No. 21-677

In The
Supreme Court of the United States

DONALD BURNS,

Petitioner,

v.

TOWN OF PALM BEACH,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Eleventh Circuit Court of Appeals properly affirmed the judgment that a midcentury modern beachfront mansion is not expressive conduct entitled to First Amendment protection where, among other factors, the design sought to shield the purportedly expressive elements of the home from any viewer.

RULE 29.6 STATEMENT

Respondent Town of Palm Beach is a Florida municipal corporation. Because it is not a nongovernmental corporation, no disclosure is required under Rule 29.6.

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INTRODUCTION

Because "[i]t is possible to find some kernel of expression in almost every activity a person undertakes," *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989), this Court has 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." *United States v. O'Brien*, 391 U.S. 367, 376 (1968). First Amendment protections extend only to conduct that is "inherently expressive" in the constitutional sense. *Rumsfeld v. Forum for Acad. & Inst'l Rights, Inc.*, 547 U.S. 47, 65–66 (2006). *See also Spence v. Washington*, 418 U.S. 405, 409–10 (1974) ("It is therefore necessary to determine whether his activity was sufficiently imbued with elements of communication. . . .").

The Eleventh Circuit correctly applied well-settled precedent to hold that the midcentury modern style oceanfront mansion that Petitioner planned to construct and shield from his neighbors' view—on all four sides—is not expressive conduct entitled to First Amendment protection. Petitioner failed to satisfy the two-part test for expressive conduct set forth by this Court in *Texas v. Johnson*, 491 U.S. 397 (1989)—the test he concedes governs. The Eleventh Circuit's independent review of the record revealed that Petitioner failed to satisfy the second *Johnson* element where no one could see the home through the dense vegetation that surrounded it and, even if they could, there was no great likelihood that any reasonable viewer would understand it to be conveying some sort of message.

Regardless of whether Petitioner intended, as he explains, to communicate an evolved philosophy of simplicity in lifestyle and living through the home's modern design, a reasonable observer would view the nearly 20,000-square-foot mansion as "nothing more than another big beachfront home." App. 53.

Petitioner's ongoing effort to invoke fundamental constitutional rights in an otherwise straightforward zoning case involving the municipal denial of a new, oversized house on an undersized lot in accordance with stated architectural review criteria fails to present any grounds for review by this Court. This Court has never reviewed zoning criteria with the higher level of scrutiny given fundamental rights protected by the First Amendment. Instead, it has traditionally only applied a rational basis test to regulation of architecture and zoning. *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 129 (1978) (upholding landmarks ordinance and recognizing "cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city"); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 2, 8 (1974) (rejecting challenge to municipal ordinance, in part on First Amendment grounds, which "restricted land use to one-family-dwellings" where the ordinance "involves no 'fundamental' right guaranteed by the Constitution"); *Berman v. Parker*, 348 U.S. 26, 32 (1954) (declining review of aesthetic-based police power actions which are "the product of legislative determinations addressed to the purposes of government"); *Village of Euclid v. Ambler*

Realty Co., 272 U.S. 365, 391 (1926) (holding regulations dealing with building height, area, and use are judged by "rational" basis test).

Petitioner's arguments in support of certiorari review are unpersuasive. Whether a municipality properly concluded that Petitioner's proposed beachfront mansion violated its architectural review ordinance does not present an important question of federal law that this Court should settle. The Eleventh Circuit expressly *declined* to weigh in on the broader constitutional question of whether residential architecture can ever be protected by the First Amendment. It assumed *Johnson* applied and independently examined the summary judgment record before concluding that no contextual clue favored Petitioner's First Amendment claim. Petitioner cannot show a conflict among lower courts where no other federal appellate court has even considered whether elements of a residential home qualify as speech under the First Amendment. Further, the Eleventh Circuit correctly concluded that Petitioner's proposed mansion did not constitute expressive conduct protected by the First Amendment. Petitioner's disagreement with the majority's factual findings does not warrant the Court's review. Finally, certiorari review could not affect the outcome of this case because the Eleventh Circuit applied the standard most favorable to Petitioner, and neither Petitioner nor the amici curiae have alleged any plausible basis for certiorari review that could lead to a different result.

For all of these reasons, the petition for certiorari should be denied.

