No. _____

In the Supreme Court of the United States

SONOKO TAGAMI, PETITIONER,

v.

CITY OF CHICAGO, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A City of Chicago ordinance prohibits women—but not men—from appearing in public if "any portion of the breast at or below the upper edge of the areola" is "exposed to public view or is not covered by an opaque covering."

Petitioner covered a portion of her breasts with opaque body paint as part of a group protest against the ordinance. A police officer ordered petitioner to cover her breasts and issued her a citation for violating the ordinance.

A divided panel of the Seventh Circuit held that petitioner's participation in the protest was not "expressive conduct" protected by the First Amendment and that "traditional moral norms" justified any infringement on speech as well as differential treatment of the sexes.

The questions presented are:

1. Should the Court resolve the conflict between the circuits about whether conduct must convey a "particularized message" to be "expressive conduct" protected by the First Amendment?

2. Should the Court resolve the conflict between the circuits about whether morality interests can sustain a law from constitutional challenge after *Lawrence v. Texas*, 539 U.S. 558 (2003)?

3. Can the naked assertion that a law furthers "traditional moral norms and public order" satisfy the heightened standards of review for laws that infringe on speech and treat men and women differently?

PARTIES TO THE PROCEEDINGS

Petitioner is Sonoko Tagami.

Respondent is the City of Chicago.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes:

Other:

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-15a) is reported at 875 F.3d 375 (7th Cir. 2017). The order of the district court granting in part and denying in part respondent's first motion to dismiss (App. 16a-23a) is available at 2015 WL 4187209. The order of the district court granting respondent's second motion to dismiss (App. 24a-29a) is available at 2016 WL 397322.

JURISDICTION

The judgment of the court of appeals was entered on November 8, 2017. The court of appeals denied rehearing on December 11, 2017. (App. 30a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 8-8-080 of the Municipal Code of the City of Chicago provides as follows:

> **Indecent exposure or dress.** Any person who shall appear, bathe, sunbathe, walk or be in any public park, playground, beach or the waters adjacent thereto, or any school facility and the area adjacent thereto, or any municipal building and the areas adjacent thereto, or any public way within the City of Chicago in such a manner that the genitals, vulva, pubis, pubic hair, buttocks, perineum, anus, anal region, or pubic hair region of any person, or any portion of the breast at or below the upper edge of the areola thereof of any female person, is exposed to public view or is not covered by an opaque covering, shall be fined not less than $100.00 nor more than $500.00 for each offense.

STATEMENT

Petitioner Sonoko Tagami has participated for several years in "GoTopless Day," an annual event held in cities around the world calling attention to laws that allow men, but not women, to appear bare chested in public.

Petitioner and other women participated in "GoTopless Day" events from 2010 to 2014 in the City of Chicago by using opaque body paint to cover a portion of their breasts in an attempt to comply with Section 8-8-080 while expressing their views that women, like men, should be allowed to appear bare chested in public. As Judge Rovner, dissenting below, explained, petitioner "apparently intended to comply with, but push the limits of the ordinance by painting her breasts with opaque paint." (App. 11a.)

Chicago did not interfere with the protests until 2014, when a Chicago police officer ordered petitioner to cover her chest or be arrested. Petitioner complied with the police order. The officer issued petitioner a notice of ordinance violation, charging her with having committed the offense of "Indecent Exposure or Dress" in violation of Section 8-8-080 of the Municipal Code of the City of Chicago.

Petitioner challenged the ticket at a hearing before an Administrative Law Officer of the City of Chicago Department of Administrative Hearings. The Administrative Law Officer, who was bound by Illinois law prohibiting consideration of constitutional questions at administrative hearings,[1] upheld the ticket and ordered

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[1] *Cinkus v. Vill. of Stickney Mun. Officers Electoral Bd.*, 228 Ill. 2d 200, 214, 886 N.E.2d 1011, 1020 (2008) ("an administrative agency lacks the authority to declare a statute unconstitutional, or even to question its validity").

petitioner to pay a $100 fine and $40 in administrative costs.

