No. 21-677

In The
Supreme Court of the United States

DONALD BURNS,

Petitioner,

v.

TOWN OF PALM BEACH,
A Florida municipal corporation,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF AMICUS CURIAE OF GOLDWATER INSTITUTE AND CATO INSTITUTE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. This Court has ruled that sculpture, dance, the "painting of Jackson Pollock, [the] music of Arnold Schöenberg, [and the] Jabberwocky verse of Lewis Carroll" are all protected by the First Amendment. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 569 (1995). Architecture is widely recognized as an art form akin to sculpture—indeed, it has been called "the mother of all the arts." Louis Sullivan, *The Autobiography of an Idea* 120 (New York: Dover, 1956) (1924). Is architecture a form of expression protected by the First Amendment?

2. When the government denies a building permit based exclusively on subjective, aesthetic design criteria, as opposed to clearly articulated, objective requirements, does that denial infringe on First Amendment rights?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IDENTITY AND INTEREST OF AMICI CURIAE[1]

The Goldwater Institute ("GI") is a nonpartisan public policy and research foundation devoted to advancing the principles of limited government and individual freedom through litigation, research, policy briefings and advocacy. Through its Scharf-Norton Center for Constitutional Litigation, GI litigates and files amicus briefs when its objectives are directly implicated.

Through its "Permit Freedom" project, the Institute has engaged with courts and legislatures to better ensure compliance with this Court's holdings that whenever *any* constitutional right is subjected to a licensing or permit requirement: (a) the criteria to obtain that permit must be clear, (b) there must be a specific date on which applicants will receive answers, and (c) applicants must have an opportunity for review of a wrongful denial before a neutral adjudicator.

GI attorneys have litigated cases and appeared as amicus curiae to challenge arbitrary permit requirements, particularly those that—as here—violate the freedom of speech. *See*, *e.g.*, *Coleman v. City of Mesa*, 284 P.3d 863 (Ariz. 2012). GI scholars have also published research on the problems with arbitrary licensing laws, *see*, *e.g.*, Sandefur, *Permit Freedom* (Goldwater

[1] Pursuant to Rule 37.2(a), counsel of record for all parties received notice at least 10 days prior to the due date of this brief of Amici's intention to file, and they consented. Pursuant to Rule 37.6, Amici affirm that no counsel for any party authored this brief in whole or in part, and no person or entity other than Amici Curiae, their members, and their counsel, made any monetary contribution intended to fund its preparation or submission.

Institute Policy Paper, 2017),[2] and the need for stronger free speech protections for architecture. *See* Sandefur, *The Permission Society* 161–64 (2016).

The Cato Institute is a nonpartisan think tank dedicated to individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies promotes the principles of constitutionalism that are the foundation of liberty. To those ends, Cato conducts conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

SUMMARY OF REASONS FOR GRANTING THE PETITION

This Court has said that any time government requires a person to obtain a permit in order to exercise any of the "freedoms which the Constitution guarantees," three procedural safeguards must be satisfied: (1) the criteria for obtaining the permission must be clear and unambiguous, (2) there must be a specified deadline on which the applicant will receive an answer, and (3) the applicant must have an opportunity to go before a neutral judge to challenge the denial of a permit if she believes that denial wrongful. *Staub v. City of Baxley*, 355 U.S. 313, 322 (1958); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225–26 (1990); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 560 (1975); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495,

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[2] https://goldwaterinstitute.org/wp-content/uploads/cms_page_media/2017/2/14/Tim%20Rela%20paper%20FINAL%20.pdf.

531 (1952) (Frankfurter, J., concurring). These are often called the *Freedman* safeguards, after the case *Freedman v. Maryland*, 380 U.S. 51 (1965).

State and local governments, however, routinely disregard these three requirements, instead imposing vague standards in a wide variety of contexts. *See*, *e.g.*, *N.Y. State Rifle & Pistol Ass'n v. Bruen* (No. 20-843) (pending) (requirement of "proper cause"); *S.A. Rest., Inc. v. Deloney*, 909 F. Supp.2d 881, 899–900 (E.D. Mich. 2012) (requiring "consideration" of applicant's "general business reputation"); *Underwood v. MacKay*, No. 3:12-cv-00533-MMD-VPC, 2013 WL 3270564 at *2 (D. Nev. June 26, 2013) (requiring applicant to prove new business would "foster sound economic conditions").