STATEMENT OF THE CASE

A. Factual Background

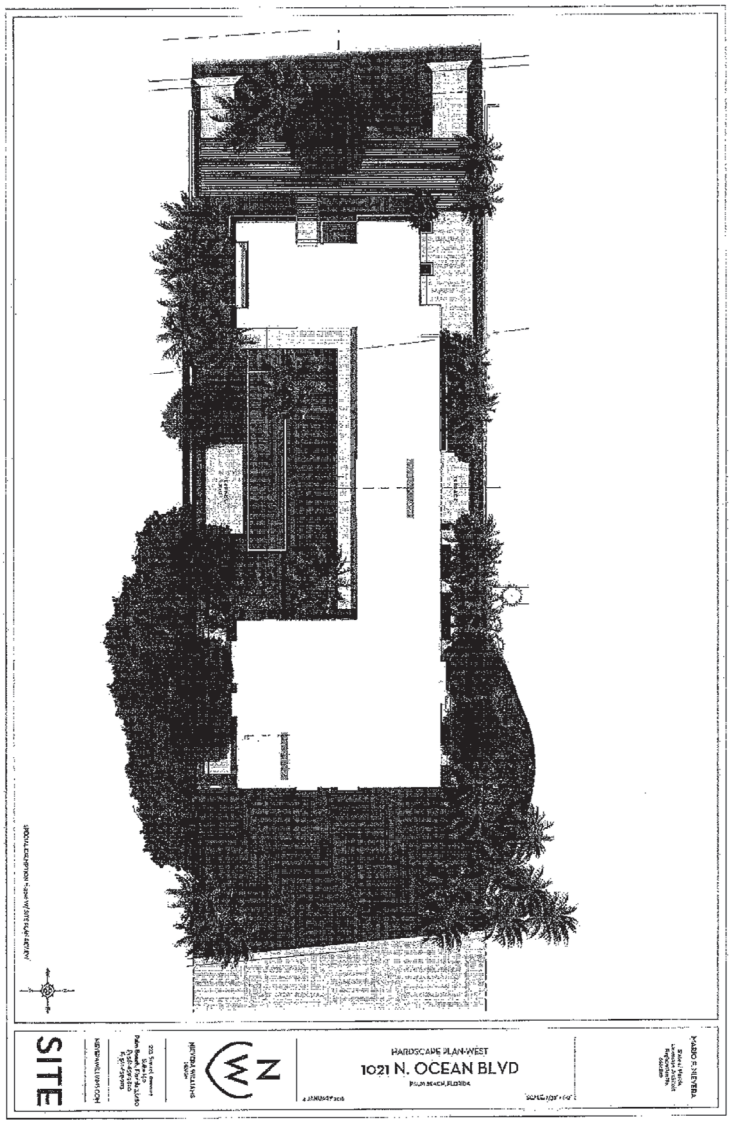
In 2014, Donald Burns applied to the Town to demolish his 10,063-square-foot "traditional" style ocean-front estate (which he has since sold) and replace it with a new structure nearly twice its size in the midcentury modern style. App. 8–9; Pet. at 5 n.1. The modern design he initially proposed comprised two stories and 25,198 square feet, with a five-car garage, elevator, wine storage area, exercise room, and steam room. App. 9. Burns swore to the district court that he wanted to utilize the midcentury modern style to convey the evolution of his personal philosophy of simplicity in lifestyle and living with an emphasis on fewer personal possessions, as well as a message that he was unique and different from his neighbors. App. 9, 199.

Burns had to apply for and obtain approval from the Town's architectural review commission to construct the new structure. App. 2, 5. The midcentury modern style proposed by Burns is one of the Town's ten predominant styles, according to the commission's own guidelines. App. 51. The seven-member commission contains at least two registered architects and one landscape architect or "master gardener." App. 4–5. All commission members must be "specially qualified" by "training or experience in art, architecture,

community planning, land development, real estate, landscape architecture, or other relevant business or profession, or by reason of civic interest and sound judgment to judge the effects of a proposed building." App. 4. The commission reviews construction applications based on ten definitive criteria set forth in section 18-205(a) of the Town's code. App. 5–6. If the standards in section 18-205(a) are met, the commission "shall" approve the application. App. 5.

