No. _____

In The Supreme Court of The United States

JOVANNA EDGE, ET AL.

PETITIONERS,

v.

CITY OF EVERETT

RESPONDENT.

APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR WRIT OF CERTIORARI

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APPLICATION FOR EXTENSION OF TIME

To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit:

Under Rules 13.5, 22, and 30 of this Court, Petitioners Jovanna Edge, Leah Humphrey, Liberty Ziska, Amelia Powell, Natalie Bjerke, and Matteson Hernandez respectfully request a 60-day extension of time within which to file a petition for a writ of certiorari up to and including Monday, February 3, 2020.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

Petitioners seek review of *Edge et al. v. City of Everett*, 929 F.3d 657 (9th Cir. 2019) (attached as Exhibit 1). Issuing a preliminary injunction, the district court found that two ordinances were likely void for vagueness under the Fourteenth Amendment and that one ordinance violated Petitioners' First Amendment right to free expression. The United States Court of Appeals for the Ninth Circuit reversed. Petitioners timely requested rehearing en banc, which the Ninth Circuit denied on September 6, 2019 (attached as Exhibit 2).

JURISDICTION

The Court has jurisdiction to review this case under 28 U.S.C. § 1254(1) because this petition is made after judgment by the United States Court of Appeals for the Ninth Circuit. Under Rules 13.1, 13.3, and 30.1, a petition for a writ of certiorari is due to be filed on or before December 5, 2019, unless extended. Under Rule 13.5, this application is filed more than 10 days before the filing date for the petition for a writ of certiorari.

REASONS JUSTIFYING AN EXTENSION OF TIME

Petitioners respectfully request this 60-day extension of time to file a petition for a writ of certiorari for the following reasons:

1. The petition will present a substantial and important question of federal law that this Court should resolve, warranting a carefully prepared petition. The issue involves a circuit split about when expressive conduct qualifies for protection under the First Amendment. Some circuits have followed *Texas v. Johnson*, 491 U.S. 397 (1989) and *Spence v. Washington*, 418 U.S. 405 (1974). Other circuits have followed the Court's later decision in *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. Of Bos.*, 515 U.S. 557, 569 (1995). They found that *Hurley* abrogated *Spence* and *Johnson*, at least in part. The two bodies of First Amendment jurisprudence conflict.

2. Following *Spence* and *Johnson*, the Ninth Circuit held that to qualify for First Amendment protection, Petitioners had to show "an intent to convey a particularized message" and a great "likelihood…that the message would be understood by those who viewed it." But in *Hurley*, the Court explained 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).

In the last quarter century, courts have struggled to reconcile *Hurley* with the *Spence-Johnson* test. A circuit split has emerged. For example, the Second Circuit continues to apply the *Spence-Johnson* 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). So, like the Ninth

Circuit did in this matter, the Second Circuit continues to require a showing that a reasonable observer would receive a particularized message in order to trigger First Amendment protection. *Zalewska v. County of Sullivan*, 316 F.3d 314, 320-21 (2d Cir. 2003). Similarly, the Fourth and Fifth Circuits appear to have assumed, without discussion, that *Spence-Johnson* is unchanged by *Hurley*. *See Stuart v. Camnitz*, 774 F.3d 238, 245 (4th Cir. 2014); *see also Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 283 (5th Cir. 2001).

By contrast, the Third Circuit and Eleventh Circuit have interpreted *Hurley* as eliminating *Spence-Johnson's* "particularized message" requirement. *Tenafly Eruv Ass'n 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) ("We 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*."); *see also Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1245 (11th Cir. 2004).

And still other circuits have ended up "somewhere in the middle" of these poles. *See Cressman v. Thompson*, 798 F.3d 938, 955–56 (10th Cir. 2015) (collecting conflicting cases from the Second, Third, Sixth, and Eleventh Circuits without resolving the issue). For example, the Sixth Circuit recognizes that *Hurley* minimized the "particularized message" requirement, but still enforces the requirement to some extent. *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 claimants to show

that their conduct conveys a particularized message. *Baribeau v. City of Minneapolis*, 596 F.3d 465, 475–76 (8th Cir. 2010). But it acknowledges that the message in question need not be narrow or succinctly articulable. *Id.*

The Seventh Circuit adopted an even different approach. It does not appear to require a particularized message. *see Disc. Inn, Inc. v. City of Chicago*, 803 F.3d 317, 326 (7th Cir. 2015). But it nonetheless holds 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). And the First Circuit has applied the "particularized message" requirement post-*Hurley* in one case while suggesting the requirement is no longer good law in another case. *Compare Casey v. City of Newport, R.I.*, 308 F.3d 106, 110 (1st Cir. 2002) (suggesting this Court rejected the "particularized message" requirement) *with 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 differing analytical frameworks between, and sometimes within, the circuits are not merely academic. They will often be outcome determinative. Whether a person has a constitutional right to engage in certain expressive conduct will turn on which jurisdiction that person happens to be in, rather than the particular expression at issue or the language of the Constitution.

Given this, the circuit split over the proper legal test for analyzing expressive conduct under the First Amendment presents a substantial question. The Court should restore uniformity to this critical area of constitutional law and prevent the suppression of

protected speech.

3. Petitioners need more time to fully research and address the complex and important legal issue in their petition for writ of certiorari. A 60-day extension would allow for the necessary time to carefully prepare a clear and concise petition for writ of certiorari for the Court's review. This extension will ensure that the important questions the petition will present are adequately explained and supported.

4. No meaningful prejudice will arise from the 60-day extension.

CONCLUSION

Petitioners respectfully request a 60-day extension of time to file their Petition for a Writ of Certiorari in this matter, up to and including February 3, 2020.

DATED this 25th day of November 2019.

Respectfully submitted,

By: _____

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Exhibit 1

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOVANNA EDGE, an individual; LEAH HUMPHREY, an individual; LIBERTY ZISKA, an individual; AMELIA POWELL, an individual; NATALIE BJERKE, an individual; MATTESON HERNANDEZ, an individual, *Plaintiffs-Appellees*, v. CITY OF EVERETT, a Washington municipal corporation, *Defendant-Appellant*.	No. 17-36038 D.C. No. 2:17-cv-01361-MJP OPINION

Appeal from the United States District Court
for the Western District of Washington
Marsha J. Pechman, District Judge, Presiding

Argued and Submitted February 4, 2019
Seattle, Washington

Filed July 3, 2019

Before: Sandra S. Ikuta and Morgan Christen, Circuit Judges, and Jennifer Choe-Groves,* Judge.

Opinion by Judge Christen

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* The Honorable Jennifer Choe-Groves, Judge for the United States Court of International Trade, sitting by designation.

SUMMARY**

Constitutional Law / Preliminary Injunction

The panel vacated the district court's preliminary injunction against enforcement of the City of Everett, Washington's Dress Code Ordinance—requiring that the dress of employees, owners, and operators of Quick-Service facilities cover "minimum body areas"—and the amendments to the Lewd Conduct Ordinances.