Nowhere is this problem more pronounced than in the realm of architectural design review, which frequently—perhaps ordinarily—imposes vague and arbitrary restrictions on the design of structures, allowing members of a government committee to override the choices of property owners and their architects and impose their own individual tastes. This plainly violates expressive rights as well as property rights.

This is a pervasive problem, one that rarely reaches the appellate courts because architects and contractors virtually never find it worth their time to challenge arbitrary denials in court. Knowing they will need a permit for the next project, and fearful of antagonizing the licensing authorities, they typically give in.

In other words, the chilling effect in this area of law has become ubiquitous.

But the issues presented here are broader than that. Because state and local governments frequently ignore the *Freedman* safeguards, permit and license requirements often impose arbitrary and irrational deprivations of fundamental constitutional rights. This Court should grant certiorari to make clear both that architecture is a form of expression entitled to constitutional protection, and more broadly that *all* licensing and permit criteria that limit the exercise of constitutionally protected rights must provide the three procedural safeguards of clarity, timeliness, and reviewability.

ARGUMENT

I. Architecture is a form of expression protected by the First Amendment.

A. Architecture conveys ideas.

Architecture is an expressive art form no less than sculpture, dance, or music. Nobody can stand in the presence of Greene and Greene's Gamble House (1909), William Lamb's Empire State Building (1931), Frank Lloyd Wright's Fallingwater (1939), or E. Fay Jones's Thorncrown Chapel (1980), without engaging in the type of aesthetic experience that all art seeks to evoke.

Naturally, because architecture is not a written art form, that aesthetic experience cannot be translated into written words any more than the experience of a symphony, or a ballet, or a painting can be. All these art forms may be *described* or *catalogued* in words, but what they convey *as art* cannot be fully expressed except in the medium in which they exist. And, as with other art forms, architecture's great masterpieces evoke or connote, rather than specifying or declaiming. Nevertheless, as this Court recognized in *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 569 (1995), "a narrow, succinctly articulable message is not a condition of constitutional protection." Just as the "message of eroticism and sexuality conveyed by [nude] dancers" is constitutionally protected, *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565 (1991), even though it cannot be wholly captured in any medium other than the dance itself, so, too, architecture's nature as an expressive art form cannot be rephrased in another language. But that does not mean it is not constitutionally protected. The Constitution protects symbolism, gestures, clothing, and silence itself, and must necessarily protect architecture.[3]

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[3] To cite an extreme example, Los Angeles's famous "Tail O' The Pup" (1946)—a hotdog stand shaped like a hotdog—is plainly commercial speech. Churches, of course, have long used architecture to express religious ideas. *See*, *e.g.*, *First Covenant Church of Seattle v. City of Seattle*, 840 P.2d 174, 182 (Wash. 1992) ("First Covenant claims, and no one disputes, that its church building itself 'is an expression of Christian belief and message' and that conveying religious beliefs is part of the building's function.").

As Frank Lloyd Wright explained, architecture seeks "to help people understand how to make life more beautiful, the world a better one for living in, and to give reason, rhyme, and meaning to life." *The Essential Frank Lloyd Wright* 2 (Pfeiffer, ed., 2008). It is therefore often an intensely personal means of expression, in which the homebuilder or homeowner expresses ideas *to herself*, as much as to other people—a crucial question for this case, as explained in Section I.B below. Yet architecture also plays an important role in public debate[4]—and has often suffered from censorship for that reason.

Architecture proved a considerable source of controversy at the dawn of the twentieth century, due largely to the advent of machines such as the automobile, the airplane, and the radio. Artists, including architects, struggled with how to reconcile humanity with mechanization, mass production, and the diminishment of distance in modern society. Some, notably the Craftsmen, shunned the machine's influence, and sought art that emphasized the hand-made and traditional. Homes such as the Gamble House were designed to evoke a sense of the artisanal and old-fashioned, shunning mechanization and mass production. Craftsman architecture employed wood and stone, and designs based on trees and plants, and were

[4] Indeed, architecture is even covered by copyright, 17 U.S.C. § 120(a), indicating Congress's recognition of the important role it plays in public expression. It would be anomalous indeed to conclude that expression protected by the copyright statutes is not expression protected by the First Amendment.

organized around a hearthstone to underscore convention and family life.

