

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

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No. 05-15725

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

**GEORGE VILLEGAS, BOB POELKER, MANCELO ORTA AND DON
DEROSIERS**

Plaintiffs/Appellants,

v.

CITY OF GILROY, GILROY GARLIC FESTIVAL ASSOCIATION, INC.

Defendants/ Appellees

**Appeal from the U.S. District Court, District of Northern California,
The Honorable James Ware, Presiding,
District Court Case Nos: C01-20720**

PLAINTIFFS/APPELLANTS' PETITION FOR REHEARING EN BANC

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TABLE OF CONTENTS

I	Introduction	1
II	History/facts	3
III	Argument	5
	A. Under <i>Hurley</i> , Plaintiffs' message of membership and affiliation with the Top Hatters is protected by the First Amendment.	5
	B. As an organization involved in charitable fund-raising, the Top Hatters right to promote itself through passive messages on clothing is constitutionally-protected.	12
	C. The Ninth Circuit's decision in <i>Sammartano</i> was improperly ignored	14
IV	Conclusion	16

TABLE OF AUTHORITIES

cases

American Civil Liberties Union of Nevada v. City of Las Vegas, 333 F.3d 1092 (9th Cir.2003)	13,14
Board of Trustees of the State University of New York v. Fox, 492 U.S. 469, (1989)	13
City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988)	13
City of Ladue v Gilleo, 512 U.S. 43 (1994)	14
Cohen v. California, 403 U.S. 15 (1971)	9
Colacurcio v. City of Kent, 163 F.3d 545 (9 th Cir. 1998)	7
Foti v City of Menlo Park, 146 F.3d 629 (9 th Cir. 1998)	17
Galvin v. Hay, 374 F.3d 739 (9 th Cir. 2004)	9,10
Gaudiya Vaishnava Society v. City and County of San Francisco, 952 F.2d 1059, (9th Cir.1990)	13,14
Heffron v. International Society for Krishna Consciousness, 452 U.S. 640 (1981)	13
Holloman v. Harland, 370 F.3d 1252 (11 th Cir. 2004)	6,8
Hurley v. Irish American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. (1995)	1,3,5, 6,7,8, 9,10, 11,16

IDK v. Clark County, 836 F.2d 1185 (9th Cir.1988)	2
Jacobs v. Clark County School District, 373 F.Supp.2d 1162 (D.Nev. 2005)	8,9
Mastrovincenzo v. City of New York, 313 F.Supp.2d 280 (S.D.N.Y. 2004).	6,7
Mastrovincenzo v. City of New York, 435 F.3d 78 (2 nd Cir. 2006)	6
National Socialist Party of America v. Skokie, 432 U.S. 43 (1977)	3
Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781 (1988)	9
Sammartano v. First Judicial District Court, 303 F.3d 959 (9 th Cir 2002)	14,15 16
Spence v. Washington, 418 U.S. 405 (1974)	3,5,6, 7,8,16
Stromberg v. California, 283 U.S. 359 (1931)	3
Tenafly Eruv Association, Inc. v. Borough of Tenafly, 309 F.3d 144 (3 rd Cir. 2002)	5,7
Texas v. Johnson, 491 U.S. 397 (1989)	2,6,8
Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969)	3,8
Troster v. Pennsylvania State Department of Corrections, 65 F.3d 1086 (3d Cir.1995)	7
United States v. O'Brien, 391 U.S. 367 (1968)	7,8
Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980)	13

West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624 (1943)	3
White v. City of Sparks, 341 F.Supp.2d 1129 (D. Nev. 2004)	12

statutes/rules

FRAP 35(a)(1)	1
---------------	---

other material

Webster's Third International Dictionary of the English Language Unabridged, (3 rd ed. 1986)	11
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I Introduction

Under FRAP 35 (a)(1), a rehearing en banc is appropriate if it (1) is necessary to secure or maintain uniformity of the court's decisions or (2) involves a question of exceptional importance. Both circumstances exist here. The panel's April 30, 2007 opinion in *Villegas v. City of Gilroy*, (No. 0515725) conflicts with the decision of the United States Supreme Court in *Hurley v. Irish American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), and consideration by the full Court is therefore necessary to maintain uniformity of the Court's decisions. Moreover, it involves a question of exceptional importance, specifically whether messages publicly expressing organizational affiliation can be stripped of First Amendment protection, as mere "demonstrative insignia".