The Town's architectural review commission met on three occasions to consider Burns's application, along with testimony and evidence presented by him, in light of the criteria set forth in the ordinance. App. 200–02. In fact, Burns relied on three architectural experts and his landscape architect to detail how his proposed mansion arguably met the architectural review criteria. App. 9, 25, 200–02. Burns's landscape architect testified that Burns's "most important design criteri[on]" was "to screen th[e] house properly, and more than adequate." App. 9. He proposed a fourteen-to-sixteen-foot-tall hedge, coconut palms at least thirty-two feet tall, and trees at least eighteen feet tall to "block views from the neighbors to the north," with similar landscaping on the south side. App. 10, 38. Revised designs added a limestone wall with a gate between the front of the house and the street. App. 11–12. "Substantial vegetation" also created a "visual barrier" between the new house and the beach. App. 42. Indeed, Burns's expert swore that the house "is surrounded *on all four sides* by a dense perimeter of trees, shrubbery, and other plantings" "to protect the neighbors from unwelcome and unavoidable intrusions." App. 42

(emphasis added). *See also* App. 273–76 (showing the landscaping that would surround the house). A picture of his design proposal is below.



App. 267.

Although Burns ultimately reduced the overall square footage of the proposed residence to 19,594 square feet, it was still nearly twice the size of his former residence. The commission determined that Burns's proposed mansion was excessively dissimilar from nearby structures with respect to the section 18-205(a) criteria, including architectural compatibility, arrangement of the components of the structure, and appearance of mass. App. 13. The commission members voted 5-2 to deny the application. *Id.*

B. Proceedings Below

Rather than appeal the commission's decision to the Town council and then to the state circuit court, as the Town's code contemplates, Burns filed suit in federal district court under 42 U.S.C. § 1983. App. 14. The two-count complaint asserted claims under the Fourteenth and First Amendments. App. 14. By the First Amendment challenge, Burns claimed the Town's ordinances violated his right to expression through the modern design of his new residence. App. 14. Burns challenged the ordinances on their face and as applied to him. App. 14.

The Town moved to dismiss and for summary judgment, based on an evidentiary record including Burns's applications and the proceedings before the Town commission and council. App. 14. Burns opposed the motion on the merits, introducing transcripts and expert reports from the municipal proceedings, declarations in opposition (including his own), and a

statement of material facts. App. 14–15. Discovery continued while the summary judgment motion was pending, and Burns supplemented his responses and filed new exhibits during that time. App. 29. The district court referred the motion to the magistrate judge. App. 15. The magistrate judge issued a lengthy report and recommendation in favor of the Town, which the district court adopted over Burns's objections. App. 186, 187–278.

The district court agreed with the magistrate judge that residential architecture is appropriately analogized to potentially-expressive merchandise or other utilitarian objects "because the structure has both a communicative component (the architecture) and a meaningful non-communicative functional purpose (a residence)." App. 167, 224. The district court reasoned that "a more limited approach is warranted because there is less risk of abridging core First Amendment principles, and more risk of prohibiting government regulation of objects that are not primarily expressive." App. 167, 225. It thus modified the two-part expressive conduct test outlined by this Court in *Johnson* to include a "dominant purpose" element outlined by the Second Circuit with respect to potentially-expressive merchandise in *Mastrovincenzo v. City of New York*, 435 F.3d 78, 82 (2d Cir. 2006), and considered:

> (1) Is the owner of the structure subjectively intending to communicate a message? [*Johnson* test]

> (2) Is the predominant purpose of the structure to communicate a message? [*Mastrovincenzo* test]
>
> (3) Is there a great likelihood that a reasonable person observing the structure in the context of the surrounding circumstances would understand it to be predominantly communicating some message, albeit not necessarily the particularized message intended by the owner? [*Johnson* test]

App. 167, 227. Concluding that the second and third elements were not met where the predominant purpose of the structure was non-expressive based on its use, location and design, the district court found for the Town on the First Amendment claim. App. 168–77.

On appeal, Burns argued that the district court erred by not limiting itself to the two-part expressive conduct test outlined by this Court in *Johnson* and that, applying *Johnson*, his proposed mansion was expressive conduct entitled to First Amendment protection. App. 31. The Town urged the district court to apply the three-part predominant purpose test adopted from *Mastrovincenzo* applied. App. 31.

A majority of the Eleventh Circuit panel affirmed the district court's grant of summary judgment to the Town. The majority expressly *declined* to decide "whether residential architecture can ever be expressive conduct protected by the First Amendment and, if so, what is the proper First Amendment test." App. 31. The majority also *declined* to apply the three-part predominant purpose test adopted by the district court

from *Mastrovincenzo*/*Johnson*. As Burns concedes, Pet. at 11, the majority instead assumed the "easier-to-meet *Johnson*" test endorsed by him applied. App. 31 ("We assume that *Johnson* controls and apply it here to Burns's new mansion.").