By contrast, artists associated with the Bauhaus movement embraced mechanization and mass production, and argued for stripping away traditional values and radically overhauling society. They proved influential in what was later termed International Style architecture, with its conception of the house as a "machine for living." Le Corbusier, *Towards a New Architecture* 117, 239 (1931). It was decidedly anti-individualistic, prioritizing universality and equality over distinctiveness. *See* Hitchcock, *The International Style* 14 (1966) (International Style "is contrary to the American cult of individualism."). Buildings such as Le Corbousier's Villa Savoye (1929–31) emphasized visual simplicity, lack of ornament, cubical structure, and large windows connecting interior and exterior.

Disputes over modernity and mechanization had important cultural and political associations in popular society in the early twentieth century. During the 1920s a kind of "culture war" was underway, in which Sinclair Lewis's novels *Main Street* and *Babbitt*, the newspaper articles of H.L. Mencken, and sensational controversies such as the Scopes Monkey Trial revealed a clash between traditionalism and modernity.

In its most extreme political form, this dichotomy manifested itself in the division between communism—which sought to reconstruct society along deliberately engineered lines—and fascism, which embraced what it saw as the purity of folk culture, and

opposed the allegedly artificial qualities of modernism. Aware, as art critic Robert Hughes observed, that "architecture was uniquely fitted to serve as the voice of ideology," Hughes, *The Shock of the New* 99 (New York: Knopf, 1990) (1980), the Soviet Union, Nazi Germany, and Fascist Italy all used buildings for purposes of political and cultural propaganda. The Hitler regime banned the International Style, viewing it as dangerously cosmopolitan. Scobie, *Hitler's State Architecture: The Impact of Classical Antiquity* 13 (1990).[5] Mussolini's Italy, by contrast, appropriated modernistic architectural styles in hopes of creating "a rhetoric of newness, youth, anti-feminism, violence, war fever, and uniting all these [fascist] social virtues, the familiar central myth of dynamism." Hughes, *supra* at 97.

In the United States, too, architecture was—and often still is—a medium in which clashes of cultural values were played out. The collision between the modernistic Louis Sullivan and his traditionalist rivals such as Daniel Burnham, for instance, served as a proxy for a debate about American culture generally. This took off particularly in 1893, when Burnham was selected to oversee construction of the Chicago World's Fair grounds. He directed that its buildings be designed in the neoclassical Beaux Arts style; Sullivan, who believed that style was European and that

[5] In the decades after World War II, Germany took care to design its official buildings in styles that distanced the country from the Hitler era. Government structures were often made as physically transparent as possible, with large windows, to emphasize the openness of democracy. Barnstone, *The Transparent State: Architecture and Politics in Postwar Germany* 6–7 (2005).

Americans should foster an indigenous architecture, refused to comply. He designed the fair's Transportation Building (1893) as a defiant statement of his belief that American architecture should give voice to the nation's "fervid democracy, its inventiveness, its resourcefulness, its unique daring, enterprise and progress," and that the Beaux Arts style was authoritarian, antiquated, "snobbish and alien to the land." Sullivan, *supra* at 325. *See also* Andrew, *Louis Sullivan and the Polemics of Modern Architecture* xii (1985) (Sullivan's architecture expressed the "belief that we 'moderns' could make the world over from scratch; that we could ignore the strivings of those before us and simply reinvent the significance of life, which Sullivan called democracy.").

Similar debates continued in the 1920s–30s with the rise of modern trends such as Art Deco and the International Style. When Tulsa's Art Deco Boston Avenue Methodist Church was built in 1929, it proved controversial in part because it was designed to accommodate automobiles. Architect Bruce Goff recalled that this was "considered very irreligious and downright sinful," because "[y]ou were supposed to suffer and walk through the rain from where you parked. You were supposed to sit on hard pews instead of a comfortable seat." Wallis, *Art Deco Tulsa* 55 (2018).

The International Style proved even more shocking because it was intended to be an "architecture of everyman," Nuttgens, *The Story of Architecture* 273 (1983), and consequently prioritized generality over uniqueness, anonymity over individuality, and

standardization over the custom-made. Americans generally greeted it with skepticism because "it was not just an architecture of simple style," but "an architecture of do-goodism, and the public was damned if it wanted to be done-good-by." Lynes, *The Tastemakers* 245 (1954). Reactionary local governments therefore often censored the style through zoning laws and other restrictions. *Id*. at 247. After Edward Durrell Stone completed his Ulrich Kowalski house (1934), for example, officials in Mt. Kisko, New York, who disliked how it looked, passed zoning laws to ban modern architecture. *Re-Creating the American Past: Essays on the Colonial Revival* 15 (Wilson, et al., eds., 2006).

