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

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF FOR THE PETITIONER

Even Idaho concedes it 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." BIO.1-2. Cold comfort to petitioner, who still faces a sentence of compelled speech as punishment for the unconstitutional conviction Idaho imposed upon him because of his disfavored speech. Doubly cold given that Idaho repeatedly expresses ambivalence about the answer to the question presented. *See* BIO.2 ("Whether the trial court was right or not"), 22 ("Whether or not Moscow prosecuted Wilson constitutionally").

Idaho's concessions do not end there. Idaho agrees that Wilson is the first and only person Moscow prosecuted in 15 years under its ordinance banning any unauthorized sign in the public square. Idaho never disputes that the Moscow officer who arrested Wilson did so because, as the officer put it, he "d[id]n't agree with [Wilson's] messaging." App.183a. And Idaho admits (at 18) that Wilson raised and preserved his as-applied vagueness challenge to Moscow's ordinance. Idaho neither defends the lower court's vagueness ruling as consistent with Wilson's speech rights nor identifies a vehicle problem preventing this Court from correcting that ruling through summary reversal or on plenary review.

A government rarely acknowledges that it likely committed a constitutional wrong. Despite representing Moscow below, Idaho never disclosed its misgivings to the Idaho Court of Appeals. No matter how begrudgingly it may now admit that Moscow probably discriminated against Wilson, Idaho has acknowledged the likely wrong and that nothing stops this Court from righting it.

The Court should accept that acknowledgment and summarily reverse the Idaho Court of Appeals.

I. Wilson Preserved His Arguments for Review.

Despite conceding Wilson preserved an as-applied vagueness challenge under the federal Constitution, Idaho contends primarily that Wilson preserved no selective-prosecution, overbreadth, or prior-restraint arguments. Idaho is wrong. Idaho does not dispute Wilson raised these First Amendment grounds to support his as-applied vagueness challenge to Moscow's ordinance—it simply disagrees on the merits. *See* BIO.18-22.

Wilson preserved each argument, which undisputedly had "in some manner been brought to the attention of the court below." *Dewey v. City of Des Moines*, 173 U.S. 193, 200 (1899). 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. Wilson was not confined "to the same arguments" he made below. *Id.* at 198.

The minimal requirements to preserve federal issues for this Court's review are informed by state preservation practice. SHAPIRO ET AL., SUPREME COURT PRACTICE § 3.18 (10th ed. 2013). To preserve an issue in Idaho, the issue and the party's position on it must have been raised in trial court. *State v. Gonzalez*, 439 P.3d 1267, 1271 (Idaho 2019). Idaho provides that "fresh substantive issues may not be raised for the first time on appeal, but that specific legal arguments in support of a position may evolve." *State v. Garnett*, 453 P.3d 838, 840-41 (Idaho 2019). A party's substantive briefing may thus preserve an argument regardless of how issues are labeled. *See Heath v. Denny's Wrecker Serv., Inc.*, 560 P.3d 1089, 1102 (Idaho 2024) (rejecting waiver where party argued position within issue in his brief).

In this Court, so long as a particular "constitutional premise" has been raised below, the petition may proceed from a different "method of analysis readily available to the state court." *Stanley v. Illinois*, 405 U.S. 645, 658 n.10 (1972). Petitioner explained how the Idaho Court of Appeals' vagueness reasoning conflicts with this Court's precedents in principle. *See* Pet.11-15 (explaining conflict with viewpoint-neutral prosecution requirement), 19-23 (explaining conflict with prior-restraint and overbreadth doctrine). In each instance, the arguments comport with the constitutional premise raised below: Moscow's ordinance could not be applied to Wilson consistently with his First Amendment rights.

Selective prosecution. Petitioner has consistently argued that Moscow singled him out for enforcement based on his viewpoint and called the Idaho Court of Appeals' attention to the First Amendment. Idaho concedes that Wilson raised viewpoint-based prosecution to the magistrate and district judges. BIO.9-12. And Wilson undisputedly alerted the Idaho Court of Appeals to "both standardless enforcement and prosecution based upon political speech." App.128a.