Clearly, the outcome implicates far more than just the rights of the instant Plaintiffs, members of the Top Hatters Motorcycle Club, but instead extends to other members, affiliates and supporters of a vast array of associations, including gay, lesbian and bisexual groups of the sort addressed in *Hurley*. The panel erroneously held that First Amendment protection of messages touting membership in a group or organization is determined by whether the organization itself touts specific "political, religious or other viewpoints." (Opinion at 4778).

Thus, the panel was incorrect on two points. The first is that the Top

Hatters, whose articles of incorporation state that “its charitable purposes ‘are to promote good will and understanding among disparate community groups and to raise and distribute funds to other charitable organizations or to needy individuals’” (Opinion at 4778), is not involved in any constitutionally-protected messaging (Opinion at 4781), but is instead no more deserving of such protection than the commercial escort services in *IDK v. Clark County*, 836 F.2d 1185 (9th Cir.1988).

The other, and more significant, error in the panel’s decision was that a “uniform” prominently displaying the organization’s name, geographic origin and symbol was insufficiently expressive to be constitutionally protected. (Opinion at 4781). Furthermore, the panel based this conclusion largely on the fact that in deposition, members of the organization ascribed different symbolic meanings to various components of the pictorial insignia, such as the wings, hat and skull.¹

¹ Under this analysis, it could be plausibly argued that the American flag would not be subject to First Amendment protection if it could be shown that the public was unaware of the fact that each of the fifty stars represented one of the fifty states and that each of the thirteen stripes represented one of the thirteen original colonies. Clearly the flag’s message – representing America – is not dependent upon awareness of this symbolism. When used on a boat or airplane, it represents America as the country of origin or registry. When burned, as in *Texas v. Johnson*, 491 U.S. 397 (1989) it is used a protest against American policy. In either case, the association of the flag with America exists regardless of whether or not those who see the flag are familiar with the symbolism contained within it. Understanding a logo’s symbolism does not affect its message of affiliation, be it

(Opinion at 4781). This analysis by the panel stands in direct contradiction to the opinion of the United States Supreme Court in *Hurley*, 515 U.S. at 569:

“Noting that ‘[s]ymbolism is a primitive but effective way of communicating ideas,’ *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 632, 63 S.Ct. 1178, 1182, 87 L.Ed. 1628 (1943), our cases have recognized that the First Amendment shields such acts as saluting a flag (and refusing to do so), *id.*, at 632, 642, 63 S.Ct., at 1182, 1187, wearing an armband to protest a war, *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 505-506, 89 S.Ct. 733, 735-736, 21 L.Ed.2d 731 (1969), displaying a red flag, *Stromberg v. California*, 283 U.S. 359, 369, 51 S.Ct. 532, 535, 75 L.Ed. 1117 (1931), and even ‘[m]arching, walking or parading’ in uniforms displaying the swastika, *National Socialist Party of America v. Skokie*, 432 U.S. 43, 97 S.Ct. 2205, 53 L.Ed.2d 96 (1977). As some of these examples show, a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a ‘particularized message,’ *cf. Spence v. Washington*, 418 U.S. 405, 411, 94 S.Ct. 2727, 2730, 41 L.Ed.2d 842 (1974) (*per curiam*), would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll.”

II History/facts

The case involves Plaintiff members of the Top Hatters Motorcycle Club who were removed from the July 2000 Gilroy, California Garlic Festival because they were wearing the club’s “patch” or insignia, indicating membership in the organization, on their clothing. (Opinion at 4777-4778). The Court noted that “[t]he festival promoters had adopted an unwritten festival dress code which

of an organization or of a nation.

provided that persons attending the festival not be permitted to wear gang colors or other **demonstrative insignia**, including **motorcycle club insignia**.” (Opinion at 4777 [emphasis added]).

As recounted in the panel’s April 30, 2007 decision, the standard of review is set forth on page 4779 of the Opinion. The procedural history is set forth on pages 4778-4779:

“On July 30, 2001, the plaintiffs filed the complaint in this case. On April 24, 2002, and April 29, 2002, respectively, the City and the GGFA filed motions to dismiss. On August 29, 2002, the district court granted the motions to dismiss. On September 20, 2002, the plaintiffs appealed the district court's dismissal. On March 11, 2004, this court reversed and remanded the case to the district court.[90 Fed. Appx. 981, 982 (9th Cir. 2004)] On September 13, 2004, the City and GGFA filed motions for summary judgment. On April 5, 2005, the district court granted those motions and rendered judgment in favor of the defendants. On April 18, 2005, the plaintiffs filed a notice of appeal in this case.”

