No. _____

In The
Supreme Court of the United States

DONALD BURNS,

Petitioner,

v.

TOWN OF PALM BEACH,
a Florida municipal corporation,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case is about the extent to which the First Amendment applies to residential architecture. Donald Burns wanted to replace his Palm Beach home with a new home in the International Style – which conveys minimalism, individuality, and the pursuit of fulfillment in harmony with nature – to reflect his persona as someone not tied to tradition. His final design met all objective zoning requirements. But Palm Beach's Architectural Review Commission rejected it based solely on aesthetics. Burns challenged this decision on First Amendment grounds. The district court, however, rejected the claim and the majority opinion of the Eleventh Circuit affirmed over a strenuous dissent. Though this Court has analyzed the First Amendment's reach in a variety of contexts, it has not yet done so with respect to residential architecture. So Burns now asks the Court to consider this issue:

> Did the Town of Palm Beach violate Burns's First Amendment rights by denying his proposed home design based solely on aesthetics when the design met all objective zoning criteria?

PARTIES TO THE PROCEEDING AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner Donald Burns is an individual and citizen of Florida, and was the plaintiff in the district court proceedings and appellant in the Eleventh Circuit proceedings.

Respondent Town of Palm Beach, a Florida municipal corporation, was the defendant in the district court proceedings and appellee in the Eleventh Circuit proceedings.

Because no Petitioner is a nongovernmental corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

RELATED CASES

Donald Burns v. Town of Palm Beach, a Florida municipal corporation, No. 17-cv-81152, U.S. District Court for the Southern District of Florida. Judgment entered September 28, 2018.

Donald Burns v. Town of Palm Beach, a Florida municipal corporation, No. 18-14515, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered June 8, 2021.

Donald Burns v. Town of Palm Beach, a Florida municipal corporation, No. 18-14515, U.S. Court of Appeals for the Eleventh Circuit. Denial of petition for rehearing entered August 5, 2021.

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INTRODUCTION

"[T]he application of constitutional freedoms in new contexts can deepen our understanding of their meaning." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1723 (2018). And the First Amendment protects a wide range of activities, including "such acts as saluting a flag (and refusing to do so), wearing an armband to protest a war, displaying a red flag, and even '[m]arching, walking or parading' in uniforms displaying the swastika." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995).

The First Amendment's application to residential architectural design—especially with regard to one's own home—warrants consideration by this Court. It is all the more important where, as here, the homeowner undisputedly was trying to express himself. Burns contends that Palm Beach's Architectural Review Commission ("ARCOM") violated his First Amendment rights by rejecting his proposed architectural design based solely on aesthetics, even though it met all objective zoning criteria.

Indeed, members of this Court already have expressed interest in the application of the First Amendment to architecture. *See, e.g., Masterpiece Cakeshop*, Transcript of Oral Argument at 17, 138 S. Ct. 1719 (2018) (No. 16-111) (Justice Alito asking whether architectural design is entitled to First Amendment protection because one might say the primary purpose of the design of a building is to create a place where

people can live or work); *id.* at 17-18 (Justice Breyer asking whether the work of Mies or Michelangelo is protected under the First Amendment). This is a perfect opportunity for the Court to analyze the First Amendment's reach with respect to architectural design.

The Eleventh Circuit majority affirmed the district court's determination that ARCOM did not violate Burns's First Amendment rights. But, like the dissenting opinion, this petition shows that custom architectural designs meeting objective zoning criteria are entitled to First Amendment protection. *First*, the Eleventh Circuit's opinion conflicts with this Court's precedent because it failed to apply authorities discussing the interplay between artistic expression and the First Amendment, which is significant because architecture is a form of artistic expression. *Second*, the Eleventh Circuit misconstrued this Court's First Amendment precedent; it simply ignored classes of people who could see Burns's proposed home, and prioritized certain categories of people over others. *Third*, the Eleventh Circuit inappropriately engrafted additional factors onto this Court's *Johnson* test, which heightened the First Amendment hurdles for Burns and would put almost every residential architectural design outside the First Amendment's reach. *Finally*, the Eleventh Circuit opinion improperly failed to apply strict scrutiny to its First Amendment analysis.

For these reasons and those described in greater detail herein, Burns asks the Court to grant his

petition and review these issues of significant public importance.

DECISIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 999 F.3d 1317, and reprinted at App. 1-70, with the dissent reprinted at App. 71-154. The order of the United States District Court for the Southern District of Florida is reported at 343 F. Supp. 3d 1258, and reprinted at App. 155-86. The Magistrate Judge's Report and Recommendation in the district court is unreported, and reprinted at App. 187-78. The Order denying petition for rehearing en banc in the Eleventh Circuit is unreported, and reprinted at App. 279.

