No. 24-853

IN THE

# Supreme Court of the United States

RORY DOUGLAS WILSON,

*Petitioner,*

*v.*

STATE OF IDAHO,

*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF IDAHO**

## BRIEF IN OPPOSITION


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## QUESTION PRESENTED

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

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## INTRODUCTION

In Mr. Wilson's two appeals before Idaho courts, he did not claim he had been selectively prosecuted. He attacked the city ordinance he had violated, but never the decision to charge and prosecute him.

With new counsel, he now reasserts a selective prosecution theory that was last ruled on by the trial court, but he does so without addressing the trial court's factual basis for rejecting it. He also suggests that his selective prosecution theory supports his other theories: that the ordinance itself is vague, overbroad, and a prior restraint.

But the overbreadth and prior restraint theories were also not raised below. Of Mr. Wilson's four constitutional arguments, only one—vagueness—was addressed by the ruling he asks this Court to review.

And as to vagueness, the Idaho Court of Appeals' decision is neither noteworthy nor erroneous. The ordinance it reviewed is not vague: it covers all signs on any property—public or private—and applying it involves only three questions: (1) "Is it a sign," (2) "Is it posted on property," and (3) "Did the owner consent?" If the first two answers are "yes" and the third one is "no," then the ordinance has been violated, and no one needs to consider the sign's content in order to tell whether the violation occurred.

Selective prosecution is a serious injustice, and the Attorney General is troubled by the thought that Moscow might not have prosecuted Mr. Wilson if his stickers

had supported rather than opposed the city's COVID policies. Had the Attorney General been responsible for the charging decision, he suspects he might have made it differently.

But the Attorney General was not responsible for the charging decision, which the city prosecutor and trial court both said was based on the severity of the offense and the irrefutable evidence of guilt. If Wilson disagreed with that ruling, he should have challenged it in his Idaho appeals instead of holding it in reserve for his cert petition.

Whether the trial court was right or not, the Idaho Court of Appeals correctly decided every question that Wilson presented to it, and its decision does not merit this Court's review.

## STATEMENT OF THE CASE

### I. The Magistrate Rejects Wilson's Selective Prosecution And Wilson Is Convicted

The Moscow City Attorney's Office, on behalf of the State of Idaho, charged Wilson with violating City of Moscow Code § 10-1-22(A). Pet. App. 21a. That ordinance prohibits the posting of "any notice, sign, announcement, or other advertising matter" on property without consent of the property owner. Pet. App. 85a. The ordinance does not distinguish between public and private property.

Wilson moved to dismiss the charge, arguing (among other things) that the ordinance was limited to commercial advertisements, that it was too vague to be enforced against him, and that he had been selectively prosecuted

because the city disapproved of his viewpoint. Pet. App. 172a–81a. He asserted the City of Moscow was "veritably festooned with signs from every corner of the commercial, personal, and political spectrum" and he was singled out for "criticizing and protesting the conduct of the Mayor, City Council, and Moscow Police Department." Pet. App. 180a. He supported his allegations with photographs of other postings that he asserted were also in the city. Pet. App. 182a–216a.

The prosecutor responded, generally denying Wilson's allegations. (R., pp. 341–53). The prosecutor argued that Wilson's evidence of "other postings on light poles and the back of parking signs downtown" did not demonstrate selective prosecution because the photographs were not representative of the places where Wilson had placed his stickers (Exs., pp.2–3, 5), did not show that anyone else had posted signs in a similar quantity to Wilson's, and did not show that anyone had posted signs on the fronts of traffic, road or parking signs as Wilson had. (R., p. 352). The prosecutor claimed the main reason that people had not been prosecuted for posting the other materials was that they had not been caught in the act, whereas in this case there were "multiple, credible witnesses" to Wilson's posting and Wilson had made admissions supporting his guilt. (R., pp. 352–53). The prosecutor asserted the reason she "chose to file charges in this case was due to the degree of severity (89 advertising stickers on many different types of property, in some cases interfering with traffic and parking signage) and the strength of evidence (multiple credible witnesses, admissions, etc.)." (R., p. 353).