Architecture serves not only as a medium of *public* debate, however, but also—and more importantly—as a medium of *personal* expression. Frank Lloyd Wright, for example, objected to the International Style, on the grounds that its austere, boxy shapes were dehumanizing and did violence to individuality, which he called "the most precious thing in life." *An Autobiography* 257 (New York: Horizon Press, 1977) (rev. ed. 1943). There was "no reason why a house should look like a machine," he thought. *Frank Lloyd Wright: Essential Texts* 270 (Twombly, ed., 2009). Rather, he practiced a "'humane' architecture" that fostered and expressed "the inner light" of "man's spirit" at "the scale of the human being." Pfeiffer, ed., *Essential Frank Lloyd Wright, supra* at 399, 438. His "Organic" style reconciled the authenticity and humanism which the Craftsmen prized with what he called a "genuine and constructive affirmation. . .of this Machine Age." *Autobiography, supra*,

at 175. His masterpiece, Fallingwater, became America's most famous house because it combines a "deep spirituality" with a "radical modernism" in a "specifically American" way. Toker, *Fallingwater Rising* 403–04 (2003).

Yet Wright, too, frequently faced obstruction from local authorities who objected to his aesthetics. The most infamous example was Kansas City's Community Christian Church, commissioned in 1940. Thanks to "the conservative instincts of local 'experts' who had final say," the final result "but vaguely resembles" Wright's original plan. Storer, *The Architecture of Frank Lloyd Wright: A Complete Catalog* 281 (2002). Officials demanded numerous unnecessary safety tests, repeatedly refused permits, and entirely prohibited the dramatic light-tower Wright originally conceived. Besinger, *Working with Mr. Wright: What it was Like* 119–21 (1995). Wright eventually walked away from the project, which remains incomplete. "I have always known that lawyers make the poorest building experts on earth," he observed. *An Autobiography, supra* at 511.

Censorship through the permitting and licensing power continues to this day. When Maya Lin submitted plans for the Vietnam Veterans Memorial (1982), the Interior Department refused to grant a permit, because the Reagan Administration objected to its design—only approving it after the plan was compromised by inclusion of a statue. Howard, *Landscapes of Memorialization, in Studying Cultural Landscapes* 64 (Robertson & Richards, eds. 2003). In 1998,

the Honolulu Building Department denied a permit to a Buddhist temple because its saddle-shaped roof exceeded the legal height restriction—despite the fact that the ordinance expressly exempted steeples for religious buildings; a rule that plainly privileged one religious practice over another, since steeples are not a typical element in Buddhist architecture, whereas "the 'balance and harmony' of the buildings forming the Temple compound [were] ingredients essential to the generation of the meditative state that is fundamental to Chogye Buddhist practice." *Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan*, 953 P.2d 1315, 1346 (Haw. 1998). In the 1960s, even the headquarters building of the American Institute of Architects was censored by the Washington Fine Arts Commission, which denied architect Romaldo Giurgola a permit because his design was insufficiently "classical." After repeated efforts at compromise failed, Giurgola was forced to resign. Scully, *American Architecture and Urbanism* 229 (1969).[6]

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[6] Some architects have even protested against censorship *in* their designs. In 1974, when French officials forced Jean Nouvel to redesign his modernist Dick House to conform to the medieval style they preferred, he incorporated the mandated changes in a different color brick in order to indicate to the public what changes he had been compelled to make. He did the same in 1980 with his Anne Frank College, in order to express his "denunciation" of such interference. Emanuel, *Contemporary Architects* 708 (1994).

B. The Court of Appeals' novel theory that an art form cannot be communicative if shielded from outside view is legally baseless and a threat to expressive rights.

The majority below insisted it was not denying that architecture *can* be protected expression, *Burns v. Town of Palm Beach*, 999 F.3d 1317, 1335–36 (11th Cir. 2021), but was only saying Burns's house itself was not. But the majority's novel application of the test from *Texas v. Johnson*, 491 U.S. 397 (1989), belies that claim. In fact, its decision establishes a precedent that, if left undisturbed, will significantly undermine protections for architectural expression.

The majority said that because Burns's house is shielded from public view, there cannot be any communication to a viewer, and therefore the house cannot qualify as protected expression. 999 F.3d at 1338–39. This theory fails for two reasons.