STATEMENT OF JURISDICTION

The opinion of the Eleventh Circuit was entered on June 8, 2021, and the Eleventh Circuit's Order denying the petition for rehearing en banc was filed on August 5, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1), and the petition is timely pursuant to Supreme Court Rules 13(1) and (3).

PERTINENT CONSTITUTIONAL PROVISIONS

The First Amendment of the United States Constitution provides that:

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

U.S. Const. amend. I. The First Amendment is applicable to the States through the Due Process Clause of the Fourteenth Amendment. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996). Section 1 of the Fourteenth Amendment of the United States Constitution provides that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV.

STATEMENT OF THE CASE

A. Factual Background

Donald Burns lived[1] in a home on the Atlantic Ocean in Palm Beach for almost 20 years. App. 8, 75. His traditional home is built in the Bermuda Style, similar to the traditional styles of the immediately neighboring homes. App. 8-9, 75. Burns originally was attracted to the house's style that communicated that he "wanted to be like [his] neighbors in all respects," but his views subsequently evolved. App. 75.

Thereafter, he wanted his new home "to be a means of communication and expression of the person inside: Me." App. 9. In 2013, he picked a design of international or midcentury modern architecture because it emphasized simple lines, minimal decorative elements, and open spaces built of solid, quality materials. App. 9; *see also* App. 76 (noting its proponents see the integration of nature into human living space as an antidote to the clutter and chaos of modernity). This

[1] Although Mr. Burns has since sold his house, this does not affect his standing to bring this Petition. As Mr. Burns alleged as far back as his Complaint, he suffered significant damages resulting from, among other things, the expense in creating the architectural plans for his proposed home, delay suffered by virtue of ARCOM's unconstitutional rejection of his plans, and the denial of increased property value that would have resulted if he had been allowed to build his new home. Burns therefore satisfies the redressability element necessary for Article III standing, especially because even "a request for nominal damages satisfies the redressability element of standing where a plaintiff's claim is based on a completed violation of a legal right." *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 802 (2021).

design communicated that his new home would be clean, fresh, independent, and modern—a reflection of his evolved philosophy of simplicity in lifestyle and living with an emphasis on fewer personal possessions, and communicated his message that he was unique and different from his neighbors. App. 9, 75-76. The traditional style of his home no longer reflected his views or his identity. App. 8-9, 76. Burns worked closely with a local architectural firm to design a home in the international style. App. 76. Pictures of Burns's original home and his design proposal are below:

App. 75-76.

Notably, it has "never been disputed" that Burns's proposal met "every objective zoning requirement to be found in Palm Beach's Town Code." App. 77. In Palm Beach, however, in addition to meeting all objective zoning requirements, ARCOM must approve all applications for demolition and construction. App. 5, 77. In an effort to accommodate comments from ARCOM and others, Burns submitted several revised versions of his plans to ARCOM. App. 9-13, 79-80.

Nevertheless, ARCOM rejected Burns's final submission with a vote of five-to-two. App. 13, 80. ARCOM cited the following vague and subjective criteria from Section 18-205(a) of the Town of Palm Beach Code of Ordinances as the basis for its rejection of Burns's design:

> (4) The proposed building or structure is *not in harmony* with the proposed developments on land in the general area, with the

> comprehensive plan for the town, and with any precise plans adopted pursuant to the Comprehensive Plan.
>
> . . .
>
> (6) The proposed building or structure is *excessively dissimilar* in relation to any other structure . . . within 200 feet of the proposed site in respect to . . .
>
> (c) *Architectural compatibility*.
>
> (d) *Arrangement of the components* of the structure.
>
> (e) *Appearance of mass* from the street or from any perspective visible to the public or adjoining property owners.
>
> (f) *Diversity of design* that is complimentary with size and massing of adjacent properties.
>
> . . . [and]
>
> (8) The proposed development is *not in conformity with the standards* of this Code and other applicable ordinances insofar as the location and appearance of the buildings and structures are involved.

App. 13-14 (emphasis added). Notably, there is no claim that this case involved historical preservation, or that the construction of Burns's design would diminish in any way the fair market value of the property in the neighborhood. App. 78.