In reply, Wilson alleged that the prosecution was an act of retaliation against Moscow's Christ Church, a religious organization with which Wilson is associated

and whose pastor Doug Wilson is Petitioner Wilson's grandfather. Pet. App. 162a–71a.

The magistrate denied Wilson's motion. Pet. App. 57a–84a. As to the claim of discriminatory prosecution, the magistrate first found that the ordinance had not been criminally enforced prior to this case. Pet. App. 82a. The magistrate then found that the decision to prosecute in this case was based on Wilson "being caught in the act and the number of materials posted on public and private property" without consent. Pet. App. 82a. The magistrate further found that "[t]he 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." Pet. App. 82a–83a. Finally, the magistrate found that Wilson had not provided evidence supporting his allegation of discriminatory purpose based on animus toward Christ Church. Pet. App. 83a–84a.

Wilson moved the magistrate to reconsider based on new evidence that the city prosecutor had privately made hostile comments about Christ Church and its members. Pet. App. 154a–61a. The prosecutor responded with a sworn declaration that she was unaware of Wilson's association with Christ Church or its pastor when she decided to charge him. (R., pp. 662–63). She wrote, "According to my records, since 2018, I have prosecuted 17 different people with the last name of Wilson . . . . When I see the last name 'Wilson' on a casefile, I do not assume any relation to Doug Wilson." *Id.* Wilson never introduced any evidence contradicting the prosecutor's statement.

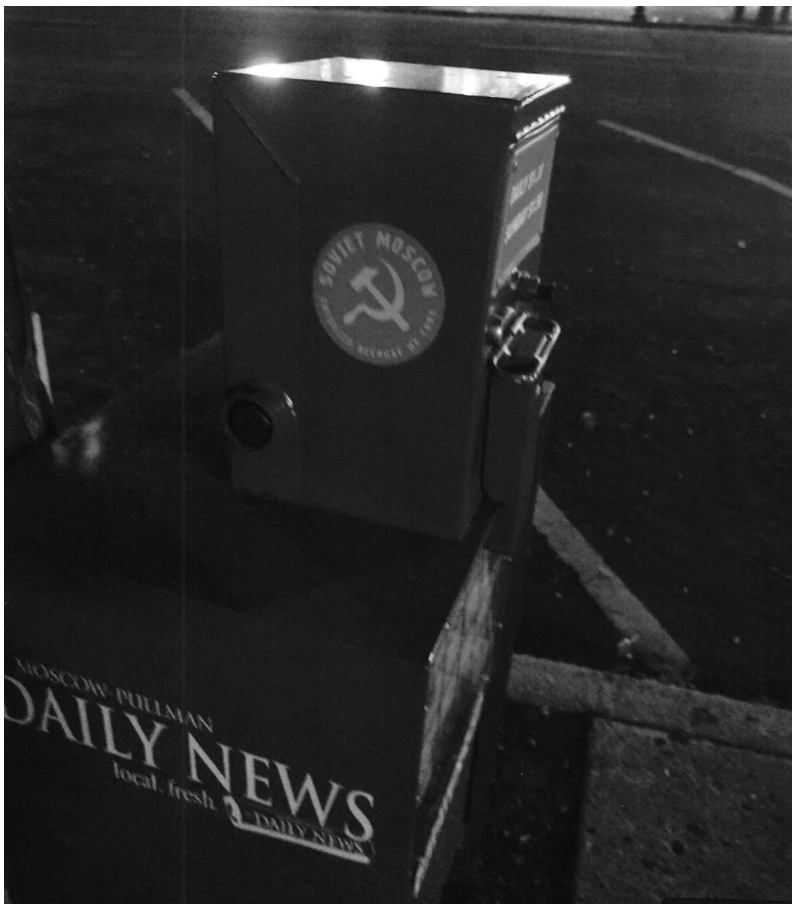
The magistrate rejected Wilson's factual allegations and found again that he had been prosecuted because of the severity of his offense and the strength of the evidence against him—dozens of stickers, eyewitness testimony, and a confession. (R., p. 834; Exs., pp. 725–726 (4/25/22 Tr., p. 134, L. 12–p. 135, L. 5)). Despite the new evidence, he had still failed to prove that "he was being prosecuted because of his protest activities." (Ex., p. 723 (4/25/22 Tr., p. 132, Ls. 22–24)).