After paying the fine, petitioner brought suit under 42 U.S.C. § 1983 to challenge application of the ordinance to prevent her exercise of First Amendment rights. Petitioner also challenged the sex-based classification of the ordinance, alleging that this differential treatment of men and women is an arbitrary classification prohibited by the Equal Protection Clause. In addition, petitioner sought review of the order of the Administrative Law Officer in a supplemental state law claim.

Chicago moved to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Petitioner opposed the motion, pointing out that the ordinance, by prohibiting any exposure of the female breast "at or below the upper edge of the areola," barred contemporary fashion. Petitioner supported this allegation with images of mainstream clothing that exposed portions of the female breast "below the upper edge of the areola." *See infra* at 11. Petitioner also pointed out that Chicago's ordinance could not be justified as protecting public sensibilities when state law explicitly permits public breastfeeding. Petitioner urged the district court to deny the Rule 12(b)(6) motion and require Chicago to come forward with evidence that the ordinance "serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *United States v. Virginia*, 518 U.S. 515, 524 (1996).

The district court granted Chicago's motion to dismiss petitioner's Equal Protection claim and initially upheld her First Amendment claim, holding that Chicago had to come forward with "some specific, tangible

evidence establishing a link between the regulated activity and harmful secondary effects." (App. 21a.)

Petitioner then filed an amended complaint, adding additional facts to her Equal Protection claim. Chicago again moved to dismiss. This time, the district court dismissed both the First Amendment and the Equal Protection claims and relinquished jurisdiction over petitioner's supplemental state law administrative review claim. (App. 24a-29a.)

A divided panel of the Seventh Circuit affirmed. (App. 1a-15a.) The panel majority reasoned that petitioner's partial nudity was not expressive conduct. (App. 4a.) The panel majority concluded that to be protected by the First Amendment, "the conduct in question must comprehensively communicate its own message without additional speech." (App. 4a.) The panel majority held that petitioner's conduct of partially uncovering her breasts at the "GoTopless" protest was not protected by the First Amendment because onlookers would not have understood petitioner's partial nudity at the protest to be "a political protest against the City's public indecency ordinance." (App. 4a.)

Next, the panel majority held that even if petitioner's protest was expressive conduct, any First Amendment infringement was justified by Chicago's interest in "promoting traditional moral norms and public order." (App. 5a-7a.) The panel majority rejected petitioner's argument that Chicago was required to present evidence to justify the restriction on speech; the panel majority upheld the restriction because of "history and tradition, without requiring an evidentiary showing." (App. 6a.)

Judge Rovner, writing in dissent, viewed petitioner's public protest as expressive conduct protected by the First Amendment, observing "[t]here could not be a

clearer example of conduct as speech than the one here." (App. 10a.) In Judge Rovner's view, an expansion of the record was required to adjudicate whether the Chicago could justify the ordinance's infringement on speech. (App. 10a-12a.)

The panel majority also rejected petitioner's Equal Protection claim, holding as a matter of law that Chicago's decision to prohibit woman, but not men, from appearing in public while exposing "any portion of the breast at or below the upper edge of the areola thereof" could not be challenged as a violation of the Fourteenth Amendment. The panel majority held that the ordinance was immune from challenge because of Chicago's "general interest in preserving health, safety, and traditional moral norms" and its need to protect "unwilling members of the public—especially children—from unwanted exposure to nudity" (App. 5a-6a)

In her dissenting opinion, Judge Rovner concluded that petitioner's Equal Protection claim should not have been dismissed at the pleading stage because "[a]ny invocation of tradition and moral values in support of a law that facially discriminates among classes of people calls for a healthy dose of skepticism on our part." (App. 13a.)

REASONS FOR GRANTING THE PETITION

Petitioner engaged in what Judge Rovner, dissenting below, accurately described as "the paradigm of First Amendment Speech" (App. 11a) when she participated in a protest of a Chicago ordinance that bars women—but not men—from appearing in public with a portion of their chests exposed. Petitioner joined in the protest by covering a portion of her otherwise uncovered breasts with opaque paint.

The Third and Eleventh Circuits view petitioner's acts as expressive conduct subject to First Amendment protection. *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 160 (3d Cir. 2002); *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1270 (11th Cir. 2004).