The record in this case also establishes the animosity certain ARCOM members had to Burns's design. One ARCOM member stated that "[i]t's very hard

to sit here and say, no, you shouldn't build this house" since "it fits on the lot" and "there are no variances required," but that she would not approve the design because it was "so dissimilar in style," and ARCOM is "charged also with making sure that we don't let the character of Palm Beach go. And the character of Palm Beach has not made it to the modern style yet." App. 126, 78-79. Another member noted that if she "were to see this architecture in a different location, [she] might find it attractive," but that there was "just the problem of where it's located." App. 126, 79. Another explained that "[t]he style that is proposed here is a very modern and new style that's inserted into the fabric." App. 126. Another member said that "[w]e can't afford to make another mistake" by forcing "everybody who drives by . . . to see this contemporary home which is not in harmony with the established character of th[e] neighborhood." App. 126, 79. Another offered that he would vote yes "by law; [but] philosophically, emphatically no." App. 127. Still another baldly proclaimed that "[t]here's not a person in Christendom who can convince me that this house is charming," and that "[t]his house is 'in your face' and has no charm that I can see," because "the overall impression of this house is institutional." App. 125, 79.

As the Eleventh Circuit dissent concluded, despite Burns's attempts to accommodate concerns from ARCOM, "it appears there was little he could do short of abandoning the International Style that was the purpose of his application." App. 80.

B. Procedural Background

Following ARCOM's rejection of Burns's re-design proposal, Burns filed a Complaint in federal court in the Southern District of Florida seeking relief under the First and Fourteenth Amendments. App. 14. Before discovery, Palm Beach moved to dismiss the Complaint for failure to state a claim and for summary judgment. App. 14. Burns submitted a declaration under Rule 56(d) that identified several areas of discovery he needed but, while the discovery period was open, the magistrate judge held a hearing and issued its recommendation granting the Town summary judgment. App. 15-16, App. 187-48. The district court then approved the Magistrate Judge's report and recommendation, and entered summary judgment for the Town. App. 18-19, 155-86.

Instead of using the expressive conduct test as expressed in *Spence v. Washington*, 418 U.S. 405 (1974) and *Texas v. Johnson*, 491 U.S. 397 (1989) (the "*Johnson* test"), the Magistrate Judge and district court instead attempted to "glue together" elements from the Second Circuit's "dominant purpose" test. App. 16-19, 95. The predominant-purpose test asks whether: (1) the owner of the structure subjectively intended to communicate a message; (2) the predominant purpose of the structure was to communicate a message; and (3) a reasonable observer viewing the structure in its surrounding context had a great likelihood of understanding it to be predominantly communicating some message. App. 16. The Second Circuit case the district court cited for the predominant-purpose

test—*Mastrovincenzo v. City of New York*, 435 F.3d 78 (2d Cir. 2006)—was completely inapposite because it involved the sale of expressive merchandise, which is in no way related to the design of one's personal home. App. 95-96.

Notably, neither the Eleventh Circuit majority nor dissent adopted this "dominant purpose" test. App. 31, 95-96. The dissent correctly noted that applying the "dominant purpose" test to residential architecture would virtually ensure that no home would ever qualify for First Amendment protection. App. 96. The result was that the district court "applied the wrong legal standard" to Burns's First Amendment claim. App. 96.

Nevertheless, upon Burns's appeal to the Eleventh Circuit, the majority affirmed the district court's order. App. 1-70. It applied the *Johnson* test, which asks: (1) "whether '[a]n intent to convey a particularized message was present,' " and (2) whether "the likelihood was great that the message would be understood by those who viewed it." *Johnson*, 491 U.S. at 404 (quoting *Spence*, 418 U.S. at 410-11).

The majority acknowledged that the first part of the test was conceded to by the Town, but it found that the second element was not satisfied. App. 34-62. It held that Burns's home could not be "seen by viewers" because of the accommodations Burns made to ARCOM in his architectural plans. *See* App. 33-49. It largely relied on the design features of a wall, gate, and landscaping that Burns's plan included, and found that it also could not be seen from the public beach

adjoining the house. App. 38-45. The majority attempted to distinguish the design itself from the house's "height" and "mass," and stated that "large trash heaps also have height and mass, and no one would say they are midcentury modern masterpieces." App. 38-41.

Judge Marcus penned a powerful, robust dissent. It found the majority's application of the *Johnson* test "deeply flawed" (App. 97), and observed that this case presented one of the first opportunities to address First Amendment protection for residential architecture and that where, as here, "freedom is in jeopardy, the courts must step in to preserve it." App. 134. The dissent easily rejected the majority's finding that the house would not be visible, including because the house would be visible from the public beach and it would be inconceivable that no guests would ever view the house, and it questioned why ARCOM and some of Burns's neighbors had such a problem with the design if it was completely nonvisible. App. 99-111. It found that ARCOM's members improperly rejected Burns's proposal because they "hated" it and "thought it was ugly." App. 78. And although the majority found that ARCOM did not make a content-based decision (App. 59-62), the dissent found otherwise. App. 124-34. It found that ARCOM placed a "heavier burden" on modern architecture and was "attempting to prescribe what is orthodox in architecture," but that "the Constitution prohibits us from censoring it solely because we do not like it." App. 133. That is, under the First Amendment, the government cannot substitute

its opinion of "beauty" over that of the homeowner who has proposed a new design.