At trial, the evidence included photographs of Wilson's stickers on city and state property—on traffic signs (front and back), street name signs, parking signs, signposts and lamp posts, traffic barriers, street crossing signals, benches, trash and recycling receptacles, city maps and notice boards, trees, a historical information sign, and bike racks.


Further photographs showed stickers on federal property or private property, including post-office drop boxes and newspaper kiosks. (Exs., pp. 28–112, 378–82 (10/11/22 Tr., p. 479, L. 12–p. 483, L. 11 (testimony of Lewiston Tribune newspaper employee about stickers on newspaper kiosks and lack of permission))).


WELP


TAKE OUT
PARKING
ONLY




After Wilson's conviction by a jury, the magistrate withheld judgment and placed him on unsupervised probation. Pet. App. 53a–56a. The conditions of probation were, in their entirety, to notify the court of any address changes; violate no law; pay $257.50 in fines and court costs; pay restitution of $186.80 for the damages his actions had caused; and write a "3-5 page paper on what appropriate civil discourse is." Pet. App. 55a; (R., p. 970).

## II. Wilson Appeals The Conviction But Not The Ruling About Selective Prosecution

Wilson appealed to the local district court, raising seven issues. (R., pp. 998–99 (omitted in Pet. App.)). Most are irrelevant to the present petition and relate to matters like the sufficiency of the evidence and the correctness of evidentiary rulings. *Id.* Wilson also argued the ordinance was void for vagueness and the magistrate had erred by denying his motion to dismiss. *Id.*

With respect to vagueness, Wilson noted there were "concerns raised over both standardless enforcement and prosecution based upon political speech" which "illustrate[ ] the danger of vague statutes which touch on the First Amendment rights of citizens." (R., pp. 1006–08). But he did not reassert his selective prosecution theory—he challenged neither the trial court's factual findings about the reasons for his prosecution nor its ultimate conclusion that the decision to prosecute had complied with the First Amendment. (R., pp. 999–1023).

On initial appeal, Wilson did challenge the order denying his motion to dismiss (R. p. 999), but he did not challenge the portion of the order that addressed selective prosecution. Instead, he argued the magistrate had misinterpreted the ordinance and that his stickers did not constitute a "notice, sign, announcement, or other advertising matter." (R. pp. 999–1004).

The district court rejected his arguments and affirmed the magistrate. Pet. App. 18a–52a. It noted that Wilson had presented "evidence of selective prosecution," but it did so only while addressing Wilson's argument

that the city ordinance was "void for vagueness." Pet. App. 36a–37a. Because Wilson did not raise his selective prosecution theory, the district court did not decide it. *See* Pet. App. 18a–52a.

Next Wilson appealed to the Idaho Supreme Court. (R., pp. 1114–19). In the new appeal, he dropped one issue and added none, repeating the other six verbatim from his district court brief. (*Compare* R., pp. 998–99, *with* Augmented Appellant's Br., p. 3 (Pet App. omits pages 1–9 of brief)). He once again contested the magistrate's ruling that the ordinance applied to his non-commercial stickers and argued the statute was void for vagueness, but he did not assert selective prosecution, prior restraint, or overbreadth. (Augmented Appellant's Br., p. 3).

After briefing, the Idaho Supreme Court assigned the case to the Idaho Court of Appeals. (1/23/24 Notice of Court Assignment). Like the district court, the court of appeals did not address selective prosecution, overbreadth, or prior restraint, and when it reviewed the magistrate's treatment of Wilson's motion to dismiss, it considered only the argument that the ordinance did not apply to his non-commercial stickers. Pet. App. 6a–7a.

The court wrote that, "[t]o succeed on an as-applied vagueness claim," Wilson needed to show either that (1) "the ordinance failed to provide fair notice that his conduct was prohibited" or (2) that the ordinance "failed to provide sufficient guidelines such that police had unbridled discretion in determining whether to arrest him." Pet. App. 10a–11a. It concluded that Wilson satisfied neither half of the test: "the ordinance is plain and unambiguous, it clearly sets forth the prohibited conduct and does not

allow unbridled discretion in enforcement." Pet. App. 11a. The court added, "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." Pet. App. 11a.