First, Burns will at least have guests who can experience the home's aesthetic. The majority claimed Burns "presented no evidence that he intended to invite guests," *id*. at 1342, but the house design includes multiple guestrooms, *id.* at 1325, and it is absurd to suggest he would not have guests. The owner of a 25,000 square foot mansion does not *not* invite guests. The majority's refusal to take judicial notice of this fact can is willful blindness. *Cf. Ho Ah Kow v. Nunan*, 12 F. Cas. 252, 255 (C.C.D. Cal. 1879) (No. 6546) ("When we take our seats on the bench we are not struck with

blindness, and forbidden to know as judges what we see as men.").[7]

Second, and more significantly, the majority disregarded the fact that in addition to expressing messages to others, architecture expresses its message *to the homeowner*. The artistic communication here is to Burns *himself* as much as to others. Architecture is largely "a matter of inner experience," Pfeiffer, ed., *Essential Frank Lloyd Wright, supra* at 233, which operates as much as through soliloquy as through dialogue: the inhabitant of the home *is* the primary audience. As Wright explained, the task of an architect is to "make of a dwelling place a complete work of art. . .lending itself freely and suitably to the individual needs of the dwellers, a harmonious entity, fitting in color, pattern, and nature the utilities, and in itself really *an expression of them* in character—this is the modern American opportunity." *Id*. at 65 (emphasis added).

This is important. Residents often testify to the life-enhancing experience of living in homes that they

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[7] Similarly, the panel's assertion that Burns had "not established" that that home design has had expressive qualities through a "history stretching back millennia," contradicts its own acknowledgment that, e.g., Monticello (1769; rebuilt 1809) is expressive. *Id.* at 1345. Monticello is older than the First Amendment, and was intended as expression. *See* McLaughlin, *Jefferson and Monticello: The Biography of a Builder* 238 (1988) (Jefferson designed Monticello to express sublime connection with nature). The history of *millennia* is not necessary for interpreting the First Amendment—but even the Bible says residential architecture expresses religious values. *See* Deuteronomy 6:9, 22:8.

feel express something important about themselves. "What speaks to me," said the owner of one Frank Lloyd Wright home, "is that it really is one with nature. You really get a sense of the outdoors. You notice the passing of the seasons. You notice where the sun is during every part of the year. . . . You see moonlight in the house at night. I've found it enriching to live in the house for that reason." Sisson, *What It's Like to Live in a Frank Lloyd Wright Home*, Curbed, Nov. 24, 2015.[8] Another agreed: "Are you into mindfulness? This is a machine that promotes being in the present moment. You don't need a house to do that, but it does help." *Id.* And a third said, "[Y]ou just walk in and it feels right. . . . It has such a positive effect on my mood. It's like living in a piece of changeable art every day. The whole house is like a living artwork." *Id.*

In short, "the design of one's house may be viewed as an extension of one's personal appearance and identity." Williams, *Subjectivity, Expression, and Privacy: Problems of Aesthetic Regulation*, 62 Minn. L. Rev. 1, 53 (1977).

The fact that one expresses oneself *to* oneself cannot deprive that expression of constitutional security. A diary is protected speech, even though it is not meant to be read by others. *See* Baker, *Harm, Liberty, and Free Speech*, 70 S. Cal. L. Rev. 979, 984 (1997) (speech intended "not, or not only, to communicate with another but to establish [oneself] as having openly

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[8] https://archive.curbed.com/2015/11/24/9897156/frank-lloyd-wright-owner-homes.

embodied self-defining commitments. . .is typically protected as free speech."). Haircuts, jewelry, and tattoos are protected by the First Amendment despite the fact that people generally use these less for communicating to others, than for projecting themselves in ways that suit their own self-conceptions. *Breen v. Kahl*, 419 F.2d 1034, 1036 (7th Cir. 1969) (haircuts); *Jucha v. City of N. Chi.*, 63 F. Supp.3d 820, 825 (N.D. Ill. 2014) (tattoos); *Bar-Navon v. Brevard Cnty. Sch. Bd.*, 290 F. App'x 273, 275 (11th Cir. 2008) (jewelry). *See further Richards v. Thurston*, 304 F. Supp. 449, 451 (D. Mass. 1969) (hairstyle is protected by the First Amendment because it is a "visible example[ ] of personality"). People sometimes even conceal their tattoos or jewelry. Yet they are still constitutionally protected.

Moreover, certain forms of dissenting speech—notably the *refusal* to speak—are intended less as communication than as a form of personal witness. Yet these, too, are constitutionally protected. The refusal to salute the flag, in *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), or to stand during the national anthem, in *Sheldon v. Fannin*, 221 F. Supp. 766 (D. Ariz. 1963), or to bow one's head in prayer, *cf. May v. Cooperman*, 572 F. Supp. 1561, 1567 (D.N.J. 1983), are certainly protected expression despite the fact that these are usually not intended to convey messages to others, but are instead types of self-testament.