In arguing that the ordinance was vague as-applied, Wilson has consistently attacked viewpoint discrimination. Wilson argued it "abuts upon sensitive areas of basic First Amendment freedoms, operating to inhibit the exercise of those freedoms." App.126a (cleaned up). No one would have "fair warning that engaging in core First Amendment political speech" was "punishable by a criminal sanction." App.134a. The Idaho Court of Appeals decided whether the ordinance "was unconstitutionally vague," and rejected petitioner's vagueness challenge insofar as it was "based on First Amendment principles." App.7a, 10a n.2. Idaho admits that viewpoint

discrimination is a "serious injustice" and identifies no vehicle defect precluding review of that federal question. BIO.1.

Indeed, because the "necessary effect of the judgment has been to deny the claim" that Moscow deployed its ordinance to suppress his First Amendment rights, Idaho cannot insist that the federal claims should more granularly "have been put in direct terms." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928). This Court does not require more specificity to alert a state court of a constitutional claim. *See, e.g.*, *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 85-86 n.9 (1980) (deeming argument for First Amendment freedom from forced use as forum for speech preserved by federal claim of a property right to exclude others); *Braniff Airways v. Ne. State Bd. of Equalization & Assessment*, 347 U.S. 590, 598-99 (1954) (finding argument preserved despite mistaken reliance on Commerce Clause rather than Due Process Clause).

Overbreadth. Petitioner preserved overbreadth. His Idaho Court of Appeals brief (App.126a) cited *Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972), which Idaho concedes "address[es] First Amendment overbreadth," BIO.22. He cited the First Amendment principle that 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." App.130a (quoting *United States v. Stevens*, 559 U.S. 460, 473 (2010)). He argued applying Moscow's ordinance was unconstitutional as-applied because it "plainly targets expressive speech in a real and substantial way that infringes upon a person's First Amendment right to free expression." App.130a. And the Idaho Court of Appeals

distinguished First Amendment overbreadth as grounds to overturn Wilson's conviction. App.10a n.2.

Prior restraint. Wilson also preserved prior-restraint arguments. Idaho does not dispute that time, place, and manner restrictions are prior restraints under First Amendment doctrine. Pet.19-20. And Idaho concedes that Wilson raised this First Amendment argument in the Idaho Court of Appeals "in the context of a vagueness argument." BIO.15. That sufficed under Idaho's preservation practices, *see supra* p.2, which align with this Court's longstanding refusal to demand "book and verse" precision, *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 n.9 (1982). And the Idaho Court of Appeals expressly refused to invalidate Wilson's conviction "based on First Amendment principles." App.10a n.2. So, Idaho cannot complain about the "particularity with which" First Amendment defects were raised. SHAPIRO, *supra*, § 3.17.

B. The Court should exercise its supervisory authority over the Idaho Court of Appeals. That court's decision drastically departs from clear guidance that the Constitution protects against viewpoint-discriminatory criminal enforcement and as-applied laws that fail to afford due process. *See* S. Ct. R. 10(c).

1. Regarding vagueness, Idaho does not dispute Wilson was the only person it prosecuted under the ordinance despite the countless times it had been violated with ample contact information to identify violators. *See* App.147a-148a; Pet.12-13. Numerous political messages covered downtown Moscow, 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 those speakers.

While Idaho suggests other factors affected Moscow's charging decisions, BIO.4, 11-12, it never disputes that Wilson was singled out because, in the arresting officer's words, "[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.

No reasonable person expects laws to be enforced against him on viewpoint-discriminatory grounds. Pet.17-19. Idaho concedes the substance of this federal question was "part of his argument" that the ordinance was unconstitutionally vague as-applied. BIO.12. And because the Idaho Court of Appeals undisputedly resolved those matters on purely federal grounds, BIO.12-13, review is appropriate.

This Court has long exercised jurisdiction to ensure a state court properly interpreted or applied precedent. *See* SHAPIRO, *supra*, § 4.25. Even without a conflict, review is proper if the state court "has rendered an erroneous or at least a doubtful decision on such a question." *Id.* Cases with serious implications for protected speech especially warrant review. Pet.23-24.

2. Idaho disputes whether the Court may reach Wilson's First Amendment arguments. BIO.11, 14. Prudentially, this Court does not ordinarily "decide questions not raised or resolved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976). Idaho's argument is untenable.