In its Order, the panel affirmed the District Court’s decision concerning the two issues before it. It first ruled that “the plaintiffs’ act of wearing their vests adorned with a common insignia simply does not amount to the sort of expressive conduct protected by the First Amendment right to freedom of speech.” (Opinion at 4782). The panel also ruled that “the plaintiffs did not engage in the kind of expressive conduct that would support a violation of the First Amendment right to freedom of expression.” (Opinion at 4785).

III Argument

A. Under *Hurley*, Plaintiffs' message of membership and affiliation with the Top Hatters is protected by the First Amendment.

The crux of the panel's freedom of expression analysis appears on page 4781 of the Opinion:

“In this case, the district court correctly applied the test in *Spence [v. Washington]*, 418 U.S. 405 (1974)] and concluded that the plaintiffs' act of wearing their vests and insignia into the festival did not rise to the level of protected speech for purposes of the First Amendment. The insignia on their vests depicted a skull with wings on either side and a top hat. All of the members of the plaintiffs' motorcycle club had different interpretations of the meaning of their club insignia. As appellant Poelker stated, the insignia signified ‘whatever you want to interpret it as.’ Even amongst themselves, the plaintiffs could not agree on a common theme or message that they sought to convey by wearing their vests and insignia. There is nothing in the record tending to establish such a common message. The district court was, therefore, correct in concluding that the plaintiffs vests did not manifest an ‘intent to convey a particularized message.’ *Spence*, 418 U.S. at 410-11.”

The panel's analysis of the “intent to convey a particularized message” standard is at variance with both *Hurley* and with *Spence* itself. Both the Third Circuit, in *Tenaflly Eruv Association, Inc. v. Borough of Tenaflly*, 309 F.3d 144, 159 (3rd Cir. 2002)(“Plaintiffs’ act of attaching an eruv or demarcation used by Orthodox Jews to allow for Sabbath travel was not imbued with sufficient expressive content under the Free Speech clause, but preliminary injunction issued

under the Free Exercise clause), and the Eleventh Circuit, in *Holloman v. Harland*, 370 F.3d 1252, 1270 (11th Cir. 2004) (“student standing silently with upraised fist during Pledge of Allegiance at school considered expressive conduct”) have noted that the 1995 *Hurley* decision modified, if not erased, the “particularized message” requirement of *Spence* (hanging American flag upside down with peace symbol attached to it) and *Texas v. Johnson*, 491 U.S. at 404 (burning of American flag considered expressive act).

The Second Circuit, in *Mastrovincenzo v. City of New York*, 435 F.3d 78, 91 n. 9 (2nd Cir. 2006) similarly noted *Hurley*’s modification of the *Spence* test. *Mastrovincenzo* addressed the issue of whether decorated articles of clothing are sufficiently expressive to receive First Amendment protection. The Second Circuit distinguished between unprotected, purely utilitarian items and those with significant expressive intent. *Id.* at 96. In ruling that the items in *Mastrovincenzo* were, indeed, entitled to constitutional protection, the Court focused on the fact that the items of clothing in questions contained, among other things, text, logos and design. *Id.*

“Mastrovincenzo’s work includes ‘decorated baseball caps with such words as ‘Boston,’ ‘Unique,’ or ‘Uptown’ (in a stars and stripes motif) painted across the front.’ Santos’s work includes caps “with words and designs such as ‘Bronx’ painted in army camouflage colors and accompanied by a partial subway map of the Bronx; ... ‘1984’ in green and purple on a background of vertical black rectangles and

black cloud-shaped splotches; and several representational scenes.” citing *Mastrovincenzo v. City of New York*, 313 F.Supp.2d 280, 290 (S.D.N.Y. 2004).

In *Tenefly Eruv*, 309 F.3d at 160, the Third Circuit, citing *Troster v. Pennsylvania State Department of Corrections*, 65 F.3d 1086, 1090, n. 1 (3d Cir.1995), noted that *Spence* contained no “language of necessity” in its particularized message criterion, and therefore treated the *Spence* standard as a mere guidepost. The *Tenefly Eruv* Court also noted that: “[t]he *Hurley* Court had no need to formulate a new test, however, because--unlike conduct that is not normally communicative--parades are inherently expressive.” 309 F.3d at 160.