In *Wooley v. Maynard*, 430 U.S. 705 (1977), the plaintiffs were Jehovah's Witnesses who obscured a portion of their license plate that they found objectionable, not because they wanted to convey a message to

others—it is unlikely that anyone seeing tape covering the slogan "live free or die" would have recognized any communicative intent—but simply because that embodied their beliefs. *See* Bezanson, *Speaking Through Others' Voices: Authorship, Originality, and Free Speech*, 38 Wake Forest L. Rev. 983, 1023 (2003). This Court still said that was protected speech.

Restrictions on such types of self-expression are typically imposed out of an "interest in uniformity, and of stifling the expression of a different 'life style,' simply because the state favors the established style and is uncomfortable with any challenge to it." Nimmer, *The Meaning of Symbolic Speech under the First Amendment*, 21 UCLA L. Rev. 29, 60 (1974). But that just *is* censorship. And the same is true of the censorship of architecture.

Simply put, speech enjoys constitutional protection even without an audience. If someone were to burn a flag, and the only person who witnessed it was the police officer who arrested him for it, that would plainly still violate the First Amendment. Kendrick, *Are Speech Rights for Speakers?*, 103 Va. L. Rev. 1767, 1784 n.63 (2017). Some artists even specialize in art that is unlikely ever to be seen. Michael Heizer has spent fifty years building "City," a massive complex of cement and rock constructions in the Nevada desert that virtually nobody has ever seen, but which the director of the Museum of Modern Art calls "one of the most important works of art to have been made in the past century." Goodyear, *A Monument to Outlast*

Humanity, New Yorker, Aug 22, 2016.[9] Musician John Cage composed a piece that takes 639 years to play; it is currently being performed in Germany, and will never be heard in its entirety by anyone. Hickley, *A 639-Year Concert*, N.Y. Times, Sept. 7, 2020.[10] Works like these are clearly protected by the First Amendment despite the absence of an audience.

It seems indisputable that if Burns were to sculpt a marble bust solely for his own enjoyment—as Bernini did with his bust "Costanza," *see Bernini and the Birth of Baroque Portrait Sculpture* 193 (Bacchi, et al., eds., 2008)—it would still be protected speech. If he were to write a poem solely for his own enjoyment (as Alan Ginsberg originally wrote "Howl" for himself, Ipp, *A History of City Lights: 56 Years in the Life of a Literary Meeting Place* (2012)[11]), it would still be protected.

Thus, even if Burns were the *sole* consumer of the aesthetic experience of his home—which is not in fact the case—it would still be entitled to First Amendment protection. The Court of Appeals held that the First Amendment did *not* apply because he "'wished to. . .better reflect [his] current tastes and. . .to be a means of communication and expression of the person inside,'" 999 F.3d at 1342, when this fact does not at *all* establish that his home lacks constitutional

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[9] https://www.newyorker.com/magazine/2016/08/29/michael-heizers-city.

[10] https://www.nytimes.com/2020/09/07/arts/music/john-cage-as-slow-as-possible-germany.html.

[11] https://books.openedition.org/pup/21649?lang=en#text.

protection—quite the contrary. It shows he is engaged in expression that should receive the *highest* constitutional solicitude. To hold that self-expression deprives his home of protection undermines the security accorded to other forms of expression that are intended to "establish [oneself] as having openly embodied self-defining commitments," Baker, *supra* at 984, including the refusal to speak.

II. The constitutional safeguards against arbitrary licensing and permit criteria are routinely ignored.

This Court has held that whenever government imposes a licensing or permit requirement on the exercise of *any* constitutional right, that requirement becomes a kind of prior restraint, which must therefore provide applicants with the "procedural safeguards" articulated in *Freedman v. Maryland*, 380 U.S. 51 (1965).

The *Freedman* test was established for permit requirements applying to the showing of movies, but other cases applied the same requirements to cases involving stage shows, *Conrad*, 420 U.S. at 552, the distribution of literature, *Fernandes v. Limmer*, 663 F.2d 619, 628 (5th Cir. 1981), and zoning regulations that infringe on free speech. *FW/PBS, Inc.*, 493 U.S. at 223; *Epona, LLC v. Cnty. of Ventura*, 876 F.3d 1214, 1222–26 (9th Cir. 2017). And *Staub*, 355 U.S. at 322, makes clear that these safeguards must apply whenever the government requires a person to obtain a permit to

exercise *any* of the "freedoms which the Constitution guarantees."

