No. _____

In The Supreme Court of The United States

JOVANNA EDGE, ET AL.,
Petitioners,

v.

CITY OF EVERETT,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The petitioners are women who serve coffee at drive-thru stands in Everett, Washington. These baristas express themselves by wearing revealing outfits that intentionally diverge from societal workplace-attire norms. Through their mode of dress, the baristas communicate messages including female empowerment, freedom of expression, and body confidence.

The City of Everett passed a dress-code ordinance targeting the baristas and their expressive conduct. In upholding the dress code, the court of appeals held that the First Amendment does not protect the baristas' expression because they "fail[ed] to show a great likelihood that their intended message will be understood by those who receive it." In so holding, the Ninth Circuit deepened an unmistakable split among the courts of appeals over what triggers First Amendment protection for expressive conduct. In denying First Amendment protection, the Ninth Circuit also held that the commercial setting in which the baristas' expression occurred "makes the difference."

The questions presented are:

1. Whether First Amendment protection extends to expressive conduct only when there is a "great likelihood" that an intended particularized message will be understood by those who view it.

2. Whether the commercial setting of expressive conduct diminishes the First Amendment protection available to the speaker.

PARTIES TO THE PROCEEDING

Petitioners (plaintiffs-appellees below) are Jovanna Edge, an individual; Leah Humphrey, an individual; Liberty Ziska, an individual; Amelia Powell, an individual; Natalie Bjerke, an individual; and Matteson Hernandez, an individual.

Respondent is City of Everett (defendant-appellant below), a Washington municipal corporation.

RELATED CASES

There are no related cases.

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Petitioners Jovanna Edge, Leah Humphrey, Liberty Ziska, Amelia Powell, Natalie Bjerke, and Matteson Hernandez respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Ninth Circuit is reported at 929 F.3d 657 (9th Cir. 2019), and reprinted in Appendix A (App., *infra*, 1a–28a). The related opinion of the district court is reported at 291 F. Supp. 3d 1201 (W.D. Wash. 2017), and is reprinted in Appendix B. (App., i*nfra*, 29a–42a.) The Ninth Circuit's denial of rehearing en banc, is reprinted in Appendix C (App., *infra*, 43a).

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its final judgment in this case on July 3, 2019. On November 27, 2019, Justice Kagan granted an extension until February 3, 2020, in which to file this petition for a writ of certiorari. The Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUES

The text of the First Amendment to the United States Constitution is found at Appendix E (App., *infra*, 58a). The ordinance at issue is set forth at Appendix D (App., *infra,* 44a–57a).

STATEMENT OF THE CASE

A. Factual Background

Jovanna Edge, Leah Humphrey, Liberty Ziska, Amelia Powell, Natalie Bjerke, and Matteson Hernandez (the "baristas") work at drive-thru coffee stands where they sell espresso drinks to customers who order from and are served in their car. *See* SER 009.[1] The coffee stands serve a wide variety of customers, including families. ER0039.[2]

The baristas are free to choose what to wear at work. SER 011. They often choose to wear bikinis. SER 008. While the bikinis sometimes consist of just pasties and a g-string, the baristas are never nude, nor do they wear see-through clothing. ER0051.

The baristas' choice of clothing is an expressive act intended to communicate messages about American freedom, the progress women have made in obtaining and protecting their rights, body positivity, and self-acceptance. ER0132, 0135, 0231, 0235; SER 002, 003, 019-020, 024.

One barista, Ms. Bjerke, goes so far as to design her own outfits, which provides her a creative, expressive outlet. ER0087. For her, a big part of the message that her outfits communicate is "empowerment" and "approachability." SER 002. Wearing a bikini at a barista stand "sends the

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[1] The Ninth Circuit Court of Appeals Supplement Excerpts of Record, Dkt. 34, is referred to as "SER."

[2] The Ninth Circuit Court of Appeals Excerpts of Record, Dkt. 11, is referred to as "ER."

message that we should be comfortable with our bodies and who we are." SER 003.

