No. 24-853

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 of Idaho

Brief of *Amicus Curiae* Thomas More Society in Support of Petitioner

Peter Breen
Joan M. Mannix
Christopher J.F. Galiardo
THOMAS MORE SOCIETY

Thomas Brejcha
Counsel of Record
THOMAS MORE SOCIETY
309 W. Washington St
Suite 1250
Chicago, IL 60606
(312) 782-1680
tbrejcha@thomasmoresociety.org

Counsel for Amicus Curiae

April 9, 2025

TABLE OF CONTENTS

Interest of Amicus Curiae 1

Introduction 2

Summary of Argument 3

Argument 5

I. The First Amendment Curtails Governments' Historical Power to Compel Private Speech.. 5

II. No Government May Force Private Citizens to Confess the Rightness of Its Views 9

III. Coercing Rory to Abjure Serves No Interest. 12

Conclusion 15

TABLE OF AUTHORITIES

Cases

303 Creative v. Elenis, 600 U.S. 570 (2023) 11
Abrams v. United States, 250 U.S. 616 (1919)..... 4, 9
Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002) . 10
Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000)..... 13
Brown v. Entm't Merchs. Ass'n, 564 U.S. 786 n.1 (2011) 11, 13
Buck v. Bell, 274 U.S. 200 (1927) 14
Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753 (1995) 11
Cohen v. California, 403 U.S. 15 (1971)..... 10
Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston, 515 U.S. 557 (1995)..... 1, 11
Janus v. *AFSCAME*, 585 U.S. 878 (2018) 10, 13
Mahanoy Area Sch. Dist. v. B.L., 594 U.S. 180 (2021) 11
McCreary County v. ACLU, 545 U.S. 844 (2005)..... 11
Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974) 13
Reed v. Town of Gilbert, 576 U.S. 155 (2015) 12
Roth v. United States, 354 U.S. 476 (1957)..... 9
Schenk v. United States, 249 U.S. 47 (1919)..... 7
State v. Regan, 564 P.3d 706 (Idaho 2025) 13
Thomas v. Collins, 323 U.S. 516 (1945) 3, 12, 13
Vidal v. Elster, 602 U.S. 286 (2024) 12
W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) 3, 4, 9, 13, 16
Wooley v. Maynard, 430 U.S. 705 (1977) 10

Statutes

1 Stat. 596 (1798) 7
54 Stat 670 (1940) 7
Public Act, 3 Charles I, c.1 (1628) 5

Other Authorities

1 John Phillip Reid, *Constitutional History of the American Revolution: The Authority of Rights* (1987) 6
1 Orlando Patterson, *Freedom in the Making of Western Culture* (1992) 5
2 *Papers of Thomas Jefferson* (Julian P. Boyd ed. 1950) 10
4 Annals of Cong. (1794) 3
8 James Madison, *The Papers of James Madison: Congressional Series* (William T. Hutchinson et al. eds., 1973) 6
9 James Madison, *The Papers of James Madison: Congressional Series* (William T. Hutchinson et al. eds., 1975) 6
A. Scott Berg, *Wilson* (2014) 7
Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (1948) 9
Alexandra Walsham, *Charitable Hatred* (2006) 4
C. Edwin Baker, *Human Liberty and Freedom of Speech* (1989) 10
Charles Darwin, *On the Origin of Species*, in 2 Harv. Classics (Charles W. Eliot ed., 1937) (1859) 14
David Colclough, *Freedom of Speech in Early Stuart England* (2005) 11

David McCullough, *John Adams* (2002) 7
Derek Parfit, *Reasons and Persons* (1984)..... 10
Documents of the Christian Church (Chris Maunder ed., Oxford Univ. Press 4th ed. 2011)..... 16
Doris Kearns Goodwin, *No Ordinary Time* (1995) 7
Eugene Volokh, *The Law of Compelled Speech*, 97 Tex. L. Rev. 355 (2018)..... 11
Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* (1985)..... 6
Godfrey Davies, *The Early Stuarts 1603-1660*, *in* 9 Oxford History of England (G.N. Clark ed. 1937).. 5
Gordon S. Wood, *The Radicalism of the American Revolution* (1993)..... 6
Irving Bryant, *The Bill of Rights: Its Origin and Meaning* (1965)..... 6
Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (1997)..... 6
James Ford Rhodes, *History of the Civil War 1861-1865* (1919) 7
John Locke, *Two Treatises of Government and A Letter Concerning Toleration* (Yale Univ. Press 2003) (1689) 14
John Milton, *Areopagitica* (John W. Hales ed., Oxford Univ. Press 1932) (1644)..... 6, 10, 11
John Phillip Reid, *The Concept of Liberty in the Age of the American Revolution* (1988)..... 6
John Stuart Mill, *On Liberty* (Mark Philp & Frederick Rosen eds., Oxford Univ. Press 2d. ed. 2015) 4