The divided panel below joined the Second Circuit to apply a different standard for expressive conduct, requiring that "the ordinary viewer . . . glean [a] particularized message" from the conduct. *Zalewska v. County of Sullivan*, 316 F.3d 314, 320-21 (2d Cir. 2003); *Church of Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 205 n. 6 (2d Cir. 2004).

Petitioner's acts would also be expressive conduct in the Sixth and Eighth Circuits. *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 388 (6th Cir. 2005); *Kaahumanu v. Hawaii*, 682 F.3d 789, 798 (9th Cir. 2012). These circuits have adopted tests that "fall somewhere in the middle" of the tests applied by the Third and Second Circuits. *Cressman v. Thompson*, 798 F.3d 938, 955 (10th Cir. 2015) (noting conflict but not resolving issue).

The Court should resolve this conflict and hold that petitioner's acts are expressive conduct under the Court's decision in *Hurley v. Irish-American Gay*,

Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995).

The ordinance that was the object of petitioner's protest treats men and women differently by "impos[ing] a burden of public modesty on women alone, with ramifications that likely extend beyond the public way." (App. 14a, dissenting opinion.) The divided panel of the Seventh Circuit rejected petitioner's argument that Chicago had the burden to come forward with evidence to justify the ordinance; the panel majority held that Chicago's interest in "promoting traditional moral norms and public order" (App. 7a) justifies restricting petitioner's protest of the ordinance (*id.*) and forecloses any Equal Protection challenge to the ordinance. (App. 7a-8a.)

The circuits are divided about relying on "archaic and stereotypic notions," *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982), to justify restrictions on constitutional rights.

The Fourth and Fifth Circuits have rejected such justifications after *Lawrence v. Texas*, 539 U.S. 558 (2003), holding that "traditional moral norms" provide neither a "compelling state interest" to justify a prohibition of same-sex marriage, *Bostic v. Schaefer*, 760 F.3d 352, 380 (4th Cir. 2014), nor an interest sufficient to regulate "consensual private intimate conduct." *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 746 (5th Cir. 2008).

The First and Eleventh Circuit hold that concerns of "public morality" continue to provide a rational basis for governmental action. *Cook v. Gates*, 528 F.3d 42, 62 (1st Cir. 2008) (challenge to "Don't Ask, Don't Tell" legislation); *Williams v. Morgan*, 478 F.3d 1316, 1323 (11th Cir. 2007) (challenge to limitation on the sale of sex toys).

The panel majority in this case deepened this split when it held that interests in "promoting traditional moral norms and public order—are both self-evident and important enough to survive scrutiny" under the heightened standards of review that apply to challenges under the Equal Protection Clause and the First Amendment. (App. 6a-7a, 8a.)

This case provides the Court with an opportunity to resolve this conflict.

1. The Chicago "Indecent Exposure or Dress" Ordinance

Section 8-8-080 of the Chicago Municipal Code, entitled "Indecent Exposure or Dress," is a strict liability statute that bars men and women from appearing in public if enumerated body parts are visible. The list of banned body parts for women is more extensive than the list for men and includes "any portion of the breast at or below the upper edge of the areola thereof." Violation of the ordinance is punishable by a fine.

Chicago adopted its present ordinance in 1978.[2] The text of the previous version did not distinguish between men and women and did not enumerate specific body parts. Former Section 192-8 of the Chicago Municipal Code, as amended in 1943,[3] provided as follows:

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[2] The court of appeals stated that the ordinance "has existed in one form or another for decades." (App. 7a.)

[3] The 1943 amendment added "with intent to conceal his or her sex" to the prohibition against wearing "a dress not belonging to his or sex." Journal of the Proceedings of the City Council of the City of Chicago, Illinois at 8334-35 (Jan. 25, 1943). The 1943 amendment answered a woman's challenge that men's clothing was "more comfortable than women's and handy for work." Rita Fitzpatrick, *Parity In Pants Issue Stirs Up Feminine Ire*, CHI. TRIB. (Jan. 9, 1943). The Illinois Supreme Court concluded that, even as amend-

> Any person who shall appear in a public place in a state of nudity, or in a dress not belonging to his or her sex, with intent to conceal his or her sex, or in an indecent or lewd dress, or who shall make any indecent exposure of his or her person, shall be fined not less than twenty dollars nor more than five hundred dollars for each offense.