This message of body positivity is heightened by the fact that many of the baristas have tattoos, scars, and other distinguishing features which are visible only when wearing a bikini. ER0231; SER 002, 014–15, 020. For Ms. Hernandez, her tattoos represent "different parts of going through the struggles of life. My tattoos express my ups and downs, and finding my true self. I share these parts of my life with my customers at the barista stand, and could not do that if I was wearing more than a bikini." SER 023. And for Ms. Ziska, tattoos on her arms, back, stomach, and hip inspire "questions from customers about my tattoos – they ask me how, why, who, what." SER 020.

But the most prevalent message communicated by the baristas is one of freedom. Ms. Hernandez, declared that "[s]ome countries make you wear lots of clothing because of their religious beliefs. But America is different because you can wear what you want to wear. I wear what I'm comfortable with and others can wear what they are comfortable with. Wearing a bikini sends this message to others." SER 024. Ms. Ziska states that she, too, sends a message of freedom by choosing to wear a bikini at work. "From the 40s-50s you had to wear clothes a certain way. We are here saying we watched our moms and grandmas going through hell and we don't have to. Millions of women fought for our rights and right to vote and it's my right to wear what I want. It's my right as a person." SER 019-020. And Ms. Powell sends a similar message. "I look at empowerment as living in a country where I'm free to do these things and because it's my constitutional right to be able to do these things." ER0135.

By engaging in the expressive act of wearing non-traditional clothing to work, the baristas communicate the message that they, and women in general, should be free to control their own mode of dress. The City of Everett disagreed with this notion and enacted a new law, called the "Dress Code Ordinance," aimed at curbing the baristas' expression. *See* App. at 44a–57a.

The ordinance is limited to "quick service facilities" which are "businesses that provide drive-thru forms of food and/or beverage service, or are focused on quick service providing minimal or no table service." *Id.* at 49a. Quick-service-facility owners must require employees to abide by the "minimum dress requirements" that the ordinance imposes. *Id.* at 48a–50a. Employees must cover "minimum body areas" defined as "the upper and lower body (breast/pectorals, stomach, back below the shoulder blades, buttocks, top three inches of legs below the buttocks, pubic area and genitals)." *Id.* at 49a. Owners with employees who fail to comply can lose the right to own and operate their businesses. *Id.* at 50a–53a

The City made no secret of its desire to specifically target the baristas with this ordinance. At the city council meeting where it was introduced, the City Attorney stated that "our intent is really to try and end the business model." ER1089. And later, at the same meeting: "I do think that what this does is it just simply makes this bikini business not a viable product." ER1095

B. Procedural History

In the face of the City's targeted attack on their rights and livelihood, the baristas challenged the

ordinance in federal district court. They alleged violations of several federal and state constitutional provisions, as well as 42 U.S.C. § 1983, and sought injunctive relief.[3] *See* App. at 31a–32a. The district court found the baristas were likely to prevail on their First Amendment claim and enjoined the City from enforcing the Dress Code Ordinance. App. at 34a.

The district court acknowledged that some may find the baristas' dress offensive. But it noted that the court's responsibility was not "to comment on taste or decorum, but rather to determine whether Plaintiffs' choice of clothing is communicative." App. at 36a–37a. The court also found that while "some customers view the bikinis as 'sexualized,' to others, they convey particularized values, beliefs, ideas, and opinions; namely, body confidence and freedom of choice. Moreover, in certain scenarios, bikinis can convey the very type of political speech that lies at the core of the First Amendment." *Id.* Having found "that Plaintiffs' choice of clothing is sufficiently communicative," the district court granted a preliminary injunction enjoining the ordinance.[4] *Id.* at 37a.

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[3] The baristas also sought injunctive relief based on violations of the Fourteenth Amendment's Equal Protection Clause and violations of Article I, Sections 5 and 12 of the Washington State Constitution, along with 42 U.S.C. § 1983. App. at 31a–32a. In granting the preliminary injunction, the district court did not reach those claims. App. at 41a. And the Ninth Circuit's opinion reversing the district court did not address those issues. *See* App. at 2a.

