No. 17-36038

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.

APPEAL FROM THE WESTERN DISTRICT OF WASHINGTON,
No. 2:17-cv-01361
HONORABLE MARSHA J. PECHMAN

OPENING BRIEF OF DEFENDANT-APPELLANT CITY OF EVERETT

Ramsey Ramerman
CITY OF EVERETT
2930 Wetmore Avenue
Everett, WA 98201-4067
Telephone: 425-257-7009
Facsimile: 425-257-8693

Matthew J. Segal
Sarah C. Johnson
PACIFICA LAW GROUP LLP
1191 Second Avenue, Suite 2000
Seattle, WA 98101-3404
Telephone: 206-240-1700
Facsimile: 206-240-1750

Attorneys for Defendant-Appellant City of Everett

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

OTHER AUTHORITIES

I. INTRODUCTION

This appeal concerns the constitutionality of the City of Everett, Washington's efforts to curb the significant negative impacts associated with "bikini barista stands". The bikini barista stands are sexually-oriented businesses where nearly nude employees (often wearing only pasties and G-strings) serve coffee to drive-up customers. The City's concern was the secondary effects arising from the business model, which included prostitution, lewd conduct, drug abuse and sexual assault, not what the bikini baristas wore. When the City's attempts to address these negative impacts (which efforts included undercover police operations, video monitoring and citations for violations of existing laws) proved insufficient, the City Council turned to a legislative solution, adopting both an amendment to its existing lewd conduct ordinance, and a new ordinance requiring a minimum amount of clothing be worn at the stands.

Specifically, the "Lewd Conduct Ordinance" prohibited public exposure of the "bottom one half of the anal cleft" and "more than one-half of the part of the female breast located below the top of the areola." ER 1153. The "Dress Code Ordinance" required owners of coffee stands and similar establishments to ensure all employees wore clothing at work that covered certain "minimum body areas", including 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." ER 1160. Through a licensing system, the Dress Code Ordinance made stand owners the primarily responsible parties for enforcing its requirements, eliminating a significant prior issue with holding owners responsible for illegal conduct that they either sanctioned or simply ignored. Only business owners, not the employees, can be cited for violations of the Ordinance. The Council enacted the Ordinances after carefully considering the scope of negative impacts associated with bikini barista stands and determining the Ordinances would assist in addressing those impacts.

The district court nonetheless entered a preliminary injunction, ruling first that both Ordinances were likely unconstitutionally vague. On a facial challenge, the district court concluded the Lewd Conduct Ordinance was unconstitutionally vague because the court was "uncertain as to the meaning of the compound term 'anal cleft'" and that the term was "not reasonably discernable to a person of ordinary intelligence," despite this term having an identifiable meaning and having been previously upheld against vagueness challenges. The district court then acknowledged that the application of both Ordinances "may be straightforward in some cases", but enjoined their enforcement in all instances on grounds of vagueness because police would purportedly have difficulty in some cases detecting violations, creating "dangers of arbitrary enforcement."

The district court further ruled that the Dress Code Ordinance likely violated the First Amendment, despite the court's determination that it was content neutral and only subject to intermediate scrutiny. The court first concluded that Plaintiffs' serving of coffee in bikinis was expressive, even though the actual conduct at issue conveyed neither a particularized or comprehensible message. The court then ruled that the legislative record was insufficient to allow the Council to reasonably believe there was any connection between baristas working alone in semi-private locations wearing almost no clothing and the negative impacts described above. But the legislative record considered by the City Council consisted of over 800 pages of material, including police reports, analogous studies and investigative records and showed exactly this link. This record more than satisfied intermediate scrutiny, and the court misapplied the applicable standards to rule otherwise.

The district court incorrectly concluded that Plaintiffs were likely to prevail on the merits, and erroneously enjoined the entirety of the City's lawful legislative effort to address secondary effects. The City respectfully requests that this Court dissolve the preliminary injunction pending a trial on the merits.

II. JURISDICTIONAL STATEMENT

On September 11, 2017, Plaintiffs filed a Complaint for declaratory and injunctive relief pursuant to 42 U.S.C. § 1983, challenging the City's Ordinances under the First, Fifth and Fourteenth Amendments to the United States

Constitutions, as well as provisions of the Washington Constitution. The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1367.

On September 21, 2017, Plaintiffs filed a motion for a preliminary injunction. Oral argument on the motion was held on November 21, 2017, and the court issued its order granting Plaintiffs' motion on December 4, 2017. ER 1-13.

On December 22, 2017, the City filed a timely Notice of Appeal. ER 14-15. This Court, therefore, has jurisdiction over this "preliminary injunction appeal" pursuant to 28 U.S.C. § 1292.

III. STATEMENT OF ISSUES

A. Whether the district court erred in concluding that Plaintiffs were likely to prevail on their claims that both the Lewd Conduct Ordinance and Dress Code Ordinance were unconstitutionally vague on their faces, when the district court ignored the legal standard to determine if language in an ordinance is unconstitutionally vague or subject to arbitrary enforcement, improperly rejecting similar language in related ordinances, and conflating the issue of vagueness with the burden of proof.

B. Whether the district court erred in concluding Plaintiffs were likely to prevail on their claims that the Dress Code Ordinance violated the First Amendment, when

1. The district court erroneously ruled the baristas' conduct was sufficiently expressive to warrant First Amendment protection despite its failure to meet the standard in *Spence v. Washington*, 418 U.S. 405 (1974); and
2. The district court failed to implement the evidentiary burdens under the intermediate scrutiny standard, so as to improperly disclaim the entirety of the City's detailed legislative record.

C. Whether, in light of the preceding legal errors, the district court erred in preliminarily enjoining enforcement of the City's Lewd Conduct Ordinance and Dress Code Ordinance.

IV. STATEMENT OF THE CASE

A. The History of Crime, Lewd Conduct and Exploitation at Everett's "Bikini Barista Stands" is Well-Established.

The City of Everett turned to the Ordinances at issue as a last resort. The City Council found the legislation was necessary only after a series of law enforcement investigations over many years linked bikini barista stands to the types of secondary effects that are commonly associated with sexually-oriented businesses, including prostitution, lewd conduct, public masturbation and other

types of criminal conduct.[1]

The process dates back to 2009, when after receiving more than 40 citizen complaints about the above conduct, the Everett Police Department ("EPD") began enforcement efforts at Everett stands. ER 207; *see also* ER 245, 255, 263, 278 (referencing citizen complaints).[2] These investigations revealed that baristas in Everett routinely appeared in various states of nudity, allowed customers to photograph and/or touch them for a fee, performed sexual "shows," openly advertised prostitution activities and permitted customers to masturbate while watching them perform. ER 208; *see also* ER 241-42, 244, 248-49, 254-55, 258-59, 263-64, 266-67, 270-79.[3]

Over the next several years, Snohomish County and the cities of Edmonds and Kent also investigated bikini barista stands, including stands owned by

---

[1] Although commonly called "bikini barista stands," the baristas' attire is typically lingerie or pasties and G-strings, not bikinis. *See, e.g.*, ER 8. The term "bikini" is therefore used in this brief to refer to this attire as opposed to swimwear.

[2] The City's history of investigating these stands is documented in the police reports in the legislative record and is further summarized in the declaration of EPD Sgt. James Collier. ER 207-19. Sgt. Collier's declaration also details (1) why illegal conduct has flourished at bikini barista stands, ER 220-21; (2) why it has been so difficult for EPD to investigate and prosecute this conduct with the City's current tools, ER 221-22; and (3) why EPD believed the new ordinances would make a material difference in the City's enforcement efforts, ER 225-27.

[3] For the Court's reference, the City has included the full legislative record in the Excerpts of Record, including the PowerPoint presentation made to the Council, as well as transcripts of the relevant portions of the Council meetings. ER 239-1059 (record), 1061-1146 (transcripts).

Carmela Panico, operating as "Java Juggs" and "Twin Peaks." ER 209-10. These investigations revealed that the same conduct observed by EPD was occurring at stands in other jurisdictions. ER 209-10, 280-310, 368-99, 401-04. Panico trained her baristas to hide this illegal conduct, and also corrupted Snohomish County Deputy Darrell O'Neill by trading sexual favors in return for law enforcement information. ER 209, 368-74, 405-20.[4]

Given the results of these investigations, in 2013, EPD invested substantial resources in undercover investigations of Panico's stands and the "Grab-N-Go" barista stands owned by Bill Wheeler, Jr. ER 210, 311-67. Along with discovering additional evidence of baristas engaging in lewd conduct and prostitution, EPD also learned baristas often were not paid hourly wages and instead worked solely for tips, resulting in significant pressure to "flash" customers to earn money. ER 210-11. This included one underage Grab-N-Go barista who was flashing customers with Wheeler's full knowledge. ER 211, 698-721.[5]

EPD's 2013 investigation further uncovered financial exploitation of baristas by stand owners and an extensive prostitution ring operating out of Panico's

[4] In oral argument, the district court chastised the City because it mistakenly believed that Deputy O'Neill was an Everett police officer. ER 20-21.

[5] After an extensive undercover investigation, Wheeler was charged with and convicted of sexual exploitation of a minor. Details of the investigation can be found in *State v. Wheeler*, 193 Wash. App. 1013, *review denied*, 186 Wash. 2d 1005, 380 P.3d 454 (2016).

stands. ER 211-19, 403-04, 427, 437, 460-81, 505-07, 518-19, 553-61. Customers still routinely masturbated at the barista stands. ER 216-17, 439, 499, 502, 519. Customers aggressively demanded that baristas provide "shows" and engage in prostitution, bought baristas "gifts" such as dildos, and sexually assaulted baristas. ER 217-18, 432-33, 453, 472, 474, 483, 486-89, 492. Customers were also observed "giving baristas money and then fondling and kissing baristas' breasts, [and] inserting their fingers into the baristas' vaginas and anuses as they stood outside their vehicles at the coffee stands' windows." ER 214-15. Even after EPD arrested Panico, O'Neill and several baristas in 2013, lewd conduct and drug use continued unabated at the stands. ER 219, 580-602.