On January 17, 1978, the Chicago City Council amended the ordinance by dropping the prohibition on a person appearing in public "in a dress not belonging to his or her sex, with intent to conceal his or her sex" and by replacing the prohibitions on public nudity and indecent exposure with a specific listing of body parts that may not be displayed in public. The ordinance was renumbered to Section 8-8-080 in 2002 and the current fines range from $100 to $500. The prohibitions contained in the ordinance have not changed since 1978.

2. The Bona Fide Debate about the Chicago Ordinance

The Chicago ordinance does not require specific intent to engage in an indecent act. Unlike the Illinois public indecency statute, 720 ILCS 5/11-30(a)(2), the Chicago ordinance bans the exposure of the female breast regardless of intent.[4] Intent is also a requirement in the Model Penal Code offense of indecent exposure, MODEL PENAL CODE § 213.5, at 405 (1980),

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ed, the ordinance was an unconstitutional infringement on the liberty interest of transsexuals awaiting sex reassignment surgery. *City of Chicago v. Wilson*, 75 Ill.2d 525, 389 N.E.2d 522 (1978).

[4] The Illinois statute is limited to exposure "with intent to arouse or to satisfy … sexual desire." 720 ILCS 5/11-30(a)(2). Chicago contends that, as a "home rule" municipality, it may adopt a more restrictive public indecency statute. This question of state law is not presented in this case.

and in most states. Lawrence M. Friedman & Joanna L. Grossman, *A Private Underworld: The Naked Body in Law and Society*, 61 BUFF. L. REV. 169, 185 (2013).

The Chicago ordinance goes beyond the conventional public nudity ban that requires "wearing pasties and G-strings." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 294 (2000).

The ordinance does not allow any exception for contemporary clothing, which often exposes "the cleavage of the human female breasts exhibited by a bikini, dress, blouse, shirt, leotard, or similar wearing apparel," an exception in the ordinance at issue in *Richland Bookmart, Inc. v. Knox County*, 555 F.3d 512, 519 (6th Cir. 2009).

The prohibition in the Chicago ordinance against public display of "any portion of the breast at or below the upper edge of the areola thereof of any female person" means that a "female person" may not wear a J.C. Penney Arizona Crochet Pushup Halterkini Swim Top on a Chicago beach without violating Section 8-8-080. (Amended Complaint, ¶ 19.)

Arizona Crochet Pushup Halterkini Swim Top

The Chicago ordinance applies to any "female person" regardless of her age but may not be enforced against a woman breastfeeding her baby "in any location, public or private, where the mother is otherwise authorized to be, irrespective of whether the nipple of the mother's breast is uncovered during or incidental to the breastfeeding." 740 ILCS 137/10.

Petitioner is one of many who have appeared in public with uncovered or partially uncovered breasts to protest the overbreadth of laws like Chicago's, as well as their differential treatment of men and women. *See, e.g.*, Jessica Blankenship, *The Social and Legal Arguments for Allowing Women to Go Topless in Public*, ATLANTIC (Sep. 18, 2013).[5] Petitioner sought in her protest to bring attention to the public debate over Chicago's law, which "imposes a burden of public modesty on women alone." (App 14a, dissenting opinion.)

Less than 90 years ago, it was not uncommon for public beaches to prohibit men from appearing bare chested. *E.g., Now Men Bathe Without Tops on Many Public Beaches*, LIFE at 36 (July 18, 1938).[6] Such restrictions of male toplessness are now viewed as impermissible attempts to impose a "view of the proper fashion for personal dress." *DeWeese v. Town of Palm Beach*, 812 F.2d 1365, 1368 (11th Cir. 1987) (holding unconstitutional ordinance that prohibited a male jogger from running without a shirt).

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[5] Available at https://www.theatlantic.com/national/archive/2013/09/the-social-and-legal-arguments-for-allowing-women-to-go-topless-in-public/279755/.