Johns Hopkins, *Coronavirus Resource Center: Idaho Data Timeline* (Mar. 10, 2023)..... 14
Jon Huang, et al., *Track Covid-19 in Latah County, Idaho*, N.Y. Times (Mar. 26, 2024) 14
Lawrence M. Friedman, *A History of American Law* (2019) 7
Leo Tolstoy, *War and Peace* (Amy Mandelker ed., Louise Maude & Aylmer Maude trans., Oxford Univ. Press 2010) 15
Mark E. Neely, Jr., *The Fate of Liberty: Abraham Lincoln and Civil Liberties* (1992)..... 7
Martin H. Redish, *Freedom of Expression* (1984).... 10
Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990) 6
Ralph Ketchem, *James Madison* (1990) 7
Richard Marius, *Thomas More* (1999) 15
Robert Nozick, *Anarchy, State, and Utopia* (1974) . 10
Rodney A. Smolla, *Free Speech in an Open Society* (1992) 10
Stephen D. Solomon, *Revolutionary Dissent* (2016) .. 4
Steven Ozment, *The Age of Reform, 1250-1550* (1981) 16
The Declaration of Independence (U.S. 1776) 9
The Merriam-Webster Dictionary, *Appropriate* 35 (2022) 13
Thomas I. Emerson, *The System of Freedom of Expression* (1970) 10
Thomas S. Kuhn, *The Structure of Scientific Revolutions* (2012)..... 14

Treatises

2 William S. Holdsworth, *A History of English Law* (3d. ed. 1922) 5
4 William Blackstone, *Commentaries* *150-53 5
Frederic W. Maitland, *The Constitutional History of England* (Cambridge Univ. Press 1963)..... 5
Frederic William Maitland, *Roman Canon Law in the Church of England* (1898)..... 5
Frederick Pollock, *The History of English Law Before the Time of Edward I* (Cambridge Univ. Press. 2d ed. 1968)..... 5

INTEREST OF AMICUS CURIAE[1]

The Thomas More Society ("TMS") is a nonprofit organization devoted to the defense and advocacy of First Amendment rights, including freedom of speech and the free exercise of religion. Incorporated as a 501(c)(3) not-for-profit corporation in Illinois and based in Chicago, TMS accomplishes its organizational mission through litigation, education, and related activities.

For amicus TMS, this case is principally about the right of all persons to choose for themselves not only what to say but what *not* to say. *See Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995). TMS has defended clients against several state and local government efforts to compel them to parrot government views. If the decision of the Idaho courts stands, it will only embolden more such violations of the First Amendment.

---

[1] Pursuant to this Court's Rule 37.6, counsel for amicus curiae certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than amicus curiae or its counsel has made a monetary contribution to the preparation or submission of this brief. Parties received timely notice of the intent to file this brief.

INTRODUCTION

Streets made desolate by Moscow, Idaho's COVID-19 shutdown saw a flurry of activity in March 2020 as city workers fanned out, signs underarm, to prop up public support for Moscow's restrictions on assembly, speech, and other rights in the name of public health. CR.105-09. The laconic language of the signs assured residents that the city had excised exercise of such core First Amendment freedoms from the public square only "Because We Care." CR. 110.

Half a year into two weeks to flatten the curve, those signs seemed to some to be as callous as the feet of those who had skittered across the city to post them. Impatience was growing fast, festering over fettering of freedoms that seemed more aligned with the state motto of "let it be perpetual" than with sound science. CR.109. Rory Wilson was one of them, and the model student joined his church to sing peaceful protest hymns outside city hall.

Police descended on those gathered to pray, arresting some to intimidate the rest. But Rory was unbent and turned his wit to parody. If Moscow claimed to suppress rights because it cared, Rory would counter that government speech with his own samizdat that quoted those words on stickers adorned with hammers and sickles. CR.110-11; App. 152a-153a.