In 2013 and 2014, EPD received reports that baristas were engaging in illegal conduct at the Hillbilly Hotties stands owned by the lead plaintiff in this case, Jovanna Edge. ER 179-200, 219-20, 603-22. Undercover operations resulted in numerous arrests for lewd conduct and prostitution. *Id*. Ms. Edge testified she terminated these baristas, but that she never investigated what happened and never saw the police reports until years later on the day of her deposition in this case (although these reports are part of the record supporting the Ordinances). ER 58-64. Hillbilly Hotties and other stands were subsequently cited by Snohomish County for violating the County's erotic entertainment ordinance. ER 219, 623-67.

B. Based on a Robust Legislative Record, the City Adopts the Ordinances to Combat Secondary Effects.

The preceding experiences led the City to conclude that the above-described secondary effects, including criminal activity, would continue unabated unless the City took legislative action. ER 225. In 2014, the City began considering both the Dress Code Ordinance and the Lewd Conduct Ordinance. ER 225-27. After holding a hearing on an initial proposal that year, the City went back to the drawing board to work on an updated proposal based on the feedback it heard from the public, including coffee stand owners.[6] The City put out a new proposal for public input in April 2017, and a final version was first taken up by the City Council at its July 19, 2017 meeting. *See* ER 1061-1113.

In considering the 2017 ordinances, the Council reviewed over 800 pages documenting the secondary effects of the bikini barista businesses. *See* ER 239-1059. The record was itself excerpted from thousands of pages of additional materials, including complete reports from the investigations.[7] The City Council also heard a detailed presentation by the City Attorney's office describing the conduct observed at the stands. ER 1014-28. The Council learned the behavior

[6] ER 219 (noting meeting with stand owners in 2014 regarding first version of the ordinance); *see also* ER 1083-84, 1087.

[7] For example, the record did not include copies of every police report generated since 2009. It also did not include the most sexually explicit investigatory material, such as video evidence of the criminal conduct.

went well beyond flashing and sex shows and encompassed "consistent acts of prostitution at the stand[s]." ER 1067; *see also* ER 1015-16. The presentation detailed the significant secondary harms associated with the bikini barista business model, including lewd conduct, prostitution and drug use; exploitation of baristas; pressure to engage in illegal acts; sexual assault and public masturbation by customers; and operation of escort businesses out of the stands. ER 1015-24, 1073-78. Similar conduct was observed by at least three other law enforcement agencies.

The Council also heard about the persistent difficulties in addressing this conduct under then-existing law, because police were essentially required to engage in time-consuming and expensive undercover operations to catch violators, and the resulting creation of evidentiary videos and photographs themselves became the subject of public records requests and related disputes. ER 1024-25, 1028, 1068-72, 1080-81. The Council also learned that prosecuting individual baristas was ineffective due to the lucrative nature of the business, while prosecution of owners was largely ineffective because they were able to cover their tracks and avoid responsibility. ER 1068; *see also* ER 1025.

The City Council next considered the proposed ordinances at its August 16, 2017 meeting. *See* ER 1115-46. At that meeting, the Council heard additional testimony from EPD Lt. James Duffy about how bikini barista stands can be run

(and have been run) in a manner similar to adult entertainment establishments. Lt. Dufy testified that based on his observations, the same types of secondary harms that are seen at strip clubs are also documented at bikini barista stands. ER 1118-19 ("During our investigations, we have observed behavior that is quite similar to the activities associated with strip clubs.").

The City Council passed the Ordinances on August 16, 2017. ER 1151-65. The Ordinances contain numerous findings, including the need to update the City's lewd conduct ordinance, and that the existing regulatory and enforcement scheme was insufficient to address the documented secondary effects of the bikini barista stands. ER 1151, 1157-59. Among the specific findings were the following:

> The City has reviewed this matter and found evidence relating to the adverse impacts of the conduct of bikini barista stands. This evidence relates to barista stands with employees dressing in a manner that is closely and customarily associated with adult entertainment or adult situations….
> ***
> The City has seen that the minimalistic nature of the clothing worn by baristas at these "bikini" stands lends itself to criminal conduct in that it can be quickly and simply partially or fully removed or adjusted but done in a manner that is not easy to detect unless someone is placed in the same proximity as the patron….
> ***
> The City has considered such evidence as compiled in the legislative record for this ordinance also including court cases, police records, memoranda and other information related to conduct of bikini barista stands;
>
> The City finds that such information about bikini barista stands indicates that they create adverse secondary effects, including health, safety, economic, and aesthetic impacts, upon neighboring properties

> and the community as a whole, and that they have adverse impacts upon minors;
> ***
> The City finds that imposing minimal dress standards requiring coverage of the torso and pubic and buttocks area for barista stands and Quick Service Facilities together with a licensing plan placing the responsibility for compliance primarily on the stand owner would lessen the negative adverse impacts related to bikini barista stands;
>
> The City finds that it is not the intent of the City to suppress any protected rights of expression under the United States or Washington Constitutions, but to propose and enact content neutral legislation which addresses narrowly the negative adverse impacts associated with bikini barista stands while allowing these types of businesses adequate alternative channels for communication of protected expression….

ER 1157-59.

As noted above, upon enactment, the Lewd Conduct Ordinance prohibited exposure of, among other things, the "bottom one-half of the anal cleft" and "more than one-half of the female breast located below the top of the areola." ER 1152. The Dress Code Ordinance required employees of "Quick Service Facilities" – defined as coffee stands, fast food restaurants, food trucks and the like – to wear clothing that covers certain "minimum body areas" including 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." ER 1160.

Through a licensing system, the Dress Code Ordinance made facility owners the primary enforcers of the clothing requirements. ER 1160-63. Thus, the Dress Code Ordinance both (1) makes it more challenging for employees to engage in

surreptitious activity by instituting minimum clothing requirements, and (2) incentivizes facility owners to monitor and control employee conduct at risk of losing their business license.

C. The Bikini Barista "Business Model" Continues in Operation.

Despite the lack of more recent concerted EPD law enforcement efforts targeting the stands, ER 219-20, the record before the district court showed evidence of continuing secondary effects. In 2017, for example, Ms. Edge herself reported exposure and "shows" were ongoing at other stands. ER 77-83. Testimony from an anonymous barista admitted into the record described similar issues, and stated that one current stand owner engages in sexual relations with baristas. ER 30.[8] Public masturbation and exposure continues at Hillbilly Hotties stands. ER 68, 138-39, 1124. Crime and other suspicious activity in and around the barista stands also is present. ER 99, 120-21, 138-41.[9]

Other elements of the bikini barista business model that incentivize illegal activity continue: all Hillbilly Hotties baristas are paid minimum wage, and while Ms. Edge claims to enforce the law, she does not employ formal training of her employees and is unable (or unwilling) to control much of what goes on at the

[8] "Jane Doe" requested and received permission from the district court to submit anonymous testimony in part to avoid retaliation. ER 16-17.

[9] For additional examples, *see* ER 202-04; *State v. Swanson*, 327 P.3d 67, 69, 75 (Wash. Ct. App. 2014); *State v. Mishkov*, No. 69076-1-I, 2014 WL 1692240, at *1 (Wash. Ct. App. Apr. 28, 2014).

stands, including admittedly criminal conduct. ER 45, 69-73, 96-97, 125; *see also* ER 30, 220-21. Moreover, the outfits Plaintiffs wear are the type EPD has identified as allowing for the practice of "flashing" customers. ER 221-22. Plaintiffs continue to refer to the outfits as "bikinis," but everyone agrees they are usually pasties and G-strings. *See, e.g.*, ER 8. Ms. Edge further testified that, with respect to the front lower body, as long as a barista covers her "labia" and "clitoris", the outfit is appropriate for Hillbilly Hotties. ER 57 ("Q: Anything other than those items has to be covered? A: No."); *see also* ER 50-52, 57, 89-90, 95-96, 117, 132-33, 143-74.

Bikini barista stands also continue to bear other hallmarks of sexually oriented-businesses. Ms. Edge allows baristas to pose in a manner suggesting they are willing to take off the limited clothing they are wearing, and to wear outfits that make accidental (or intentional) exposure almost inevitable. ER 50, 53-55, 143-74. Bikini baristas often engage in activities such as selling nude photos, ER 30, and two plaintiffs testified they had sold photos of themselves in outfits typical of those they wear at the stands. ER 105-08, 119, 126-27. Plaintiffs also solicit, receive, and display gifts of pasties, thongs, and other items through online "wish lists". ER 86, 91-94, 109-11, 115-18, 129-31.

D. Procedural History.

The two Ordinances briefly went into effect on September 5, 2017, but before the City made any effort to start enforcement, the Plaintiffs filed this lawsuit on September 11, 2017. After Plaintiffs filed, the City agreed to a moratorium on enforcement of the Ordinances pending the outcome of Plaintiffs' motion for preliminary injunction. Dkt. # 5.

After hearing oral argument, the district court issued its order granting Plaintiffs' motion on December 4, 2017. ER 1-13. The district court first ruled both Ordinances were likely unconstitutionally and facially vague, first because the court was "uncertain" of the meaning of the compound term "anal cleft", and second based on the court's concern that the Ordinances could in some cases be arbitrarily enforced. ER 6-7. The district court so ruled despite citing the dictionary definitions of the terms "anal" and "cleft", which establish that this term refers to the splitting of the anus, ER 6, and despite acknowledging that determinations regarding violations of the Ordinances "may be straightforward in some cases," ER 7.