The *Johnson* test asks: (1) "whether an intent to convey a particularized message was present," and (2) whether "the likelihood was great that the message would be understood by those who viewed it." *Johnson*, 491 U.S. at 404 (quoting *Spence*, 418 U.S. at 410–11) (cleaned up). The majority held that Burns satisfied the first element where he indisputably intended to convey a message through his home design, but failed to satisfy the second. App. 33–34.

As to the second *Johnson* element, the majority concluded that (1) a reasonable viewer could not see Burns's new mansion and (2) even if a viewer could see it, "there still would be no great likelihood that they would understand that it conveyed some sort of message." App. 49. The majority observed that this Court and the Eleventh Circuit "have focused on the perspective of those who 'view' the expressive conduct" in determining whether the second element is satisfied. App. 35 (quoting *Johnson*, 491 U.S. at 404). Finding that "[f]rom day one Burns wanted to conceal from his neighbors what he now says is his message" and noting that his own expert swore that the house would be surrounded by dense vegetation "on all four sides," App. 42, the majority distinguished cases in which the expressive conduct was or could be viewed. App. 37–38 (collecting cases). The majority concluded that "a

reasonable viewer would not infer some sort of message from Burns's new mansion because, quite simply, a viewer can't see it." App. 34–35. *See also* App. 49 (citing *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 568 (1995)) ("Burns's architectural design does not speak so long as his trees prevent viewers from seeing it.").

The majority also asked whether, even if viewers could see the house, "the reasonable person would interpret [the conduct] as *some* sort of message, not whether an observer would necessarily infer a *specific* message." App. 34 (quoting *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1270 (11th Cir. 2004)) (cleaned up). Emphasizing the importance of context, the majority considered factors the Eleventh Circuit had previously assembled in *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235, 1239 (11th Cir. 2018), as "contextual guidelines" to determine whether Burns met the second prong of *Johnson*. App. 55–56. It also considered, and rejected, two additional factors put forward by the dissent. App. 57–59. The majority ultimately found it unnecessary to "weigh any competing contextual clues" "[b]ecause *none* of the [*Fort Lauderdale*] factors favor finding a great likelihood that a reasonable observer would receive some sort of message from a hidden beachfront mansion." App. 55 (emphasis added).

Judge Marcus dissented, finding that Burns's modern style mansion is expressive conduct protected under the First Amendment. App. 121. The dissent

acknowledged that "the majority properly select[ed] the *Spence/Johnson* framework" and that "[c]ontext is the touchstone of the expressive conduct test." App. 97, 111. The dissent took issue with the majority's "*application* of [the *Spence/Johnson*] test" to the modern style mansion Burns proposed to construct. App. 97 (emphasis added). *See also* App. 115 ("Ultimately, the majority embraces the letter of the expressive conduct test, but not its spirit."). On its reading of the record, the dissent concluded that Burns's proposed home would be visible to the community and that even if it were not, it was proper to assume that it would be visible to a guest. App. 109–10. Citing to examples it deemed "matters of historical fact," as well as various journals and articles, the dissent next determined a reasonable viewer would understand the modern home design to convey some sort of message. App. 91, 116–21. Finding the proposed new mansion to be expressive conduct protected under the First Amendment, the dissent concluded that the Town's architectural review criteria are content-based and do not survive strict scrutiny. App. 121–33.

Burns filed a petition for rehearing en banc, which the court of appeals denied without recorded dissent. App. 279. Burns did not assert a conflict with any decision of this Court or another circuit court of appeal. *Burns v. Town of Palm Beach*, No. 18-14515-A (11th Cir. June 29, 2021) (petition for rehearing en banc). Nor did he claim the majority opinion created any intra-circuit split. *Id.* Burns merely cited to the split panel decision and dissent. *Id.*

REASONS FOR DENYING CERTIORARI

I. Whether Burns's Proposed Mansion Is Protected Expressive Conduct Is Not an Important Question of Federal Law That This Court Must Settle.

Contrary to Burns's conclusory assertion, Pet. at 13, the Eleventh Circuit did not decide a broad constitutional issue of national importance that this Court has not settled, but should. Sup. Ct. R. 10(c). The Eleventh Circuit expressly *declined* to determine the correct rule or standard to evaluate whether a specific example of residential architecture constitutes expressive conduct. App. 31. ("Because we conclude that, even under the easier-to-meet *Johnson* test, Burns's new mansion was not expressive conduct protected by the First Amendment, we do not decide . . . whether residential architecture can ever be expressive conduct and, if so, what is the proper First Amendment test. We assume that *Johnson* controls and apply it here . . . ."). This case presents no questions significant to the nation at large. Instead, the case has always turned on the fact-bound particulars of the application of the Town's detailed architectural review ordinance to the design of an oceanfront mansion that Burns proposed to construct on property he no longer owns. The petition identifies no pure legal question likely to have any broader importance beyond this case-specific dispute.