Plaintiffs are owners and employees of a bikini barista stand in Everett, Washington.

The panel held that plaintiffs did not show a likelihood of success on the merits of their two Fourteenth Amendment void-for-vagueness challenges, nor on their First Amendment free expression claim.

Concerning the Lewd Conduct Ordinances, which expanded the definition of "lewd act" and also created the misdemeanor offense of Facilitating Lewd Conduct, the panel held that the activity the Lewd Contact Amendments prohibited was reasonably ascertainable to a person of ordinary intelligence. The panel also held that the Amendments were not amenable to unchecked law enforcement discretion. The panel concluded that the district court abused its discretion by holding that the plaintiffs were likely to succeed on the merits of their void-for-vagueness challenge to the Amendments.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Concerning enjoinment of the enforcement of the Dress Code Ordinance, the panel held that the vagueness principles governing the panel's analysis of the Lewd Conduct Amendments applied with equal force to the Dress Code Ordinance. The panel concluded that the vagueness doctrine did not warrant an injunction prohibiting enforcement of the Dress Code Ordinance. As to plaintiffs' First Amendment contention that the act of wearing almost no clothing while serving coffee in a retail establishment constituted speech, the panel held that plaintiffs had not demonstrated a "great likelihood" that their intended messages related to empowerment and confidence would be understood by those who view them. The panel concluded that the mode of dress at issue in this case was not sufficiently communicative to merit First Amendment protection. The panel also held that the district court's application of intermediate scrutiny under the "secondary effects" line of authority was inapposite, and the City need only demonstrate that the Dress Code Ordinance promoted a substantial government interest that would be achieved less effectively absent the regulation. Because the district court did not analyze the ordinance under this framework, the panel vacated the preliminary injunction and remanded for further proceedings.

COUNSEL

Ramsey Everett Ramerman (argued), City of Everett, Everett, Washington; Sarah C. Johnson and Matthew J. Segal, Pacifica Law Group LLP, Seattle, Washington; for Defendant-Appellant.

Melinda W. Ebelhar (argued) and Gerald M. Serlin, Benedon & Serlin LLP, Woodland Hills, California, for Plaintiffs-Appellees.

OPINION

CHRISTEN, Circuit Judge:

"Bikini barista" stands are drive-through businesses where scantily clad employees sell coffee and other non-alcoholic beverages. In Everett, Washington, a police investigation confirmed complaints that some baristas were engaging in lewd conduct at these establishments, that some baristas had been victimized by patrons, and that other crimes were associated with the stands. The City responded by adopting Everett Municipal Code (EMC) § 5.132.010–060 (the Dress Code Ordinance) requiring that the dress of employees, owners, and operators of Quick-Service Facilities cover "minimum body areas." Separately, the City also broadened its lewd conduct misdemeanor by expanding the Everett Municipal Code's definition of "lewd act" to include the public display of specific parts of the body. EMC § 10.24.010. The City also created a new misdemeanor called Facilitating Lewd Conduct for those who permit, cause or encourage lewd conduct. EMC § 10.24.020.

A stand owner and several baristas sued the City pursuant to 42 U.S.C. § 1983, contending that the Dress Code Ordinance and the amendments to the Lewd Conduct Ordinances violate their First and Fourteenth Amendment rights. The district court granted plaintiffs' motion for a preliminary injunction and enjoined enforcement of these provisions. The City appeals. We have jurisdiction over the

City's interlocutory appeal pursuant to 28 U.S.C. § 1292. Because we conclude that plaintiffs did not show a likelihood of success on the merits of their two Fourteenth Amendment void-for-vagueness challenges, nor on their First Amendment free expression claim, we vacate the district court's preliminary injunction and remand this case for further proceedings.

I. Factual Background

Bikini barista stands have operated in and around Everett since at least 2009. The baristas working at these stands wear what they call "bikinis," but the City describes them as "nearly nude employees," and the district court made clear that their attire is significantly more revealing than a typical bikini. The district court's finding that at least some of the baristas wear little more than pasties and g-strings is well-supported by the record.

Beginning in summer 2009, the Everett Police Department (EPD) began fielding numerous citizen complaints related to bikini barista stands. One complainant asserted that she observed a female barista wearing "pasties" and "a thong and what appeared to be garter belts sitting perched in the window with her feet on the ledge[.]" The complainant went on to describe how a customer in a truck approached the window and began "groping" the barista in intimate areas. According to the complainant, "the next customer in line . . . was clearly touching his genitals through his clothes as he was waiting his turn." Stuck in traffic, the complainant wrote that she "had to sit there w/ my 2 young daughters and was so disgusted[.]"

After receiving upwards of forty complaints, EPD launched an undercover investigation and documented that some baristas at this type of stand were openly violating the existing criminal code prohibiting various forms of lewd conduct. At the time, EMC § 10.24.010 defined lewd conduct to include exposure or display of one's genitals, anus or any portion of the areola or nipple of the female breast, but EPD's investigation revealed that some of the bikini baristas removed their costumes entirely. EPD also discovered that some baristas were not paid hourly wages and worked for tips only, resulting in pressure to engage in lewd acts, and that other baristas were paid wages but still performed lewd acts in exchange for large tips. Everett undercover police officers took a series of graphic photos documenting the extremely revealing nature of the baristas' garb and instances in which baristas removed their tops and bottoms altogether. Officers also documented a wide variety of customer-barista physical contact. At least one bikini stand owner was convicted of sexually exploiting a minor after he was caught employing a sixteen-year old at one of the bikini stands. *See State v. Wheeler*, No. 72660-9-I, 2016 WL 1306132, at *1–3 (Wash. Ct. App. 2016). Another stand turned out to be a front for a prostitution ring, and some of the baristas, who worked in isolated locations late at night, reported being victims of sexual violence. A Snohomish County Sheriff's Deputy was convicted of a criminal offense after helping an owner evade the City's undercover officers in exchange for sexual favors.

Enforcing the City's existing lewd conduct ordinance required extensive use of undercover officers and proved to be both expensive and time consuming. The City also complained that policing the stands detracted from EPD's efforts to address the City's other priorities.

After five years of using undercover operations to prosecute individual offenders, EPD decided its "investigative approach was an ineffective and resource-intensive method of motivating stand owners to stop the illegal conduct" and it began collaborating with the City on a legislative fix. The City complied by enacting EMC §§ 5.132.010–060, a Dress Code Ordinance applicable only to "Quick-Service Facilities" like drive-throughs and coffee stands. The City also amended its criminal code to broaden the definition of "lewd act" and created the crime of Facilitating Lewd Conduct. *See* EMC §§ 10.24.010; 10.24.025. Because the constitutional challenges in this case focus on the text and effect of these enactments, we describe each in some detail.

A. The Lewd Conduct Amendments

The Lewd Conduct Amendments expanded the definition of "lewd act" to include:

> An exposure or display of one's genitals, anus, bottom one-half of the anal cleft, or any portion of the areola or nipple of the female breast[] or [a]n exposure of more than one-half of the part of the female breast located below the top of the areola; provided that the covered area shall be covered by opaque material and coverage shall be contiguous to the areola.