REASONS FOR GRANTING THE WRIT

This case presents an ideal vehicle for addressing unanswered questions of national importance regarding the application of the First Amendment to architectural design. The Court's guidance is needed to determine whether custom architectural designs that satisfy all objective zoning criteria for homes that express the individual's personal philosophy are entitled to First Amendment protection, and whether a municipal ordinance is subject to strict scrutiny where, like here, it allows a content-based rejection of a proposed architectural design based solely on subjective aesthetic factors.

I. The Eleventh Circuit's Majority Opinion Conflicts with this Court's First Amendment Jurisprudence by Finding Burns's Custom Architectural Design is Not Entitled to First Amendment Protection.

The First Amendment's constitutional protection for freedom of speech "does not end at the spoken or written word" (*Johnson*, 491 U.S. at 404), and "the Constitution looks beyond written or spoken words as mediums of expression." *Hurley*, 515 U.S. at 569. Indeed, "the First Amendment shields such acts as saluting a flag (and refusing to do so), wearing an armband to

protest a war, displaying a red flag, and even '[m]arching, walking or parading' in uniforms displaying the swastika." *Hurley*, 515 U.S. at 569 (internal citations omitted); *see also Masterpiece Cakeshop*, 138 S. Ct. at 141-42 & n.1 (Thomas, J., concurring in part and in judgment) (noting protected activities include "nude dancing, burning the American flag, flying an upside-down American flag with a taped-on peace sign, wearing a military uniform, wearing a black armband, conducting a silent sit-in, refusing to salute the American flag, and flying a plain red flag") (collecting cases). The First Amendment generally prevents the government from proscribing expressive conduct because of disapproval of the ideas expressed. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992). "A court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by [a] regulation." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 502 (1981). And performing this task "requires a particularized inquiry into the nature of the conflicting interest at stake [], beginning with a precise appraisal of the character of the ordinance as it affects communication." *Id.* at 503.

A. The Eleventh Circuit Majority Failed to Apply this Court's Authorities Holding That Artistic Expression is Protected by the First Amendment.

As the Eleventh Circuit's dissenting opinion found, "Burns's house presents a novel First Amendment claim and an important one for the freedom of

artistic expression." App. 97. Although the Eleventh Circuit majority acknowledged that "there was no factual dispute about whether architecture was art" (App. 29), it failed to apply this Court's precedent explaining the interplay between art and First Amendment protections.

"The First Amendment's fundamental purpose . . . is to protect all forms of peaceful expression in all of its myriad manifestations." *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 231 (1977). This Court's cases "have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters—to take a nonexhaustive list of labels—is not entitled to full First Amendment protection." *Id.* Moreover, conduct may be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." *Johnson*, 491 U.S. at 404 (internal citations omitted). When determining whether particular conduct "possesses sufficient communicative elements to bring the First Amendment into play," courts have inquired whether there was an intent to convey a particular message and the likelihood that the message would be understood by those who viewed it. *Id.*

Indeed, as the Eleventh Circuit dissent below noted, the First Amendment protects art in its myriad forms. App. 80-81; *see also Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580-82 (1998) (subjecting regulations governing the National Endowment for the Arts to First Amendment scrutiny); *Hurley*, 515 U.S. at 569 (noting that the "painting of Jackson Pollock,

music of Arnold Schöenberg, [and] Jabberwocky verse of Lewis Carroll" are "unquestionably shielded" by the First Amendment); *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) ("Music, as a form of expression and communication, is protected under the First Amendment."); *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 65-66 (1981) ("Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works fall within the First Amendment guarantee."); *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557-58 (1975) ("By its nature, theater usually is the acting out—or singing out—of the written word, and frequently mixes speech with live action or conduct. But that is no reason to hold theater subject to a drastically different standard."); *Kaplan v. California*, 413 U.S. 115, 119-20 (1973) (noting that "pictures, films, paintings, drawings, [] engravings, . . . oral utterance and the printed word" are protected by the First Amendment); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) ("It cannot be doubted that motion pictures are a significant medium for the communication of ideas.").

Architecture is an expressive form of art. The United States Constitution specifically provides protection for the "useful Arts." U.S. Const. art. I, § 8. And copyright law defines "architectural work" as "the design of a building as embodied in any tangible medium of expression." 17 U.S.C. § 101 (emphasis added); *see also* H.R. Rep. No. 101-735 (1990), as reprinted in 1990 U.S.C.C.A.N. 6935, 6936 ("Architecture is a form of

artistic expression that performs a significant societal purpose, domestically and internationally."); *Imperial Homes Corp. v. Lamont*, 458 F.2d 895, 897 (5th Cir. 1972) ("[T]he architect who originates a set of blueprints for a dwelling is as much an author for copyright purposes as the writer who creates an original novel or the dramatist who pens a new play.").