Even if the Court did find a general question of the applicability of the First Amendment to residential architecture, this case is far from a perfect vehicle for deciding that question. The summary judgment record

reflects Burns's deliberate efforts to physically block the public's view of his proposed home design. "While this Court decides questions of public importance, it decides them in the context of meaningful litigation. . . . Resolution here . . . can await a day when the issue is posed less abstractly." *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959).

Further, claims that a residential structure is "sufficiently imbued with elements of communication" to require the protection of the First Amendment rarely arise. *Spence*, 418 U.S. at 409. The dissent correctly observed that the Eleventh Circuit is "one of the first courts to address the issue of First Amendment protection to residential architecture." App. 133. Indeed, prior to this case, only one other district court had squarely addressed it, and that court determined that no protection applied. *See Comm. for Reasonable Reg. of Lake Tahoe v. Tahoe Reg'l Planning Agency*, 311 F. Supp. 2d 972, 975, 980–81, 1004 (D. Nev. 2004) (declining to find "the color, design, setback, visibility and other aspects of residential housing" regulated by scenic review ordinance to be expressive or communicative under the First Amendment).

Burns has failed to show that the outcome of this case turned on the resolution of an issue of national importance. Regardless, it is clear that this case is an improper vehicle for resolution of issues beyond individualized questions.

II. The Eleventh Circuit's Decision That Burns's Proposed Mansion Is Not Protected by the First Amendment Does Not Conflict With Relevant Decisions of This Court.

A. Burns Concedes the Eleventh Circuit Used the Proper Expressive Conduct Test, as Set Forth by This Court in *Johnson*.

Burns concedes that "[t]he Eleventh Circuit majority applied the correct *Johnson* test." Pet. at 20. The majority assumed the *Johnson* test advocated by Burns applied—without considering the *Mastrovincenzo* "dominant purpose" element—and still concluded that Burns's proposed mansion was not expressive conduct protected by the First Amendment. As this Court has instructed, the Eleventh Circuit "ma[d]e an independent examination of the whole record" to determine the constitutional claim. *ACLU of Fla., Inc. v. Miami-Dade Cty. Sch. Bd.*, 557 F.3d 1177, 1205 (11th Cir. 2009) (quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 508 n.27 (1984)) (internal quotation marks omitted); App. 20. The inquiry should end there.

Burns asserts that the Eleventh Circuit majority opinion conflicts with this Court's First Amendment jurisprudence in three ways, none of which gains traction. Pet. at 13–28.

First, Burns loosely argues that the Eleventh Circuit majority failed to apply this Court's authorities and "principles." Pet. at 14–20. He initially asserts that the Eleventh Circuit "failed to apply this Court's

precedent explaining the interplay between art and First Amendment protections." Pet. at 15. Yet this case does not involve a pure work of art, but a functional home that Burns claims would *also* serve an expressive purpose. Burns cites to "[c]ommentators" and secondary sources such as law review articles and treatises for the proposition that architecture is an expressive form of art, while simultaneously recognizing that this "does not mean all buildings are art—just that some architectural construction can be artistic and may be protected by the First Amendment." Pet. at 17–18. Burns does not cite any specific precedent the majority failed to follow and concedes that the court correctly applied the *Johnson* expressive conduct test to determine whether his residential architecture was expressive. Pet. at 15.

Attempting to elevate his dispute over the commission's denial of his proposed construction, Burns cites cases from this Court involving the right to privacy or political speech that add nothing to the expressive conduct analysis. Pet. at 19. For instance, *City of Ladue v. Gilleo* did not remotely suggest that the architectural style of a residence is entitled to First Amendment protection. 512 U.S. 43 (1994). Ladue put a sign in the upstairs window of her home to protest the Persian Gulf War, intending others to see the sign, and was charged with violating a municipal ordinance banning almost all residential signs. *Id.* at 45, 58. As this Court observed, "[m]ost Americans would be understandably dismayed . . . to learn that it was illegal to display from their window a[] sign ***expressing their political views***." *Id.* at 58 (emphasis added). In

Stanley v. Georgia, this Court held that the First Amendment prohibited the state from prosecuting the defendant for possessing obscene films in his home. 394 U.S. 557, 558–59 (1969). None of the cited cases involved expressive conduct.

