No. 24-853

In the Supreme Court of the United States

RORY DOUGLAS WILSON, *Petitioner*,

v.

IDAHO

On Petition for Writ of Certiorari to
the Court of Appeals of Idaho

BRIEF OF PROTECT THE FIRST FOUNDATION AS *AMICUS CURIAE* SUPPORTING PETITIONER

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APRIL 9, 2025

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INTRODUCTION, SUMMARY, AND INTERESTS OF *AMICUS CURIAE*[1]

Petitioner Rory Wilson was convicted for failing to seek permission from Moscow, Idaho's government before publicly posting stickers condemning its COVID-19 response. His conviction was then affirmed in a published opinion, setting a dangerous precedent that not only leaves Moscow's law in place, but also gives the green light to other cities in Idaho that—emboldened by this case—may follow Moscow's lead and claim the authority to convict those who dare to publicly post their speech without prior government approval. The petition should be granted to guarantee that the now court-approved prior restraint Moscow has imposed is not adopted elsewhere.

This Court's precedents confirm that regimes like Moscow's—which premise a person's right to speak on his first seeking government permission—are inherently suspect. After all, if permission must be affirmatively granted, permission can be denied. And where a speaker's right to speak is left to the whims of a government actor with "unbridled discretion," the speaker is subject to an unconstitutional "prior restraint." *City of Lakewood* v. *Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988). The risk of viewpoint-discriminatory censorship is all the greater where, as here, the speaker seeks to criticize the very government from which it must seek permission to

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[1] This brief was not authored in whole or in part by counsel for any party and no person or entity other than *amicus curiae* or its counsel has made a monetary contribution toward the brief's preparation or submission. All parties have received timely notice of the filing of this brief.

speak. And some speakers, rather than facing the indignity of asking the government for permission to criticize it, may be deterred from speaking at all. Yet, as Justice Thomas has explained, government actions leading to "self-censorship" violate "the First Amendment just as acutely as a direct bar on speech." *Speech First, Inc.* v. *Sands*, 144 S. Ct. 675, 676 (2024) (Thomas, J., dissenting) (citations omitted).

Because Petitioner was charged for not seeking the government's permission before speaking, this Court's precedents on discretionary-permitting regimes should have led to his acquittal. Yet the Idaho courts ignored those precedents—as well as Petitioner's showing that the Moscow ordinance exceeds reasonable time, place, and manner restrictions.

That error is particularly troubling to *amicus* Protect the First Foundation ("PT1"), a nonprofit, nonpartisan organization that advocates for protecting First Amendment rights in all applicable areas of law. PT1 advocates on behalf of all people across the ideological spectrum, including people who may disagree with the organization's—or, as here, with the government's—views.

Amicus agrees with Petitioner that Moscow's ordinance and the resulting prosecution are unconstitutional. *Amicus* writes separately to expand on Petitioner's showing that discretionary licensing regimes that require "a speaker to seek permission before" speaking, Pet. 2, are constitutionally invalid under this Court's precedents. Because the Idaho courts left that regime in place, this Court should grant review and reverse.

STATEMENT

Moscow City Code section 10-1-22 restricts the posting of signs on public property "without prior approval, in writing[.]" App. 85a. After Petitioner posted stickers criticizing the city's COVID-19 response, Moscow charged him with violating the ordinance. App. 4a. But though other signs have been posted without prior permission, Moscow had never enforced the ordinance. Pet. 5. And the arresting officer admitted that it was only being enforced now because Moscow police did not "agree" with the stickers' "messaging." Pet. 6; App. 183a.

This was not the first time city officials had expressed distain for those who criticized their COVID-19 response. The City Prosecutor had expressed animosity, for example, against Petitioner's church—which Petitioner's grandfather led—and called members of the church, among other things, "religious idiots." Pet. 3. And, after Moscow arrested church attendees at a "psalm sing" organized to protest the city's COVID-19 restrictions, the City Prosecutor called church members "obnoxious" for "trying to turn [the arrests] into a religious persecution thing." Pet. 4.