The district court further concluded the Plaintiffs were likely to succeed on the merits of their First Amendment claim with respect to the Dress Code Ordinance, holding that the conduct of serving coffee in bikinis was expressive conduct under the First Amendment. ER 7-8. To support a finding of expressive

conduct, the district court both compared the baristas' conduct to erotic dance—a comparison the baristas expressly disclaim—and speculated that "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 9 (emphasis added). The district court further concluded that the Ordinance was content-neutral and subject to intermediate scrutiny. ER 9-10. The district court nonetheless ruled the Ordinance likely could not withstand this scrutiny because it considered the legislative record "shoddy" and the Ordinances failed to leave open adequate alternative channels of communication. ER 10-12. The district court equated the "communication" to the conduct of serving coffee in bikinis, rather than the messages the baristas claimed to be sending to customers (such as freedom, empowerment and the like).

Finally, the district court ruled the Plaintiffs had satisfied the other elements to warrant injunctive relief, although its findings in this regard were based solely on the presence of a likely constitutional violation, with no other showing. ER 12.

Following issuance of the preliminary injunction, the City timely appealed.

V. SUMMARY OF ARGUMENT

Although it paid lip service to some of the legal standards governing the underlying issues in this case, the district court disregarded those standards in

practice across the board. In enjoining enforcement of both Ordinances based on a Fourteenth Amendment challenge, the district court paid no heed to the established authority utilized to determine if language in an enactment is unconstitutionally vague or subject to arbitrary enforcement. While the district court may have professed some confusion as to the terms of the Ordinances or how they might be applied, that does not render the legislation void for vagueness.

Nor does the district court's speculation about how in different circumstances the wearing of a bikini (comprised, for example, of black armbands to protest a war), might be expressive conduct, equate to the requisite finding of particularized and comprehensible messages sufficient to establish expressive conduct. And even if it did, the district court's analogy of the messages conveyed by serving coffee in bikinis to erotic dancing, renders unsustainable the corresponding refusal to credit the City's record on secondary effects arising from sexually-oriented adult businesses. Indeed, the City's record met and exceeded the standard articulated by the Supreme Court in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002). The ordinances also left open substantial alternative channels of communication, and the district court only avoided that conclusion by improperly conflating the conduct at issue with the messages Plaintiffs claim to communicate.

In sum, the district court may have disapproved of the City's legislative approach, which it turned to only after years of alternative efforts. The district court went so far as to propose alternative options to the City in oral argument. But the Constitution and the Supreme Court afford local governments a necessary degree of deference in addressing complex problems, as has been emphasized in numerous other decisions involving regulation of adult businesses. The district court erred in enjoining these ordinances, and the City respectfully requests that this Court reverse and remand.

VI. STANDARD OF REVIEW

This court reviews "de novo the legal premises underlying a preliminary injunction" and "review[s] for abuse of discretion the terms of a preliminary injunction." *State of Hawaii v. Trump*, 871 F.3d 646, 654 (9th Cir. 2017) (quoting *A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091, 1096 (9th Cir. 2002)). Where a district court's preliminary injunction ruling rests solely on a premise of law, and the facts are either established or undisputed, the court's review is de novo. *Sanders Cnty. Republican Cent. Comm. v. Bullock*, 698 F.3d 741, 744 (9th Cir. 2012); *Pickup v. Brown*, 740 F.3d 1208, 1222 (9th Cir. 2014) (court may undertake "plenary review" of the issues if a district court's ruling rests solely on a premise as to the applicable rule of law and the facts are established or of no controlling relevance). A district court necessarily abuses its discretion where it applies an

erroneous legal standard or bases its decision on clearly erroneous factual findings. *Vivid Entm't, LLC v. Fielding*, 774 F.3d 566, 573 (9th Cir. 2014); *Preminger v. Principi*, 422 F.3d 815, 820 (9th Cir. 2005).[10] Moreover, although "[h]istorical questions of fact (such as credibility determinations or ordinary weighing of conflicting evidence) are reviewed for clear error,… constitutional questions of fact (such as whether certain restrictions create a severe burden on an individual's First Amendment rights) are reviewed de novo." *Prete v. Bradbury*, 438 F.3d 949, 960 (9th Cir. 2006) (internal quotation omitted) (citing *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1070 (9th Cir. 2002)).

Here, the relevant issues are legal—whether the City's Ordinances are unduly vague on their face, or constitute permissible regulation of conduct rather than protected speech. The district court's errors arise from misapplication or circumvention of the governing legal standards. At most, any factual issues are

[10] "A district court's decision is based on an erroneous legal standard if: (1) the court did not employ the appropriate legal standards that govern the issuance of a preliminary injunction; or (2) in applying the appropriate standards, the court misapprehended the law with respect to the underlying issues in the litigation." *Walczak v. EPL Prolong, Inc.*, 198 F.3d 725, 730 (9th Cir. 1999). "[A] district court's decision is based on clearly erroneous factual findings if 'the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Id.* (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). Reversal for clear error is warranted when the district court's factual determination is "illogical, implausible or lacks support in inferences that may be drawn from facts in the record." *Americans for Prosperity Found. v. Harris*, 809 F.3d 536, 539 (9th Cir. 2015).

"intermingled" with applicable conclusions of law addressing whether Plaintiffs have established a likelihood of success on the merits. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 567 (1995). As such, this Court should conduct a de novo review. *Id.*; *see also Pickup*, 740 F.3d at 1222. But even if the Court applies an abuse of discretion standard to any portion of its review, it should hold the district court abused its discretion by misapplying the legal standards and misapprehending the law underlying the issues in this case. Either way, reversal is warranted.

VII. ARGUMENT

A. The District Court Misapplied the Constitutional Void-for-Vagueness Standards in Enjoining Enforcement of the City's Ordinances.

At the outset, the district court erred in enjoining enforcement of both Ordinances on grounds of vagueness. An ordinance is unconstitutionally vague only if it (1) fails to provide fair notice to a person of ordinary intelligence what is prohibited, or (2) authorizes or encourages arbitrary and discriminatory enforcement. *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972). An ordinance will be upheld if it "clearly delineate[s] the conduct it proscribes" and "set[s] forth reasonably precise standards for law enforcement officials and triers of fact to follow." *Kev, Inc. v. Kitsap Cnty.*, 793 F.2d 1053, 1057 (9th Cir. 1986).

Here, Plaintiffs asserted a facial vagueness challenge to both Ordinances. Such a challenge "'is, of course, the most difficult challenge to mount successfully,

since the challenger must establish that no set of circumstances exists under which the [statute] would be valid.'" *Alphonsus v. Holder*, 705 F.3d 1031, 1042 (9th Cir. 2013) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)).[11] To succeed on a facial due process vagueness challenge, Plaintiffs must "prove that the enactment is vague 'not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.'" *Id.* (quoting *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 n.7 (1982)). "Put another way, [Plaintiffs] must demonstrate that the 'provision simply has no core.'" *Id.* (emphasis original) (quoting *Vill. of Hoffman Estates*, 455 U.S. at 495 n.7).

The district court ruled that the Lewd Conduct Ordinance was unconstitutionally vague because the court was "uncertain as to the meaning of the compound term 'anal cleft'". ER 6. The district court further ruled that both

[11] Despite the plurality opinion in *City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999), this Court continues to apply the "no set of circumstances" requirement for facial vagueness challenges outside of First Amendment or abortion cases "until a majority of the Supreme Court directs otherwise." *Alphonsus*, 705 F.3d 1042 n.11 (internal quotation omitted). Plaintiffs did not assert an independent First Amendment overbreadth challenge, but even if they had, they would be required to show that "a substantial number of [the ordinances'] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Puente Arizona v. Arpaio*, 821 F.3d 1098, 1104 (9th Cir. 2016) (citing *United States v. Stevens*, 559 U.S. 460, 473 (2010)). A facial challenge based on overbreadth remains "strong medicine that is not to be casually employed." *United States v. Williams*, 553 U.S. 285, 293 (2008) (quotations omitted).

Ordinances were unconstitutionally vague because, in close cases, the court believed police would have a difficult time determining whether the Ordinances were violated. ER 7 ("While these determinations may be straightforward in some cases, they will inevitably be less so in others."). The district court's ruling is contrary to the standard applicable to facial challenges and otherwise misapplies the standard governing vagueness challenges.

1. The Lewd Conduct Ordinance Is Not Unconstitutionally Vague.

The district court first erred when it enjoined enforcement of the Lewd Conduct Ordinance because it concluded the meaning of the phrase "anal cleft" was not reasonably discernible based solely on the court's own "uncertainty". ER 6. A court's purported "uncertainty" is insufficient to establish an ordinance has "no core", or fails to identify any standard of conduct such that it is vague on its face. *Alphonsus*, 705 F.3d at 1042. To the contrary, the vagueness doctrine does not require laws define prohibitions with "perfect clarity and precise guidance." *United States v. Williams*, 553 U.S. 285, 304 (2008) (internal quotation omitted); *see also Grayned*, 408 U.S. at 110 ("Condemned to the use of words, we can never expect mathematical certainty from our language."); *Broadrick v. Oklahoma*, 413 U.S. 601, 608 (1973) (noting that "[w]ords inevitably contain germs of uncertainty").