Commentators have also found that this protection should be even more applicable for personal homes. *See, e.g.*, John Nivala, *Constitutional Architecture: The First Amendment and the Single Family House*, 33 SAN DIEGO L. REV. 291, 310-11 (1996) ("Architecture, particularly as seen in the exterior of the single-family house, is an expressive art, expressive of individual and cultural values, status, and yearnings."); Janet Elizabeth Haws, *Architecture as Art? Not in My Neocolonial Neighborhood: A Case for Providing First Amendment Protection to Expressive Residential Architecture*, 2005 B.Y.U. L. REV. 1625, 1644 (2005) ("Like music, dance, and visual art, residential architecture can be a highly expressive way to communicate lifestyle choices, political stances, and individuality."). George Ranalli, one of Burns's experts in the case, also discussed the work of Frank Lloyd Wright, who reinvented American residential architecture through his Prairie style homes, which represent a "stark departure from the traditional homes that dominated American architecture at the time," and helped "realign the aristocratic art of residential architecture more closely to modern democratic ideals." App. 89 (citing other examples of expressive modern residential architecture).

Moreover, contrary to the Eleventh Circuit majority's finding, residential architecture does not lose its expressive qualities because it is also practical. "The great palaces of Europe—Versailles, the Winter Palace, Schönbrunn—all housed their country's royal families and their accompanying staff, but are still recognized as architectural marvels. There is nothing in the theory either of artistic expression or architectural aesthetics that changes merely because a person spends the night in a building." App. 87; *see also* App. 88-90 (discussing long history of expressive modern residential architecture). That architecture is a form of art does not mean that all buildings are art—just that some architectural construction can be artistic and may be protected by the First Amendment. App. 93. Burns's proposed design in the International Style, with its "white rectilinear forms, cantilevered construction, interior/exterior openness, steel, glass, concrete wall planes, flat roofs, horizontal linear elements and asymmetrical composition which is absent of ornamentation" (App. 119), is particularly indicative of art. *See* Brian J. Connolly, *Reed, Rembrandt, and Wright: Free Speech Considerations in Zoning Regulations of Art and Architecture*, 41 No. 11 Zoning & Planning L. Reports (Dec. 2018) ("artwork differs from other forms of speech . . . in one critical respect: in the case of artwork, the medium is commonly the message. . . . In many cases, the size, orientation, color, or materials comprising the work of art are of critical importance to the piece's communicative intent.").

Providing robust First Amendment protections to the design of one's home is also consistent with the fact that, in multiple contexts, this Court has given extensive protection to the home. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) ("In our tradition the State is not omnipresent in the home."); *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (describing "the right of man to retreat into his own home and there be free from unreasonable governmental intrusion"); *Payton v. New York*, 445 U.S. 573, 597 n.45 (1980) (noting "the common law's special regard for the home"); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (citing "the sanctity of a man's home" (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)). In fact, the First Amendment especially protects speech from governmental censorship in the home. *See, e.g.*, *City of Ladue v. Gilleo*, 512 U.S. 43, 58 (1994) ("A special respect for individual liberty in the home has long been part of our culture and our law; that principle has special resonance when the government seeks to constrain a person's ability to speak there.") (citations and emphasis omitted); *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) ("Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.").

By failing to apply these authorities and principles, the Eleventh Circuit Opinion conflicts with this Court's authorities. Architectural design, especially

the design of one's own home, is an expressive form of art that can—and for Burns's proposed design, should—be entitled to robust First Amendment protection.

B. The Eleventh Circuit Misconstrued this Court's First Amendment Precedent.

The Eleventh Circuit majority applied the correct *Johnson* test, but misapplied it in such a way that it conflicted with this Court's First Amendment jurisprudence. Under *Johnson*, to evaluate the scope of First Amendment protection beyond "pure speech," a court must examine whether (1) "[a]n intent to convey a particularized message was present," and (2) "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). Here, the Town "does not dispute on appeal, that Burns had the intent to convey a message," thus satisfying the first *Johnson* factor. App. 33-34, 99. The record undisputedly establishes that it was Burns's "intention that the design of the new house [] be a means of communication and expression of the person inside: Me." App. 98. Burns explained that the International Style "communicates that it is *not* old fashioned; it is clean, fresh, independent, modern, and different from what I, and my prior home, were in the past." App. 98; *see also Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994) ("At the heart of the First Amendment lies the principle that each person should decide for himself or herself the

ideas and beliefs deserving of expression, consideration, and adherence.").