Rory himself was then arrested because the police disagreed with his views. CR.113. He was convicted under an ordinance never before enforced. CR.113; App. 183a. Then the court that sentenced him conditioned his probation—and thus in a sense his liberty—on him abjuring his earlier speech as inappropriate and uncivil. CR.113; App. 55a.

Moscow indeed.

This case is about one young man's freedom to peaceably contribute to the marketplace of ideas. Rory's petition convincingly argues that his conviction cannot stand because in a republic the people tell the government what to say, not the reverse. *See W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); 4 Annals of Cong. 934 (1794) (James Madison).

Amicus will not rehash his argument. But it writes the Court because yet more is at stake. Conditioning physical liberty on parroting government speech sounds more in Torquemada than Tocqueville, more like Malenkov than Madison. Examples of it blot the pages of Rory's Bible and Anglo-American legal history alike. But this Court has grown hoarse reminding government officials for decades that our Constitution protects the right not to speak.

The petition in this case should be granted.

SUMMARY OF ARGUMENT

The founding generation knew that governments sometimes coerce speech when they fail to convince. Commoners had never enjoyed freedom of speech in Britain, where Magna Carta granted even nobles little right to speak their minds, and rulers from William the Conqueror to George III had molded public opinion by regulating press and speech. *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring). But during an English civil war just generations removed, each side had gone further, compelling even religious oaths in the name of security, unity, and peace. *See* Leonard W. Levy, *Legacy of Suppression* 6-7 (1960).

Government attempts to compel speech in the colonies too had grown in the years before the Revolution and encroached on natural rights. In some colonies

one needed to swear fealty to buy land. *See* Alexandra Walsham, *Charitable Hatred* 86-87 (2006). But worse, all down the seaboard scores of colonists were hauled before colonial assemblies each year just for criticizing government actions, with their best shot of escaping jail or the stocks being to recant. *See* Leonard W. Levy, *Legacy of Suppression* at 11-12, 39-63; Stephen D. Solomon, *Revolutionary Dissent* 120-49 (2016).

From the first years after the Revolution, America has taken a more solicitous stance toward speech. *See* Leonard W. Levy, *Legacy of Suppression* at 176-248. And since the middle of the last century that stance has toed the line of libertarianism. *See id.* at 249-312; *cf.* John Stuart Mill, *On Liberty* 18-54 (Mark Philp & Frederick Rosen eds., Oxford Univ. Press 2d. ed. 2015). Our fixed star as to compelled speech is that no government official may "prescribe what shall be orthodox in … matter of public opinion or force citizens to confess … their faith therein." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). We leave truth-finding instead to honest debate in a marketplace of ideas. *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

Even in wartime, American governments rarely have retreated from that revolutionary ideal. Of late, however, government officials increasingly have compelled speech even during peacetime to cudgel those they cannot cajole. *E.g.*, *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755 (2018); *Masterpiece Cakeshop Ltd. v. Colo. Civ. Rts. Comm'n*, 584 U.S. 617 (2018). Absent extreme dangers and narrow bounds, such compulsion cannot survive scrutiny. Nor can it in this case, where forcing Rory to write an apologia against himself about pandemic policies long past cannot advance any government interest.

ARGUMENT

I. The First Amendment Curtails Governments' Historical Power to Compel Private Speech.

Securing freedom of speech was one of our founders' most revolutionary acts. That freedom was unknown in contemporary Europe. *See* 1 Orlando Patterson, *Freedom in the Making of Western Culture* (1992). And even five centuries after Magna Carta, no treatise writer in England seems to have thought its limited speech rights should extend to lower social classes. *See* Frederick Pollock, *The History of English Law Before the Time of Edward I* (Cambridge Univ. Press. 2d ed. 1968); Frederic W. Maitland, *The Constitutional History of England* (Cambridge Univ. Press 1963) .

Not even Coke or Blackstone thought otherwise. As chair of the committee that drafted England's Petition of Right in the 1620s, Coke extended much of Magna Carta to commoners. *See* Public Act, 3 Charles I, c.1 (1628). But not speech. After a civil war sparked over debates over religion in government, Blackstone disavowed the mere thought: a commoner has a "right to lay what sentiments he pleases before the public." 4 William Blackstone, *Commentaries* *150-53. But he could and should be punished for writing anything blasphemous or seditious. *See id.* No other rule, Blackstone insisted, could keep "peace and good order." *Id.*

Blackstone was right about the risk. Religious conflict in England had recently riven the country into sects that set on each other's presses and sentenced each other's ministers to whippings or worse. *See* Godfrey Davies, *The Early Stuarts 1603-1660*, at 68-78, 203-06, *in* 9 Oxford History of England (G.N. Clark ed. 1937); Frederic William Maitland, *Roman Canon Law in the Church of England* 60-61, 162-63 (1898).