EMC § 10.24.010(A)(1)–(2). An "owner, lessee, lessor, manager, operator, or other person in charge of a public place" commits the offense of Facilitating Lewd Conduct if that person "knowingly permits, encourages, or causes to be

committed lewd conduct" as defined in the ordinance. *Id.* § 10.24.025(A). Findings supporting the City's Lewd Conduct Amendments state that the City "seeks to protect its citizens from those who profit from facilitating others to engage in the crime of Lewd Conduct, and so deems it necessary . . . to create the new crime Facilitating Lewd Conduct, a gross misdemeanor punishable by a maximum penalty of 364 days in jail and a $5,000.00 fine[.]"

B. The Dress Code Ordinance

The City did not hide its effort to specifically address the problems associated with the bikini barista stands when it adopted the Dress Code Ordinance. The very first factual finding in the enactment establishing the Dress Code stated that "[t]he City has seen a proliferation of crimes of a sexual nature occurring at bikini barista stands throughout the City[.]" The next paragraph memorialized the City's conclusion "that the minimalistic nature of the clothing worn by baristas at these 'bikini' stands lends itself to criminal conduct[.]"

The Dress Code Ordinance requires all employees, owners, and operators of "Quick-Service Facilities" to comply with a "dress requirement" mandating coverage of "minimum body areas." EMC § 5.132.020(A). Minimum body areas are further 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.* § 5.132.020(B). The Dress Code Ordinance defines Quick-Service Facilities as "coffee stands, fast food restaurants, delis, food trucks, and coffee shops" in addition to all other drive-through restaurants. *Id.* § 5.132.020(C). This ordinance prohibits owners of Quick-

Service Facilities from operating their businesses if any employee is not in full compliance with the dress requirement. EMC § 5.132.040(A)(1). Violations are deemed civil infractions. *Id.* To ensure that stand owners are motivated to enforce the dress code, the City instituted a $250 fine for first time offenders. EMC § 5.132.040(B)(1). Repeat offenders face stiffer fines and risk losing their business licenses. EMC § 5.132.040(B)(1)–(2). In enacting these provisions, the City expressed its intent to "provide powerful tools for reducing the illegal conduct that has occurred at bikini barista stands in a cost-effective manner."

II. Procedural Background

Plaintiff Jovanna Edge owns Hillbilly Hotties, a bikini barista stand in Everett. Plaintiffs Leah Humphrey, Liberty Ziska, Amelia Powell, Natalie Bjerke, and Matteson Hernandez are, or at one time were, baristas employed at Hillbilly Hotties. Approximately one week after the Lewd Conduct Amendments and Dress Code Ordinance went into effect, plaintiffs filed this lawsuit alleging multiple constitutional violations, two of which are relevant to this appeal. Plaintiffs' complaint alleges: (1) that the Dress Code Ordinance and the Lewd Conduct Amendments violate their First Amendment rights to free expression, and (2) that the new provisions violate the Due Process Clause because they are unconstitutionally vague.

Plaintiffs' First Amendment free expression claim asserts that the baristas convey messages such as "female empowerment," "confiden[ce]," and "fearless body acceptance" by wearing bikinis while working. In support of their motion for a preliminary injunction, plaintiffs submitted declarations from several baristas explaining their views that

"a bikini is not a sexual message, [it's] more a message of empowerment," "we are empowered to be comfortable in our bodies," "[t]he bikini sends the message that I am approachable," "the message I send is freedom[,]" and "my employees expose messages through tattoos and scars."[1] The baristas assert that their choice of clothing demonstrates that they are "fun and more open," and that wearing bikinis at work shows they are "empowered, confident, and free." Plaintiff Edge, owner of Hillbilly Hotties, explained that her employees' dress allows them to "tell stories of who they are[.]"

Notably, in the district court and on appeal, plaintiffs persistently disavow that they are nude dancers or that they engage in erotic performances, conduct that is expressly protected under the First Amendment. *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991).[2] Plaintiffs' argument is that simply *wearing* what they refer to as bikinis is itself sufficiently expressive to warrant First Amendment protection, and that the City's new ordinance and amendments therefore impermissibly burden their speech.

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[1] We have considered all of plaintiffs' diverse messages. For brevity, we refer to the baristas' intended messages as those "relating to empowerment and confidence" throughout this opinion, recognizing that each individual barista's intended message is likely somewhat unique.

[2] Nude dancing and erotic performances are subject to Everett's pre-existing ordinances regulating "public places of adult entertainment." *See* EMC § 5.120. These regulations require adult entertainment businesses to obtain licenses and adhere to standards of conduct and operations, among other restrictions. *See* EMC §§ 5.120.030; 5.120.070. Everett's zoning ordinances also restrict the location of adult businesses, excluding them from operating within the downtown core. *See id.* §§ 19.05.090; 19.05 Table 5.2.

The City disputes the baristas' premise that the act of wearing pasties and g-strings at work constitutes speech. The City also offers extensive evidence of adverse secondary effects associated with the stands, including prostitution and sexual violence, and argues that the new ordinance and Lewd Conduct Amendments are aimed at those effects.

Plaintiffs' motion for a preliminary injunction alleged that the new measures are impermissibly vague because they use ambiguous language to define parts of the body that must be covered by employees, owners, and operators of barista stands, and that a person of ordinary intelligence is denied a reasonable opportunity to know what conduct the City now prohibits. The City's opposition denied that the text of the Dress Code Ordinance and Lewd Conduct Amendments is vague or ambiguous, but the City voluntarily agreed to suspend enforcement of the new measures pending resolution of plaintiffs' motion for a preliminary injunction.

III. The Preliminary Injunction

In *Winter v. Natural Resources Defense Council*, the Supreme Court held that a plaintiff seeking a preliminary injunction must establish "[(1)] that he is likely to succeed on the merits, [(2)] that he is likely to suffer irreparable harm in the absence of preliminary relief, [(3)] that the balance of equities tips in his favor, and [(4)] that an injunction is in the public interest." *Coffman v. Queen of Valley Med. Ctr.*, 895 F.3d 717, 725 (9th Cir. 2018) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)) (alterations in original). "Likelihood of success on the merits is the most important factor; if a movant fails to meet this threshold inquiry, we need not consider the other factors." *California*

v. Azar, 911 F.3d 558, 575 (9th Cir. 2018) (internal quotation marks omitted).

The district court applied the *Winter* factors and concluded that plaintiffs had demonstrated a likelihood of success on the merits of their vagueness challenges. The court expressed concern that the compound term "anal cleft" in the definition of "lewd act" is vague, and also ruled that both ordinances are susceptible to "arbitrary enforcement." Separately, the court concluded that plaintiffs had established a likelihood of success on the merits of their First Amendment free expression challenge to the Dress Code Ordinance, a ruling based on the court's conclusion that the act of wearing pasties and g-strings at Quick-Service Facilities was sufficiently expressive to merit constitutional protection.