[4] The district court also found that both the Dress Code Ordinance and a second ordinance violated the Fourteenth Amendment's Substantive Due Process Clause and enjoined enforcement of them on that basis. App. at 35a. The Ninth Circuit reversed the district court on that issue as well. App. at 5a.

The City appealed the preliminary injunction to the United States Court of Appeals for the Ninth Circuit. ER0014. In a published opinion, the court reversed and remanded. App. 5a. The court's First Amendment analysis relied primarily on *Spence v. Washington*, 418 U.S. 405 (1974), which provided a test for when expressive conduct is entitled to protection. App. 21a.

The court recognized that the baristas intended to convey messages "relating to empowerment and confidence." But it found that "the message sent by the baristas' nearly nonexistent outfits vastly diverges from those described in plaintiffs' declarations." App. at 9a–10a at n.1, 23a–24. And because the baristas could not show "a 'great likelihood' that their intended messages related to empowerment and confidence will be understood by those who view them," the court held that "the mode of dress at issue in this case is not sufficiently communicative to merit First Amendment protection." App. at 23a–24a. In reaching that conclusion, the court held that the "commercial setting and close proximity to the baristas' customers makes the difference." *Id.*[5]

The court's opinion did not address whether the Court's decision in *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557 (1995) fundamentally altered the *Spence* test. *Hurley* did not require a "particularized message" for First

[5] Because the Ninth Circuit concluded the First Amendment did not apply to the baristas' conduct, it did not reach the separate issues of whether the Dress Code Ordinance should be analyzed under strict or intermediate scrutiny and whether it could withstand either level of scrutiny. App. 24a. Those issues are not the subject of this petition.

Amendment protection to apply to expressive conduct. The baristas sought reconsideration on this point—drawing the panel's attention to an existing split of authority among circuit courts—but were denied. 43a.

REASONS FOR GRANTING THE PETITION

The baristas intended to communicate a message through their manner of dress—as described in detail in their declarations and deposition testimony. The court of appeals denied the baristas First Amendment protection because, under *Spence*, they did not show "a 'great likelihood' that their intended messages…will be understood by those who view them." App. at 23a.

The court's decision deepens an acknowledged circuit split about when expressive conduct qualifies for First Amendment protection. Specifically, the courts of appeals have struggled to reconcile the Court's decision in *Hurley* with the *Spence* test's two requirements—(1) an intent to communicate a narrow and particularized message and (2) a great likelihood that the intended message would be received. All federal circuit courts of appeals except the D.C. Circuit and Federal Circuit have weighed in on the continued viability of the *Spence* test post-*Hurley*.

Some court of appeals opinions have engaged the issue directly and at length. Others addressed the issue briefly, and some only implicitly. But despite twenty-five years of percolation among the lower courts, no consensus has emerged. Instead, some courts read *Hurley* as relaxing or eliminating *Spence*'s requirements. Others believe the *Spence* test survives unchanged.

Now, the question of whether any given instance of expressive conduct is protected by the First Amendment turns largely on where the case is heard, rather than the underlying facts or the language of the Constitution. For example, in this case, the Ninth Circuit ruled against the baristas because it believed *Spence* requires an "unmistakable communication" containing a particularized message, and a great likelihood that the message will be understood by those who view it. App. at 21a–22a. But if the baristas worked in Florida, instead of Washington, the case would have resolved in the baristas' favor. The Eleventh Circuit's inquiry would have focused on whether a reasonable person would interpret the baristas' 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) (emphasis original). And both the City and court below acknowledged *some* sort of a message.

Separately, the Ninth Circuit's decision discounted the baristas' free-speech interests because the conduct at issue occurs in a "commercial setting and close proximity to the baristas' customers...." App. at 23a. While that rationale has been repeatedly rejected by the Court, the Ninth Circuit's decision joins a growing list of cases that depart from the Court's guidance on the issue.

The Court should grant this petition to restore uniformity to First Amendment rights across the country so that Americans enjoy the same freedom of expression regardless of jurisdiction. The Court should also correct the Ninth Circuit's error and reverse the dangerous trend of denying First

Amendment protection in cases arising in commercial settings.