[6] Available at https://books.google.com/books?id=nU8EAAAAMBAJ&lpg=PA36&dq=topless&pg=PA36.

Less than 40 years ago, school boards sought to "insulate schoolchildren from the sight of conspicuously pregnant women" based in part on what this Court described as "outmoded taboos." *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 641 n.9 (1974).

Evolving views on female breasts are reflected in the near universal acceptance of public breastfeeding. About 20 years ago, a commentator accurately referred to a "few states" that had enacted breastfeeding protection laws. Danielle M. Shelton, *When Private Goes Public: Legal Protection for Women Who Breastfeed in Public and at Work*, 14 LAW & INEQ. 179, 186 (1995). Today, however, "[f]orty-nine states, the District of Columbia and the Virgin Islands have laws that specifically allow women to breastfeed in any public or private location." NATIONAL CONFERENCE OF STATE LEGISLATURES, BREASTFEEDING LAWS (June 5, 2017).[7]

Petitioner is one of many persons who have initiated litigation to challenge the differential treatment of men and women who appear in public with uncovered breasts. As Justice Tintone of the New York State Court of Appeals stated in a concurring opinion, "there is really no objective reason why the exposure of female breasts should be considered any more offensive than the exposure of the male counterparts." *People v. Santorelli*, 80 N.Y.2d 875, 881, 600 N.E.2d 232, 236 (1992). *Santorelli* was an early successful legal challenge, decided on state law grounds. *Id.*

More recent challenges are percolating in the federal courts. *See, e.g.*, *Free the Nipple-Fort Collins v. City of Fort Collins*, 237 F. Supp. 3d 1126 (D. Colo. 2017), *appeal pending* No. 17-1103 (10th Cir.); *Free the Nip-*

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[7] Available at http://www.ncsl.org/research/health/breastfeeding-state-laws.aspx

ple-Springfield v. City of Springfield, 153 F. Supp. 3d 1037 (W.D. Mo.), *appeal pending* No. 17-3467 (8th Cir.). In contrast to this case, the appeals in the Eighth and Tenth Circuit are from district court decisions made on an expanded factual record.

The decision of the Seventh Circuit in this case, if allowed to stand, stops the development of the law on the legitimacy of ordinances like those in force in Chicago. The decision of the panel majority eliminates any re-examination of the justification for differential treatment of men and women because an ordinance has "existed in one form or another for decades" (App. 7a), and because its "essential purposes" are "both self-evident and important enough to survive scrutiny." (App. 7a.)

Petitioner does not ask the Court to resolve the ultimate question raised in various challenges below: Do laws like Chicago's ordinance violate the Constitution? That question should be decided on a full record after trial on the merits. The questions presented in this case involve whether petitioner should have received an opportunity to present evidence to prove her case, rather than seeing her important and substantial mixed questions of law and fact decided on a motion to dismiss.

3. A Conflict among the Circuits: Was Petitioner's Protest "Expressive Conduct?"

Petitioner's protest of the Chicago ordinance would be protected by the First Amendment as expressive conduct in the Third, Sixth, Ninth, and Eleventh Circuits but not in the Second and Seventh Circuits.

The Court has long recognized that the First Amendment extends to expressive conduct, *i.e.*, "symbolic or expressive conduct." *Virginia v. Black*, 538 U.S. 343, 358 (2003). For example, the Court has protected saluting a flag and refusing to salute a flag, *West Vir-*

ginia Bd. of Ed. v. Barnette, 319 U.S. 624, 632 (1943), wearing an armband to protest a war, *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 505-506 (1969), nude dancing, *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), nudity as part of a film, *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211 n. 7 (1975), and nudity as part of a theatrical performance, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975).

At one time, the Court applied a two-part test to determine "whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play." *Texas v. Johnson*, 491 U.S. 397, 404 (1989). The Court looked to (1) whether "'[a]n intent to convey a particularized message was present'" and (2) whether "'the likelihood was great that the message would be understood by those who viewed it.'" *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence v. State of Washington*, 418 U.S. 405, 410-11 (1974). Circuit courts have referred to this test as the "*Spence-Johnson* test." *E.g.*, *Cressman v. Thompson*, 798 F.3d 938, 955 (10th Cir. 2015).