This points out another fundamental flaw in the panel’s First Amendment analysis in the instant case. The so-called *Spence* test involves the question of First Amendment protection for expressive conduct. Conduct may have expressive and non-expressive components. *United States v. O'Brien*, 391 U.S. 367, 376 (1968). *O'Brien* involved a law banning the burning of draft cards. *Id.* at 369. The Court noted that the law at issue was content-neutral, because it dealt with conduct that might or might not have an expressive element. *Id.* at 375.

The Ninth Circuit has noted that the *Spence* standard applies not to pure speech but to conduct that might be expressive. See, *Colacurcio v. City of Kent*, 163 F.3d 545, 550, n. 1 (9th Cir. 1998). In fact, the use of the American flag in

Spence and *Johnson*, the Saint Patrick's Day parade in *Hurley*, all involved conduct that was imbued with expressive intent. In contrast, the rule banning associational insignia in this case was aimed directly at the expressive elements of Plaintiffs' clothing.

The Supreme Court, in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 508 (1969), noted that the black armbands worn by certain students in protest of the Viet Nam War, were not conduct but more "akin to pure speech." The inapplicability of the *Spence* test to expression that is "akin to pure speech" was pointed out by the *Holloman* Court. 370 F.3d at 1270:

"It is quite possible, however, that *Holloman's* act constituted 'pure speech.' As the Court suggested in *O'Brien*, 391 U.S. at 376, 88 S.Ct. at 1678, expressive conduct is an act with significant " 'non-speech' elements," that is being used in a particular situation to convey a message. *Holloman's* act does not contain any of the substantive 'non-speech' elements that are necessary to remove something from the realm of 'pure speech' into the realm of expressive conduct. It seems as purely communicative as a sign-language gesture or the act of holding up a sign, and in this respect is similar to the wearing of a black armband, which the *Tinker* Court found to be a "primary First Amendment right[] akin to 'pure speech.'" 393 U.S. at 508, 89 S.Ct. at 737."

That articles of clothing can be expressive when they contain words or symbols is well-established. *Jacobs v. Clark County School District*, 373 F.Supp.2d 1162, 1172 (D.Nev. 2005):

“Clothing may constitute pure speech when it bears printed language. *Cohen v. California*, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971) (shirt bearing message derogatory of the military draft considered political speech). Clothing may also be meant to demonstrate group affiliation by indicating ethnicity (e.g., a culture's traditional dress), social class (e.g., brand name or custom clothing), religion (e.g., bearing cross, star of David), political affiliation (e.g., bearing elephant, donkey); or other symbols signifying group or viewpoint association (e.g., a band's concert shirt, gangland paraphernalia, or shirt featuring a marijuana leaf). (emphasis added)

In the instant case, the panel found no significance in the language printed on the vests, much less the logo or insignia. Instead, the panel focused almost entirely on the fact that several Top Hatters each found different symbolic meaning in details of the insignia. (Opinion at 4781). Yet, there is no question that the printed words and logos on the vests were meant to demonstrate group affiliation. Moreover, symbolism need not be explicit and obvious in order to be protected.

Galvin v. Hay, 374 F.3d 739, 750 (9th Cir. 2004):

“ ‘The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it.’ *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 790-91, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988). It is therefore the ‘general rule’ that ‘the speaker has the right to tailor the speech.’ *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 573, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995); *see also Cohen v. California*, 403 U.S. 15, 25, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971) (‘[I]t is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.’). Messages can be inchoate, *see Hurley*, 515 U.S. at 569-70, 115 S.Ct. 2338 (‘a private speaker does not forfeit

constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech'), . . .”

This point is most clearly demonstrated by Justice Souter’s invocation of Jackson Pollock’s abstract painting, Arnold Schönberg’s musical composition, and Lewis Carroll’s verse, in *Hurley*, supra, 515 U.S. at 569. These examples are far less likely to engender agreement among the viewers, listeners or readers about what each means, than the straightforward banner indicating membership and/or affiliation with the Irish American Gay, Lesbian and Bisexual Group of Boston in *Hurley*, or with the Top Hatter vests in the instant case. In *Hurley*, the Court noted that the parade itself was inherently expressive, even though the message might have been somewhat inchoate. 515 U.S. at 574.

