 6th St



Taken by Nathan Wilson

Appendix P

100+ ASSORTED STICKERS/ADS/POLITICAL:
JOHN'S ALLEY 2

10:45PM 10/31/20

151-199 E 6th St

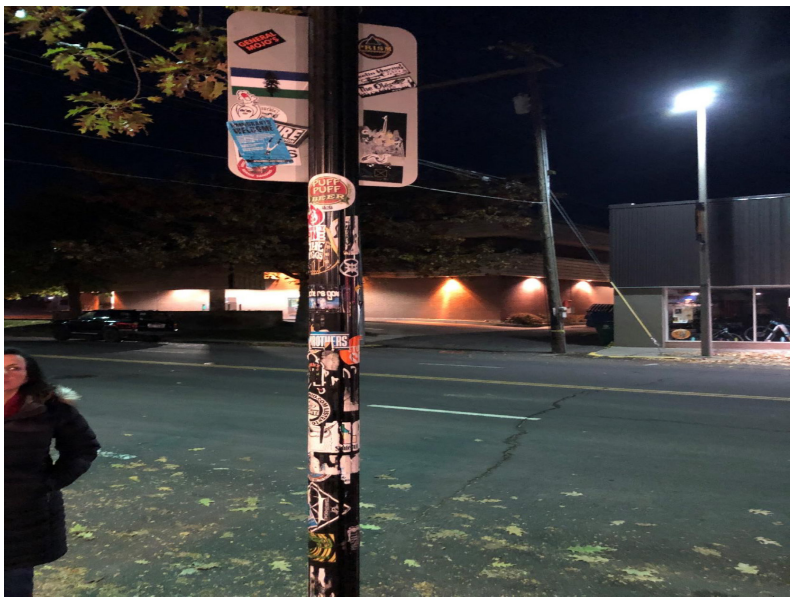
Taken by Nathan Wilson

Appendix P

100+ STICKERS/ADS/POLITICAL: JOHN'S ALLEY 3
"IMMIGRANTS WELCOME"

10:45PM 10/31/20

151-199 E 6th St



Taken by Nathan Wilson

Appendix P

******POLES WHERE WILSON PROTEST STICKERS WERE REMOVED WHILE OTHER POLITCAL STICKERS WERE ALLOWED TO REMAIN.***

***POLITICAL STICKERS/ADS: MAIN AND 6th #1

10:44PM 10/31/20

Main and 6th Streets

Taken by Nathan Wilson

Appendix P

***POLITICAL STICKERS/ADS: MAIN AND 6th #2

10:44PM 10/31/20

Main and 6th Streets

Taken by Nathan Wilson

Appendix P

***POLITICAL STICKERS/ADS: MAIN AND 6th #3

"IMMIGRANTS WELCOME"

10:44PM 10/31/20

Main and 6th Streets

Taken by Nathan Wilson

Appendix P

STICKER AD

“ILLICIT NATURE” #1

3:26PM 10/13/20

112 S. Main St.

Taken by Nathan Wilson

Appendix P

STICKER “DOLCE VITA”

3:26PM 10/13/20

112 S. Main St.

Taken by Nathan Wilson

Appendix P

ASSORTED STICKER ADS

“ILLICIT NATURE” #2

3:26PM 10/13/20

112 S. Main St.

Taken by Nathan Wilson

Appendix P

POLITICAL STICKERS/ADS

"GEGEN NAZIS"

3:23PM 10/13/20

112 S. Main St.

Taken by Nathan Wilson

Appendix P

STICKERS

"THANK YOU"