The Court refined the *Spence-Johnson* test in *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), holding that "a narrow, succinctly articulable message is not a condition of constitutional protection." *Id.* at 569. The Court explained that if constitutional expression was so confined, it "would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll." *Id.*

The Circuits are divided on the extent to which *Hurley* modified the *Spence-Johnson* test. *Cressman v. Thompson*, 798 F.3d 938, 955 (10th Cir. 2015) ("Our

sister circuits have taken divergent approaches to reconciling *Hurley* with the requirements of the *Spence-Johnson* test.")

In the view of the Third Circuit, conduct may be expressive without a "particularized message." *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 160 (3d Cir. 2002). The Third Circuit asks whether "the nature of the activity, combined with the factual context and environment in which it was undertaken" shows that the conduct was "sufficiently imbued with elements of communication." *Id.* at 161.

The Eleventh Circuit agrees with the Third Circuit, holding that the relevant question is whether a reasonable person would interpret conduct as expressing "some sort of message, not whether an observer would necessarily infer a specific message." *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1270 (11th Cir. 2004). *Holloman* held that a student was engaging in "expressive conduct" when he raised his fist during the pledge of allegiance, even "if [other] students were not aware of the specific message." *Id.* at 1270.

In conflict with these circuits, the Second Circuit holds that *Hurley* did not alter the *Spence-Johnson* test, and the First Amendment does not apply without a particularized message. *Church of Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 205 n.6 (2d Cir. 2004); *Zalewska v. County of Sullivan*, 316 F.3d 314, 319 (2d Cir. 2003).

The Sixth and Ninth Circuits take an intermediate position, requiring that expressive conduct need not convey a succinctly articulable message but must convey a particularized message. *Hurley. Kaahumanu v. Hawaii*, 682 F.3d 789, 798 (9th Cir. 2012); *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 388 (6th Cir. 2005).

The majority opinion below sided with the Second Circuit, holding that petitioner's conduct could not have First Amendment protection because it "did not *itself* communicate a message of political protest." (App. 4a, emphasis in original) The panel majority also relied on the accompanying "explanatory speech," a factor this Court identified in considering a ban on military recruiters from campuses in *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006). (App. 3a.) In the view of the court below, petitioner's protest of the Chicago ordinance had no expressive component; petitioner was simply "walking around the streets of Chicago naked from the waist up." (App. 1a.)

Judge Rovner disagreed, siding with the Third, Sixth, Ninth, and Eleventh Circuits, and explained that the court of appeals should have relied on the context of petitioner's protest:

> Nor can one evaluate the expressive content of public nudity divorced from the context in which it occurs. It is akin to taking a picture of a recent women's march protest and enlarging it again and again to isolate a single marcher wearing a pink hat and concluding from the picture of a single hat-wearing marcher alone that the conduct is not expressive because the wearing of a hat "d[oes] not itself communicate a message of political protest." See Majority at 4 [App. 4a].

(App. 10a.)

Petitioner's participation in the "GoTopless" protest fits squarely within the Court's view of expressive conduct. The Court's holding in *Hurley* that a public parade is a form of expression, *Hurley*, 515 U.S. at 568, applies with equal force to a public protest. *E.g.*, *Snyder v. Phelps*, 562 U.S. 443 (2011). *Hurley* holds that "[t]he

protected expression that inheres in a parade is not limited to its banners and songs, however, for the Constitution looks beyond written or spoken words as mediums of expression." *Hurley*, 515 U.S. at 569. So too does the protected expression of the "GoTopless" protest extend beyond the signs, literature, or spoken words of the protestors.

The Court should grant certiorari to resolve this important conflict.

4. A Conflict among the Circuits: Can "Traditional Moral Norms" Sustain a Statute Against Constitutional Challenge?

The panel majority held that "traditional moral norms" justify the differential treatment of women and men by Chicago's ordinance and permit Chicago to punish petitioner for protesting the ordinance by appearing at the protest with a portion of her otherwise uncovered breasts covered by opaque paint. (App. 6a-7a, 8a.) This conclusion conflicts with the holdings of the Fourth and Fifth Circuits that after this Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), concerns of "public morality" cannot sustain a statute from constitutional challenge.