I. The Court should grant review to resolve the deep and widening circuit split about when expressive conduct enjoys First Amendment protection.

A. The courts of appeals are divided on whether expressive conduct receives First Amendment protection only when the viewer understands a particularized message.

Several decades ago, the Court articulated what would become a two-part inquiry to determine whether activity is "sufficiently imbued with elements of communication" to trigger First Amendment protection. *Spence v. Washington*, 418 U.S. 405, 410–11 (1974). The "*Spence* test"[6] first asks whether an "intent to convey a particularized message was present." *Spence*, 418 U.S. at 410–11. The second part asks whether "in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it." *Id.* at 411.

But more recently, the Court held unanimously that a "narrow, succinctly articulable message is not a condition of constitutional protection." *Hurley v. Irish–Am. Gay, Lesbian, & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995) (citing *Spence*, 418 U.S. at 411). In *Hurley*, the Court found that a parade was entitled to First Amendment protection even though it didn't

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[6] Sometimes called the "*Spence-Johnson* test" in light of the Court's discussion of *Spence* in *Texas v. Johnson*, 491 U.S. 397 (1989).

communicate a particular message. As the Court explained, "if confined to expressions conveying a 'particularized message,'" the First Amendment "would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll." *Hurley*, 515 U.S. at 569.

In this case, the court of appeals concluded that the petitioners—bikini baristas—did not qualify for First Amendment protection because they did not show "a 'great likelihood' that their intended messages related to empowerment and confidence will be understood by those who view them." App. 23a. The Ninth Circuit's reasoning relied entirely on the two-part *Spence* test without mention of the Court's ruling in *Hurley*. The Ninth Circuit seems to have taken *Spence* even farther, writing that "First Amendment protection is only granted to the act of wearing particular clothing or insignias where circumstances establish that an unmistakable communication is being made." App. 21a–22a. But neither *Spence* nor any of the Court's other cases required an "unmistakable communication" to trigger First Amendment protection.

The Ninth Circuit's decision added to the division among courts of appeals about how to apply the *Spence* test after *Hurley*. All but two circuit courts of appeals have addressed the issue, directly or indirectly. But they have produced differing and conflicting holdings.

On one end of the spectrum, the Second Circuit continues to require a showing that a reasonable observer would receive a particularized message to trigger First Amendment protection. *Zalewska v.*

County of Sullivan, 316 F.3d 314, 320–21 (2d Cir. 2003). It continues to apply the *Spence* test in the same manner it did before *Hurley*. *See Church of Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 205 n.6 (2d Cir. 2004) (citation omitted) (interpreting *Hurley* to leave *Spence-Johnson* intact). Similarly, the Fourth and Fifth Circuits appear to have assumed, without discussion, that *Hurley* did not abrogate the *Spence* test. *See Stuart v. Camnitz*, 774 F.3d 238, 245 (4th Cir. 2014) (citing *Hurley* but applying *Spence-Johnson*); *see also Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 283, 296 (5th Cir. 2001) (applying *Spence-Johnson* with a discussion of *Hurley's* inapplicability relegated to Circuit Judge Barksdale's concurrence).

By contrast, the Third Circuit and Eleventh Circuit have interpreted *Hurley* as eliminating *Spence*'s "particularized message" requirement. *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 160 (3d Cir. 2002); *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235, 1240 (11th Cir. 2018). The Eleventh Circuit put it plainly in *Fort Lauderdale*: "[w]e decline the City's invitation…to resurrect the *Spence* requirement that it be likely that the reasonable observer would infer a particularized message. The Supreme Court rejected this requirement in *Hurley*…" 901 F.3d at 1240; *see also Holloman*, 370 F.3d at 1245.