Wilson filed a petition for review by the Idaho Supreme Court, which that court denied. Pet. App. 1a–2a.

## REASONS TO DENY THE PETITION

### I. Wilson's Selective Prosecution Theory Was Not Preserved And Does Not Merit This Court's Review

Certiorari is appropriate where "a state court . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). Wilson contends this standard is met because the Idaho Court of Appeals decided an important federal question regarding selective prosecution. Pet. 11–15. But the Idaho Court of Appeals decided no question whatsoever regarding selective prosecution—the issue was not raised and was not mentioned in the court's opinion.

Before the magistrate, Wilson asserted a claim of selective prosecution in violation of his equal protection rights based on prosecutorial animus toward Christ Church and its conflict with the city. Pet. App. 179a–80a, 154a–57a. The magistrate concluded Wilson had failed to prove such animus and that charges were brought for constitutionally permissible reasons—in short, it rejected Wilson's claim of selective prosecution for factual reasons, not legal reasons. Pet. App. 81a–84a; (Exs., pp. 725–28 (4/25/22 Tr., p. 134, L. 12–p. 137, L. 13)).

In Idaho, an appellant challenging the trial court's factual findings must show clear error. *State v. Ish*, 461 P.3d 774, 783 (Idaho 2020). This means reviewing factual findings in the "light most favorable to the respondent" and affirming any finding of fact "supported by substantial and competent, although conflicting," evidence. *Matter of Webber's Est.*, 551 P.2d 1339, 1343 (Idaho 1976). Rather than assume this high appellate burden in the Idaho courts, Wilson abandoned his claim of selective prosecution on appeal. Neither in the district court nor in the Idaho Court of Appeals did he ever argue the magistrate had erred by rejecting his selective prosecution defense—and because the issue went unraised, it also went undecided.

Wilson suggests otherwise, claiming the court of appeals' decision "cannot be reconciled with" this Court's selective prosecution precedent in *Nat'l Rifle Ass'n of Am. v. Vullo*, 602 U.S. 175, 198 (2024); *Gonzalez v. Trevino*, 602 U.S. 653, 655, 658 (2024); and *Nieves v. Bartlett*, 587 U.S. 391, 406–07 (2019). Pet. 11–15. But those cases were not at issue before the court of appeals because Wilson did not cite them—he had no reason to cite them, because he was not challenging the denial of his selective prosecution claim. (Augmented Appellant's brief, p. iii (table of authorities)). Because Wilson did not cite them, the court of appeals never considered them, and they are not mentioned in its opinion. Pet. App. 3a–17a.

Wilson argues that the Idaho Court of Appeals "responded" to a claim of unconstitutional "enforcement discretion" by merely pointing out the ordinance was "facially neutral." Pet. 14. But Wilson's arguments about "enforcement discretion" did not relate to any claim of selective prosecution—they were part of his argument

that the city ordinance was unconstitutionally vague, and the court of appeals expressly addressed them under the heading of "As-applied vagueness challenge." Pet. 14 (citing Pet. App. 9a–11a). Whether the ordinance was too vague and whether it was selectively enforced are entirely separate questions: vagueness is a purely legal due process issue that focuses on the text of the ordinance, while selective prosecution is a partly factual First Amendment issue that focuses on the conduct of the prosecutor. *Cf. Holder v. Humanitarian L. Project*, 561 U.S. 1, 20 (2010) ("our precedents make clear that a Fifth Amendment vagueness challenge does not turn on whether a law applies to a substantial amount of protected expression"); *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 497 (1982) ("A law that . . . satisfies the overbreadth test may nevertheless be challenged on its face as unduly vague, in violation of due process.").