In *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014), a challenge to a ban on same-sex marriage decided before *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the Fourth Circuit held "the interest of promoting moral principles is . . . infirm in light of *Lawrence*." *Id.* at 380. The Fifth Circuit reached the same result in *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 745 (5th Cir. 2008), a case involving "sexual devices," holding that "interests in 'public morality' cannot constitutionally sustain the statute after *Lawrence*." *Id.* at 745.

The First and Eleventh Circuit hold that after *Lawrence*, public morality may still sustain a law from constitutional challenge under rational basis review. *Cook v. Gates*, 528 F.3d 42, 53 (1st Cir. 2008); *Williams v. Morgan*, 478 F.3d 1316, 1323 (11th Cir. 2007).

The panel majority in this case adopted a different rule, squarely holding that interests in "traditional moral norms" defeat any challenge to the ordinance under both of the heightened standards of review that apply to challenges under the Equal Protection Clause and the First Amendment. (App. 6a-7a, 8a.) The Court should review this conflict.

a. Traditional Morality under the First Amendment

The panel majority based its First Amendment holding on the three-justice plurality opinion of Chief Justice Rehnquist in *Barnes v. Glen Theatre, Inc*, 501 U.S. 560 (1991).[8] Chief Justice Rehnquist endorsed the "traditional power" of the government to "protect morals and public order" that the Court had upheld in *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986). *Barnes*, 501 U.S. at 569.

The Court, however, overruled *Bowers* in *Lawrence v. Texas*, 539 U.S. 558 (2003), when it adopted the dissenting opinion of Justice Stevens in *Bowers* to hold that 'the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting

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[8] The panel majority erroneously referred to a portion of the three-justice plurality as the "Court's reasoning." (App. 6a). Justice Souter's concurrence, rather than the three-Justice plurality, was the narrowest ground of decision and was therefore the effective holding of the Court. See *Marks v. United States*, 430 U.S. 188, 193 (1977).

the practice.'" *Id.* at 577 (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)). This Court in *Lawrence* explicitly rejected the panel majority's reliance on the ordinance's "pedigree." (App. 7a.) That the ordinance has "existed in one form or another for decades" (App. 7a) is not a sufficient reason to uphold the law.

The ruling of the court below that a First Amendment infringement may be justified based on interests in public morality deepens the split among the circuits about how to apply *Lawrence* because, as the panel recognized, petitioner's First Amendment challenge is subject to an intermediate level of scrutiny.[9] (App. 5a.)

Under intermediate scrutiny, this Court requires evidence to sustain a law, rather than "mere speculation or conjecture." *Edenfield v. Fane*, 507 U. S. 761, 770-771 (1993). In *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), a majority of the Court held that a regulating body seeking to defeat a First Amendment challenge to the regulation of adult businesses must produce some specific, tangible evidence establishing a

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[9] The panel majority applied the test of this Court's opinion in *United States v. O'Brien*, 391 U.S. 367, 376 (1968), holding that a law survives First Amendment scrutiny if

> "(1) the regulation is within the constitutional power of the government; (2) the regulation furthers an important or substantial govern-mental interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4) the restriction on alleged First Amendment freedoms is no greater than essential to further the government's interest. *Foxxxy Ladyz Adult World, Inc. v. Village of Dix*, 779 F.3d 706, 712 (7th Cir. 2015) (describing *O'Brien*'s intermediate standard of scrutiny).

(App. 5a.)

link between the regulated activity and harmful secondary effects. *Id.* at 438 (four-justice plurality); *id.* at 453 (Kennedy, J., concurring).

The decision of the panel majority that the government may ban speech because it is offensive to some would, if allowed to stand, upend this Court's First Amendment jurisprudence. *E.g.*, *Snyder v. Phelps*, 562 U.S. 443 (2011); *Nat'l Socialist Party of Am. v. Vill. of Skokie*, 432 U.S. 43 (1977). As Judge Rovner explained in her dissenting opinion below:

> The First Amendment protects not just the speech which a majority of people find persuasive and worthwhile, but to the contrary, its protections are most essential when the speech is that with which most take offense. *See, e.g.*, *Rankin v. McPherson*, 483 U.S. 378, 387 (1987).