Second, Burns asserts that the majority misconstrued or misapplied the second *Johnson* factor. Pet. at 20–21. Misapplication of correctly stated precedent is not a basis for this Court's review on this record. Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."). In addition, the Eleventh Circuit did not "radically depart[] from" the second *Johnson* factor by independently analyzing the summary judgment record before it and concluding that the midcentury modern mansion Burns proposed to build was not entitled to First Amendment protection. Pet. at 21.

Indeed, it is difficult to discern how Burns claims the majority failed to follow this Court's precedent. Burns asserts that a "narrow, succinctly articulable message is not a condition of constitutional protection" under *Hurley*. Pet. at 21. The Eleventh Circuit majority agreed with him, following its prior holdings that interpreted *Hurley* as eliminating any "particularized message" requirement in the *Spence/Johnson* test. App. 34. *See also 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. . . .”). The majority thus applied the most liberal interpretation of the second *Johnson* element, asking whether a reasonable person would understand Burns’s proposed mansion to convey “*some* sort of message.” App. 34. (quoting *Holloman*, 370 F.3d at 1270). Granting certiorari in this case would not clarify the scope of and requirements for satisfying the second *Johnson* factors.

Third, Burns argues that the Eleventh Circuit majority somehow “improperly heightened the requirements for demonstrating entitlement to First Amendment protection under *Johnson*” by considering certain contextual guidelines the court had previously outlined in *Fort Lauderdale*. Pet. at 24. In *Fort Lauderdale*, the Eleventh Circuit examined five contextual factors to determine whether “surrounding circumstances would lead a reasonable observer to view the conduct at issue (meal-sharing in a public park) as conveying some sort of message” under the second element of the *Johnson* test. 901 F.3d at 1242–43. The factors were: (1) whether the sharing of food with the public was accompanied by acts that distinguished it from relatives or friends simply eating together in the park (like setting up tables and banners and distributing literature); (2) whether the expressive conduct was open to everyone; (3) the location of the expressive conduct, including whether it occurred in a traditional public forum; (4) whether the conduct addressed an issue of community concern; and (5) whether the conduct has historically been understood to convey a message. *Id.* Burns asserts that the court was wrong to consider these factors in his case merely because they were

outlined in a case involving food-sharing in a public park. Pet. at 25–26. As the majority observed, however, "[t]he *Fort Lauderdale* court didn't make up the expressive conduct factors. It got them from Supreme Court expressive conduct cases having nothing to do with sharing meals." App. 55. *See also* App. 55–56 (tracing *Fort Lauderdale* factors to this Court's precedent); *Fort Lauderdale*, 910 F.3d at 1242–43 (citing *Hurley*, 901 F.3d at 1242; *Spence*, 418 U.S. at 409–10; *Johnson*, 491 U.S. at 406; and *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 50 (1969)). "There's no reason . . . why the same factors cannot be used to evaluate the expressiveness of residential architecture." App. 56.

Consideration of the *Fort Lauderdale* factors also does not conflict with *Johnson* or any other precedent of this Court. As Burns concedes, the majority's consideration of context is especially appropriate in this First Amendment case. Pet. at 24 (citing *Johnson*, 491 U.S. at 405; *Spence*, 418 U.S. at 410) ("[I]n the First Amendment space . . . context is so important."). The majority did not consider the *Fort Lauderdale* factors to be *exclusive* of any other contextual clues. App. 56 ("We do not hold and have not said, as the dissenting opinion implies we have, that the *Fort Lauderdale* factors are 'exclusive.' "). It recognized that some circumstances may make it appropriate to consider *additional* factors to determine whether conduct is expressive and considered two proffered by the dissent, ultimately finding them unsupported by the summary judgment record. App. 57–58. Nor did the majority construe the *Fort*

Lauderdale factors as a "test" that would deny First Amendment protection if any one were not met, as Burns mistakenly contends. Pet. at 26. *See* App. 55 ("[W]e've never said that every contextual factor has to weigh in favor of the conduct being expressive. The *Fort Lauderdale* factors are contextual guidelines that we weigh together . . . ."). Ultimately, it was not even a close call—the majority found that not a single one of the "contextual guidelines" from *Fort Lauderdale* favored Burns. App. 55.

By simply weighing contextual factors identified in prior precedent from this Court and the Eleventh Circuit, the majority did not create a "new test" supplanting any part of *Johnson*. The majority's application of prior Eleventh Circuit precedent likewise does not evidence any circuit split, as explained in Section III below.