The district court decided that plaintiffs had satisfied the remaining *Winter* factors, *see* 555 U.S. at 7, and enjoined enforcement of the new ordinances and amendments.

IV. Standard of Review

We review the district court's order granting a preliminary injunction "for an abuse of discretion," *Gorbach v. Reno*, 219 F.3d 1087, 1091 (9th Cir. 2000) (en banc), but "legal issues underlying the injunction are reviewed de novo because a district court would necessarily abuse its discretion if it based its ruling on an erroneous view of law." *Adidas Am., Inc. v. Sketchers USA, Inc.*, 890 F.3d 747, 753 (9th Cir. 2018) (quoting *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1204 (9th Cir. 2000)). When an injunction involves a First Amendment challenge, constitutional questions of fact (such as whether certain restrictions create a severe burden on

an individual's First Amendment rights) are reviewed de novo. *See Prete v. Bradbury*, 438 F.3d 949, 960 (9th Cir. 2006) (citing *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1070 (9th Cir. 2002)).

V. The Lewd Conduct Amendments

We first analyze the Lewd Conduct Amendments, which expanded the definition of "lewd act" and also created the misdemeanor offense of Facilitating Lewd Conduct.

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). That said, we recognize that "[c]ondemned to the use of words, we can never expect mathematical certainty from our language." *Id.* at 110. To put a finer point on it: "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *United States v. Williams*, 553 U.S. 285, 304 (2008) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989)).

The vagueness doctrine incorporates two related requirements. First, "laws [must] give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned*, 408 U.S. at 108. Typically, all that is required to satisfy this due process concern is "'fair notice' of the conduct a statute proscribes." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018). But "where [F]irst [A]mendment freedoms are at stake, an even greater degree of specificity and clarity of laws is required," *Kev, Inc. v. Kitsap Cty.*, 793 F.2d 1053, 1057 (9th Cir. 1986) (citing *Grayned*, 408 U.S. at 108–09), and

courts ask whether language is sufficiently murky that "speakers will be compelled to steer too far clear of any forbidden area[s.]" *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 588 (1996) (internal quotation marks omitted). This enhanced standard protects against laws and regulations that might have the effect of chilling protected speech or expression by discouraging participation.

The vagueness doctrine's second requirement aims to avoid "arbitrary and discriminatory enforcement," and demands that laws "provide explicit standards for those who apply them." *Grayned*, 408 U.S. at 108. A law that relies on a subjective standard—such as whether conduct amounts to an "annoyance"—is constitutionally suspect. *See id.* at 113. In *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971), for example, an ordinance was deemed unconstitutionally vague because it criminalized the assembly of three or more persons on city sidewalks if they conducted themselves in a manner annoying to passers by. The Supreme Court observed that "[c]onduct that annoys some people does not annoy others," *id*., and it struck down the ordinance because "men of common intelligence must necessarily guess at its meaning." *Id*. (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)).

Here, the district court concluded that the amended definition of "lewd act" similarly fails to give a person of ordinary intelligence a reasonable opportunity to conform his or her conduct to the City's law. The court explained that it was "uncertain as to the meaning of the compound term 'anal cleft' as used" in the amended definition, because "[t]he term 'bottom one-half of the anal cleft' is not well-defined or reasonably understandable[.]" We reach the opposite conclusion. Having examined the text adopted by the City,

we are not persuaded that the public will be left to guess at the meaning of the term "anal cleft," particularly because the meanings of both "anal" and "cleft" are easily discerned through recourse to a common dictionary. *See*, *e.g.*, *United States v. Wyatt*, 408 F.3d 1257, 1261 (9th Cir. 2005) (relying in part on the dictionary definition of an allegedly ambiguous term); *Kev, Inc.*, 793 F.2d at 1057 (same).[3] Moreover, "[t]his circuit has previously recognized that otherwise imprecise terms may avoid vagueness problems when used in combination with terms that provide sufficient clarity." *Gammoh v. City of LaHabra*, 395 F.3d 1114, 1120 (9th Cir. 2005) (citing *Kev, Inc.*, 793 F.2d at 1057). The Lewd Conduct Ordinance uses the term "anal cleft" in near proximity to a list of other intimate body parts. Viewing these facts together, we conclude that a person of ordinary intelligence reading the ordinance in its entirety will be adequately informed about what body areas cannot be exposed or displayed "in a public place or under circumstances where such act is likely to be observed by any member of the public." EMC § 10.24.020. Likewise, we conclude that the modifier "bottom one-half" does no more than specify an easily ascertained fractional part of an otherwise well-understood area of the body. Plaintiffs do not expressly challenge the new misdemeanor Facilitating Lewd Conduct on vagueness grounds, but we note that this provision does no more than prohibit owners, operators, lessors, lessees or any person "in charge of a public place"

[3] Merriam-Webster defines "anal" as "of, relating to, *situated near*, or involving the anus" and defines "cleft" as "a space or opening made by or as if by splitting." (emphasis added). It goes on to identify the phrase "the anal cleft of the human body" as an example. *See* Merriam-Webster Online Dictionary, www.merriam-webster.com/dictionary/cleft (last visited June 25, 2019). We agree with the City that "[t]here is only one possible portion of the human body that fits this description."

from knowingly permitting, or causing another person to commit lewd conduct as defined in EMC § 10.24.010. This prohibition is clear, as is the definition of lewd conduct. We therefore hold that the activity the Lewd Conduct Amendments prohibit is reasonably ascertainable to a person of ordinary intelligence.[4]

The second part of the vagueness test concerns whether the Lewd Conduct Amendments are amenable to unchecked law enforcement discretion. *See*, *e.g.*, *Papachristou v. City of Jacksonville*, 405 U.S. 156, 169–70 (1972).[5] Definitions of proscribed conduct that rest wholly or principally on the

[4] The district court did not analyze whether any term other than "anal cleft" is reasonably ascertainable to a person of ordinary intelligence, and we decline to do so in the first instance.

[5] The Jacksonville, Florida ordinance at issue in *Papachristou* deemed the following people "vagrants" and therefore guilty of a criminal offense:

> Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children[.]

Papachristou, 405 U.S. at 156 n.1.

subjective viewpoint of a law enforcement officer run the risk of unconstitutional murkiness. *See*, *e.g.*, *Gammoh*, 395 F.3d at 1119–20 (collecting cases); *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 554–55 (9th Cir. 2004). Everett's definition of lewd conduct requires that certain areas of the body be covered in public and as we have explained, the definition is not ambiguous. Nor does the definition rely on the subjective assessment of an enforcing officer. The term "anal cleft" is clear and ascertainable and what constitutes the "bottom half" of this unambiguously described part of the human body is also an objective standard. In short, EMC § 10.24.010's description of the body parts that must be covered in public does not create a constitutional problem by inviting discretionary enforcement because there are "standards governing the exercise of the discretion granted by the ordinance[.]" *Papachristou*, 405 U.S. at 170.