Wilson finally contends the selective prosecution issue was "sufficiently presented" because a petitioner is "not confined 'to the same arguments which were advanced in the courts below upon a federal question there discussed.'" Pet. 32 (quoting *Dewey v. City of Des Moines*, 173 U.S. 193, 197–98 (1899)). The case Wilson quotes, however, shows why his argument fails. Although a party is not bound to the "same argument," a "claim or right which has never been made or asserted cannot be said to have been denied by a judgment which does not refer to it." *Dewey*, 173 U.S. at 200. In this case, no claim of selective prosecution was "made or asserted" before the Idaho Court of Appeals, and its "judgment . . . does not refer to [selective prosecution]."

The Idaho Court of Appeals has not "decided an important federal question in a way that conflicts with

relevant decisions of this Court." Sup. Ct. R. 10(c). To the contrary, Wilson never raised—and the Idaho Court of Appeals never addressed—the key theory Wilson advances here.

## II. Wilson's Prior Restraint And Overbreadth Theories Were Not Preserved And Do Not Merit Review

### A. Prior Restraint

Certiorari is appropriate where "a state court . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). As with selective prosecution, Wilson's prior restraint arguments do not satisfy this standard because the Idaho Court of Appeals did not decide any issues regarding prior restraint. Pet. App. 3a–17a.

Wilson raised the issue of prior restraint to the magistrate in his first motion to dismiss, contending that requiring the permission of property owners before posting on their property was the functional equivalent of requiring a city license. Pet. App. 176a–79a. The magistrate disagreed, ruling that obtaining permission of a property owner prior to posting matters on that person's property did not infringe on First Amendment rights. Pet. App. 79a–80a.

Like the selective prosecution ruling, the prior restraint ruling went uncontested in Wilson's first two appeals. Wilson did not raise the issue before the district court on intermediate appeal. Pet. App. 18a–52a. Neither did he assert any claim of prior restraint to the Idaho Court of Appeals. Pet. App. 3a–17a. Because the issue of

prior restraint was not raised in the prior appeals, this issue is not appropriate for certiorari.

Wilson contends he did raise a claim that the ordinance "exceeded permissible time, place, and manner prior restraints" on appeal to the Idaho Court of Appeals. Pet. 8 (citing Pet. App. 131a). The page he cites, however, appears in the section of his brief addressing his claim that the statute is unconstitutionally vague "given the trial court's interpretation" of the ordinance as applying beyond advertising. Pet. App. 126a–34a (cleaned up). On the cited page is a reference to time, place and manner restrictions in support of his argument that the "First Amendment concerns" he mentions "are cured if the ordinance is limited to advertising matter." Pet. App. 131a. This mention, in the context of a vagueness argument, did not raise a separate appellate issue. More importantly, the Idaho Court of Appeals never even mentions prior restraint or time, place, and manner restrictions in its opinion. Pet. App. 3a–52a. Because the Idaho Court of Appeals has not "decided an important federal question" regarding prior restraint, certiorari is not appropriate.

Even if the court of appeals had decided an important question regarding prior restraint, Wilson has failed to show that its decision "conflicts with relevant decisions of this Court," Sup. Ct. R. 10(c). The Court's decisions about prior restraint uniformly apply to laws that require speakers to seek permission *from the government*. *See, e.g.*, *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988) ("a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship"). This Court has never called it a prior restraint when a law

requires a property owner's consent before a speaker can use the property; if it had, then ordinary trespass law would be constitutionally suspect.

Moscow's ordinance does not even mention the city—it protects all property owners equally, Pet. App. 85a, and all the conduct it prohibits was already prohibited by the common-law tort of trespass. *See, e.g.*, Restatement (Second) of Torts § 158 (definition of trespass "include[s] the presence upon the land of a . . . thing which the actor has caused to be or remain there"); Restatement (Second) of Torts § 217 (definition of "trespass to a chattel" includes "intermeddling with a chattel in the possession of another"). Further, Wilson did not violate the ordinance solely by posting on property belonging to the city; he spread his 89 stickers across city, state, federal and private property—all of which was the basis for a single count of violating the ordinance. (Exs., pp. 31–112).

Wilson has failed to establish that this unremarkable ordinance creating an ordinary property crime runs afoul of the Court's Free Speech precedents or merits the Court's attention.