B. The Eleventh Circuit Did Not Deviate From This Court's Precedent With Respect to the Appropriate Level of Scrutiny.

The Eleventh Circuit's Opinion does not conflict with any prior decision of this Court regarding the applicable level of scrutiny because the majority never decided what level of scrutiny would apply to protected residential architecture. The majority applied the *Johnson* expressive conduct test and concluded that the application of the Town's architectural review ordinance to Burn's proposed mansion did not warrant First Amendment protection. It thus had no need to decide what level of review to afford that ordinance,

whether strict scrutiny or otherwise. *See* App. 61 ("Because we've concluded that, even under the *Johnson* test, Burns's proposed new mansion is not expressive conduct protected under the First Amendment free speech clause, we don't need to decide: whether the commission's criteria are content-based or content-neutral; *the level of scrutiny to be applied*; and whether the town has given a sufficient justification for its ordinance. Generally we don't answer constitutional questions that don't need to be answered.") (emphasis added) (quoting *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988)).

There is no need for this Court to weigh in on the issue. Any ruling from this Court on the correct level of scrutiny for potential future cases concerning residential architecture protected by the First Amendment would not affect the outcome of this case. *See Monrosa*, 359 U.S. at 184 ("While this Court decides questions of public importance, it decides them in the context of meaningful litigation."). *See also Texas v. Hopwood*, 518 U.S. 1033, 116 S. Ct. 2581, 2582 (1996) (Ginsburg, J., opinion respecting denial of petition for writ of certiorari) (quoting *Chevron U.S.A., Inc. v. Nat. Res. Defense Council, Inc.*, 467 U.S. 837, 842 (1984)) ("[T]his Court . . . reviews judgments, not opinions.") (internal quotation marks omitted).

III. This Case Does Not Create Any Circuit Split.

The holding that Burns's proposed modern style mansion is not expressive conduct entitled to First

Amendment protection accords with *Johnson* and *Hurley*, as well as decisions of other courts of appeals. Ultimately, the Petition does not identify a single circuit court decision applying *Johnson* to residential architecture. That is because there is none. There can be and is no circuit split.

Burns asserts that "this case presents an ideal vehicle for the Court to clarify *Johnson*," citing what he describes as a conflict among the circuit courts "regarding how *Johnson* was impacted by this Court's later decision in *Hurley*." Pet. at 27. Burns principally cites to nuances among the circuits concerning how this Court's decision in *Hurley*—that "a narrow, succinctly articulable message is not a condition of constitutional protection"—modifies the "particularized message" requirement articulated in *Spence* and *Johnson*. Pet. at 27–28. While several circuits have taken "differing approaches" to applying the expressive conduct test after *Hurley*, "at a minimum they require that the display be of such a character that a viewer could draw an identifiable inference from it." *Cressman v. Thompson*, 798 F.3d 938, 957 (10th Cir. 2015) (citing *Kaahumanu v. Hawaii*, 682 F.3d 789, 799 (9th Cir. 2012); *Holloman*, 370 F.3d at 1270; *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 162 (3d Cir. 2002)). The Eleventh Circuit did not require Burns to make a greater showing. App. 33–35.

The majority concluded that Burns could not prevail even under the reading of the second *Johnson* element most consistent with *Hurley* and most favorable to Burns, which "ask[s] whether the reasonable person would interpret [the conduct] as *some* sort of message,

not whether an observer would necessarily infer a *specific* message." App. 34 (quoting *Holloman*, 370 F.3d at 1270) (cleaned up). The Eleventh Circuit's Opinion does not conflict with its prior holding in *Holloman*, as Petitioner contends (Pet. at 27), but directly follows it *in Burns's favor*. No grounds exist for him to seek certiorari review on this issue.

Further, this Court has recently declined to review the extent to which *Hurley* modified the second *Johnson* element. *See* Brief for Petitioner at 18, *Edge v. City of Everett*, No. 19-976, 2020 WL 584342, at *18, *petition for cert. denied*, 140 S. Ct. 1297 (2020) (unsuccessfully alleging that "[t]he Court should resolve the long-standing conflict about *Hurley's* impact on the *Spence* test and set a national standard for when expressive conduct is protected under the First Amendment"); Brief for Petitioner at 24, *Cressman v. Thompson*, No. 15-709, 2015 WL 7732627, at *24, *petition for cert. denied*, 577 U.S. 1216 (2016) (unsuccessfully arguing that "[h]aving failed to reach anything close to a consensus on whether and how *Hurley* affects the *Spence-Johnson* framework—after trying for two decades—the circuits stand in need of guidance from this Court on the constitutional way to analyze symbolic speech"). No grounds exist to intervene on the issue here.