Plaintiffs argue that there will be close cases requiring some degree of law enforcement subjectivity when the Lewd Conduct Amendments are enforced, and the district court shared this concern. But "the mere fact that close cases can be envisioned" does not render an otherwise permissible statute unconstitutionally vague. *Williams*, 553 U.S. at 305. The Supreme Court has observed in other criminal contexts that close cases are addressed "not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt." *Id.* at 306. Put another way, in close cases, a fact finder will decide whether the City has met its burden by the required standard of proof. That determination does not raise constitutional vagueness concerns *so long as* the legal standard against which it is measured is sufficiently clear. All a statute must define with specificity is what the fact finder is required to decide in any given case. *See id.* ("What renders a statute vague is not the possibility that it

will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather *the indeterminacy of precisely what that fact is*." (emphasis added)).

The district court abused its discretion by ruling that plaintiffs are likely to succeed on the merits of their void-for-vagueness challenge to the Lewd Conduct Amendments. We therefore vacate the district court's preliminary injunction with respect to the Lewd Conduct Amendments.

VI. The Dress Code Ordinance

We next consider the district court's order enjoining enforcement of the Dress Code Ordinance. EMC § 5.132.030 mandates that employees, operators, and owners of "Quick-Service Facilities" comply with the City's dress requirement. The Dress Code Ordinance makes it unlawful to serve customers or operate a Quick-Service Facility if "minimum body areas" of the owner or any employee are not covered. EMC § 5.132.030. "Minimum body areas" are defined as: "breast/pectorals, stomach, back below the shoulder blades, buttocks, top three inches of legs below the buttocks, pubic area and genitals." EMC § 5.132.020(B). The district court enjoined the Dress Code Ordinance for two distinct reasons: (1) the court concluded that the Dress Code Ordinance's susceptibility to arbitrary enforcement renders it unconstitutionally vague; and (2) the district court concluded that the Dress Code Ordinance likely fails First Amendment review because it impermissibly burdens plaintiffs' rights to free expression. We address each rationale in turn.

A. Vagueness

The vagueness principles governing our analysis of the Lewd Conduct Amendments apply with equal force to the Dress Code Ordinance. The fact that law enforcement may have to make some close judgment calls regarding compliance with these provisions does not, perforce, mean that police are vested with impermissibly broad discretion. *See Williams*, 553 U.S. at 306. The terms of the Dress Code Ordinance are sufficiently clear to preclude enforcement on "an ad hoc and subjective basis" because the dress requirement clearly defines areas of the body that owners and employees must cover while operating Quick-Service Facilities, using commonly understood names for those body areas. *Hunt v. City of L.A.*, 638 F.3d 703, 712 (9th Cir. 2011). Enforcement does not require subjective judgments. *Id.* All an officer must determine is whether the upper body (specifically, the breast/pectorals, stomach, back below the shoulder blades) and lower body (the buttocks, top three inches of legs below the buttocks, pubic area and genitals) are covered. The meaning of these parts of the body is not beyond the common experience of an ordinary layperson, and the ordinance does not require that officers assessing potential violations delve into subjective questions. *Cf. id.* (observing that what constitutes a "religious, political, philosophical, or ideological" message is subjective). Because the Dress Code Ordinance is not open to the kind of arbitrary enforcement that triggers due process concerns, the vagueness doctrine does not warrant an injunction prohibiting enforcement of the Dress Code Ordinance.

B. Free Expression

The district court also concluded that plaintiffs demonstrated a likelihood of success on the merits of their First Amendment challenge to the Dress Code Ordinance. This part of the court's order relied on its determination that the baristas' choice to wear provocative attire (pasties and g-strings) constituted sufficiently expressive conduct to warrant First Amendment protection, that the Dress Code Ordinance amounted to a content-neutral restriction on the baristas' speech, and that the Dress Code Ordinance failed intermediate scrutiny under the "secondary effects" line of cases. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986) (applying intermediate scrutiny to ordinances aimed at combating the side-effects of adult and sexually oriented businesses).

"The First Amendment literally forbids the abridgment only of 'speech,'" but the United States Supreme Court has "long recognized that its protection does not end at the spoken or written word." *Texas v. Johnson*, 491 U.S. 397, 404 (1989). The Supreme Court refers to non-speech activity that is within the ambit of the First Amendment's protections as "expressive conduct." *See*, *e.g.*, *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). Conduct that is "sufficiently imbued with elements of communication" is protected by the First Amendment, *Johnson*, 491 U.S. at 404 (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974) (per curiam)), but the Court "has consistently rejected 'the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.'" *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1058 (9th Cir. 2010) (quoting *United States v. O'Brien*, 391 U.S. 367, 376 (1968)).

The Court has never "invalidated the application of a general law simply because the conduct that it reached was being engaged in for expressive purposes and the government could not demonstrate a sufficiently important state interest." *Barnes*, 501 U.S. at 577 (Scalia, J., concurring). "Because the Court has eschewed a rule that 'all conduct is presumptively expressive,' individuals claiming the protection of the First Amendment must carry the burden of demonstrating that their nonverbal conduct meets the applicable standard." *Knox v. Brnovich*, 907 F.3d 1167, 1181 (9th Cir. 2018) (quoting *Clark*, 468 U.S. at 293 n.5).

Expressive conduct is characterized by two requirements: (1) "an intent to convey a particularized message" and (2) a "great" "likelihood . . . that the message would be understood by those who viewed it." *Johnson*, 491 U.S. at 404 (quoting *Spence*, 418 U.S. at 410–11); *see also Vivid Entm't, LLC v. Fielding*, 774 F.3d 566, 579 (9th Cir. 2014). With respect to the first requirement—an intent to convey a particularized message—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. *See*, *e.g.*, *Nat'l Socialist Party of Am. v. Village of Skokie*, 432 U.S. 43 (1977) (per curiam) (declining to enjoin Nazi marchers from wearing symbols of ideology in parade); *Cohen v. California*, 403 U.S. 15, 18 (1971) (concluding that a person wearing a jacket bearing the inscription "F— the Draft" was entitled to First Amendment protections); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505–06 (1969) (holding that students who wore black armbands to protest Vietnam War engaged in expressive conduct "'closely akin to pure speech[.]'").

Even if plaintiffs could show that their intent is to convey a particularized message, and thereby satisfy the first requirement for classification as expressive conduct, *Johnson*, 491 U.S. at 404, plaintiffs' First Amendment claim falters for failure to show a great likelihood that their intended message will be understood by those who receive it. *See id.*

Context is everything when deciding whether others will likely understand an intended message conveyed through expressive conduct. To decide whether the public is likely to understand the baristas' intended messages related to empowerment and confidence, we consider "the surrounding circumstances[.]" *Spence*, 418 U.S. at 411. The Supreme Court made this clear in *Spence*, where a college student displayed a flag with an attached peace symbol from his university dorm room "roughly simultaneous with" the United States' invasion of Cambodia and the Kent State shootings. *Id.* at 410. Under these circumstances, the Supreme Court observed that "it would have been difficult for the great majority of citizens to miss the drift of [the student's] point at the time that he made it." *Id.* Likewise, the choice to wear military medals—even medals one has not earned—"communicates that the wearer was awarded that medal and is entitled to the nation's recognition and gratitude 'for acts of heroism and sacrifice in military service.'" *United States v. Swisher*, 811 F.3d 299, 314 (9th Cir. 2016) (en banc) (quoting *United States v. Alvarez*, 567 U.S. 709, 724 (2012) (Kennedy, J., plurality opinion)). In the same way, a student group's choice to wear black arm bands to school during the 1965 holiday season was protected by the First Amendment because the group's intended anti-Vietnam War message "was closely akin to 'pure speech[.]'" *Tinker*, 393 U.S. at 505.