On the second *Johnson* factor, however, the Eleventh Circuit radically departed from this Court's precedent in a way that would exclude from First Amendment protection the overwhelming majority of architecture, with wide-ranging implications. This Court has stated that "the factual context and environment in which [the activity] was undertaken" serve as a limiting principle to separate generic activities from expressive ones. *Spence*, 418 U.S. at 409-10 (internal quotation marks omitted). Accordingly, a "narrow, succinctly articulable message is *not* a condition of constitutional protection" because "if confined to expressions conveying a 'particularized message,'" the First Amendment "would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll." *Hurley*, 515 U.S. at 569 (emphasis added).

Nevertheless, the Eleventh Circuit majority found that the second *Johnson* factor was not met because Burns's home purportedly could not be "seen by viewers." *See* App. 33-49. This conclusion makes no sense on its face. Why would citizens be opposed to Burns's design, and why would ARCOM vote to deny his application, if his home was nonvisible? Indeed, it was the house's visibility that created the opposition.

Notably, 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. Nothing in *Johnson* requires the "reasonable viewer" to be a passerby or a neighbor. Indeed, it is inconceivable that Burns would build this new home and never have anyone else see it, whether they be house guests, staff, or other visitors. App. 110-11. The proposed home would have undoubtedly been visible from multiple sides—including from the public beach adjacent to his property—and from multiple parties. Under First Amendment precedent, nothing prioritizes certain viewers over others, and the Eleventh Circuit erred in concluding that it does. Excluding guests from the First Amendment analysis creates a slippery slope for free speech in other contexts, such as inviting others over to view artworks, listen to poetry, or pray inside a home.

Indeed, for First Amendment protections to apply, the object need only be visible to some viewers. This Court has protected expression over a wide range of activities ranging from extremely personal expression (like wearing an armband to protest a war), to extremely public expression such as "[m]arching, walking or parading" in uniforms displaying the swastika. *See Hurley*, 515 U.S. at 569 (citing *Tinker v. Des Moines Ind. Cmty. Sch. Dist.*, 393 U.S. 503, 505-06 (1967) and *Nat'l Socialist Party of Am. v. Skokie*, 432 U.S. 43 (1977)). Indeed, it would not make sense for the First Amendment protection of the "painting of Jackson Pollock, music of Arnold Schöenberg, [and] Jabberwocky verse of Lewis Carroll" (*Hurley*, 515 U.S. at 69) to change depending on whether it is in an individual's

house and seen or heard by a few, or a public museum and seen or heard by thousands.

Moreover, if the proposed new home were truly not visible as the Eleventh Circuit majority claimed, whatever interest the Town had would be near non-existent. This is especially significant when compared against Burns's robust First Amendment right to express himself, especially because he undisputedly met all objective zoning criteria. As explained further below, the only interest the Town identified here is aesthetic uniformity. But if the house were nonvisible, aesthetic uniformity would be irrelevant.

The dissent also found that the record "seems clear" that Burns's home was visible to the Palm Beach community, both to Burns's neighbors and from the well-trafficked public beach. App. 99-106. Trying to explain its rationale, the majority attempted to distinguish the design itself from the house's "height" and "mass" (App. 38-39), but the elements that make up the design undeniably include height and mass (App. 106-07). And, as the dissent notes, why would Burns tear down a perfectly functional home in order to create a home in the International Style, which emphasizes floor-to-ceiling windows, only to completely block his view? App. 107. In other words, it "would be hard to understand why Burns's design created so much controversy . . . if the house would not be visible to the public at all." App. 108.

Granting certiorari here would greatly benefit the public by further clarifying the scope of and requirements for satisfying the second *Johnson* factor.

C. The Eleventh Circuit Improperly Engrafted Additional Factors onto the *Johnson* test, and this Case Presents an Ideal Vehicle for the Court to Clarify *Johnson*.

The Eleventh Circuit majority also found, in the alternative, that the second *Johnson* factor was not satisfied because a reasonable observer would not understand Burns's new home as communicating a message. App. at 49. In so doing, it relied on contextual "factors" it drew from a previous Eleventh Circuit case, *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235 (11th Cir. 2018). But those are not actual factors of the *Johnson* test, and by applying them the Eleventh Circuit improperly heightened the requirements for demonstrating entitlement to First Amendment protection under *Johnson*. This is especially egregious in the First Amendment space where context is so important. *See Spence*, 418 U.S. at 410 ("the context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol."); *Johnson*, 491 U.S. at 405 ("in characterizing such action for First Amendment purposes, we have considered the context in which it occurred.").