There is no uncertainty as to the meaning of the term "anal cleft" in the Lewd Conduct Ordinance, as its meaning can be readily gleaned from the context of the Ordinance and requires no subjective interpretation. Because the term "anal cleft" appears in the Ordinance among a list of intimate body parts, a person of ordinary intelligence can reasonably determine it is also an intimate body part. *Gammoh v. City of La Habra*, 395 F.3d 1114, 1120 (9th Cir. 2005) (noting that "otherwise imprecise terms may avoid vagueness problems when used in combination with terms that provide sufficient clarity"); *Kev*, 793 F.2d at 1057 (ordinance prohibiting dancers from "caressing" and "fondling" patrons was not vague "in the context of the other definitions provided in the ordinance" at issue); *Geaneas v. Willets*, 715 F. Supp. 334, 339 (M.D. Fla. 1989), *aff'd*, 911 F.2d 579 (11th Cir. 1990) (construing the coverage requirement for the "buttocks" in light of other body parts subject to same coverage requirement). The text of the Ordinance also fairly disclosed that the anal cleft is vertical because the Ordinance requires persons to cover the "bottom one half" of the cleft.

If the meaning of "anal cleft" is not clear from the text, any possible confusion can be resolved by consulting a standard dictionary. *See, e.g., Vill. of Hoffman Estates*, 455 U.S. at 500-01 (noting that the ordinary person could resort to the dictionary definition to understand a prohibition); *United States v. Osinger*, 753 F.3d 939, 944-45 (9th Cir. 2014) (same); *United States v. Kilbride*, 584 F.3d

1240, 1257 (9th Cir. 2009) (relying on dictionary definitions in rejecting vagueness challenge).[12] "Anal" is defined as "of, relating to, or situated near the anus". Webster's Third New International Dictionary 76 (1993). "Cleft" is defined as "a space or opening made by or as if by splitting," or "a hollow between ridges or protuberances," for example "the anal ~ of the human body". *Id.* at 421 (emphasis added). Thus, by reviewing the text of the Ordinance and consulting a dictionary, a person of ordinary intelligence could also determine that the "anal cleft" is a "space or opening made . . . as if by splitting" that is "situated near the anus." *Id.* at 76, 421. There is only one possible portion of the human body that fits this description. And although the district court specifically quoted portions of the dictionary definitions of "anal" and "cleft" in its ruling, it stated it could not understand the two terms together.[13] ER 6.

Any claim that the baristas themselves were unable to determine the meaning of the term "anal cleft" is also directly rebutted by Ms. Edge's testimony that she not only understood, but required her baristas to follow this exact same requirement when the baristas were working in unincorporated areas of the

[12] Today, the ordinary person trying to determine the meaning of "anal cleft" is more likely to conduct an internet search of the term. Such search would result in precisely the common sense definition that is apparent on the face of the term itself.

[13] Notably, the district court did not quote in its order the portion of the definition of the term "cleft" specifically referencing "the anal ~ of the human body." *See* ER 6.

County. Snohomish County Code 10.04.025(1)(a)(i) (stating that "[a] person is guilty of lewd conduct" if "the person intentionally . . . [e]xposes . . . [the] bottom one-half of the anal cleft") (emphasis added); ER 56-57 (Ms. Edge testifying that she instructs her baristas working in Snohomish County on code compliance and stating the baristas follow the law by covering "like two-thirds of their butt" while at work); ER 76-77 (Ms. Edge testifying that she remedied prior violations of Snohomish County Code and "made sure" her baristas "were wearing the proper outfits for the county"). There is simply no explanation offered as to why the baristas can comply with the requirement that they cover a portion of their "anal cleft" in the County's jurisdiction, but not in the City.[14]

Moreover, other court decisions, which the district court cited and disregarded, have upheld ordinances containing the phrase "anal cleft". *See, e.g.*, *Int'l Food & Beverage Sys. v. City of Fort Lauderdale*, 724 F. Supp. 942, 944 (S.D. Fla. 1989) ("Despite Plaintiff's contention that it is impossible to tell with precision where the anal cleft or cleavage begins or ends, the Court finds that the term is sufficiently communicative to put the average citizen on notice as to the exposure prohibited by the Ordinance."); *Fillingim v. Boone*, 835 F.2d 1389, 1391

[14] Indeed, despite acknowledging she instructs her baristas to comply with the Snohomish County Code requiring coverage of the "bottom one-half of the anal cleft", Ms. Edge nonetheless claimed in her deposition that she could not understand the term "anal cleft" when it was used in the Everett ordinance. ER 65-66.

n.1, 1398 (11th Cir. 1988) (upholding ordinance prohibiting public exposure of "anus or anal cleft or cleavage"); *DPR, Inc. v. City of Pittsburg*, 953 P.2d 231, 241-42 (Kan. Ct. App. 1998) (upholding ordinance prohibiting exposure of "anal cleft"). The court attempted to discount these cases in a footnote on the grounds that the "fractional modifier 'bottom one-half of'" was not present in those ordinances. ER 6 n.2. But the phrase "bottom one-half" is itself not vague or lacking in standards, and there is no reason that combining these terms would somehow render the term "anal cleft" facially vague. If anything, as noted, this qualifier merely provides more guidance as to the scope of the regulation by indicating that the "cleft" is vertical, not horizontal by requiring the "bottom one-half" be covered. *Cf. Geaneas*, 715 F. Supp. at 337 (upholding ordinance despite finding it "somewhat vague" in part because it "does not specify whether the entire buttocks, or what portion thereof, must be covered").

Notwithstanding the above, the district court maintained it was "uncertain" of the meaning of "anal cleft". ER 6. Even if the district court remained uncertain, this did not amount to unconstitutional vagueness sufficient to enjoin enforcement of the Lewd Conduct Ordinance.[15]

[15] At oral argument, the district court seemed to believe the term "anal cleft" also appeared in the Dress Code Ordinance, but it does not. *See* ER 79 ("Do I need to reach the constitutional issue if I find that the statute is void on its face? Because, honestly, they've used some terms that I'm not sure are known or one wouldn't have to get out a diagram to understand how you'd enforce it. For example, when

2. Both Ordinances Provide Clear Guidance to Law Enforcement and will not Result in Arbitrary Enforcement.

The district court further erred in enjoining enforcement of both Ordinances on the premise that they could permit arbitrary enforcement. In this pre-enforcement context, Plaintiffs were required to show the Ordinances are "impermissibly vague in all of [their] applications." *Vill. of Hoffman Estates*, 455 U.S. at 497.[16] The district court expressly acknowledged this burden was not met here by recognizing that application of the Ordinances "may be straightforward in some cases." ER 7. Based on the district court's own determination that the Ordinances can be applied in a manner that does not implicate any vagueness concerns, the Ordinances are not facially void for this reason alone. *See Alphonsus*, 705 F.3d at 1042 (requiring there be "no set of circumstances . . . under which the [statute] would be valid" in order to uphold a facial due process vagueness challenge) (internal quotation omitted).

---

you look up the term "anal" and "cleft," there is no combination of those two. You get "anal," or you get "cleft."); *see also* ER 22-23.

[16] Even when an enactment "clearly implicates free speech rights, it will survive a facial challenge so long as it is clear what the statute proscribes in the vast majority of its intended applications." *Humanitarian Law Project v. U.S. Treasury Dep't*, 578 F.3d 1133, 1146 (9th Cir. 2009) (quoting *Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1149, 1151 (9th Cir.2001) (quoting Hill v. Colorado, 530 U.S. 703, 733 (2000))) (internal quotes omitted) (emphasis added). In this case, however, a facial challenge fails under either standard. *See id.*

Notwithstanding the above, it is well-established that so long as the law adequately defines what is prohibited, any hypothetical concern as to whether the prohibition has been violated does not implicate the vagueness doctrine. *Williams*, 553 U.S. at 306 ("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). As the Supreme Court has recognized, "[c]lose cases can be imagined under virtually any statute." *Id.* But this problem is addressed "not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt." *Id.*

Here, the district court conflated these two requirements, ruling that because the proscribed conduct may be difficult to prove in certain cases, the Ordinances must be vague on their faces. But the Ordinances do not leave the meaning of the legislation to the subjective judgment of police officers; instead they identify the precise portions of the body that must be covered. ER 1153, 1160. Whether the Ordinances have been violated can therefore be established by objective evidence, which may in turn be challenged. Given the precise nature of the Ordinances, an officer's opinion or observation that someone has violated those requirements can be objectively proven true or false; the officer's subjective opinion cannot change that objective analysis. *See Williams*, 553 U.S. at 306 (vagueness doctrine applies

to prohibitions requiring subjective judgments and is not implicated where prohibition can be objectively proven true or false).

This case is therefore wholly unlike *Hunt v. City of Los Angeles*, 638 F.3d 703 (9th Cir. 2011), the only authority relied on by the district court for its decision on vagueness. *Hunt* involved the question of whether an ordinance requiring a purely subjective determination—whether a particular item was "inextricably intertwined" with a religious, political, philosophical or ideological message—was void for vagueness. 638 F.3d at 712. This Court held that because the phrase "inextricably intertwined" did not have any inherent meaning, this left the decision as to what items met this standard to the subjective judgment of the officers, rendering it unconstitutionally vague. *Id.* at 712-13. As set forth above, there is no such subjective determination necessary here.