The context here is starkly different from cases where First Amendment protection has been extended to expressive clothing or symbols. The Dress Code Ordinance applies at Quick-Service Facilities—coffee stands, fast food restaurants, delis, food trucks, coffee shops and drive-throughs. *See* EMC § 5.132.020(C). In other words, it applies at retail establishments that invite commercial transactions, and in these transactions, the baristas undisputedly solicit tips. The baristas' act of wearing pasties and g-strings in close proximity to paying customers creates a high likelihood that the message sent by the baristas' nearly nonexistent outfits vastly diverges from those described in plaintiffs' declarations. The commercial setting and close proximity to the baristas' customers makes the difference.

Because plaintiffs have not demonstrated a "great likelihood" that their intended messages related to empowerment and confidence will be understood by those who view them, we conclude that the mode of dress at issue in this case is not sufficiently communicative to merit First Amendment protection.

We stress that plaintiffs deny that they engage in nude dancing and erotic performances, thereby disavowing the First Amendment protections available for that conduct. *See Barnes*, 501 U.S. at 566. The outcome of this case turns on the plaintiffs' contention that the act of wearing almost no clothing while serving coffee in a retail establishment constitutes speech. Because wearing pasties and g-strings while working at Quick-Service Facilities is not "expressive conduct" within the meaning of the First Amendment, the Dress Code Ordinance does not burden protected expression.

The district court's application of intermediate scrutiny under the "secondary effects" line of authority was inapposite because that doctrine applies to regulations that burden speech within the ambit of the First Amendment's sphere of protection. *See World Wide Video of Wash., Inc. v. City of Spokane*, 368 F.3d 1186, 1192 (9th Cir. 2004). Here, because the Dress Code Ordinance does not burden expressive conduct protected by the First Amendment, the City need only demonstrate that it "promotes a substantial government interest that would be achieved less effectively absent the regulation." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc*., 547 U.S. 47, 67 (2006) (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)). The district court did not analyze the ordinance under this framework, so we vacate its preliminary injunction and remand for further proceedings.

VACATED AND REMANDED.

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SINCE 1828

cleft noun

\ ˈkleft \

Definition of *cleft* (Entry 1 of 2)

1 : a space or opening made by or as if by splitting : FISSURE

2 : a usually V-shaped indented formation : a hollow between ridges or protuberances

// the anal *cleft* of the human body

cleft adjective

Definition of *cleft* (Entry 2 of 2)

: partially split or divided

specifically : divided about halfway to the midrib

// a *cleft* leaf

Synonyms

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Synonyms for *cleft*

Synonyms: Noun

check, chink, crack, cranny, crevice, fissure, rift, split

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Examples of *cleft* in a Sentence

Noun

// The river begins as a trickle of water from a *cleft* in the rock.

// He has a distinctive *cleft* in his chin.

Recent Examples on the Web: Noun

// While visiting an orphanage in Bangladesh in 1991, Cindy came across baby Bridget who suffered from a severe *cleft* palette as well as a congenital heart condition.

— Lauren Hubbard, *Town & Country*, "How John McCain's Children Were Shaped by His Political Career," 27 Aug. 2018

// The site plan, by landscape architect Kristen Reimann, includes natural-*cleft* bluestone patios and a saltwater pool.

— Marni Elyse Katz, *BostonGlobe.com*, "After renting for years on Martha's Vineyard, building a getaway all their own," 15 June 2018

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Noun

14th century, in the meaning defined at sense 1

Adjective

14th century, in the meaning defined above

History and Etymology for *cleft*

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Middle English *clift*, from Old English *geclyft*; akin to Old English *cleofan* to cleave

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cleft noun

English Language Learners Definition of *cleft*

: a narrow space in the surface of something

: a narrow area that looks like a small dent in someone's chin

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---

cleft noun

\ ˈkleft \

Kids Definition of *cleft* (Entry 1 of 2)

1 : a space or opening made by splitting or cracking : CREVICE

2 : NOTCH entry 1 sense 1

cleft adjective

Kids Definition of *cleft* (Entry 2 of 2)

: partly split or divided

---

cleft noun

\ ˈkleft \

Medical Definition of *cleft*

1 : a usually abnormal fissure or opening especially when resulting from failure of parts to fuse during embryonic development

2 : a usually V-shaped indented formation : a hollow between ridges or protuberances

// the anal *cleft* of the human body

3 : the hollow space between the two branches of the frog or the frog and bars or between the bulbs of the heel of a horse's hoof

4 : a crack on the bend of the pastern of a horse

5 : a division of the cleft foot of an animal

6 : SYNAPTIC CLEFT

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United States Court of Appeals for the Ninth Circuit

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San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - A material point of fact or law was overlooked in the decision;
  - A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- The proceeding involves a question of exceptional importance; or
- The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Exhibit 2

No. 17-36038

Before the Honorable Sandra S. Ikuta and Morgan Christen, CJJ, and Jennifer Choe-Groves, J;
Memorandum Disposition filed July 3, 2019

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Jovanna Edge, an individual; et al.,

Plaintiffs – Appellees,

v.

City of Everett, a Washington municipal corporation,

Defendant – Appellant.

On Appeal from the United States District Court
for the Western District of Washington
No. 2:17-cv-01361-MJP (Hon. Marsha J. Pechman)

PLAINTIFFS-APPELLEES' PETITION FOR REHEARING EN BANC

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INTRODUCTION

This matter is appropriate for en banc review under Federal Rule of Appellate Procedure 35(a) because the panel decision conflicts with a decision of the United States Supreme Court, diverges from the published opinions of other United States courts of appeals, and raises an issue of exceptional importance.

The panel relied on the old *Spence-Johnson* test in holding that clothing choices do not qualify as expression under the First Amendment unless there is "an intent to convey a particularized message" and a "great likelihood…that the message would be understood by those who viewed it." Add. 21 (internal quotations omitted). But more recently, the Supreme Court held 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). The Court explained that "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." *Id.* The panel decision does not address or distinguish *Hurley*. Nor does it differentiate this case from this Court's decision in *Anderson v. City of Hermosa Beach*, 621 F.3d 1051 (9th Cir. 2010), which recognized *Hurley*.