“Rather like a composer, the Council selects the expressive units of the parade from potential participants, and though the score may not produce a particularized message, each contingent's expression in the Council's eyes comports with what merits celebration on that day. Even if this view gives the Council credit for a more considered judgment than it actively made, the Council clearly decided to exclude a message it did not like from the communication it chose to make, . . .”

The controversial message in question was described as “a shamrock-strewn banner with the simple inscription ‘Irish American Gay, Lesbian and Bisexual Group of Boston.’” *Id.* at 570. As in this case, the controversy in *Hurley* did not

involve the exclusion of any individual, but only the exclusion of individuals bearing a message of membership, affiliation or support of a disfavored group. *Id.* at. 572 (“Petitioners disclaim any intent to exclude homosexuals as such, and no individual member of GLIB claims to have been excluded from parading as a member of any group that the Council has approved to march. Instead, the disagreement goes to the admission of GLIB as its own parade unit carrying its own banner.”).

Similarly, Plaintiffs themselves were not banned from the Gilroy Garlic Festival, nor were vests in general. Members of the Top Hatters were welcome at the festival as long as they did not wear any clothing that contained a message containing the “demonstrative insignia.” (Opinion at 4777-4778). The panel never attempted to reconcile the obvious inconsistency involved with banning material that purportedly has no message whatsoever under the rubric of prohibiting “demonstrative” insignia. If the Top Hatters vests are indeed “demonstrative” then they necessarily have a message.²

As the panel did not mention *Hurley* at all, it obviously did not attempt to

² According to Webster’s Third International Dictionary of the English Language Unabridged, 600 (3rd ed. 1986), synonyms for the verb to “demonstrate” are to “prove” or to “show”. The regulation itself is defined by what is expressed. A demonstrative item that expresses nothing is an oxymoron.

reconcile the two cases nor did it attempt to analyze the equally clear parallels in the two situations.

In *White v. City of Sparks*, 341 F.Supp.2d 1129, 1132 (D. Nev. 2004), the Court addressed a municipal ordinance that allowed local officials to determine whether an artist's work merited a First Amendment exemption from the general prohibition against selling goods in specified public places. There, Plaintiff White argued that his art conveyed a message of love for wildlife and nature and a Native American spiritual theme. *Id.* at 1140. The City argued that "plaintiff's work must contain specific symbols such as white buffalo or spirit faces in the clouds in order to convey his message and constitute protected speech." *Id.* The Court disagreed, stating that the artist "cannot be required to convey a particular message immediately obvious and understandable to any viewer." *Id.*

"In fact, even if a particularized message were required, which after *Hurley* it is not, plaintiff's work, at least to the extent submitted or represented to this court, would clearly still fall under the First Amendment's protection." *Id.*

B. As an organization involved in charitable fund-raising, the Top Hatters right to promote itself through passive messages on clothing is constitutionally protected.

The *White* Court noted Plaintiff White's work "could be found to meet the Ninth Circuit's protected merchandise standard." 341 F.Supp.2d at 1139. The Court

noted that the Ninth Circuit “has stated that ‘[t]he sale of merchandise which carries or constitutes a political, religious, philosophical or ideological message falls under the protection of the First Amendment.’” *American Civil Liberties Union of Nevada v. City of Las Vegas*, 333 F.3d 1092, 1107 (9th Cir.2003), *cert. denied*, 540 U.S. 1110, 124 S.Ct. 1077, 157 L.Ed.2d 897 (2004) (citing *Gaudiya Vaishnava Society v. City and County of San Francisco*, 952 F.2d 1059, 1063 (9th Cir.1990)).” *Id.*

Under this standard, charitable solicitation and sales of message-bearing merchandise are clearly protected by the First Amendment. As the Court stated in *Gaudiya*, 952 F.2d at 1063:

“The Supreme Court has held that fund-raising for charitable organizations is fully protected speech. *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989). Additionally, it has held that an expressive item does not lose its constitutional protections because it is sold rather than given away. *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 756, n.5 108 S.Ct. 2138 108 S.Ct. 2143 (1988); *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 647, 101 S.Ct. 2559, 2563, 69 L.Ed.2d 298 (1981); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 633, 100 S.Ct. 826, 834, 63 L.Ed.2d 73 (1980).”