The bloodshed had caused even free speech champion John Milton to blanch, arguing that religious heterodoxy must be muzzled. *Areopagitica* 5 (John W. Hales ed., Oxford Univ. Press 1932) (1644). Courts agreed, convicting William Penn among others for refusing to recant religious beliefs. *See* Irving Bryant, *The Bill of Rights: Its Origin and Meaning* 56-57 (1965); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1471-1472 & n.320 (1990).

But by the time our founders convened in Penn's colony to discuss independence, they were of the mind that it was not freedom of speech that had triggered tyranny and war. Suppression of that freedom had. *See* John Phillip Reid, *The Concept of Liberty in the Age of the American Revolution* 120-21 (1988); Irving Bryant, *The Bill of Rights* at 121-28 (1965). And so the Continental Congress endorsed a free press, and several colonies relaxed their own speech bans in their revolutionary constitutions.[2] *See* Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* 45 (1985).

James Madison pushed the Continental Congress to also formally declare it could not compel speech in violation of religious belief as kings and parliaments had a century earlier. *See* 8 James Madison, *The Papers of James Madison: Congressional Series* 149, 195-97, 295-304 (William T. Hutchinson et al. eds., 1973); 9 *id.* at 430-31 (1975). And for more than a century,

---

[2] Products of their time, the colonial charters until then had internalized the British understanding that Magna Carta only prohibited prior restraints on speech. *See* Jack N. Rakove, *Original Meanings* 292 (1997); 1 John Phillip Reid, *Constitutional History of the American Revolution* 165-66 (1987); Gordon S. Wood, *The Radicalism of the American Revolution* 13-14 (1993).

that redline mostly held even during wartime when government *suppression* of speech ramped up.[3]

Government speech regulation during World War II broke through Madison's redline, though, marking the first time in American history when governments systematically tried to coerce speech. The issue came to a head in West Virginia, where in the wake of the Pearl Harbor attack the legislature directed the state board of education to prescribe a course of study aimed at "teaching, fostering, and perpetuating the ideals, principles and spirit of Americanism, and increasing

---

[3] Such government suppression of speech during wartime has been one of the most consistent practices in American political history from the beginning. Washington asked Congress to ban speech supporting the French Revolution. Ralph Ketchem, *James Madison* 354-55 (1990). Adams banned criticism of government as war loomed with France. 1 Stat. 596 (1798); David McCullough, *John Adams* 504-07 (2002). And during the Civil War, governments on both sides of the war suppressed speech. *See* Mark E. Neely, Jr., *The Fate of Liberty* 27-28 (1992); James Ford Rhodes, *History of the Civil War 1861-1865,* at 351-54 (1919); *Public Laws of the Confederate States of America* 6 (James M. Matthews ed., 1862).

Governments suppressed speech even more during World War I. Wilson signed a ban on speech that might cast "contempt, scorn, contumely, or disrepute" on the federal government. A. Scott Berg, *Wilson* 452-56 (2014). For their part, several States passed syndicalism laws to achieve the same effect. *See* Lawrence M. Friedman, *A History of American Law* 696-97 (2019). And this Court found that such suppression can pass muster during times war because the Constitution is not a suicide pact: "things that might be said in time of peace … will not be endured so long as men fight." *Schenk v. United States*, 249 U.S. 47, 52 (1919).

And just months after telling millions that Americans deserved to be free from fear and before World War II had even hit American shores, Roosevelt signed a sedition law similar those signed by predecessor wartime presidents. *See* 54 Stat 670, 671 (1940); Doris Kearns Goodwin, *No Ordinary Time* 201-02 (1995).

the knowledge of the organization and machinery of government." W. Va. Code § 1734 (1941 Supp.). The board fulfilled that mandate by requiring students and others to salute the American flag. *Barnette*, 319 U.S. at 626 & n.2. Students who refused were to be expelled and deemed juvenile delinquents while their parents were subject to fines and jailtime. *See* W. Va. Code §§ 1847, 1851, 4904(4) (1941 Supp.).