3:23PM 10/13/20

112 S. Main St.

Taken by Nathan Wilson

Appendix P

ASSORTED STICKERS/ADS: HUMBLE BURGER

"DANTE'S POP-UP" #1

3:21PM 10/13/20

102 N. Main St.

Taken by Nathan Wilson

Appendix P

STICKER MULE LOGO

DUMPSTER

2:45PM 10/13/20

207 N. Main St.

Taken by Nathan Wilson

Appendix P

STICKER ART: PRITCHARD

2:42PM 10/13/20

414 S. Main St.

Taken by Nathan Wilson

Appendix P

SNOOPY

2:41PM 10/13/20

531 S. Main St.

Taken by Nathan Wilson

Appendix P

FATHER DEER

2:40PM 10/13/20

115 E. Third St.

Taken by Nathan Wilson

Appendix P

ASSORTED ADS/STICKERS

“ORACLE SHACK”

2:39PM 10/13/20

121 E 5th St.

Taken by Nathan Wilson

Appendix P

PLASTERED PAPER ART #1

2:19PM 10/13/20

115 E. Third St.

Taken by Nathan Wilson

Appendix P

PLASTERED PAPER ART #2

2:19PM 10/13/20

115 E Third St.

Taken by Nathan Wilson

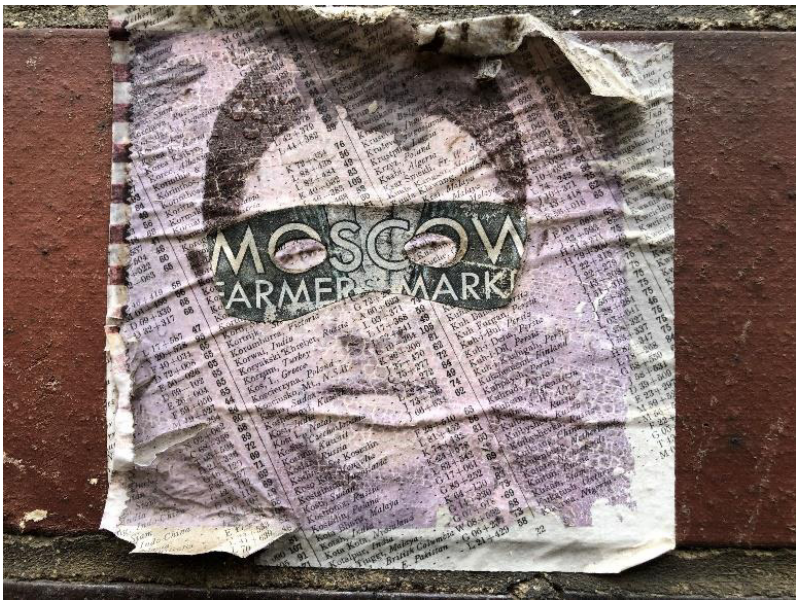
Appendix P

PLASTERED PAPER ART #3

“FARMERS MARKET”

2:18PM 10/13/20

115 E Third St.



Taken by Nathan Wilson

Appendix P

OBSCENE FADED TRUMP STICKER AND ASSORTED

2:13PM 10/13/20

504 S Main St.

Taken by Nathan Wilson

Appendix P

ASSORTED ADS/STICKERS: LATAH TITLE

2:13PM 10/13/20

504 S Main St.

Taken by Nathan Wilson

Appendix P

ASSORTED FADED STICKERS: PRITCHARD

2:13PM 10/13/20

414 S Main St.

Taken by Nathan Wilson

Appendix P

DANTE'S POP-UP #2: PRITCHARD

2:13PM 10/13/20

414 S Main St.

Taken by Nathan Wilson

Appendix P

LOST DOG: JUNE

1:09PM 10/13/20

617 N Hayes St.

Taken by Nathan Wilson

Appendix P

WASHED OUT PRIDE ART

1:07PM 10/13/20

720 E D St.

Taken by Nathan Wilson

Appendix P

LOST CAT: CHARLIE

1:07PM 10/13/20

720 E D St.

Taken by Nathan Wilson

Appendix P

DANTE'S POP-UP #3

12:40PM 10/12/20

205 S Main St.

Taken by Nathan Wilson