For this reason, courts have routinely rejected vagueness challenges to laws that require certain body parts to be covered, recognizing such a requirement is objectively factual, even if it may be difficult to determine the precise contours of that body part on a particular person. *See, e.g., Geaneas*, 715 F. Supp. at 339 (rejecting vagueness challenge to law that required persons to cover the buttocks, finding this requirement was not vague even if it would be difficult to pinpoint in some cases); *SDJ, Inc. v. City of Houston*, 837 F.2d 1268, 1278 & n.36 (5th Cir. 1988), *cert. denied*, 489 U.S. 1052 (1989) (upholding against vagueness challenge

an ordinance containing the language "Female breast or breasts below a point immediately above the top of the areola"); *Fillingim*, 835 F.2d at 1398 (rejecting plaintiff's argument that the term "that area of the human female breast at or below the areola thereof" was not easily interpreted by reasonable persons, police officers and jurists).[17]

Further, to the extent the district court's ruling was based on Plaintiffs' argument that enforcement will necessarily involve "humiliating and intrusive" searches to obtain evidence of violations, ER 1149, there is nothing in the record that in any way suggests the City would employ such tactics to enforce these laws. Such concerns, if they ever arose, would, of course, also implicate the Fourth Amendment (although not the vagueness doctrine). *See, e.g.*, *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 375-77 (2009) (unreasonable strip search violated Fourth Amendment); *Byrd v. Maricopa Cnty. Sheriff's Dep't*, 629 F.3d

[17] *See also, e.g.*, *City of Daytona Beach v. Del Percio*, 476 So.2d 197, 199-200 (Fla. 1985) (upholding ordinance prohibiting exposure of a woman's breasts "below the top of the areola", noting that "[t]he fact that several interpretations of an ordinance may be possible does not render a law void for vagueness" where the ordinance sets forth terms that the ordinary person can sufficiently understand); *Dodger's Bar & Grill, Inc. v. Johnson Cnty. Bd. of Cnty. Comm'rs*, 32 F.3d 1436, 1444-45 (10th Cir. 1994) (upholding against vagueness challenge a provision prohibiting display of the "female breast below the top of the nipple", rejecting "inventive hypotheticals" attempting to demonstrate vagueness); *Rivera v. State*, 363 S.W.3d 660, 676 (Tex. Ct. App. 2011) ("We conclude that the phrase 'any portion of [the female breast] that is situated below a point immediately above the top of the areola' provides a sufficient warning to place persons of ordinary intelligence on notice regarding what conduct the Ordinance regulates and to prevent the risk of arbitrary enforcement.").

1135, 1146 (9th Cir. 2011) ("This litany of cases over the last thirty years has a recurring theme: cross-gender strip searches in the absence of an emergency violate an inmate's right under the Fourth Amendment to be free from unreasonable searches.").

Because this is a pre-enforcement, facial challenge, Plaintiffs bore the burden of establishing there was no set of circumstances under which the two Ordinances could be valid. The district court acknowledged that Plaintiffs failed to meet this standard in finding that the Ordinances could be validly applied in at least "some cases". Accordingly, the district court's ruling was error and should be reversed. And because purported vagueness was the only basis to enjoin enforcement of the Lewd Conduct Ordinance, the injunction against that ordinance should be dissolved on this basis alone.

B. The District Court Erred in Finding Plaintiffs were Likely to Succeed on the Merits of their First Amendment Claim.

The preliminary injunction should also be reversed as to the Dress Code Ordinance because Plaintiffs are unlikely to prevail on the merits of their First Amendment claim. The district court's ruling to the contrary was premised on a series of legal errors. First, the district court improperly concluded that Plaintiffs serving coffee in bikinis amounted to expressive conduct sufficient to trigger the First Amendment. Although Plaintiffs themselves disclaimed they were communicating an "erotic" message by wearing bikinis, the district court equated

the conduct at the bikini barista stands to erotic dancing in order to find the baristas' conduct sufficiently expressive. The district court further erred in improperly conflating the messages Plaintiffs actually claimed to be sending (empowerment, personal freedom, and the like) with the means of conveying these asserted messages (wearing "bikinis"). The district court then failed properly to apply the particularity or comprehensibility requirements derived from *Spence* to determine if Plaintiffs' wearing of bikinis was sufficiently expressive.

Compounding these errors, the district court then incorrectly concluded that the Dress Code Ordinance failed under intermediate First Amendment scrutiny because the City's legislative record was purportedly insufficient and the Ordinance insufficiently tailored. In so ruling, the district court misapplied the burden shifting test established in *Alameda Books*, in effect requiring the City to prove at the preliminary injunction stage that the Ordinance was supported by contemporaneous empirical data and was the most (or only) effective means of mitigating the secondary effects arising from bikini barista stands. Under the proper legal standard, however, the City's record was more than adequate and demonstrated a sufficient nexus between the Dress Code Ordinance and the mitigation of crime and other harms. The district court erred in its First Amendment analysis, and its ruling should be reversed.

1. The District Court Erred in Finding the Baristas' Clothing Choice was Expressive Conduct Protected by the First Amendment.

In order to prevail on a First Amendment claim arising from conduct (rather than speech), Plaintiffs must show the conduct in question "convey[s] a particularized message" and the "likelihood [is] great that the message [will] be understood by those who view[] it." *Spence*, 418 U.S. at 411; *see also Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984) ("[I]t is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies.").

In an effort to avoid meeting this test, Plaintiffs argued below that *Hurley*, 515 U.S. at 569, superseded the particularity requirement of *Spence*. ER 32-33. But *Hurley* merely held that a particularized message need not be "narrow [and] succinctly articulable," it did not remove the particularization requirement from this test. 515 U.S. at 569. This Court and others have confirmed the "particularized message" element remains the law. *See, e.g., Vivid Entm't, LLC*, 774 F.3d at 579; *Kaahumanu v. Hawaii*, 682 F.3d 789, 798 (9th Cir. 2012); *Zalewska v. Cnty. of Sullivan*, 316 F.3d 314, 319-20 (2d Cir. 2003). The Seventh Circuit recently reiterated the reasons for these parameters:

> [T]he conduct *itself* must convey a message that can be readily "understood by those who view[ ] it." *Texas v. Johnson*, 491 U.S. 397, 404, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) (quoting *Spence v. Washington*, 418 U.S. 405, 411, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974)). This limiting principle is necessary lest "an apparently

> limitless variety of conduct be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *U.S. v. O'Brien*, 391 U.S. 367, 376, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968).

Tagami v. City of Chicago, 875 F.3d 375, 378 (7th Cir. 2017).

Here, Plaintiffs expressly disclaimed their intended message was erotic or sexual. *See, e.g.*, ER 39 (Edge disclaiming that Hillbilly Hotties is adult entertainment business); ER 231 ("Wearing a bikini is not a sexual message[.]"); ER 235 ("The clothing and my message is not sexual."). Plaintiffs instead claimed to communicate varying generalized messages such as "empowerment, personal freedom, openness . . . vulnerability, and individuality". ER 1148; *see also* ER 229 (message is "young and fun and confident"); ER 233 (message is "I am approachable"); ER 235 (message is "comfortable" and "free"). This conduct must meet the requirements of *Spence* to qualify for First Amendment protection.

Under *Spence*, courts must first distinguish between "communicative activity with a clear contextual message" and communications that are "vague and unfocused". *Zalewska*, 316 F.3d at 319-20 (internal quotation omitted). For example, "wearing of a black armband in protest during the Vietnam War" is a particularized message. *Id*. at 320. Other examples include displaying an upside down flag with a peace symbol, saluting the flag, and staging a sit-in by African-American students in a "whites only" library. *See Kuerbitz v. Meisner*, No. 16-12736, 2017 WL 4161111, at *6 (E.D. Mich. Sept. 20, 2017) (summarizing cases).

In contrast, the wearing (or not wearing) of certain clothing may express broad concepts or ideas, but is generally not a sufficient to convey particularized messages subject to protection under the First Amendment. Thus, "[a]lthough freedom of speech and of the press—the relevant terms in the First Amendment—are often loosely paraphrased as 'freedom of expression,' and clothes are certainly a way in which people express themselves, clothing as such is not—not normally at any rate—constitutionally protected expression." *Brandt v. Bd. of Educ. of City of Chicago*, 480 F.3d 460, 465 (7th Cir. 2007). This is so even if the clothing may express general sentiments of individuality or empowerment, as Plaintiffs claim to do in this case. *See id.* (noting that the "kind of 'message' that clothing normally sends—'I am rich,' 'I am sexy,' 'I have good taste'" is not recognized as inherently expressive); *Zalewska*, 316 F.3d at 320 (stating that "a woman today wearing a dress or a skirt on the job does not automatically signal any particularized message about her culture or beliefs"); *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 389 (6th Cir. 2005) (holding no protection for clothing because it "look[s] nice" or conduct that "amounts to nothing more than a generalized and vague desire to express . . . individuality").

The messages Plaintiffs have identified in this case are "vague and unfocused" as opposed to sufficiently particularized. *See, e.g., E. Hartford Ed. Ass'n v. Bd. of Ed. of Town of E. Hartford*, 562 F.2d 838, 858 (2d Cir. 1977)

(teacher's refusal to wear a tie to demonstrate "a comprehensive view of life and society" was "vague and unfocused" and not subject to First Amendment protection). Not only did each barista claim to be conveying different general and subjective messages, they also acknowledged their personal "message" was open to a wide variety of interpretations. *See, e.g.*, ER 114, 134-37.

Other than drawing an analogy to "nude or partially nude dancing," the district court also failed to identify any specific particularized messages. ER 8. Tellingly, rather than agreeing that serving coffee in bikinis was itself inherently expressive conduct, the district court constructed its own potential messages to ascribe some communicative element to Plaintiffs' attire. To that end, the district court speculated that "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 9 (emphasis added). But there is no basis to sustain what amounts to a facial challenge through hypothetical activity. *See Roulette v. City of Seattle*, 97 F.3d 300, 303 (9th Cir. 1996) (holding the fact that conduct "can possibly be expressive" under some circumstances cannot sustain a facial challenge). This Court should reject the district court's attempt to circumvent the first prong of *Spence* by imbuing the baristas' conduct with unintended communicative elements.