Parents and teachers objected to making a gesture uncannily like the Nazi flag salute. *Id.* at 627-28. The school board granted concessions to some groups. But not to Jehovah's Witnesses. That religious group insisted it was patriotic, and members offered to periodically and publicly pledge "allegiance and obedience to all the laws of the United States that are consistent with God's law, as set forth in the Bible." *Barnette*, 319 U.S. at 628 n.4. But they insisted that the flag was a graven image they could not salute without violating the First Commandment. *Id.* at 629.

State public schools widely ignored the scruple, expelling students of the Jehovah Witness faith when they did not salute and threatening to ship them off to criminal reformatories. *Id.* at 630. Their parents were then prosecuted for causing delinquency. *Id.* A class of affected parents sought to enjoin the flag statute policy as applied to them. A three-judge panel granted that injunction, and the school board brought the case before this Court on direct appeal. *See id.*

The case entangled numerous constitutional issues, but this Court homed in on compelled speech. It acknowledged that the school board was within its rights to enact a flag statute to promote a government interest in fostering "patriotism and love of country." *Id.* at 631. But echoing Madison, this Court said that "substituting a compulsory salute and slogan" was a

bridge too far. *Id.* A flag salute is symbolic speech as much as a bowed head before a cross or bended knee before a crown, and just as illicit to coerce without a compelling reason because it stifles the mind and sullies the conscience with barren lies. *Id.*at 631-34.

Doctrine prohibiting compelled speech has ramified since *Barnette*, but its root remains intact and vital. Even national unity during history's deadliest war did not justify government threatening children for merely abstaining from speech. Nor has any lesser national crisis since warranted conjuring the suppressive spirit of the Star Chamber to force someone to recant his views tethered to religion in favor of views officials deem more "appropriate." CR.113; App. 55a.

II. No Government May Force Private Citizens to Confess the Rightness of Its Views.

The taxonomic distinction this Court made in *Barnette* between suppressing and compelling private speech sounds in an understanding of how they are alike but also how they importantly differ.

Many think of speech solely in instrumental terms. America rebelled so its people could live however "shall seem most likely to effect their Safety and Happiness." The Declaration of Independence para. 2 (U.S. 1776). And the Free Speech Clause just maximizes the likelihood that what seems best actually is by forcing all ideas into dialectic and synthesis. *See Roth v. United States*, 354 U.S. 476, 484 (1957); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* 1-27 (1948).

But this Court has recognized since *Barnette* that the freedom to speak is more than merely a societal

utility maximizer. *Cf.* Robert Nozick, *Anarchy, State, and Utopia* 41 (1974); Derek Parfit, *Reasons and Persons* 385-90 (1984). There is a self-actualization that occurs when a person interacts with his speech. *See* Martin H. Redish, *Freedom of Expression* 20-21 (1984). That interaction forces him, as Milton once put it, to "summon up all his reason and deliberation to assist him." John Milton, *Areopagitica* at 30. He "searches, meditates, is industrious, and likely consults and confers with his judicious friends." *Id.* And then when he sits down to write, pride if nothing else forces him to engage with the best opposing views of "any that writ before him." *Id.*

Compelling speech thus violates not just a man's mouth but the mechanics of his mind. *See* Rodney A. Smolla, *Free Speech in an Open Society* 9 (1992); C. Edwin Baker, *Human Liberty and Freedom of Speech* 69 (1989). At best, it impresses him into a kind of ventriloquism act before he has time to think. At worst, it orders him to lie about what he already thinks to be true, a doublethink both "sinful and tyrannical," 2 *Papers of Thomas Jefferson* 545-53 (Julian P. Boyd ed. 1950); *accord Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002), because it impairs development of one's intellect and personality. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); Thomas I. Emerson, *The System of Freedom of Expression* 6 (1970). As much when it indoctrinates the weak as when it humiliates the strong, it "is always demeaning." *Janus* v. *AFSCAME*, 585 U.S. 878, 893 (2018); *see Cohen v. California*, 403 U.S. 15, 24 (1971).

Barnette aimed to end such indignity. If there is any "fixed star in our constitutional constellation," it exalts, it is that no government official "can prescribe what shall be orthodox in … matter of public opinion

or force citizens to confess by word or act their faith therein." 319 U.S. at 642. Instead, as this Court has expounded in a long line of cases applying *Barnette*, with rare exception it lies with the speaker alone to choose whether to speak and then what to say. *See, e.g.*, *Hurley*, 515 U.S. at 573.