The Eleventh Circuit asks whether a reasonable person would interpret conduct as expressing "*some* sort of message, not whether an observer would necessarily infer a *specific* message." *Holloman*, 370 F.3d at 1270 (emphasis original). Similarly, the Third Circuit held that *Hurley* "eliminated the 'particularized message' aspect of the *Spence-Johnson*

test" altogether. *Tenafly*, 309 F.3d at 160. Its test for expressive conduct is if "considering the nature of [the] activity, combined with the factual context and environment in which it was undertaken, we are led to the conclusion that the activity was sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." *Id.* (internal quotations and citations omitted).

And still other courts of appeals have ended up somewhere between these poles. For example, the Sixth Circuit held that the "particularized message" requirement survives *Hurley* but is now minimized. *See Condon v. Wolfe*, 310 F. App'x 807, 819 (6th Cir. 2009); *see also Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 388 (6th Cir. 2005). The Eighth Circuit requires a particularized message. *Baribeau v. City of Minneapolis*, 596 F.3d 465, 475–76 (8th Cir. 2010). But it acknowledges—based on *Hurley*—that the message in question need not be narrow or succinctly articulable. *Id.*

The Seventh Circuit recognizes that, after *Hurley*, visual works of art and other "silent expression" including, perhaps, gardening and landscaping fall under the First Amendment's umbrella. *See Disc. Inn, Inc. v. City of Chicago*, 803 F.3d 317, 326 (7th Cir. 2015). But it nonetheless held that the expression at issue must be "overwhelmingly apparent." *Tagami v. City of Chicago*, 875 F.3d 375, 378 (7th Cir. 2017), as amended (Dec. 11, 2017).

The First Circuit is conflicted within itself. One panel suggested—after *Hurley*—that the "particularized message" requirement is no longer good law. *Compare Casey v. City of Newport, R.I.*, 308 F.3d 106, 110 (1st Cir. 2002). But two years later, a

different panel applied the "particularized message" requirement from *Spence* in reaching its conclusion. *Wine & Spirits Retailers, Inc. v. Rhode Island*, 418 F.3d 36, 49 (1st Cir. 2005) (holding that a particularized message is required for conduct to be entitled to constitutional protection).

The Ninth Circuit in *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1060 (9th Cir. 2010) applied an approach that added another step before the *Spence* test. To determine whether the business of tattooing was expressive conduct worthy of First Amendment Protection, the court stated "our analysis proceeds as follows. Our first task is to determine whether tattooing is (1) purely expressive activity or (2) conduct that merely contains an expressive component." *Id.* The court applied this "complex legal framework" and found that "the business of tattooing qualifies as purely expressive activity rather than conduct with an expressive component, and is therefore entitled to full constitutional protection without any need to subject it to" the *Spence* test. *Id.* at 1064. But in the present case, also from the Ninth Circuit, the court did not analyze whether the baristas' manner of dress at work might qualify as "purely expressive activity." And applying *Anderson's* opening analysis of whether "purely expressive activity" exists before turning to the *Spence* test could change the result of a case that applies only *Spence*, as the court did below.

For its part, the Tenth Circuit recognizes the conflict among other courts of appeals. *See 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."); *Cressman v. Thompson*, 719

F.3d 1139, 1150 (10th Cir. 2013) ("Federal circuit courts have interpreted *Hurley's* effect on the *Spence-Johnson* factors differently."). But thus far, that court has avoided a definitive ruling on the issue. The Tenth Circuit observed that "*Hurley* suggests that a *Spence-Johnson* 'particularized message' standard may *at times* be too high a bar for First Amendment protection." 798 F.3d at 956 (internal citations and quotations omitted)(emphasis original).

B. The Court should resolve this circuit split because freedom of expression should be consistently applied nationwide.

The Court should resolve this circuit split so that there is a national standard for when expressive conduct is protected by the First Amendment. Whether a person has a constitutional right to engage in expressive conduct now turns on which jurisdiction hears the case, rather than the expressive activity or the language of the First Amendment.

If this case had originated in Florida, for example, the Eleventh Circuit's *Hollomon* analysis would control. First Amendment protection would turn on whether a reasonable person would interpret the baristas' expression "as *some* sort of message, not whether an observer would necessarily infer a *specific* message." 370 F.3d at 1270 (emphasis original). And the baristas would likely prevail under this relaxed standard.