IV. The Decision Below Is Correct Because Burns's First Amendment Rights Were Not Violated.

The decision below is correct. The court of appeals applied settled precedent to the individualized facts

before it to hold that Burns's proposed mansion did not constitute expressive conduct. Specifically, the Eleventh Circuit correctly applied the second element of the *Johnson* test to determine the proposed mansion could not be seen from outside the property and, even if it could be seen, there was no great likelihood that a reasonable viewer would understand it to convey some message. App. 38–39, 49.

The Eleventh Circuit also correctly rejected the argument that the mansion should have been deemed expressive conduct because guests may have seen it. App. 45–46. Burns asserts that "the Eleventh Circuit majority made a categorical error in assuming that the relevant people viewing Burns's home must be those passing by his home," as opposed to "guests, staff, or other visitors." Pet. at 21–22. The Eleventh Circuit, however, made no such assumption. Unlike the dissent, the majority *refused to assume* that Burns planned to show his home to guests where the record did not support that assumption. App. 45–46 ("The dissenting opinion finds it 'hard to imagine that Burns intended to rebuild his home and never invite a single soul to see it,' but the dissenting opinion's imagination is not evidence and does not create a genuine issue of material fact for summary judgment purposes.") (internal citations omitted). The Eleventh Circuit properly declined to consider facts not in the record below.

Further, Burns's assertion that his home need only be visible "to some viewers" to garner the protection of the First Amendment is wrong. There must be

a great likelihood that the intent to convey a message is understood by "third parties or casual observers," not just Burns and his personal acquaintances. *Hurley*, 515 U.S. at 558 (explaining that to warrant First Amendment protection, non-verbal conduct must have an "inherent expressiveness . . . to make a point," "not just to each other but to bystanders along the way"). The conduct or object must be "sufficiently imbued with elements of communication," *Spence*, 418 U.S. at 409–10, such that the "average person" understands the conduct is expressive. *See*, *e.g.*, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1743 (2018) (Thomas, J., concurring) ("If an average person walked into a room and saw a white, multitiered cake, he would immediately know that he had stumbled upon a wedding.").

To the extent Burns now disputes the finding that he failed to establish the potential of guests viewing the mansion, that is not an appropriate basis for certiorari review. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings. . . ."). As this Court has stated, "[t]he jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals . . . was not conferred upon this [C]ourt merely to give the defeated party in the Circuit Court of Appeals another hearing." *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923).

V. This Court's Review Could Not Possibly Affect the Outcome of the Case.

Where the Eleventh Circuit majority found that Burns's proposed mansion was not expressive conduct under the more lenient expressive conduct test for which Burns himself advocates, App. 31, this Court's review could not affect the outcome. Granting certiorari review to "clarify[] the scope of and requirements for satisfying the second *Johnson* factor," as Petitioner urges, Pet. at 24, could only result in an endorsement of the same or a stricter version of the *Johnson* test as informed by *Hurley*. In other words, all possible applications of certiorari review lead to the same outcome—a finding that Burns's proposed mansion is not expressive conduct protected by the First Amendment. These circumstances make this case an inappropriate vehicle for certiorari review of constitutional questions. *See Piccirillo v. New York*, 400 U.S. 548, 549 (1971) ("[O]ur determination upon the fundamental constitutional question underlying this case would be in no sense necessary to its resolution in this instance. . . . In this posture of affairs, we conclude that the writ of certiorari should be dismissed as improvidently granted.").

VI. The Amici Do Not Present Additional Points That Warrant Certiorari Review.

Two different groups have submitted amicus curiae briefs in this matter. An amicus curiae brief can be helpful when it "brings to the attention of the Court relevant matter not already brought to its attention by the parties," but otherwise such a brief "burdens the Court." Sup. Ct. R. 37.1. By presenting only issues

covered by the Petition and new issues that were not raised or decided below, neither of the submitted briefs achieve the Court's stated purpose.

In addition to replicating some of Petitioner's arguments, amici the Goldwater Institute and the Cato Institute dedicate an entire section to discussing the constitutional requirements for prior restraints. Brief of Goldwater and Cato Insts. as Amici Curiae at 25. This issue was not raised or argued to the district court. It is a well-established general rule "that a federal appellate court does not consider an issue not passed on below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). This Court should decline to review the arguments that have been raised for the first time in the briefs of amici curiae.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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