Here, the panel acknowledged that the Top Hatters’ purpose was “to ride motorcycles and to raise money for charity” whose purpose was memorialized in

the group's Articles of Incorporation. (Opinion at 4778). Thus, under Ninth Circuit precedent in *Gaudiya Vaishnava Society, supra*, and *ACLU v. City of Las Vegas, supra*, had the Top Hatters been selling vests or other clothing with their insignia, both the act and the merchandise would have been deemed constitutionally protected expression. Yet, the **wearing** of such items was considered by the panel to be totally outside the realm of First Amendment protection. Thus, we have a situation where the vest loses its First Amendment protection because it is not sold but merely displayed. Under this skewed analysis, the loss of constitutional protection would necessarily extend to groups such as the United Way, the Cancer Society, the Shriners and the March of Dimes.³

C. The Ninth Circuit's decision in *Sammartano* was improperly ignored.

Finally, the panel completely dismisses this Court's decision in *Sammartano v. First Judicial District Court*, 303 F.3d 959 (9th Cir 2002) by noting: "[i]n *Sammartano*, however, the court did not address the issue of whether the plaintiffs'

³ In fact there is a more compelling need for a relatively unknown group such as the Top Hatters to promote itself through message-bearing clothing than for more famous organizations. Moreover, the ability to self-promote in venues such as the Gilroy Garlic Festival is an important part of Plaintiffs' message. See, *Gilroy, supra*, 374 F.3d at 750 ("location of speech, like other aspects of presentation, can affect the meaning of communication and merit First Amendment protection for that reason"), citing *City of Ladue v Gilleo*, 512 U.S. 43, 56 (1994).

conduct was sufficiently expressive to warrant First Amendment protection.” (Opinion at 4781). This is not quite accurate.

In *Sammartano*, Plaintiffs were barred from the Carson City, Nevada Courthouse because of a policy that prohibited anyone from entering the building with “[c]lothing attire or ‘colors’ which have symbols, markings or words indicating affiliation with street gangs, biker or similar organizations.” *Id.* at 963-964. The *Sammartano* Court did not specifically analyze the content of the clothing worn by Plaintiffs, as it was acknowledged that the messages on Plaintiffs clothing were well within the scope and purview of the clothing ban. *Id.* at 963. The Court granted Plaintiffs standing to challenge the clothing ban facially, on the claim that “the Rules run afoul of the First Amendment’s requirements of reasonableness and viewpoint neutrality and are also impermissibly overbroad and vague.” *Id.* at 965.

The *Sammartano* Court noted that, “Rule 3 singles out bikers and members of ‘similar organizations’ for the message their clothing is presumed to convey.” *Id.* at 971. The Court held that Rule 3 violated the First Amendment’s requirement of viewpoint neutrality because “motorcycle enthusiasts are targeted with a regulation that applies to them solely because they choose to communicate the fact of their association with this particular kind of organization.” *Id.* at 971-972. Thus, the

assertion of the panel in the instant case, that the *Sammartano* Court did not address whether the clothing that specifically communicated their “association with this particular kind of organization” was expressive is simply inaccurate. The clothing was banned because of what it communicated. Moreover, like the regulation at issue in the instant case, the ban on attire communicating affiliation with motorcycle clubs violated the First Amendment by being viewpoint discriminatory.

IV Conclusion

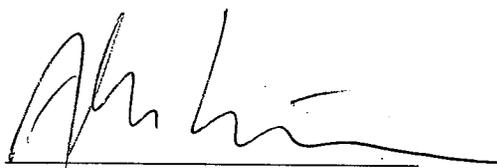
By holding that a ban on words and logos associating the wearer with the Top Hatters Motorcycle Club implicated no rights protected by the First Amendment, the panel does not cite any case law or other legal authority for its conclusion that attire communicating such affiliation with a group is devoid of any constitutional implications. Clearly, the Supreme Court in *Hurley* stated otherwise. Even under the “particularized message” criterion of *Spence*, the panel’s decision is unsupported. As the Ninth Circuit noted in *Sammartano*, statements communicating affiliation with a motorcycle club are expressive.

Thus, not only does the panel’s decision contradict standards set by the Supreme Court, the Ninth Circuit and other Circuits, it serves to significantly

diminish constitutional protection for all associations. This diminution of the fundamental First Amendment right of free expression is truly a matter of exceptional importance, warranting an en banc review, and a remand for analysis under the appropriate First Amendment standard.⁴

Dated this 28th day of May 2007:

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⁴ It is Plaintiffs' view that due to the content and viewpoint based nature of the ban on "demonstrative insignia" and motorcycle club insignia, strict scrutiny applies. *Foti v City of Menlo Park*, 146 F.3d 629, 637 (9th Cir. 1998).