As *Barnette* itself suggests, that holds true especially for speech that involves religious belief. Freedom of speech arose out of discussions about the freedom of religion *See* David Colclough, *Freedom of Speech in Early Stuart England* 77-119 (2005). And ever since the Revolution, religious speech thus has lain at the heart and in the sinews of First Amendment freedom. It is as central to the freedom as the prince is to *Hamlet*. *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995). And so invading it with sufficient cause is barred.

Government indeed must carry a "heavy burden to justify intervention" with respect to "religious speech." *Mahanoy Area Sch. Dist. v. B.L.*, 594 U.S. 180, 190 (2021). Government may not imperil "the integrity of individual conscience in religious matters," *McCreary County v. ACLU*, 545 U.S. 844, 876 (2005), by forcing one to "utter what is not in her mind about a question of … religious significance." *303 Creative v. Elenis*, 600 U.S. 570, 596 (2023) (cleaned up).

It makes no difference if, like in the Inquisition or Star Chamber, the coerced speech occurs in private. *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 792 n.1 (2011). To speak, and much more to write, is a labor of mind. John Milton, *Areopagitica* at 30. And the government cannot impress that labor in pursuit of a view it favors. *303 Creative LLC*, 600 U.S. at 588-89; Eugene Volokh, *The Law of Compelled Speech*, 97 Tex. L. Rev. 355, 382 (2018).

Descending from the ethereal to brass tacks, this means that because government action that compels speakers to alter the content of their speech is always content-based, it must satisfy strict scrutiny, i.e., it is presumed to be unconstitutional unless it is narrowly tailored to advance a compelling government interest. *See Vidal v. Elster*, 602 U.S. 286, 292-93 (2024). That standard of review is the most stringent in constitutional law and satisfied only by laws that target "the gravest abuses, endangering paramount interests." *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

That scrutiny is even more searching when the compulsion is viewpoint discriminatory. Such viewpoint discrimination egregiously strikes at the heart of the First Amendment. *Vidal*, 602 U.S. at 293. And so whatever the motive of the government might be, *see Reed v. Town of Gilbert*, 576 U.S. 155, 163-67 (2015), it drives information out of the marketplace of ideas and so presumptively is unconstitutional. *Matal*, 582 U.S. at 246.

III. Coercing Rory to Abjure Serves No Interest.

Among other conditions, the trial court gave Rory unsupervised probation—that is, allowed him to remain out of jail—only if he wrote "a 3-5 page paper on "what appropriate civil discourse is, what you would have done differently in this case, and file [sic] with the Court by June 30, 2022." App. 55a. In other words, much like the school board vis-à-vis students in *Barnette*, the court dangled a sword of Damocles above Rory unless he knuckled under to voice government views. *See* 319 U.S. at 630.

Given the facts of this case and what the Idaho Supreme Court has understood the word "appropriate"

to typically mean, the court can only be understood to have mandated that Rory write an essay confessing that it was either (1) impermissible or (2) inapt to post stickers in public places that criticized Moscow's COVID-19 policies and enforcement using its own language in obvious parody. *See State v. Regan*, 564 P.3d 706, 711 (Idaho 2025); The Merriam-Webster Dictionary, *Appropriate* 35 (2022). Since it beggars belief that the court thought any criticism of government is impermissible, it must have had aptness in mind.

That approach, to its credit, seems to recognize the situational analysis that strict scrutiny requires. But it fails to recognize the situational analysis yields no finding of a cognizable government interest that compelling the confession could serve. Such an interest would need to be both real rather than speculative, *see Brown*, 564 at 799, and concern "the gravest abuses" that are "endangering paramount interests." *Collins*, 323 U.S. at 530. And not at some future time but at the time the speech is compelled. *See Janus*, 585 U.S. at 893; *Barnette*, 319 U.S. at 633.

This Court has never found a government interest to meet that lofty standard in a compelled speech case. National security does not, even in wartime. *Barnette*, 319 U.S. at 634, 640-41. Protecting others from discrimination does not. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 644, 656-61 (2000). And even making it easier for others to exercise constitutional rights does not overleap the necessary bar. *See Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 244, 248, 258 (1974).

Same for whatever public health interests the court might have thought were at stake in this case. To be sure, governments have an interest in public health. *Roman Cath. Diocese of Brooklyn*, 592 U.S. at 19. But the pandemic had petered out before Rory was

sentenced. Idaho had *one* COVID-19-related death that day. Johns Hopkins, *Coronavirus Resource Center: Idaho Data Timeline* (Mar. 10, 2023). And his county barely even had any hospitalized COVID-19 patients. *See* Jon Huang, et al., *Track Covid-19 in Latah County, Idaho*, N.Y. Times (Mar. 26, 2024).