### B. Overbreadth

At no point in this case did Wilson claim the ordinance was constitutionally overbroad. *See generally* Pet. App. 86a–151a. The only mention of overbreadth in the opinion of the Idaho Court of Appeals is in a parenthetical in a footnote pointing out that "[t]o the extent Wilson is raising" a claim that the ordinance is facially vague "based on First Amendment principles" that claim fails because vagueness—unlike overbreadth—"'does not

turn on whether a law applies to a substantial amount of protected expression.'" Pet. App. 10a, n.2 (quoting *Holder*, 561 U.S. at 20). Certiorari is inappropriate with regards to overbreadth because the Idaho Court of Appeals has not "decided an important federal question." Sup. Ct. R. 10(c).

And in any case, there was no plausible federal question to be decided. As Wilson agrees, overbreadth applies when "a substantial number of [a statute's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." Pet. 22 (quoting *United States v. Stevens*, 559 U.S. 460, 473 (2010)). Wilson's problem is that he has not identified "a substantial number" of unconstitutional applications—in fact, he has not identified even one. At no point does his petition explain why the First Amendment gives him the right to post signs on other people's property without their consent. *See* Pet. 21–23 (overbreadth argument).

Even if there is some constitutional question about the ordinance's application to city property, based on the city's ability to approve or reject signs based on their viewpoint, Wilson did not post signs exclusively on city property. He also posted them on state, federal, and private property, (Exs., pp. 31–112), and for his 89 posted signs he was prosecuted on only a single count of violating the ordinance. Pet. App. 21a. That Wilson questions the ordinance's application to a single property owner cannot make the ordinance overbroad when it is clearly constitutional as applied to the city's hundreds or thousands of other owners.

Finally, Wilson argues that the ordinance is overbroad because it is not limited to "categories [of speech]

traditionally lacking First Amendment protection, such as incitement, defamation, obscenity, and true threats." Pet. 23. But Wilson cites no authority saying that restrictions on time, manner, and place are overbroad if they do not limit themselves to unprotected speech, and no such authority exists. If Wilson's argument were correct, the vast majority of time, manner, and place restrictions would be overbroad because very few (if any) of them limit themselves to unprotected speech.

No authority required the city to limit its sign-posting ordinance to incitement, defamation, obscenity, and true threats. If the city had in fact limited the ordinance to those categories of speech, then it would not have served its purpose of protecting property from sign-posting vandalism.

## III. The Court of Appeals' Vagueness Ruling Does Not Merit Review

Only one of the petition's issues was actually decided by the Idaho Court of Appeals: the court held that the Moscow city anti-posting ordinance was not unconstitutionally vague as applied to Wilson's conduct. Pet. 9a–11a.

The court of appeals concluded "the ordinance is plain and unambiguous," "clearly sets forth the prohibited conduct," and "does not allow unbridled discretion in enforcement." Pet. App. 9a–11a; *see also* 7a–9a (stating that 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'" and rejecting the argument that the word "other" modifies the language preceding that

word to include only advertising). Because the ordinance applies to all acts of posting on another's property without permission, there is no vagueness as to whether it applied to Wilson's act of posting on another's property without permission.

In the Petition, Wilson argues the statute is vague because it does not prevent selective prosecution. Pet. 15–19. His argument that a statute must by its language prohibit selective enforcement or be deemed unconstitutionally vague is without support. Nothing in this Court's precedents suggests that the mere possibility that a statute may be enforced in a selective or discriminatory manner—a possibility inherent in literally every criminal statute—renders it so vague as to violate due process.

This Court's vagueness doctrine is a "manifestation[ ] of the fair warning requirement." *United States v. Lanier*, 520 U.S. 259, 266 (1997). The "'void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'" *Beckles v. United States*, 580 U.S. 256, 262 (2017) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). To prevent discriminatory enforcement, the statute must "establish minimal guidelines to govern law enforcement." *Kolender*, 461 U.S. at 358. A statute may be unconstitutionally vague if it "entrusts lawmaking to the moment-to-moment judgment of the policeman on his beat, furnishes a convenient tool for harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, [or]

confers on police a virtually unrestrained power to arrest and charge persons with a violation." *Id.* at 360 (cleaned up). Ultimately, however, the standard is still whether the statute "describe[s] with sufficient particularity what a suspect must do in order to satisfy the statute." *Id.* at 361.