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APPEAL FROM UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA
HON. JAMES WARE, JUDGE PRESIDING

APPELLEE CITY OF GILROY'S ANSWER TO
APPELLANTS' PETITION FOR REHEARING EN BANC

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TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ARGUMENT.....	1
	A. A Rehearing En Banc Is Unwarranted	1
	B. <i>Hurley</i> Did Not Abrogate The <i>Spence</i> Requirement Of An Intent To Convey A Particularized Understandable Message.....	2
	C. The Panel’s Opinion Does Not Irreconcilably Conflict With <i>Hurley</i>.....	3
	D. The “Expressive Merchandise” Test Does Not Apply	6
	E. Petitioners Failed To Meet Their Burden Of Proving Expressive Conduct	8
III.	CONCLUSION	9
	CERTIFICATE OF SERVICE.....	10
	CERTIFICATE OF COMPLIANCE.....	11

TABLE OF AUTHORITIES

CASES

Boy Scouts of America v. Dale 530 U.S. 640 (2000).....	4, 5
Church of American Knights of the Ku Klux Klan v. Kerik 356 F.3d 197 (C.A.2 (N.Y.),2004).....	2
Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984).....	8
Hurley v. Irish American Gay, Lesbian and Bisexual Group of Boston 515 U.S. 557 (1995).....	2, 3, 4, 5
Mastrovincenzo v. City of New York 435 F.3d 78 (C.A.2 (N.Y.), 2006).....	7
Spence v. Washington, 418 U.S. 405 (1974).....	2
Texas v. Johnson, 491 U.S. 397 (1989)	2
United States v. Hardesty, 977 F2d 1347 (9th Cir.1992).....	1
United States v. Weitzenhoff, 35 F3d 1275 (9th Cir. 1993).....	1
United States v. Zolin, 842 F2d 1135 (9th Cir. 1988)	1

I. INTRODUCTION

This case has been fairly and finally resolved by this Court in its April 30, 2007 decision which fully complies with all applicable legal precedent. Petitioners have failed to demonstrate the requisite conditions for a rare en banc review.

II. ARGUMENT

A. A Rehearing En Banc Is Unwarranted

Petitioners must establish that a rehearing en banc of this court's April 30, 2007 opinion is required to maintain uniformity of the court's decisions or to resolve an issue of exceptional importance. Petitioners contend they have both, when in fact they have established neither.

In *United States v. Weitzenhoff*, 35 F3d 1275, 1293 (9th Cir. 1993) this court stated that en banc consideration is appropriate only where conflicting precedents make application of law "unduly difficult," or to correct "egregious errors in important cases". En banc review is required only if there is a clear, irreconcilable split in the court's published opinions. The court should not order a rehearing en banc if the prior decisions can be distinguished. *United States v. Hardesty*, 977 F2d 1347, 1348 (9th Cir.1992). In *United States v. Zolin*, 842 F2d 1135, 1136 (9th Cir. 1988) an order

granting en banc review was vacated as “improvidently granted” where the en banc panel was able to distinguish the court's prior opinions.

The panel’s April 30, 2007 opinion contains no “egregious error” nor does it create an irreconcilable conflict with the decision in *Hurley v. Irish American Gay, Lesbian and Bisexual Group of Boston* 515 U.S. 557 (1995). The panel’s decision is well reasoned and harmonious with established precedent, including *Hurley*. While protection of First Amendment rights is vitally important, the issue presented in *Villegas* has been properly resolved by the panel and therefore need not be revisited.

B. *Hurley* Did Not Abrogate The *Spence* Requirement Of An Intent To Convey A Particularized Understandable Message

In determining whether conduct is sufficiently expressive to implicate the First Amendment, the test is whether “ ‘[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed 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, 410-11, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974)).