The panel decision also conflicts with the authoritative decisions of the Third Circuit and Eleventh Circuit. Those courts recognized that *Hurley* abrogated the *Spence-Johnson* test. *See Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235, 1245 (11th Cir. 2018) ("The Supreme Court rejected [the particularized message] requirement in *Hurley*."); *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 160 (3d Cir. 2002) ("*Hurley* eliminated the 'particularized message' aspect of the *Spence–Johnson* test.").

The conflict with the Supreme Court and other circuits involves a question of exceptional importance. The panel decision held that the First Amendment does not protect mode of dress and expressive style unless they contain a particularized, readily understood message. This paves the way for governments within this circuit to restrict expression of ideas that make people uncomfortable. But if "there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

This Court should grant rehearing en banc.

STATEMENT OF THE CASE

A drive-thru coffee stand sells beverages and food to customers who order from and are served in their car. *See* SER 009. A bikini-barista stand is a drive-thru coffee stand where the baristas are dressed in bikinis. SER 010.

Plaintiffs-Appellees Jovanna Edge, Leah Humphrey, Liberty Ziska, Amelia Powell, Natalie Bjerke, and Matteson Hernandez (the "baristas") work at bikini-barista stands. According to Ms. Bjerke, "bikinis are a big part of the message of empowerment and approachability." SER 002. Wearing a bikini at a barista stand "sends the message that we should be comfortable with our bodies and who we are." SER 003. Ms. Ziska states that she sends a message of freedom by choosing to wear a bikini at work. SER 019–20.

Many of the baristas have tattoos, scars, and other distinguishing features which are visible only when wearing a bikini. ER 0231; 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.

Defendant-Appellant City of Everett enacted two municipal ordinances. One regulates "quick service facilities." ER 1157; Everett Municipal Code ("EMC") § 5.132.030. It requires baristas to completely cover their undergarments and upper and lower bodies, including "breast/pectorals, stomach, back below the shoulder blades, buttocks, top three inches of legs below the buttocks, pubic area and genitals." ER 1160; EMC § 5.132.020(B).

The baristas challenged the City's ordinances under the First Amendment to the United States Constitution and 42 U.S.C. § 1983. They argued that the ordinances unreasonably burdened their freedom of expression in clothing choice and dress. The City argued that "the message received by others" after viewing the baristas' clothing "might send a negative message about the plaintiffs to others." SER 035.

The district court acknowledged that some may find the baristas' dress offensive, but 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." ER 0008. 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 ordinances. ER 0009.

The City appealed the preliminary injunction to this Court. The panel decision reversed and remanded. The panel recognized that the baristas intended to convey messages "relating to empowerment and confidence" but found that "the message sent by the baristas' nearly nonexistent outfits vastly diverges from those described in plaintiffs' declarations." Add. 9–10 at n.1, 23. 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 panel held that "the mode of dress at issue in this case is not sufficiently communicative to merit First Amendment protection." Add. 23.

The baristas now seek en banc review because the panel decision conflicts with the United States Supreme Court's decision in *Hurley* and diverges from this Court's decision in *Anderson*. *See* Fed. R. App. P. 35(a); Circuit Rule 35-1. The panel decision also directly conflicts with authoritative opinions of other courts of appeals on a rule of national application in which there is an overriding need for national uniformity. Finally, the baristas seek en banc review because this case

presents an issue of exceptional importance—the extent to which the First Amendment protects expression of ideas through clothing choices.

ARGUMENT

A. The panel decision—that First Amendment protection requires a particularized message that is likely to be understood by those who view it—conflicts with Supreme Court precedent.

Several decades ago, the Supreme Court formulated a two-part inquiry to determine when expressive conduct is protected under the First Amendment. *Spence v. Washington*, 418 U.S. 405, 410–11 (1974); *Texas v. Johnson*, 491 U.S. 397, 404 (1989). First, whether an "intent to convey a particularized message was present." *Spence*, 418 U.S. at 410–11. Second, whether "in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it." *Id.* at 411. The panel decision's First Amendment analysis relies entirely on that two-part test, known as the *Spence* test or *Spence-Johnson* test.

But more recently, a unanimous Supreme Court held 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). 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.

And in *Anderson v. City of Hermosa Beach*, this Court cited *Hurley* in holding that certain expressive activities have "full constitutional protection without relying on the *Spence* test." 621 F.3d 1051, 1060 (9th Cir. 2010). The *Anderson* court struck down a municipal ban on tattoo parlors even though the work of tattoo artists wasn't understood the same way as the "finely wrought sketches of Leonardo da Vinci." *Id*. at 1061.

Like the *Anderson* court, the district court below recognized that "it is not the Court's responsibility to comment on taste or decorum, but rather to determine whether Plaintiffs' choice of clothing is communicative." ER 0008. The court explained 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." *Id*.

In contrast, the panel decision did not cite *Hurley* or explain why the baristas' expression is not protected under *Anderson*. Instead, the panel fixated on some baristas wearing g-strings and pasties—mentioning that fact six times. The panel concluded that because "wearing pasties and g-strings while working at Quick-Service Facilities is not 'expressive conduct' within the meaning of the First

Amendment, the Dress Code Ordinance does not burden protected expression." Add. 23. But the ordinance and panel decision reach far beyond "pasties and g-strings." The dress code would also prohibit people from wearing less-controversial clothing like scoop-back shirts (which partially expose the back below the shoulder blades) and crop-top sweaters (which partially expose the stomach).

As the district court noted, "in certain scenarios, bikinis can convey the very type of political speech that lies at the core of the First Amendment." ER 0008. The court gave examples: "Plaintiffs might wear bikinis constructed of the bright pink 'pussyhats' worn by protesters during the Women's March or the black armbands worn by students during the Vietnam War, or emblazoned with the logos and colors of their favorite sports teams." ER 0008–09. Or as barista Liberty Ziska explained the political statement she makes with a bikini: "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 020.

The ordinances ban all messages that the baristas express and that could be expressed through a bikini. The panel's endorsement of the ordinances conflicts with *Hurley* and *Anderson*. The Court should rehear this case en banc to conform to

Supreme Court jurisprudence and to secure and maintain uniformity of the Court's decisions. *See* Fed. R. App. P. 35(a)(1).

B. The panel decision directly conflicts with authoritative decisions from the Third Circuit and Eleventh Circuit on this issue.

Other United States courts of appeals have recognized the inherent tension between the Supreme Court's decision in *Spence*, requiring a particularized message, and its later decision in *Hurley*, holding that an articulable message is not required. The Third Circuit and Eleventh Circuit directly addressed this issue and both concluded that the *Spence* test no longer applies.

The Third Circuit found that *Hurley* eliminated the "particularized message" requirement of the *Spence-Johnson* test. *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 160 (3d Cir. 2002). And the Eleventh Circuit reasoned that after *Hurley*, the "great likelihood" prong of *Spence-Johnson* does not apply. *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235, 1240 (11th Cir. 2018) ("We 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*."); *see also Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1245 (11th Cir. 2004).

The Eleventh Circuit articulated a new objective inquiry to determine whether conduct is protected by the First Amendment: "whether the reasonable person

would interpret it as *some* sort of message, not whether an observer would necessarily infer a *specific* message." *Holloman*, 370 F.3d at 1270 (emphasis in original). Applying this inquiry rather than the *Spence-Johnson* test yields different results.