Regarding selective prosecution, Wilson undisputedly challenged Moscow's ordinance *as applied to him*. While not every vagueness challenge invokes freedom from viewpoint-discriminatory prosecutions, Wilson's did. Idaho concedes as much. BIO.12. Wilson argued the ordinance improperly "target[ed] all speech, including political speech." App.130a, but the Idaho Court of

Appeals stated that defense of the ordinance "'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 upheld the ordinance as-applied because it was "plain and unambiguous" and petitioner had "notice that his conduct was prohibited." App.11a.

For similar reasons, jurisdiction is appropriately exercised on prior-restraint and overbreadth grounds. *Contra* BIO.14-18. Both doctrines sound in the First Amendment and were undisputedly raised in Wilson's Idaho Court of Appeals brief, and "the First Amendment" was undisputedly rejected as grounds to invalidate the ordinance as to Wilson. BIO.15, 16-17; App.10a n.2. That clears the minimal review hurdle.

II. This Court's Intervention Is Warranted Through Either Summary Reversal or Plenary Review.

A. The grave intrusion on Wilson's rights and the "serious injustice" at stake justify summary reversal. BIO.1. Idaho concedes the arresting officer "didn't agree" with Rory's message and Moscow never enforced its ordinance against anyone else. App.183a (cleaned up). The parties agree, no one had the benefit of *Gonzalez v. Trevino*'s more-recent admonishment that probable cause cannot insulate viewpoint-driven enforcement of rarely enforced laws from constitutional scrutiny. 602 U.S. 653, 655-58 (2024) (per curiam). Summary disposition is warranted in the interest of justice. *See* 28 U.S.C. § 2106; SHAPIRO, *supra*, § 5.12.

B. As *amici* note, important, recurring selective-enforcement questions also merit plenary review. There is widespread, recent viewpoint-based enforcement of ostensibly neutral speech restrictions like those in *Frederick Douglass Foundation, Inc. v. District of Columbia*,

82 F.4th 1122, 1131 (D.C. Cir. 2023), and *Tucson v. City of Seattle*, 91 F.4th 1318, 1324 (9th Cir. 2024). *See* Pet.25-26. *Amici* present even more examples of how officials invoke ostensibly broad prohibitions to suppress disfavored speech. 1A Clinics Br.12-18; Protect the 1st Br.4-8.

Idaho hand-waves this context by casting such laws as garden-variety protections against "commandeering" private property. BIO.22. But Wilson does not argue all posters must be granted free rein to post signs anywhere. Rather, as *Gonzalez* teaches, 602 U.S. at 658, even facially neutral criminal laws are not immune from constitutional scrutiny when rarely enforced yet deployed to chill disfavored speech.

Idaho identifies no vehicle defects. Idaho does not dispute the state court conclusively construed state law and rejected an alternative limiting construction. *See* Pet.30-32. Moreover, as Idaho concedes (at 17), Moscow made no attempt to distinguish between protest stickers posted on public versus private property under its ordinance, which required the State to prove only that the subject property was "not belonging to" Wilson. Moscow City Code § 10-1-22(A). This case thus does not implicate public-versus-private property-rights distinctions.

III. The Idaho Court of Appeals' Erroneous Judgment Drastically Departs from This Court's Decisions.

A. The ordinance was vague as-applied and thus violated the Fourteenth Amendment because it did not "set reasonably clear guidelines for law enforcement officials . . . in order to prevent 'arbitrary and discriminatory enforcement.'" *Smith v. Goguen*, 415 U.S. 566, 573 (1974) (cleaned up). The "more important aspect of vagueness doctrine" is not actual notice but whether an ordinance

sufficiently protects against a "standardless sweep." *Kolender v. Lawson*, 461 U.S. 352, 358 (1983). Moscow's ordinance lacked "clear guidelines" to prevent viewpoint-discriminatory enforcement. *Goguen*, 415 U.S. at 573. The Idaho Court of Appeals mistakenly limited its analysis to whether petitioner had notice of what the ordinance prohibited. App.10a-11a. That was error.