In *Holloman*, a student raised his fist during the Pledge of Allegiance to protest the administration's treatment of the student's classmate. 370 F.3d at 1260–61. It was unclear whether other students would have realized what prompted the display. *Id.* at

1270. But the Eleventh Circuit nonetheless held the act was protected expressive conduct. *Id.* Even if onlookers wouldn't perceive the student's particular message, they would understand a "generalized message of disagreement or protest directed toward [a teacher], the school, or the country in general." *Id.*

Similarly, in *Fort Lauderdale Food Not Bombs*, a non-profit organization hosted weekly events at a park, sharing food at no cost with anyone who cared to join. 901 F.3d at 1238. The City of Fort Lauderdale disliked these events and enacted an ordinance restricting food sharing in the park. *Id.*

The non-profit group challenged the new law. It argued that the act of food sharing communicated that "society can end hunger and poverty if we redirect our collective resources from the military and war and that food is a human right, not a privilege, which society has a responsibility to provide for all." *Id.* The district court agreed with the city, concluding that "outdoor food sharing does not convey [the group's] particularized message unless it is combined with other speech, such as that involved in [the group's] demonstrations." *Id.* at 1241. But the Eleventh Circuit reversed because taking the group's actions in context, "the reasonable observer would interpret its food sharing events as conveying *some* sort of message." *Id.* at 1243 (emphasis original).

Like the student in *Holloman* and organization in *Fort Lauderdale Food Not Bombs*, the baristas' clothing choices conveyed several messages. The baristas testified not only to their intent to communicate a message though their clothing choices, but also articulated what they were expressing: freedom, empowerment, openness, body

acceptance, approachability, vulnerability, and individuality.

The City and Ninth Circuit both acknowledged that the baristas communicated some message. The City claims "the message received by others might send a negative message about the plaintiffs to others." The Ninth Circuit worried that the "message sent by the baristas nearly nonexistent outfits," might "vastly diverge from those described in plaintiffs' declarations." App. 9a–10a at n.1, 23a. But under the Eleventh Circuit *Holloman* decision, the baristas' communication of "some message" is enough to trigger First Amendment protection. So, if this case were decided in Florida, the district court's preliminary injunction would have been affirmed.

Reasonable minds may differ on which approach is best. But the caselaw makes two things clear. First, the lower courts are split on what is the proper framework for when expression qualifies for protection under the First Amendment. Second, the different legal tests have a real-world impact on Americans' constitutional rights.

In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, Justice Thomas offered insight into the Court's expressive-conduct jurisprudence. His opinion gathered precedent and suggested the proper inquiry is whether the actor "intended to be communicative" and, "in context, would reasonably be understood by the viewer to be communicative." 138 S. Ct. 1719, 1742 (Thomas, J., concurring and citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 294 (1984).) This restatement indicates that gone are the requirements for a "particularized message" with a "great likelihood" of being understood—let

alone an "unmistakable communication" of that message. Instead, the First Amendment protects expression whenever there is an intent to communicate that would reasonably be understood as an intent to communicate. If the Court were to hold according to Justice Thomas's observation, the baristas' expression should be protected and Americans' First Amendment rights would be restored.

This case is no less important because it involves bikinis rather than other expression. Fashion choices were assumed to be protected expressions of individuality as far back as the 1789 Congressional debate over the Bill of Rights. *See* Gowri Ramachandran, *Freedom of Dress: State and Private Regulation of Clothing, Hairstyle, Jewelry, Makeup, Tattoos, and Piercing*, 66 Md. L. Rev. 11, 13 n.4 (2007) (quoting Congressman Theodore Sedgwick's speech analogizing the freedom of assembly to the freedom of personal appearance and arguing that both freedoms were so self-evident that neither needed to be addressed via constitutional amendment).[7] Fashion is often understood to be a type of language, or code, and is undeniably capable of conveying symbolic expression. *See Id.* at 45–49. The medium of fashion and personal appearance are among the most commonly employed modes of daily individual expression in Western Culture. *See* William C. Vandivort, *I See London, I See France: The*

[7] (available at: http://digitalcommons.law.umaryland.edu/mlr/vol66/iss1/3).