Petitioner was convicted of violating Moscow's ordinance, and the district court rejected his claims that the City prosecuted him to punish his viewpoint on the COVID-19 restrictions. Pet. 6-7. The Court of Appeals affirmed, ignoring Petitioner's showing that the ordinance exceeded permissible time, place, and manner prior restraints. Pet. 8. The Idaho Supreme Court denied review. *Ibid.*

ADDITIONAL REASONS FOR GRANTING THE PETITION

I. This Court Has Repeatedly Condemned Standardless Discretionary Licensing Regimes in the Speech Context.

As recent scholarship confirms, this "Court has long taken the view that discretionary permitting regimes for speech are themselves censorious and thus unconstitutional."[2] Because Moscow's ordinance is materially indistinguishable from other laws that this Court has found to violate the First Amendment, it too is unconstitutional.

In *Saia* v. *People of State of New York*, for example, this Court reviewed the constitutionality of an ordinance that allowed the public use of radio and loudspeakers to share "news and matters of public concern" only with "permission obtained from the Chief of Police." 334 U.S. 558, 558 n.1 (1948). The case arose after a minister, who sought—and was denied—a permit, was convicted for using such equipment anyway. *Id.* at 559.

In finding that the resulting conviction facially violated the First Amendment, the Court explained that the ordinance "establishe[d] a previous restraint on the right of free speech." *Id.* at 559-560. Worse, the ordinance provided no standards governing the Chief of Police's permitting decision and therefore placed "[t]he right to be heard * * * in [his] uncontrolled discretion." *Id.* at 560-561. The Court explained that

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[2] Eli Nachmany, *Bill of Rights Nondelegation*, 49 BYU L. Rev. 513, 517 & n.13 (2023) (collecting cases).

such "uncontrolled discretion" essentially allowed officials to deny permits "because some people find the ideas annoying." *Id.* at 560-562.

The concerns that were dispositive in *Saia* are equally controlling here. Given Moscow's history of animus towards members of Petitioner's faith who criticized Moscow's COVID-19 response, it requires no stretch of the imagination to know what Moscow would have done if Petitioner *had* sought its permission before posting the stickers.

Likewise, in *Largent* v. *State of Texas*, the Court reviewed an ordinance that made "it unlawful for any person to solicit orders or to sell books, wares or merchandise * * * without first filing an application and obtaining a permit." 318 U.S. 418, 418 (1943) (citation omitted). Such permits were only available if "the Mayor deem[ed] it proper or advisable[.]" *Id.* at 418-419 (citation omitted). Largent was convicted for violating this ordinance by asking for voluntary monetary contributions as she distributed religious materials. *Id.* at 419-420. This Court reversed because the "proper or advisable" standard left the "[d]issemination of ideas depend[ent] upon the" Mayor's prior approval, which the Court considered "administrative censorship in an extreme form." *Id.* at 422.

Saia and *Largent* are hardly outliers. In *Kunz* v. *People of State of New York*, this Court also reviewed a city ordinance that made "it unlawful to hold public worship meetings on the streets without first obtaining a permit from the city police commissioner." 340 U.S. 290, 290-291 (1951). As in *Saia*, the petitioner—also a minister—was convicted for

speaking after unsuccessfully trying to comply with the ordinance by obtaining a permit. *Id.* at 292-293. Here again, the Court held that the ordinance violated the First Amendment in part because it contained "no mention * * * of reasons for which such a permit application can be refused." *Id.* at 293. Without "appropriate standards" to guide an official's actions, the ordinance provided "an administrative official discretionary power to control in advance the right of citizens to speak[.]" *Id.* at 293, 295. That discretion made the ordinance "clearly invalid as a prior restraint on the exercise of First Amendment rights." *Id.* at 293. Here, Moscow's ordinance suffers from the same defect. App. 85a.

Also illustrative is *Niemotko* v. *State of Maryland*, 340 U.S. 268 (1951), a case that this Court decided on the same day it decided *Kunz*. In *Niemotko*, two Jehovah's Witnesses "scheduled Bible talks" at a public park. *Id.* at 269. Although no ordinance forbade using the park for such talks, "the custom for organizations * * * desiring to use it for meetings and celebrations" was to first "obtain permits from the Park Commissioner." *Ibid.*

The Witnesses sought—and were refused—permission to use the park. *Id.* at 269-270. The story played out in a now familiar way. The Witnesses held their meeting anyway and, because they lacked a permit, they were arrested and convicted for engaging in "disorderly conduct." *Id.* at 270. In reversing, this Court concluded that it was "quite apparent that any disorderly conduct" that the Witnesses were accused of "must have been based on the fact that appellants were using the park without a permit[.]" *Id.* at 271.