The district court also erred with respect to the comprehensibility requirement of *Spence* because Plaintiffs failed to show their purported messages were actually received and understood as intended. Indeed, the district court concluded as much, stating, "some customers view the bikinis as 'sexualized,' to others, they convey particularized values, beliefs, ideas, and opinions; namely, body confidence and freedom of choice." ER 8; *see also* ER 33 (Plaintiffs concede "the message may be interpreted and perceived in different ways"). Plaintiffs also did not offer any testimony from customers that they actually understood any specific message they claimed to convey, and in their depositions the baristas confirmed the opposite was true. *See* ER 87 ("Q: Have any customers specifically told you that they understand that you're providing them a message of empowerment? . . . A. I can't remember."); ER 88 (cannot say whether message is appropriate for anyone but herself); ER 114 ("Q. Do you think different customers understand what you're conveying in your bikini in different ways? A. Yes."); ER 135-36 ("A: I can't speak to other people's opinions of what they think about me.").[18]

To meet the comprehensibility requirement, "the conduct in question must comprehensively communicate its own message without additional speech."

[18] The district court did not identify any evidence supporting comprehensibility, instead referring solely to Plaintiffs' rhetorical contentions in their briefing. ER 8 (citing Plaintiffs' opening and reply briefs).

Tagami, 875 F.3d at 378 (citing *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006)); *see also Santiago v. City of East Chicago*, No. 2:15 CV 358, 2018 WL 571943, at *2 (N.D. Ind. Jan. 26, 2018). Because the act of being naked generally does not communicate its own message without additional speech, "[b]eing 'in a state of nudity' is not an inherently expressive condition." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000); *Mglej v. Multnomah Cnty.*, No. 16-35126, 2018 WL 1373340, at *1 (9th Cir. Mar. 19, 2018) (same); *Tagami*, 875 F.3d at 378 (same).[19]

Accordingly, the mere fact that conduct encompasses nudity or sexuality does not make it likely viewers will understand any "message" the person subjectively intends to convey. *See*, *e.g.*, *Vivid Entm't, LLC*, 774 F.3d at 579 (holding that "whatever unique message Plaintiffs might intend to convey by depicting condomless sex, it is unlikely that viewers of adult films will understand that message"); *Tagami*, 875 F.3d at 378 (the mere act of going topless in public,

[19] *Tagami* reaffirms that even when persons seek to use nudity to protest prohibitions on public nudity, such conduct is generally not sufficiently expressive to trigger First Amendment protection. *See also Hightower v. City and Cnty. of San Francisco*, 77 F. Supp. 3d 867, 877-880 (N.D. Cal. 2014) (holding only those naked protests that occurred at city hall within days or two months of enactment of prohibition qualified as expressive conduct); *Naturist Soc'y v. Fillyaw*, 736 F. Supp. 1103, 1111 (S.D. Fla. 1990) ("Even if the plaintiffs intend to advocate a clothing optional lifestyle by appearing on the beach in G–Strings, pasties, and socks, the court finds, as a matter of law, that there is not a *great* likelihood that other beach patrons would understand this message."), *rev'd on other grounds*, 958 F.2d 1515 (11th Cir. 1992).

even on a city-wide day of protest regarding public nudity, not sufficiently likely to be understood without additional speech); *Recreational Developments of Phoenix, Inc. v. City of Phoenix*, 83 F. Supp. 2d 1072, 1092 (D. Ariz. 1999) ("As Plaintiffs' own testimony reveals . . . the message being sent by those engaging in sexual conduct in the clubs is not a particularized message guaranteed to be consistently interpreted and understood by the 'great majority' of those who view it. Although some Plaintiffs claim to express a view of a sexually liberated society, others stated that it was impossible to determine the message being sent and that the message varied depending on who interpreted it."), *aff'd sub nom.*, 238 F.3d 430 (9th Cir. 2000).

Nor does the linkage of nudity (partial or total) with a common commercial transaction establish a comprehensible message. "Ordinary commercial activity… is subject to governmental regulation without offending the First Amendment." *Las Vegas Nightlife, Inc. v. Clark Cnty., Nev.*, 38 F.3d 1100, 1102 (9th Cir. 1994). Courts have therefore rejected claims that the First Amendment protects the right to serve customers in various measures of undress. *See, e.g., Shetler v. State*, 681 So.2d 730, 731 (Fla. Dist. Ct. App. 1996) (prohibition on wearing "T-back" swimsuit did not violate First Amendment because "[w]hen nudity is employed as sales promotion in bars and restaurants, nudity is conduct") (internal quotation omitted); *King Cnty. ex rel. Sowers v. Chisman*, 658 P.2d 1256, 1258 (Wash. 1983)

("Nudity, in and of itself, is clearly conduct and has traditionally been subject to the police power of the State, particularly when used as sales promotion in bars and restaurants."); *City of Portland v. Derrington*, 451 P.2d 111, 113 (Or. 1969). Here, on its face, the Ordinance only regulates the attire of baristas at work and does not limit the exercise of these activities outside this commercial context. ER 1157-65; *see also* ER 67 (describing interaction with customer as typical commercial transaction); ER 98 (although not limited in doing so, barista testifying that she does not deliver her "message" outside of work); ER 112-13 (describing commercial transaction)

In sum, the district court should also be reversed because, under *Spence* and its progeny, Plaintiffs did not demonstrate sufficient expressive conduct to establish First Amendment protection, and are unlikely to prevail on the merits for this reason.

2. To the Extent the Baristas' Conduct Warrants First Amendment Protection, the Dress Code Ordinance Satisfies Intermediate Scrutiny.

Although serving coffee in bikinis does not constitute expressive conduct warranting constitutional protection, the Dress Code Ordinance survives First Amendment scrutiny regardless. The district court properly ruled that the Dress Code Ordinance was a content-neutral "secondary effects" regulation subject only

to intermediate scrutiny. ER 9-10.[20] As a secondary effects regulation, the Dress Code Ordinance must be upheld "if it is designed to serve a substantial government interest, is narrowly tailored to serve that interest, and does not unreasonably limit alternative avenues of communication." *World Wide Video of Wash., Inc. v. City of Spokane*, 368 F.3d 1186, 1192 (9th Cir. 2004) (internal quotations and citations omitted).[21] Here, the district court erred in concluding that the City had failed to "demonstrate a connection between the speech regulated by the ordinance and the

[20] Although concluding the Dress Code Ordinance was content neutral, the district court suggested in a footnote that there was "some indication that it was motivated at least in part by the City's disagreement with Plaintiffs' message." ER 9 n.3. Nothing in the legislative record supports any such inference. Indeed, the legislative findings reaffirm that the Council was not enacting this ordinance because it had concerns about how women dressed. ER 1157-59. The "evidence" cited by the district court consisted of the City's brief and a declaration used in the litigation, neither of which were before the City Council. ER 11. Moreover, the brief and declaration pertained to the manner in which Plaintiffs' conduct might be perceived under the *Spence* test, and the potential secondary effects of adult businesses, not the Council's motivation for passing the Ordinance.

[21] This test is "little, if any, different" from the test for validating a regulation of expressive conduct. *Clark*, 468 U.S. at 298; *see also Colacurcio v. City of Kent*, 163 F.3d 545, 551 n.4 (9th Cir. 1998) (quoting *Clark*). The expressive conduct test, derived from *United States v. O'Brien*, 391 U.S. 367 (1968), states "a regulation of symbolic expression is sufficiently justified if it: (a) is within the constitutional power of government; (b) furthers an important or substantial governmental interest unrelated to the suppression of expression; and (c) the incidental restriction on First Amendment freedoms is no greater than essential to the furtherance of that interest." *Colacurcio*, 163 F.3d at 551 n.4. As the Supreme Court noted, if an ordinance passes the first test, "it is untenable to invalidate it under *O'Brien* on the ground that the governmental interest is insufficient to warrant the intrusion on First Amendment concerns or that there is an inadequate nexus between the regulation and the interest sought to be served." *Clark*, 468 U.S. at 298 n.8.

secondary effects that motivated the adoption of the ordinance" and in determining the Ordinance was not narrowly tailored. ER 9-10. The district court further erred in ruling that the Ordinance did not leave open adequate alternative channels of communication. *Id.* These rulings should be reversed.

a. The District Court Failed to Apply Alameda Books in Erroneously Ruling there was no Causal Connection between the Barista Stands and Harmful Secondary Effects.

In considering the first prong of the intermediate scrutiny test, the district court properly concluded that the City had a substantial interest in deterring the harmful secondary effects associated with the bikini barista business model. ER 10. The district court erred, however, in ruling that the City could not "demonstrate a connection between the speech regulated by the ordinance and the secondary effects that motivated the adoption of the ordinance." *Id.* (quoting *Alameda Books*, 535 U.S. at 441). Specifically, the district court failed properly to apply the legal standards articulated in *Alameda Books* and this Court's resulting authority.

When a city enacts a secondary effects regulation such as the Dress Code Ordinance, the city council may rely on "whatever evidence it reasonably believes to be relevant to the problem at hand." *Ctr. for Fair Pub. Policy v. Maricopa Cnty., Arizona*, 336 F.3d 1153, 1168 (9th Cir. 2003) (internal quotation omitted). This includes analogous studies from other jurisdictions, legal precedent, anecdotal

evidence, the city's own experiences and relevant testimony. *See, e.g.*, *Gammoh*, 395 F.3d at 1126-27 (city could reasonably rely on studies involving nude erotic dancing to support its restrictions on partially clothed erotic dancing); *Pap's A.M.*, 529 U.S. at 297, 300 (upholding regulation where city relied on Supreme Court authority establishing harmful secondary effects related to adult businesses as well as city's "own experiences"); *Ctr. for Fair Pub. Policy*, 336 F.3d at 1167 (relying on "experiences of other communities" to support rationale for regulation).