Under this standard this Court has struck down a statute requiring presentation of "credible and reliable" identification to an officer where the determination of what was "credible and reliable" was vested in the "complete discretion" of the officer, *id.* at 358; a "[f]lag contempt statute[ ]" because "what is contemptuous to one man may be a work of art to another" and the statute " fail[ed] to draw reasonably clear lines between the kinds of nonceremonial treatment that are criminal and those that are not," *Smith v. Goguen*, 415 U.S. 566, 573–74 (1974); a vagrancy law with "imprecise terms" such as prowling or loitering, *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972); and a statute forbidding addressing a police officer with "opprobrious language," which left up to the officer the subjective determination of what language violated the statute and what did not, *Lewis v. City of New Orleans*, 415 U.S. 130, 133–34 (1974). These cases make clear that the vagueness doctrine is offended where the language of a statute leaves up to the officer the determination of whether the conduct falls within or without the statute's prohibition, not whenever selective prosecution could theoretically occur. If a local government chose to enforce its speeding laws only against a particular racial, religious, or political minority, such selective enforcement would certainly be unconstitutional, but not because the speed limit was vague.

The ordinance in question suffers none of the flaws identified in this Court's precedents. The ordinance prohibits the act of posting of "any notice, sign, announcement, or other advertising matter" on property without consent of the property owner. Pet. App. 85a. Nothing in this ordinance invites law enforcement to arrest or charge for conduct that is so ill-defined as to leave its interpretation up to the subjective judgment of police and prosecution.

Wilson argues that "legislation need not be ambiguous" to be unconstitutionally vague if it "stifle[s] too much protected speech" or "allow[s] for arbitrary or viewpoint-discriminatory enforcement." Pet. 17. The cases he cites, however, do not support this claim.

In *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 206 (1975) (cited Pet. 17), for example, this Court addressed a city ordinance for nuisance prohibiting the exhibition of any motion picture "in which 'female buttocks and bare breasts were shown'" if the exhibition was visible from public streets. The issue in the case was not whether the ordinance was vague, but rather the balancing of "the First Amendment rights of speakers against the privacy rights of those who may be unwilling viewers or auditors." *Id.* at 208. In finding the ordinance violated the First Amendment, this Court held that it was not justified on privacy grounds because it "discriminate[d] among movies solely on the basis of content" and was not justified as protecting children because it "sweepingly forbid[ ] display of all films containing any uncovered buttocks or breasts, irrespective of context or pervasiveness." *Id.* at 211–13. Ultimately the Court held that the ordinance was facially overbroad under the First Amendment. *Id.* at 215–17. The Court at no point addressed due process vagueness.

The same is also true of Wilson's other cases. *See Grayned v. City of Rockford*, 408 U.S. 104, 114 (cited Pet. 17 and addressing First Amendment overbreadth); *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45–46 (1983) (cited Pet. 17 and addressing what constitutes a public forum under the First Amendment); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112–13 (2001) (cited Pet. 17 and finding viewpoint discrimination in school board exclusion of religious club from using school facilities). Because these cases addressed First Amendment claims and do not discuss Fifth Amendment vagueness standards, they are irrelevant to the whether this Court should review the Idaho Court of Appeals' Fifth Amendment vagueness ruling.

Wilson next asserts that he was denied adequate statutory notice by the presence of other postings in the city. Pet. 18 (arguing he had "no notice that his political stickers will be treated differently than the countless other political stickers that Moscow has allowed to proliferate"). He cites no cases supporting his proposition that a statute can be rendered vague by a spotty enforcement record.

Whether or not Moscow prosecuted Wilson constitutionally, the ordinance it used to prosecute him is a straightforward trespass law, forbidding persons from commandeering others' property for the purpose of posting signs. There is no question the ordinance can be abused by politically motivated prosecutors, but that is true of all criminal prohibitions, and it does not render the ordinance unconstitutionally vague.

## CONCLUSION

The petition for a writ of certiorari to the Idaho Court of Appeals should be denied.

Respectfully submitted,

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