The Court then made quick work of the conviction, finding it invalid under the "many" cases where the Court has "examined the licensing systems by which local bodies regulate the use of * * * public places." *Ibid.* The Court expressed concern with the "limitless discretion" that informed the conviction, which necessarily turned on "the whims or personal opinions of a local governing body." *Id.* at 272. Because the unwritten practice lacked "standards" and "narrowly drawn limitations" to "circumscrib[e] * * * [the Park Commissioner's] absolute power" to deny a permit, it violated the First Amendment. *Id.* at 271-272.

To be sure, this Court has since established standards allowing "reasonable restrictions on the time, place, or manner of protected speech" in public places—such as those necessary to ensure equitable access to limited resources in, say, a public park. See *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989) (collecting cases). But any such restrictions must be "justified without reference to the content of the regulated speech, * * * [be] narrowly tailored to serve a significant governmental interest, and * * * leave open ample alternative channels for communication of the information." *Ibid.* (quoting *Clark* v. *Community for Creative Non-Violence,* 468 U.S. 288, 293 (1984)).

But even this Court's more recent cases acknowledge and reaffirm the fundamental unconstitutionality of regimes that "plac[e] unbridled discretion in the hands of a government official" to limit—or prevent altogether—a person's free expression. See *City of Lakewood* v. *Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988) (collecting cases);

accord *City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410, 423 n.19 (1993). Under the precedents explored above, taken together with those explained by Petitioner (at 19-21), a statute is not a reasonable time, place, and manner restriction, and is instead "unconstitutional[,] if it delegates *standardless* discretion to a government official to permit or deny expressive activity."[3]

II. At a Minimum, This Court Should Summarily Reverse to Enforce the Well-Established Rule That Standardless Discretionary Licensing Regimes Violate the First Amendment.

Petitioner's conviction—which results from just such an ordinance—flouts this nearly century-long precedential chain. Yet the court below completely ignored Petitioner's showing that Moscow's ordinance is not a reasonable time, place, and manner regulation. And Petitioner was correct, both for the reasons he offered, see App. 131a, and because the ordinance imposes a blanket prohibition on all posted speech without prior government approval and sets no standards governing the exercise of the City's discretion. This case presents a clear opportunity to reassert that standardless discretionary licensing regimes violate the First Amendment.

By upholding Petitioner's conviction under the Moscow ordinance, Idaho courts approved that discretionary licensing regime and decided an important federal question in a way that drastically

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[3] Nachmany, *supra* note 2, at 539 (emphasis added).

departs from this Court's First Amendment precedents. Sup. Ct. R. 10(c). Petitioner should not be forced to carry a criminal conviction for violating an unconstitutional law. At a minimum, this Court could summarily reverse the decision below, or it could grant review to reiterate the base constitutional principles reflected in its licensing precedents.

But Petitioner's unconstitutional conviction is only one reason for review. Moscow's ordinance and the Idaho courts' decisions upholding it remain the law in Idaho. Without this Court's review, the ordinance will continue to impose a prior restraint on those that wish to speak in Moscow by requiring them—on threat of conviction—to seek approval prior to speaking. That precedent will both chill and restrict those who wish to post views disfavored by the City. And there is a risk that the precedent set in this case will cause other cities in Idaho and elsewhere to follow Moscow's lead. This Court should grant the petition to ensure that ordinances like Moscow's do not proliferate, giving local governments "uncontrolled discretion" over "the right to be heard" in the public square. *Saia*, 334 U.S. at 560-561.

CONCLUSION

Moscow's standardless discretionary-permitting ordinance allowed it to convict a person for expressing a disfavored viewpoint without first seeking the government's imprimatur. That conviction should be reversed—whether summarily or on plenary review. Either way, the petition should be granted.

Respectfully submitted,

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April 9, 2025