The City bears a very limited evidentiary burden to satisfy this test. *World Wide Video*, 368 F.3d at 1195-96 (requiring "very little evidence" to satisfy causal connection); *Ctr. for Fair Pub. Policy*, 336 F.3d at 1167 (recognizing even a "slim" record as sufficient to justify the ordinance at issue). When determining whether the government has met its burden, the Court may not reject the government's interpretation of the evidence if that interpretation is "plausible." *Alameda Books*, 535 U.S. at 438-39 (court erred by substituting its interpretation of a study for the city council's "plausible" interpretation of that study). Once the government introduces evidence sufficient to establish a causal link, the burden shifts to the plaintiff to establish that the government's evidence "does not support its rationale" or to "furnish[] evidence that disputes the municipality's factual findings". *Id.*

Here, despite acknowledging that only "very little evidence" was required for the City to meet its burden, the district court did not apply the *Alameda Books* test. Instead, it simply dismissed the City's legislative record out of hand, claiming it contained data from "years ago" regarding conduct perpetrated by "two individuals who have since been convicted." ER 11. This is a wholly inaccurate characterization of the legislative record, which documented a series of different investigations that revealed criminal conduct at stands owned by at least four different individuals, including Ms. Edge, and involved approximately 30 different baristas and an unknown number of customers. *See* ER 214 (identifying 27 different baristas); *see also* ER 242-45, 249-52, 314-16, 329-33, 344-47, 348-51, 358-59, 362-64, 585-88, 594-95, 600-01, 604, 620-21, 622-23, 624-25. These reports documented criminal conduct occurring in recent years, both in Everett and elsewhere. And these reports described a wide range of criminal conduct at the stands, including flashing, prostitution, public masturbation, assault and harassment. ER 274-75, 291, 442, 446, 486, 489-92, 502, 515-18, 521, 583-605.

Under the *Alameda Books* standard, the district court was not permitted to re-interpret this evidence or substitute its assessment of the significance of this evidence in place of the City Council's assessment. 535 U.S. at 438 (city not required to prove its interpretation of the evidence is the "only one" that is plausible); *see also Pap's A.M.*, 529 U.S. at 301 ("Even though the dissent

questions the wisdom of Erie's chosen remedy, … the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems[.]") (internal quotation omitted). This evidence of secondary harms at the stands is by itself sufficient for the City to meet its burden under intermediate scrutiny. *See World Wide Video*, 368 F.3d at 1195-96 (anecdotal evidence of secondary harms was sufficient).

In addition to considering these documented instances of criminal conduct, the Council heard testimony on several critical points, none of which was addressed by the district court. For example, the Council was informed about the prevalence of crime at bikini barista stands and the challenges law enforcement encountered in addressing it. ER 1019, 1027, 1070-71, 1075-81. The Council heard testimony that the current enforcement scheme required time-intensive undercover investigations to obtain video evidence of illegal conduct. ER 1027-28, 1071-75. The Council further heard testimony explaining how the Dress Code Ordinance would curtail illegal conduct, including that the minimum clothing requirement would make it harder for baristas to "flash", and that this unlawful conduct would be much easier to detect if the baristas were not already in an almost-nude state. ER 1030, 1085-86. And the Council was advised that the licensing requirement would motivate stand owners to regulate conduct at their

stands rather than turning a blind-eye to the illegal conduct and claiming ignorance. ER 1020, 1028, 1073, 1083-86.

The district court also ignored studies, court decisions and testimony demonstrating the link between adult entertainment businesses and the types of illegal conduct observed at the bikini barista stands. Specifically, the legislative record demonstrated the types of secondary effects typically seen at adult businesses, the presence of these same types of effects at bikini barista stands and the similarities between these business models. *See generally* ER 239-1059. Although the district court expressed skepticism of the commonalities between the bikini barista model and strip clubs, ER 25[22], it at the same time likened baristas serving coffee in bikinis to nude dancing for purposes of finding their conduct sufficiently expressive. ER 8. The district court cannot on the one hand rely on similarities between the baristas' conduct and erotic dance to justify its finding on expressive conduct, but at the same time reject those similarities when considering this conduct's harmful secondary effects. At the very least, it was plausible for the Council conclude that studies about the secondary harms caused by adult entertainment establishments were relevant to bikini barista stands. *See Alameda Books*, 535 U.S. at 438.

[22] At oral argument, the court asked: "So you're telling me that buying lattes and going into strip clubs are comparable?" ER 25. As the legislative record established, the conduct observed at numerous stands was equivalent to conduct at adult businesses. ER 747-76, 1023, 1073, 1076-77, 1093, 1117-19.

Rather than referring to the actual legislative record that formed the basis for the Council's decision, the district court instead attacked a summary the City prepared during briefing of the preliminary injunction showing recent reported incidents of crime at various Everett business locations.[23] ER 11. Plaintiffs attempted to introduce testimony from their own lawyer to rebut this report, but the district court properly struck that testimony on the grounds of hearsay and improper expert opinion. ER 5. Despite this, the district court appeared to rely on this inadmissible evidence in asserting that the crime data report was "suspect." ER 11. Even if the district court reached this conclusion independent of the stricken testimony, however, the crime data report was not part of the legislative record the Council considered in enacting the Dress Code Ordinance. As such, it had no bearing on the Council's consideration of this regulation, and had no bearing on whether the City met its initial burden under *Alameda Books*. *See, e.g.*, *Alameda Books*, 535 U.S. at 438-39 (referencing evidence considered by the municipality when enacting the ordinance); *Ctr. for Fair Pub. Policy*, 336 F.3d at

[23] The legislative record documents events that occurred over an extended period of time prior to the enactment of the ordinances. ER 239-62. The most contemporaneous evidence was not available because the EPD had shifted focus to legislation rather than undercover visits. ER 223, 1068-71, 1096-97. There is no requirement, however, for the City to rely on evidence of secondary harms occurring immediately prior to the enactment of the ordinance. *See, e.g.*, *Alameda Books*, 535 U.S. at 438-40 (affirming city council's use of 1977 study to justify 1983 amendment to ordinance). Nor was the City required to show the secondary harms had occurred in Everett. *Pap's A.M.*, 529 U.S. at 297 (council could rely on secondary harms in other jurisdictions to justify ordinance).

1167 (analyzing extent of "pre-enactment record" considered by legislature). The actual record before the Council was more than sufficient to meet the City's initial burden of demonstrating a connection between its stated rationale and the conduct at issue. *See, e.g.*, *Dream Palace v. Cnty. of Maricopa*, 384 F.3d 990, 1014-15 (9th Cir. 2004) (holding it was reasonable for a county board of supervisors to infer a regulation limiting hours of operation would reduce secondary harms based on summaries of studies linking secondary harms to erotic entertainment, and testimony about such conduct occurring during the late hours).

Moreover, this Court should hold that Plaintiffs failed to meet their burden of "casting direct doubt" on the City's rationale, either by showing the City's evidence did not support its rationale or by offering their own "actual and convincing evidence" to the contrary. *World Wide Video*, 368 F.3d at 1195 (quoting *Alameda Books*, 535 U.S. at 438-39). The only "evidence" Plaintiffs attempted to offer to rebut the City's legislative record was the inadmissible declaration from Plaintiffs' counsel purporting to refute – not the legislative record – but the City's post-litigation crime data summary. In the absence of any admissible evidence, Plaintiffs simply argued (inaccurately) that the City's record was flawed because it lacked recent examples of criminal conduct and related only to two bad actors. This type of attack is insufficient. *See Ctr. for Fair Pub. Policy*, 336 F.3d at 1168 (finding plaintiff failed to cast doubt on state's theory by arguing

legislative record consisted of "irrelevant anecdotes", "isolated incidents" and testimonial evidence); *World Wide Video*, 368 F.3d at 1196 (noting that although plaintiff contradicted some of city's secondary effects evidence, it failed to rebut the public testimony relied on by the council).

Plaintiffs further argued that the City's evidence was flawed based on their claims that they did not themselves participate in illegal conduct. But there is no requirement that the evidence in the record be tied to a particular plaintiff.[24] Ms. Edge also filed a police report in 2017 regarding continuing illegal conduct occurring at a nearby competitor stand. ER 202-04. And in this litigation alone, one of the Plaintiffs was fired for engaging in lewd behavior and was subsequently dismissed from this case. ER 41-42. Plaintiffs cannot meet their burden of establishing the City's evidence fails to support its stated rationale.

In sum, the district court erred in enjoining the Dress Code Ordinance based on the first level of the *Alameda Books* test. The City was entitled to rely on precisely the type of evidence it did in enacting the Ordinance. The City was not

[24] For example, in *Ino Ino, Inc. v. City of Bellevue*, 937 P.2d 154, *as amended*, 943 P.2d 1358 (Wash. 1997), the Washington Supreme Court observed: "the City relied on evidence that adult cabarets generally produce certain harmful secondary effects. In order to prevent these secondary effects, the City may regulate all adult cabarets and require Respondents' compliance <u>despite their claims that they do not produce the secondary effects targeted by the regulation</u>." 937 P.2d at 170 (emphasis added); *see also One World One Family Now v. City and Cnty. of Honolulu*, 76 F.3d 1009, 1015 (9th Cir. 1996) ("Cities need not prove up their interests on a block-by-block basis….").

obligated to come forward with "empirical data" to support its rationale or to create its own studies and data to support its decision-making. *Alameda Books*, 535 U.S. at 439; *see also City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986) ("The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities[.]"). The City Council properly relied on the legislative record in finding the Dress Code Ordinance "would lessen the negative adverse impacts related to bikini barista stands." ER 1159. The district court's ruling to the contrary should be reversed.

b. The District Court Improperly Substituted its Judgment for the City's in Finding the Dress Code Ordinance was not Narrowly Tailored.