Nor could the court have reasonably thought the essay would advance a compelling government interest in getting people to "believe science," however that unscientific expression is understood. Five Justices of this Court concluded in *United States v. Alvarez* that no such interest even exists. *United States v. Alvarez*, 567 U.S. 709, 731-32 (2012) (Breyer, J., concurring); *id.* at 749 (Alito, J., dissenting). That makes sense. Government ex ante lacks clear expertise to discern what accurate science even is. *See* John Locke, *Two Treatises of Government and A Letter Concerning Toleration* 241 (Yale Univ. Press 2003) (1689). And any track record that includes *Scopes*, Dred Scott, and sterilization of women after "three generations of imbeciles" hardly inspires ex post confidence in such competence. *Buck v. Bell*, 274 U.S. 200, 207 (1927).

If anything, the government interest lies in *not* saying what science people are to believe in any subfield where science is still in flux. Science historically has advanced only by debate leavened with time. *See* Charles Darwin, *On the Origin of Species* 499, in 2 Harv. Classics (Charles W. Eliot ed., 1937) (1859). That is just as true today. Debates from the smelting of galaxies to the melting of glaciers might rage hot. But that crucible alone can forge science. *See generally* Thomas S. Kuhn, *The Structure of Scientific Revolutions* 143-72 (2012).

Even assuming any of the above interests was cognizable (none is), the court could not reasonably have

believed the essay would advance the interest in a narrowly tailored way. If anyone in Moscow still resisted the city's COVID messaging by the time Rory was sentenced, there were plenty of alternative ways to provide another nudge without compelling speech.

CONCLUSION

Voluntarily voicing his views from another Moscow shaken by social change, Leo Tolstoy observed that to "tell the truth is very difficult, and young people are rarely capable of it." Leo Tolstoy, *War and Peace* 258 (Amy Mandelker ed., Louise Maude & Aylmer Maude trans., Oxford Univ. Press 2010). After lengthy litigation over some stickers, Rory appreciates the accuracy of that statement as much as anyone does.

But he also knows the First Amendment protects the right of young people like him to shop their views in the marketplace of ideas. America is the better off because of it: thirtysomethings Jefferson, Hamilton, and Madison wrote our Declaration of Independence, most of the Federalist Papers that helped knit our nation, and a Bill of Rights that keeps that nation one of, by, and for the people even in times of crisis. So often only the young can afford to become iconic iconoclasts.

Implicitly since those iconoclasts wrote and expressly since this Court decided *Barnette* in response to other government attempts to coerce student speech, the First Amendment likewise has been recognized to protect a right not to engage in the fraud of and upon the mind that is compelled speech.

That right is rare. Amicus's namesake lacked it and so mounted the scaffold in England's Inquisition. *See* Richard Marius, *Thomas More* 490-514 (1999). The father of Rory's branch of Christianity also lacked

it as he stood trial for (like Rory) parrying by parody what he thought to be benighted government policy in a Holy Roman Empire where church and state were inseparable. *See* Steven Ozment, *The Age of Reform, 1250-1550*, at 199-204 (1981). When ordered to recant, Luther insisted he could not without betraying his beliefs: "Here I stand, I can do no other." *Documents of the Christian Church* 212-14 (Chris Maunder ed., Oxford Univ. Press 4th ed. 2011).

Nor can Rory recant his own beliefs five centuries later, and there is no good reason to make him do so. *Barnette* read history from the time of the Roman Coliseum to the time of modern Russian labor camps to prove that coercing speech never achieved the goal of national unity of thought it sought to. *See* 319 U.S. at 641. It could terrify but not unify. And so like our Founders and Framers, this Court chose another way.

This case offers the Court a chance to confirm us on that path and remind governments that even in a city called Moscow and with respect to Dostoyevsky, we are a nation of crime and punishment but not of a grand inquisitor.

The petition should be granted.

Respectfully submitted,

Thomas Brejcha
Counsel of Record
Peter Breen
Joan M. Mannix
Christopher J.F. Galiardo
THOMAS MORE SOCIETY
309 W. Washington St.
Suite 1250
Chicago, IL 60606
(312) 782-1680
tbrejcha@thomasmoresociety.org