(App. 10a.) Indeed, this Court explicitly rejected in *Spence v. State of Washington*, 418 U.S. 405 (1974) the rationale adopted by the divided panel of the Seventh Circuit of protecting "unwilling members of the public—especially children—from unwanted exposure to nudity." (App. 5a.) As this Court made plain in *Spence:* "We are also unable to affirm the judgment below on the ground that the State may have desired to protect the sensibilities of passersby." *Id.* at 412.

b. Traditional Morality under the Equal Protection Clause

The Seventh Circuit's application of the morality justification to petitioner's Equal Protection claim also deepens this conflict among the circuits and is contrary to well-established precedent.

"For close to a half century . . . this Court has viewed with suspicion laws that rely on 'overbroad generalizations about the different talents, capacities, or prefer-

ences of males and females.'" *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1692 (2017) (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)). As the Court explained in *Morales-Santana*, there was an "era when the lawbooks of our Nation were rife with overbroad generalizations about the way men and women are." *Morales-Santana*, 137 S. Ct. at 1689. The Court's own rulings sanctioned such laws until quite recently. *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 729 (2003); *Frontiero v. Richardson*, 411 U.S. 677, 684-85 (1973) (plurality opinion).

Today, though, laws that treat men and women differently are subject to heightened scrutiny. *Morales-Santana*, 137 S. Ct. at 1689. Thus, "the classification must substantially serve an important governmental interest *today*, for 'in interpreting the equal protection guarantee, we have recognized that new insights and societal understandings can reveal unjustified inequality . . . that once passed unnoticed and unchallenged.'" *Morales-Santana*, 137 S. Ct. at 1690 (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015)) (alterations omitted).

The Court applied this standard in *Morales-Santana* to review a statute that treated unwed fathers differently from unwed mothers. As the Court explained, "if a 'statutory objective is to exclude or 'protect' members of one gender' in reliance on 'fixed notions concerning that gender's roles and abilities,' the 'objective itself is illegitimate.'" *Morales-Santana*, 137 S. Ct. at 1692 (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982)). The law ran afoul of the Equal Protection Clause because the basis of the statute—that unwed fathers are less qualified and entitled than mothers to take responsibility for nonmarital children—was one of the overbroad generalizations that "the

Court has come to comprehend, have a constraining impact, descriptive though they may be of the way many people still order their lives." *Id.* at 1692-93 (footnote omitted).

The panel majority ignored this Court's recent history of rejecting "archaic and stereotypic notions" to justify differential treatment of the sexes. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724-25 (1982). The panel majority also ignored this Court's instruction that a proffered justification for differential treatment of the sexes "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *United States v. Virginia*, 518 U.S. 515, 533 (1996).

As Judge Rovner explained, the majority's reliance on tradition and pedigree without any evidentiary support cannot be squared with this Court's precedent:

> Any invocation of tradition and moral values in support of a law that facially discriminates among classes of people calls for a healthy dose of skepticism on our part, as historical norms are as likely to reflect longstanding biases as they are reasonable distinctions.

(App. 13a.) Besides being contrary to this Court's precedent, the ruling below is also contrary to the rulings of the First and Fifth Circuits rejecting morality justifications in response to constitutional challenges. *See ante* at 18, discussing *Bostic v. Schaefer*, 760 F.3d 352, 380 (4th Cir. 2014) and *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 745 (5th Cir. 2008).

As Judge Rovner stated, "we should not 'accept the notion ... that we should continue a stereotypical distinction 'rightly or wrongly,' or that something passes constitutional muster because it has historically

been a part of 'our culture.'" (App. 12a quoting *Free the Nipple-Fort Collins v. City of Fort Collins, Colorado*, 237 F. Supp. 3d 1126, 1133 (D. Colo. 2017)). If the courts had followed this logic, "we would not now have women lawyers, women jurors, women estate administrators or women military cadets." *Id.*

The circuits are divided over when traditional morality can be used to justify a challenged statute. The Court should grant certiorari to resolve this important conflict.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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