For example, in *Holloman*, a student raised his fist during the Pledge of Allegiance to protest the administration's treatment of his classmate. 370 F.3d at 1260–61. The Eleventh Circuit held the act was protected expressive conduct. *Id.* at 1270. Even if onlookers wouldn't perceive the student's specific message, they would understand a "*generalized* message of disagreement or protest directed toward [a teacher], the school, or the country in general." *Id.* (emphasis added).

In another Eleventh Circuit case, a non-profit organization hosted weekly events at the park, sharing food at no cost with anyone who cared to join. *Fort Lauderdale Food Not Bombs*, 901 F.3d 1235 at 1238. The group was trying to send the message 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 City of Fort Lauderdale disliked these events and enacted an ordinance restricting food sharing in the park to halt them. *See Id.* at 1238–39. The district court upheld the ordinance because there was not a great likelihood that an observer would receive the group's

specific message about redirecting resources from foreign wars to fighting hunger and homelessness. *Id*. at 1241. But the Eleventh Circuit held that the First Amendment protected the group's right to hold the events 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 in original).

Like the student in *Holloman* and organization in *Fort Lauderdale Food Not Bombs*, the baristas' clothing choices conveyed generalized messages of body confidence and female empowerment—the idea that women should be free to control their own dress in the workplace. And not even the City disputes that the baristas conveyed "some sort of a message." Instead the City claims "the message received by others might send a negative message about the [P]laintiffs to others." SER 035. Similarly, the panel decision acknowledges there was a "message sent by the baristas nearly nonexistent outfits," even if it "vastly diverges from those described in plaintiffs' declarations." Add. 9–10 at n.1, 23. Under *Holloman*, the successful communication of "some message" is enough to trigger First Amendment protections.

In a recent concurrence, Justice Thomas suggested a test similar to the Eleventh Circuit's *Holloman* inquiry: "To determine whether conduct is

sufficiently expressive, the Court asks whether it was 'intended to be communicative' and, 'in context, would reasonably be understood by the viewer to be communicative.' But a 'particularized message' is not required…" *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1742 (2018) (citing and quoting *Clark v. Cmty. for Creative Non–Violence,* 468 U.S. 288, 294 (1984); *Hurley*, 515 U.S. at 569). Here, the baristas satisfy Justice Thomas's proposed test. The baristas testified (and the district court found) that they intended to convey a message through their attire. And, in context, viewers would reasonably understand the baristas' efforts to be communicative even if they didn't receive a particularized message.

Other circuits have taken different approaches to reconciling *Hurley* with the requirements of the *Spence–Johnson* test. *See Cressman v. Thompson*, 798 F.3d 938, 955–56 (10th Cir. 2015) (collecting cases); *see also 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). But the panel decision did not acknowledge this circuit split. This Court should grant rehearing en banc so it can weigh the various approaches of its sister circuits and decide the proper path forward. *See* Circuit Rule 35-1.

C. The panel decision has wide-ranging implications for First Amendment rights that go beyond the baristas' clothing choices.

In his *Masterpiece* concurrence, Justice Thomas recalled the purpose of the First Amendment: "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." 138 S. Ct. at 1746 (internal quotations and citations omitted). Put another way, "if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection." *Id.* (citing and quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988)).

Here, the City openly targeted the baristas' opinion that women are empowered to decide how they will dress at work, limited only by their private employers' policies. The very fact that the City took offense at this idea is all the more reason to afford it protection under the First Amendment.

And while this particular ordinance shut down only the baristas' expression, the panel's holding opens the door for governments to dictate how people dress in other workplaces and in public. This decision runs against the tides of history and the Supreme Court's tendency to deepen and broaden First Amendment protections rather than retract and restrict them. *See e.g. Hurley*, 515 U.S. 557; *Masterpiece*, 138 S. Ct. at 1723 ("This is an instructive example, however, of the

proposition that the application of constitutional freedoms in new contexts can deepen our understanding of their meaning.").

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), http://brooklynworks.brooklaw.edu/blr/vol75/iss2/10. 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 Constitutional Challenge to "Saggy" Pants Laws*, 75 Brook. L. Rev. 667, 686–88 (2009), http://brooklynworks.brooklaw.edu/blr/vol75/iss2/10.

Yet under the panel decision, the First Amendment does not prevent governments from imposing arbitrary dress codes in the workplace and beyond, unless the clothing at issue communicates a narrow, articulable message that other people are likely to understand. And the decision may go further. The holding may even allow government to suppress the expression of any idea that is not readily understood. Taking the panel decision to its natural conclusion, city councils may

impose their personal tastes on restaurant décor and even art galleries that do not display entirely clear, readily understandable, messages.

Under Rule 35(a)(2), the Court should order that this appeal be reheard en banc because the proceeding involves a question of exceptional importance. *See also* Circuit Rule 35-1.

CONCLUSION

The panel decision allows cities to ban expression that lacks a particularized, readily understood, message. But the Supreme Court eliminated this requirement decades ago in *Hurley*—as recognized by at least two other United States courts of appeals. And since *Hurley*, the Supreme Court has moved to protect more and more forms of expression, while the panel decision moves the law of this Court in the opposite direction.

The panel decision is not limited to pasties and g-strings at bikini-barista stands. The holding strips an individual's right to expression through clothing choice or personal style. The decision may even extend beyond clothing to jeopardize other forms of expression—anything that lacks a particularized message readily understood by others.

The Court should rehear this appeal en banc to reconcile this Court's jurisprudence with the Supreme Court and other circuits and to reaffirm its commitment to a deep, broad, and robust reading of the First Amendment.

Dated: July 31, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Circuit Rules 35-4 and 40-1 because it contains 3,237 words, exclusive of the exempted portions of the brief. The brief has been prepared in a format, type face, and type style that comply with Fed. R. App. P. 32(a)(4)–(6).

Dated this 31st day of July, 2019.

/s/ Derek A. Newman
Derek A. Newman

Counsel for Plaintiffs-Appellees Jovanna Edge, Leah Humphrey, Liberty Ziska, Amelia Powell, Natalie Bjerke, and Matteson Hernandez

CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: July 31, 2019

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Exhibit 3

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOVANNA EDGE, an individual; et al., Plaintiffs-Appellees, v. CITY OF EVERETT, a Washington municipal corporation, Defendant-Appellant.	No. 17-36038 D.C. No. 2:17-cv-01361-MJP Western District of Washington, Seattle ORDER

Before: IKUTA and CHRISTEN, Circuit Judges, and CHOE-GROVES,* Judge.

Judges Ikuta and Christen have voted to deny the petition for rehearing en banc, and Judge Choe-Groves has so recommended.

The full court has been advised of Plaintiffs-Appellees' petition for rehearing en banc, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED.

* The Honorable Jennifer Choe-Groves, Judge for the United States Court of International Trade, sitting by designation.