Even that incomplete analysis was wrong. Moscow's undisputed history of non-enforcement in allowing other speakers' messages to proliferate supports a reasonable person's understanding that speech "cannot be excluded" by officials based on viewpoint. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 (2001). Even though the Idaho Court of Appeals reasoned the ordinance unambiguously prohibited postings of any type, that open-ended prohibition is precisely the problem Wilson challenged: if the ordinance criminalizes all unauthorized speech posted in the public square, then enforcement was left solely to Moscow's viewpoint-based discrimination. As Wilson argued below, App.126a-127a, that regime impermissibly "operat[es] to inhibit the exercise" of First Amendment freedoms. *Grayned*, 408 U.S. at 109; *see also* Pet.18-19. No reasonable person would read a law prohibiting 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 expression format. No reasonable person would expect officials to restrict expression because of its viewpoint, *see Police Dep't of City of Chi. v. Mosley*, 408 U.S. 92, 95 (1972), because "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). The Idaho Court of Appeals erred by construing Moscow's ordinance otherwise.

Idaho mistakenly contends (at 21) that First Amendment concerns cannot render a law unconstitutionally vague as-applied. Specifically, Wilson's argument before the Idaho Court of Appeals invoked the Ninth Circuit's articulation of *Grayned*, 408 U.S. at 108, to state that "an ordinance may be void for vagueness" if it "abuts upon sensitive areas of basic First Amendment freedoms, operating to inhibit the exercise of those freedoms." *Hunt v. City of Los Angeles*, 638 F.3d 703, 710 (9th Cir. 2011) (cleaned up). Idaho's argument confirms the need for review to ensure consistent application of these important federal principles.

B. Nor can Wilson's conviction survive First Amendment scrutiny, whether seen as viewpoint-based enforcement or the product of an overbroad prior restraint.

1. Regarding viewpoint-based prosecution, Idaho suggests (at 11-13) the purported probable cause supporting petitioner's prosecution avoids constitutional scrutiny. That contravenes this Court's admonishment 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). Officials cannot single out individuals for prosecution through charges that are almost never brought. *Gonzalez*, 602 U.S. at 658 (citing *Nieves v. Bartlett*, 587 U.S. 391, 406-07 (2019)). Even "where officers have probable cause to make arrests, but typically exercise their discretion not to do so," the First Amendment protects against the "risk that some police officers may exploit the arrest power as a means of suppressing speech." *Nieves*, 587 U.S. at 406 (cleaned up). Idaho does not dispute Moscow never previously enforced its

ordinance against anyone or that arresting officers singled out Wilson because of disagreement with his message.

Moscow's refusal to permit Wilson's easily removable stickers 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, 257 (2022). As in *Shurtleff*, the absence of guidance for approval both encouraged and enabled forbidden viewpoint discrimination.

2. Because Moscow's ordinance requires permission to post any message in the public square, it is a prior restraint. Pet.19-20. Idaho does not dispute the ordinance requires permission before posting any sign in Moscow or that such laws without "definite standards to guide the licensing authority" are almost universally unconstitutional. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969). Because no governmental interest justifies universal preapproval regimes, Idaho never attempts to demonstrate narrow tailoring in service of significant governmental interests or that the ordinance leaves open ample alternative communication. *See* Pet.20-21. The ordinance is not analogous to trespass laws as Idaho contends (at 16). For instance, Idaho's trespass laws impose criminal penalties only for a "failure to leave or upon return to property within a year after receiving proper notice to depart." *State v. Pentico*, 265 P.3d 519, 528 (Idaho Ct. App. 2011). Moscow's ordinance is not similarly tailored—indeed, when Wilson offered to remove his harmless stickers, the police told him it was "too late for that. App.183a. And the only alternative for disapproved postings is loitering with hand-held signs, which Idaho does not dispute is a more limited means of expression that stifles anonymous dissent.

Idaho instead mistakenly argues that prior-restraint doctrine cannot apply because some stickers were placed on private property in the public square. Not so. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225-30 (1990) (invalidating as an impermissible prior restraint a licensing ordinance regulating use of private property).

3. Overbreadth prohibits enforcement of laws that chill an intolerably large amount of protected speech. Idaho does not dispute that an ordinance is overbroad because "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Stevens*, 559 U.S. at 473. Here, the ordinance prohibited protected speech in its sole application—to stifle dissent from Moscow's COVID-19 policies. As *amici* note, such laws exist to "facilitate selective enforcement that amounts to viewpoint discrimination." 1A Clinics Br.12.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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