In *Fort Lauderdale*, a nonprofit engaging in "peaceful political direct action" argued that its weekly events at a public park in Fort Lauderdale, which involved sharing food at no cost with those who gathered there, were expressive conduct protected by the First Amendment. *Fort Lauderdale*, 901 F.3d at 1237-38. The Eleventh Circuit found the organization's food sharing events to be "an act of political solidarity meant to convey the organization's message" and a form of expressive conduct protected by the First Amendment. *Id.* at 1238, 1245. The Court outlined five "circumstances" that placed the challenged activity "on the expressive side of the ledger," which included: (1) the organization "set[] up tables and banners . . . and distributed literature at its events" which distinguished the activity from sharing a meal with friends; (2) "the food sharing events [were] open to everyone"; (3) the organization "h[eld] its food sharing in . . . a public park near city government buildings"; (4) "the treatment of the City's homeless population is an issue of concern in the community"; and (5) "the significance of sharing meals with others dates back millennia." *Id.* at 1242-43. While these circumstances may have been appropriate in *Fort Lauderdale*, they have no place in this case related to residential architecture.

The majority opinion here, however, tied its analysis to these *Fort Lauderdale* factors even though this case's "context" is nothing like that in *Fort Lauderdale*. For example, it found that "Burns has no plans to set up tables, distribute literature, or hang up a banner in front of his new mansion," and found that "Burns has

offered no evidence that his house will be open to everyone or that he has invited the public to view his architectural design." App. 50. Of course Burns did not do those things. That would make no sense in the context of a private home. *See Conrad*, 420 U.S. at 557 ("Each medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems."). The absence of some of these *Fort Lauderdale* factors does not mean Burns is not entitled to First Amendment protection for the design of his house, and by finding that they do, the Eleventh Circuit undermined this Court's authority under *Johnson*.

The Eleventh Circuit's new test would basically foreclose the First Amendment's application to almost every form of architecture. For example, while the majority notes that Monticello may qualify because it satisfies the *Fort Lauderdale* factors (App. 54), the dissent explained why this would be overly restrictive—"[i]f a piece of residential architecture must publish a website and brochures, hold public tours, and maintain designation as a national historic landmark in order to merit First Amendment protection, then the range of residential architecture that may qualify is not exceedingly narrow, but would likely be unknown until maybe centuries later." App. 115. Indeed, what the majority opinion described was not a residence but a museum. The First Amendment applies at least as much for the architectural designs of personal homes, and the *Fort Lauderdale* factors would exclude such application. And Burns's research has revealed no decision from

any other circuit imposing the Fort Lauderdale factors to art or architecture.

The application of *Fort Lauderdale* is even further complicated by the longstanding conflict among federal Courts of Appeals regarding how *Johnson* was impacted by this Court's later decision in *Hurley*. In fact, they fundamentally disagree on the extent to which the *Johnson* factors even survive. *See, e.g.*, *Cressman v. Thompson*, 798 F.3d 938, 955 (10th Cir. 2015) ("Our sister circuits have taken divergent approaches to reconciling *Hurley* with the requirements of the *Spence-Johnson* test."); *Church of Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 205 n.6 (2d Cir. 2004) ("[W]e have interpreted *Hurley* to leave intact the Supreme Court's test for expressive conduct in *Texas v. Johnson*."); *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 388 (6th Cir. 2005) (using intermediate approach that requires conduct to convey "a particularized message"—but not "a narrow, succinctly articulable" one—as well as a great likelihood that this message "will be understood by those who view it."). The Eleventh Circuit's Opinion here even conflicts with its own earlier precedent. *See Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1270 (11th Cir. 2004) (the test is whether a reasonable person would interpret conduct as expressing "*some* sort of message, not whether an observer would necessarily infer a *specific* message."). Still other circuits analyze the *Johnson* factors fundamentally differently. *See, e.g.*, *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 160 (3d Cir. 2002) (viewing the *Johnson* factors as mere "signposts

rather than requirements' and holding that *Hurley* "eliminated the 'particularized message' aspect of the *Spence-Johnson* test" altogether). This confusion among the circuits also calls for this Court's review.

The Eleventh Circuit should not have engrafted additional factors onto this Court's *Johnson* test, and by doing so, the majority opinion conflicts with this Court's precedent. This case presents an ideal vehicle for this Court to clarify and provide guidance on *Johnson*.

II. The Eleventh Circuit Misapplied this Court's First Amendment Precedent to Conclude that the ARCOM Ordinance is Not Subject to Strict Scrutiny.

This Court also has the opportunity to clarify that regulations such as Palm Beach's's ARCOM ordinance are subject to strict scrutiny when applied in an improper content-based manner.