The district court further erred in concluding that the Dress Code Ordinance was not narrowly tailored to meet the City's interests. "The narrow tailoring requirement is satisfied so long as the government's asserted interest would be achieved less effectively absent the regulation." *Dream Palace*, 384 F.3d at 1016 (internal quotation omitted); *see also One World*, 76 F.3d at 1013-14 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)).[25] This does not require

[25] Similarly, "an incidental burden on speech is no greater than is essential, and therefore is permissible under [the] *O'Brien* [test], so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Kev*, 793 F.2d at 1059 n.3 (quoting *United States v.*

the restriction be the "least restrictive or least intrusive alternative." *One World*, 76 F.3d at 1014 (quoting *Ward*, 491 U.S. at 798). Nor will a restriction be invalidated "simply because there is some imaginable alternative that might be less burdensome on speech." *Vivid Entm't, LLC*, 774 F.3d at 581 (internal quotation omitted). To that end, district courts may not invalidate a restriction simply because they disagree with a city's chosen method of addressing the harms at issue. *See, e.g.*, *Colacurcio*, 163 F.3d at 553 ("The courts have emphasized that judges should not supplant the legislature's role in developing the most appropriate methods for achieving government purposes.").

In the same vein, the City is not obligated to establish that the Dress Code Ordinance is the most effective means of addressing the problem at issue; the relevant inquiry is instead whether it will have some impact. *See, e.g.*, *Vivid Entm't, LLC*, 774 F.3d at 582; *Pap's A.M.*, 529 U.S. at 301 (noting that regulation "may not greatly reduce [the] secondary effects, but *O'Brien* requires only that the regulation further the interest in combatting such effects").

Here, the district court summarily concluded that the "City's legitimate interest in deterring crime could reasonably be furthered in less restrictive ways." ER 12. This was apparently based solely on the district court's conclusion that the Ordinance was improper because it went "far beyond prohibiting the 'pasties and

---

Albertini, 472 U.S. 675 (1985)). This prong of *O'Brien* is further satisfied by the demonstration of ample alternative means of expression.

G-strings' complained of by the City." ER 12. But the City's goal in passing the Dress Code Ordinance was to require certain minimum clothing be worn in quick service facilities in order to both deter the type of criminal conduct at issue and to make it easier to detect. *See* ER 1157-59.[26] The district court simply ignored these purposes in reaching its holding.

Instead, the district court appeared to substitute its judgment for that of the Council in questioning whether other possible means of regulation were possible. ER 12, 26.[27] But "precedent commands that courts should not stray from a deferential standard in these contexts, even when First Amendment rights are implicated through secondary effects." *Ctr. for Fair Pub. Policy*, 336 F.3d at 1168-69 (internal quotation omitted). This is because the City Council "is in a better position than the Judiciary to gather and evaluate data on local problems." *Alameda Books*, 535 U.S. at 439. The district court erroneously failed to give proper deference to the City in attempting to craft a legislative solution. This was error.

---

[26] A provision that "facilitates the detection of public sexual contact and discourages contact from occurring in the first place" furthers an "important or substantial governmental interest." *Ino Ino, Inc.*, 937 P.2d at 169; *see also Dream Palace*, 384 F.3d at 1014-15.

[27] "Well, in the strip club, they don't have a clothing ordinance, presumably, but they do have other restrictions. For example, lighting, distances. Why is it that those kinds of ordinances wouldn't work? If you believe that these baristas are engaged in criminal conduct, you know, put a cam in the barista stand." ER 26. In fact, testimony before the district court explained the difficulty with and limitations of surveillance video. ER 222-225.

c. The District Court Erred in Finding the Baristas Lacked Adequate Alternative Channels to Share their Messages.

The district court further erred in determining that alternative channels of communication were unavailable for the baristas to send their self-identified messages of freedom, empowerment and openness. In reaching this conclusion, the district court did not consider the alternative ways the baristas could convey their messages. Instead, the district court simply conflated the baristas self-identified "messages"— i.e., self-confidence, empowerment, vulnerability, etc.—with the conduct at issue—serving coffee in bikinis. ER 12. The Supreme Court and this Court have repeatedly rejected attempts to define what is being banned as the message. *Pap's A.M.*, 529 U.S. at 293; *see also Colacurcio*, 163 F.3d at 549, 555 (rejecting definition of protected speech as "table dancing" – which was completely banned by the ordinance – and instead defined it as erotic entertainment); *Vivid Entm't, LLC*, 774 F.3d at 578-79 (rejecting definition of restricted speech as "films depicting condomless sex" as opposed to erotic movies generally); *Gammoh*, 395 F.3d at 1123 (noting that the "'expression' at issue could always be defined to include the contested restriction").

The district court's ruling defines the conduct at issue as the protected expression without addressing whether the baristas are able to convey their self-defined messages using other means of communication. ER 12 ("[I]t is precisely by wearing bikinis while serving coffee to customers that Plaintiffs convey their

intended messages."). The baristas may share their messages of openness, friendliness and empowerment in numerous ways, including through the spoken word. *See, e.g.*, *Jacobs v. Clark Cnty. Sch. Dist.*, 526 F.3d 419, 437 (9th Cir. 2008) (recognizing alternative channels for students to communicate outside of attire, including through verbal conversations). If anything, the baristas' messages are only "slightly impaired" by the Dress Code Ordinance; but this is insufficient to find inadequate alternative channels remain. *Vivid Entm't, LLC*, 774 F.3d at 582; *see also One World*, 76 F.3d at 1014 (although ordinance foreclosed plaintiffs from selling message-bearing merchandise, plaintiffs were "free to disseminate and seek financial support for their views through myriad and diverse alternative channels, such as handing out literature, proselytizing or soliciting donations") (internal quotation omitted).

The district court's error was especially pronounced here because the baristas have expressly disclaimed that their messages are sexual or erotic in nature. Thus, unlike erotic dance, which necessarily involves states of undress, serving coffee in a bikini is not necessary in and of itself for the baristas to deliver their self-identified, non-sexual messages. In the "absence of an absolute bar to the market . . . it is irrelevant whether [a regulation] will result in lost profits, higher overhead costs, or even prove to be commercially unfeasible for an adult business." *Colacurcio*, 163 F.3d at 557 (internal quotation omitted). Adequate

alternative channels other than wearing a bikini at work exist for the baristas to communicate their messages. The district court erred in determining otherwise.

For each of the reasons above, the district court's ruling that Plaintiffs were likely to succeed on the merits of their First Amendment claim should be reversed. And because the district court's grant of an injunction was based entirely on Plaintiffs' likelihood of success on the merits, *see* ER 12, the preliminary injunction should be dissolved and the case remanded for further proceedings.

VIII. CONCLUSION

For the foregoing reasons, this court should reverse the district court, dissolve the preliminary injunction, and remand for further proceedings.

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, counsel hereby affirms that it is not aware of any cases that would be deemed related under the provisions of this rule.

DATED this 28th day of March, 2018.

CITY OF EVERETT

By */s/Ramsey Ramerman*
Ramsey Ramerman, WSBA #30423
CITY OF EVERETT
2930 Wetmore Avenue
Everett, WA 98201-4067
Telephone: 425-257-7009
Facsimile: 425-257-8693

PACIFICA LAW GROUP LLP

By */s/Matthew J. Segal*
Matthew J. Segal, WSBA #29797
Sarah C. Johnson, WSBA #34529
PACIFICA LAW GROUP LLP
1191 Second Avenue, Suite 2000
Seattle, WA 98101-3404
Telephone: 206-240-1700
Facsimile: 206-240-1750

ATTORNEYS FOR DEFENDANT-APPELLANT CITY OF EVERETT

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 17-36038

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

I certify that (*check appropriate option*):

☒ This brief complies with the length limits permitted by Ninth Circuit Rule 28.1-1.
The brief is 13,614 words or _____ pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☒ This brief complies with the length limits permitted by Ninth Circuit Rule 32-1.
The brief is 13,614 words or _____ pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 32-2(b).
The brief is _____ words or _____ pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable, and is filed by (1) ☐ separately represented parties; (2) ☐ a party or parties filing a single brief in response to multiple briefs; or (3) ☐ a party or parties filing a single brief in response to a longer joint brief filed under Rule 32-2(b). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the longer length limit authorized by court order dated _____
The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). The brief is _____ words or _____ pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.

☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 32-2 (a) and is _____ words or _____ pages, excluding the portions exempted by Fed. R. App. P. 32 (f), if applicable. The brief's type size and type face comply with Fed. R .App. P. 32(a)(5) and (6).

☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 29-2 (c)(2) or (3) and is _____ words or _____ pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits set forth at Ninth Circuit Rule 32-4.
The brief is _____ words or _____ pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Signature of Attorney or Unrepresented Litigant /s/ Matthew J. Segal

Date Mar 28, 2018

("s/" plus typed name is acceptable for electronically-filed documents)

9th Circuit Case Number(s) 17-36038

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

****

CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that 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 on (date) 3/28/18 .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) /s/ Matthew J. Segal

****

CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that 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 on (date) .

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

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature (use "s/" format)