Constitutional Challenge to "Saggy" Pants Laws, 75 Brook. L. Rev. 667, 686–88 (2009).[8]

Yet according to the Ninth Circuit and Second Circuit, First Amendment freedom of expression only applies to conduct that communicates a narrow, articulable message that other people will understand. This opens the door for government to impose overreaching restrictions on expressive conduct, including mandating arbitrary dress codes in the workplace and beyond.

The First Amendment should mean the same thing in Florida as it does in Washington and New York—and every other place where the Constitution is the supreme law of the land. But for expressive conduct, the contours of First Amendment protection differ from circuit to circuit. The Court should resolve the longstanding conflict about *Hurley*'s impact on the *Spence* test and set a national standard for when expressive conduct is protected under the First Amendment.

II. The Ninth Circuit's decision conflicts with the Court's holdings that a commercial setting does not reduce First Amendment protection.

The Court has held time and again that speech is "protected even though it is carried in a form that is 'sold' for profit." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976) (deeming it "beyond serious dispute"); *see also Riley v. Nat'l Fed. of the Blind of N.C., Inc.*, 487 U.S. 781, 801 (1988) ("[A] speaker is no less a

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[8] (available at: http://brooklynworks.brooklaw.edu/blr/vol75/iss2/10).

speaker because he or she is paid to speak."); *Murdock v. Com. of Pennsylvania*, 319 U.S. 105, 111 (1943) ("It should be remembered that the pamphlets of Thomas Paine were not distributed free of charge."). Though context should be considered when analyzing expressive conduct for First Amendment protection, "the degree of First Amendment protection is not diminished merely because the [protected expression] is sold rather than given away." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 756 n.5 (1988); *see also Times, Inc. v. Hill*, 385 U.S. 374, 397 (1967) (explaining that just because publications are "sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment").

In the case below, the court of appeals found that the baristas' expressive conduct occurred "at retail establishments that invite commercial transactions, and in these transactions, the baristas undisputedly solicit tips." App. at 23a. It emphasized that the "commercial setting and proximity to the baristas' customers makes the difference." *Id.* In stating that the commercial setting was determinative in whether the baristas were entitled to First Amendment protection, the Ninth Circuit contradicted the Court's decisions that a commercial context does not diminish or prevent the safeguards of the First Amendment. Commercial context does not eliminate free speech. But the Ninth Circuit used the commercial setting of this case to disregard the testimony from the baristas about their intended messages.

The Ninth Circuit is not alone in its departure from the Court's precedent. In recent years, state high courts have denied First Amendment protection based on speech occurring in a commercial context.

See State v. Arlene's Flowers, Inc., 187 Wash. 2d 804, 831 (2017) (focusing on individual's "commercial sale of floral wedding arrangements"), *cert. granted, judgment vacated on other grounds*, 138 S. Ct. 2671 (2018); *Elane Photography, LLC v. Willock*, 309 P.3d 53, 68 (N.M. 2013) (while "photography may be expressive, the operation of a photography business is not"); *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. Ct. App. 2015) ("[I]t is unlikely that the public would understand Masterpiece's sale of wedding cakes to same-sex couples as endorsing a celebratory message about same-sex marriage."), *rev'd on other grounds sub nom. Masterpiece Cakeshop*, 138 S. Ct. 1719.

The Court should clarify that, though context should be considered, the commercial context of expressive conduct, in and of itself, does not "make the difference."

CONCLUSION

This case squarely presents the question of when and how non-verbal, non-written expression is protected by the First Amendment. The issue has vexed the courts of appeals and led to dramatically divergent views among them. The question of whether and when Americans enjoy First Amendment protection is fundamental to civil rights. The Constitution should apply the same throughout the nation. The Court should resolve this issue.

Petitioners respectfully request the Court grant the petition for writ of certiorari to answer the two questions presented.

Respectfully Submitted,

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