Those safeguards are simple. First, the criteria for obtaining a permit must be clear and unambiguous, *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150–51 (1969); second, the applicant must be given a deadline—"a specified brief period," *Freedman*, 380 U.S. at 59—within which the government will either grant or deny the permit application; third, the wrongful denial of a permit must be reviewable by a neutral decisionmaker within a reasonably prompt time. *Conrad*, 420 U.S. at 559.

These rules do not necessarily prohibit aesthetic zoning or design review—only arbitrary or irrational restrictions. An aesthetics ordinance that specifies design limitations could pass muster if it gives "person[s] of ordinary intelligence a reasonable opportunity to know what is prohibited." *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972). *See also* Williams, *supra* at 55 ("a specific architectural prescription, for example, a requirement of neo-Tudor. . .[includes] no vagueness.").[12] For example, Sedona, Arizona, specifies the colors allowed on buildings, using the Munsell color

[12] Nor is it the case that aesthetics are inherently subjective; they are not. *See id.* at 6–16; Guberman, *Aesthetic Zoning*, 11 Urb. L. Ann. 295, 306 (1976) (noting that there is remarkable consensus on what constitutes architectural beauty). But vague design standards make it more likely that officials will " 'equate "good" architecture with traditional architecture and "bad" architecture with modern architecture.' " Kim, *What Do Design Reviewers Really Do?* 25 (2019) (citation omitted).

system, and states what materials are prohibited on buildings exteriors (e.g., "cedar or other wood shakes"). *See* Sedona Land Development Code §§ 5.7.F(4)(b), (5)(b).[13] This provides adequate guidance for builders to know what is allowed.

By contrast, criteria whereby permits can be denied based on "conformity with good taste," or "charm," *Burns*, 999 F.3d at 1323, resemble the type of "good cause" or "good character" standards that expand official discretion and make it impossible to comprehend what is or is not allowed. *Cf. Konigsberg v. State Bar of Cal.*, 353 U.S. 252, 263 (1957) ("Such a vague qualification, which is easily adapted to fit personal views and predilections, can be a dangerous instrument for arbitrary and discriminatory denial of [individual] right[s]."). *See also Schneider v. Town of Irvington*, 308 U.S. 147, 158 (1939) (invalidating ordinance allowing police to deny permit to door-to-door solicitor if applicant was "not of good character"); *Steele v. City of Bemidji*, 257 F.3d 902, 907–08 (8th Cir. 2001) (ordinance allowed police to deny solicitor permit to anyone who lacked good "business reputation").

Vague rules encourage *ad hoc* decision-making and arbitrary enforcement. *See City of W. Palm Beach v. State ex rel. Duffey*, 30 So.2d 491, 492 (Fla. 1947) (vague permit criteria increase risk that decisions will "be left to the whim or caprice of the administrative agency"). That is a particular concern in cases that,

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[13] https://sedona.municipal.codes/SLDC/5.7.

like this one, involve constitutional interests of the highest order: free speech and the home.

But vagueness in licensing requirements is a concern in countless other contexts as well. For example, to obtain a permit to run a moving company in Nevada, an applicant must prove to the state's Transportation Agency that a new business would "foster sound economic conditions." *Underwood*, 2013 WL 3270564 at *2. Asked to define this term, the head of the Agency testified, "[i]t is what it is. . .you know it when you see it"—virtually the definition of *ad hoc* arbitrariness. Sandefur, *State "Competitor's Veto" Laws and the Right to Earn A Living: Some Paths to Federal Reform*, 38 Harv. J.L. & Pub. Pol'y 1009, 1047 (2015). Or consider Illinois' statute governing the placement of automobile dealerships. It provides that anyone wishing to open a franchise must first prove to the state's Motor Vehicle Franchise Board that there is "good cause" for doing so. *Gen. Motors Corp. v. State Motor Vehicle Rev. Bd.*, 862 N.E.2d 209, 218–19 (Ill. 2007). What this means is anybody's guess; "the standard is so vague that it provides no meaningful guidance to either the parties whom it affects, the administrative body charged with implementing it, or courts which must review the administrative action." *Id.* at 230 (Karmeier, J., dissenting). What is clear is that it lets existing businesses prohibit potential competitors from opening.