Content-based laws "target speech based on its communicative content." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015); *see also Turner*, 512 U.S. at 643 ("[L]aws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based."). The "principal inquiry in determining content neutrality" is "whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys." *Ward*, 491 U.S. at 791. And "the mere assertion of a content-neutral purpose [will not] be

enough to save a law which, on its face, discriminates based on content." *Turner*, 512 U.S. at 642-43. "Content-based regulations are presumptively invalid." *R.A.V.*, 505 U.S. at 382. A court will uphold a content-based regulation only if the government can show that it is "narrowly tailored to service compelling state interests" (*Turner*, 512 U.S. at 653), which requires "the least restrictive means." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000) (internal quotation marks omitted).

Indeed, ordinances as vague as the one here could hardly be other than content-based. Rather than provide objective criteria, this ordinance includes vague criteria such as "not in harmony," "excessively dissimilar," "architectural compatibility," "diversity of design," and "not in conformity." App. 13-14. Decisions under this criteria will always be in the eye of the beholder. Thus, while Burns's home may be his castle, what his castle looks like is determined by the government regulators—not based on established guidelines applicable to formally designated historic neighborhoods, but on the subjective views of whoever might be a member of ARCOM at the time.

Defamation law provides an instructive framework to understand that the vague ordinance as applied here was by definition content-based. The difference between facts and opinions are that facts are capable of verification, whereas opinions are not. Opinions are an individual's conclusions reached after consideration of certain facts and, consequently, are personal to the individual. Ultimately, a person's

opinion is not capable of verification of whether it is "true" or "false." In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), for example, the Court explained that "[u]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." 418 U.S. at 351 (quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)). Vague unprovable statements and statements of opinion do not give rise to a defamation claim; instead, statements must contain an objectively verifiable factual assertion. *Ptasznik v. St. Joseph Hosp.*, 464 F.3d 691, 698 (7th Cir. 2006); *see also Knievel v. ESPN, Inc.*, 393 F.3d 1068 (9th Cir. 2005) (requiring the court to "inquire whether the statement itself is sufficiently factual to be susceptible of being proved true or false"). Similarly, the criteria by which Burns's application was rejected related purely to opinion and not objective facts. It violates this Court's First Amendment precedent to reject an architectural design based on it not being "in harmony" and "excessively dissimilar" because there can be "no such thing as a false idea." *Gertz*, 418 U.S. at 351. Because the ordinance is so vague, whether a proposed design contributes to Palm Beach's interest in aesthetics depends on the whims of the individual ARCOM members.

As the Eleventh Circuit dissent found, Palm Beach rejected Burns's design based on ordinance provisions that are "entirely" based on the content of its design and its architectural style. App. 124. Burns's proposal

"indisputably met" the Town's objective, non-aesthetic zoning requirements. App. 125. But, in rejecting the design, ARCOM relied instead on the subjective content-based factors described above. The ARCOM majority made clear their disdain of the architectural style through disparaging remarks that revealed their opinion that modern architecture does not belong in Palm Beach. App. 125-27. They said, for example, that there is no "charm" in the house, that the taste "is questionable," that "[t]here's not a person in Christendom who can convince me that this house is charming," and that "[t]his house is 'in your face' and has no charm that I can see," because "the overall impression of this house is institutional." App. 125-27. In fact, one commissioner expressed regret over the approval of an earlier, unrelated project, explaining that "[w]e can't afford to make another mistake." App. 126. The ARCOM majority was concerned with not "let[ting] the character of Palm Beach go," which "has not made it to the modern style yet." App. 126.

The only interest ARCOM identified is aesthetic uniformity, but that does not save the content-based and vague regulations. App. 128. The record shows that there is no aesthetic uniformity in Palm Beach, as several different styles of homes are permitted. App. 128-29. And aesthetics are not "compelling" government interests to sustain content-based restrictions. *Metromedia*, 453 U.S. at 507-08; *see also Ward*, 491 U.S. at 793 ("Any governmental attempt to serve purely esthetic goals by imposing subjective standards of acceptable sound mix . . . would raise serious First Amendment concerns. . . ."). Moreover, recognizing

First Amendment protection in this case would allow the vast majority of zoning regulations to be enforced. App. 130. Palm Beach, like any other local government, has an interest in those types of objective standards. And a "naked interest in stylistic orthodoxy" cannot overcome the "guarantees of the First Amendment"—and those guarantees must be applied to expression conveyed through architecture. App. 131.

Accordingly, the ARCOM ordinance is vague, and it was applied in a content-based manner here. And by failing to apply strict scrutiny, the Eleventh Circuit contravened this Court's First Amendment precedent.

CONCLUSION

The Court should grant the petition and reverse the judgment below.

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