Or take the landscaping rules in Columbus, Ohio. *See Stevens v. City of Columbus*, No. 2:20-CV-1230, 2020 WL 3792210 (S.D. Ohio July 7, 2020). They forbid a person from changing the plants in her front yard

unless the changes are "compatible to. . .other [landscaping on the property] and to the subject building. . .as well as to adjacent contributing properties, open spaces and the overall environment." *Id.* at *4. The district court in *Stevens* upheld this incomprehensible standard on the theory that the code lists factors for officials to consider when determining "appropriateness," but that list includes "*in addition to any other pertinent factor*, the architectural characteristics typical of structures in the district. . ., the. . .general design, arrangement, texture, material and color of the architectural feature. . .and its relation to the architectural features of other contributing properties in the immediate neighborhood." *Id.* at *8 (citation omitted, emphasis added). Such broad language obviously gives homeowners no guidance as to what is allowed. In *Stevens*, the homeowner installed two brick terraces to prevent erosion in his front yard—hardly eyesores, and in no way an obstruction to the home's design, *see id.* at *1 (including photos), yet the city deemed them violations.

Finally, the absence of a specific deadline increases the likelihood that agencies will engage in gamesmanship. *See* Hylas, *Note: Final Agency Action in the Administrative Procedure Act*, 92 N.Y.U. L. Rev. 1644, 1647 (2017) (discussing "incentives for agencies to strategically abuse the final agency action requirement, thus potentially operating to preclude judicial review where it might otherwise be available"); Strachan & Strachan, *The Ripeness Doctrine in Regulatory Takings Litigation*, 22 J. Land Res. & Env't L. 19, 29

n.76 (2002) ("Some local government officials have found it expedient to invoke the 'strategic run-around' to prevent or retard unpopular growth. . . . [A] form of 'growth management' can be achieved through the use of stall tactics—that is, growth that cannot constitutionally be prevented can at least be 'timed.' ")

Thus, for example, in *Appalachian Power Co. v. E.P.A.*, 208 F.3d 1015, 1020 (D.C. Cir. 2000), the agency carefully avoided making a final determination in an effort to "immuniz[e] its lawmaking from judicial review." And in *Palazzolo v. Rhode Island*, 533 U.S. 606, 618–26 (2001), this Court rejected the state's efforts to prevent judicial review on ripeness grounds by saying there was still a chance the state might allow the property owner to build. "Government authorities," the Court replied, "may not burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision." *Id*. at 621. But there is no indication that local governments have obeyed that rule. And the Palm Beach City Code includes no deadline whereby property owners are guaranteed an answer to an application.

The *Freedman* safeguards impose no *substantive* restriction on the government's power to impose permit or license requirements; they simply require fair and open procedures so applicants can know what is required and how to proceed. Yet local governments disregard these requirements in a wide variety of contexts.

Mapleton Hill, a neighborhood in Boulder, Colorado, prohibits new construction unless it is "an expression of its own time." Mapleton Hill Historic District Design Guidelines VI(U)(3).[14] Louisiana requires florists to obtain a state license—and grants licenses based in part on "personal flower design." Louisiana Department of Horticulture, *Retail Florist Exam Content*.[15] New York County ordinances provide for the revocation of a taxi license based on "any act. . .against the best interests of the public," which can mean anything. New York Taxi & Limousine Commission Rule 58-15(c).[16]

Vague permit criteria are rarely challenged in court, however, especially in the realm of architecture, because developers know they will need another permit for another project later, and it is not worthwhile to make enemies of the permitting authorities. *Cf.* Elias, *Koontz v. St. Johns River Water Management District Was Not a Big Deal*, 34 Va. Env't L.J. 457, 475 (2016) ("Going to court over a land-use regulation is rarely worth it. Lawsuits are very expensive, and. . .landowners risk spending a great deal of money for the prospect of little to nothing in return."). Thus abuses will continue until this Court acts.

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[14] https://www-static.bouldercolorado.gov/docs/section-c-mapleton-hill-district-1-201305201310.pdf.

[15] http://www.ldaf.state.la.us/wp-content/uploads/2020/06/Retail-Florist-Exam-Content.pdf.

[16] https://www1.nyc.gov/assets/tlc/downloads/pdf/rule_book_current_chapter_58.pdf.

CONCLUSION

This Court should grant certiorari to make clear that the procedural safeguards required by *Freedman* apply to *any* law that "requir[es] a permit or license" before a person may exercise "the peaceful enjoyment of freedoms which the Constitution guarantees." *Staub*, 355 U.S. at 322.

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