The Court in *Church of American Knights of the Ku Klux Klan v. Kerik* 356 F.3d 197, 205 (C.A.2 (N.Y.),2004) noted that this standard was not altered by *Hurley*:

“The Supreme Court's decision in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995), did not alter these standards. In *Hurley*, the Court, in finding the St. Patrick's Day Parade in Boston to be an “expressive parade,” stated that “a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a ‘particularized message,’ would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll.” *Id.* at 569, 115 S.Ct. 2338 (citation omitted). While we are mindful of *Hurley* 's caution against demanding a narrow and specific message before applying the First Amendment, we have interpreted *Hurley* to leave intact the Supreme Court's test for expressive conduct in *Texas v. Johnson*, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989). *See Zalewska v. County of Sullivan*, 316 F.3d 314, 319 (2d Cir.2003) (“To be sufficiently imbued with communicative elements, an activity need not necessarily embody ‘a narrow, succinctly articulable message,’ but the reviewing court must find, at the very least, an intent to convey a ‘particularized message’ along with a great likelihood that the message will be understood by those viewing it.”) *Johnson*, 491 U.S. at 404, 109 S.Ct. 2533; *Spence*, 418 U.S. at 410-11, 94 S.Ct. 2727. “

The decision in the instant case is in accord with this test, and properly concluded that the Petitioners' wearing of the Top Hatter's logo to a festival, was not intended to convey a particularized understandable message and thus was undeserving of First Amendment scrutiny.

C. The Panel's Opinion Does Not Irreconcilably Conflict With *Hurley*

The *Hurley* decision does not conflict with the panel's April 30, 2007 decision. In the case at bar, Petitioners liken themselves to the GLIB

group in *Hurley*, which sought, but was denied, the right to march in the St. Patrick's Day parade "as a way to express pride in [GLIB's] Irish heritage as openly gay, lesbian, and bisexual individuals." *Id.*, at 561, 115 S.Ct. 2338.¹ However, as the Supreme Court later observed in *Boy Scouts of America v. Dale* 530 U.S. 640, 120 S.Ct. 2446 (U.S.N.J.,2000) the GLIB's attempt to march in the parade was accorded First Amendment review because of the following factors at page 694, none of which apply to the Top Hatter's logo:

"First, it was critical to our analysis that GLIB was actually conveying a message by participating in the parade—otherwise, the parade organizers could hardly claim that they were being forced to include any unwanted message at all. Our conclusion that GLIB was conveying a message was inextricably tied to the fact that GLIB wanted to march in a parade, as well as the manner in which it intended to march. We noted the "inherent expressiveness of marching [in a parade] to make a point," *id.*, at 568, 115 S.Ct. 2338, and in particular that GLIB was formed for the purpose of making a particular point about gay pride, *id.*, at 561, 570, 115 S.Ct. 2338. More specifically, GLIB "distributed a fact sheet describing the members' intentions" and, in a previous parade, had "marched behind a shamrock-strewn banner with the simple inscription 'Irish American Gay, Lesbian and Bisexual Group of Boston.'" *Id.* at 570. "[A] contingent marching behind the organization's banner," we said,

¹ In *Hurley* it is important to note that the Supreme Court's ruling upheld the right of the St. Patrick's Day parade organizers (petitioners) to exclude a contingent of gays, lesbians, and bisexuals (GLIB) who sought to march in the petitioners' parade. The Court's ruling reaffirmed that the government may not compel anyone to proclaim a belief with which he or she disagrees. *Id.*, at 573-574, 115 S.Ct. 2338. Therefore even if this court were to conclude that the Top Hatter's logo was "speech" then applying *Hurley* to the instant facts would require this court to recognize the First Amendment rights of the Appellee GGFA to exclude the Top Hatters' alleged "message" from the festival, a point already advanced by GGFA in their responding brief at pages 37-40.

would clearly convey a message.” *Id.*, at 574, 115 S.Ct. 2338.

None of these factors were present when the Top Hatters’ attended the Garlic Festival wearing their logo. Attending a festival is not a context which is “inherently expressive” as is “marching in a parade to make a point”. In *Hurley*, the GLIB was formed for the purpose of making a particular point about gay pride, whereas the Top Hatters had “no common message” [Opinion page 4781], and could only resort to their articles of incorporation to find a generalized charitable purpose [Opinion page 4778]. In *Hurley* the GLIB distributed a “fact sheet” and marched behind an identifying banner, but there was no such message offered by the Top Hatters.

The Supreme Court observed in *Boy Scouts*, “Though *Hurley* has a superficial similarity to the present case, a close inspection reveals a wide gulf between that case and the one before us today.” [Id at page 693]. The same wide gulf exists between the GLIB in *Hurley* and the Top Hatters in the case at bar. The Top Hatter’s logo worn in attendance at a festival is not expressive conduct.

Petitioners also contend that the panel’s decision conflicts with the holdings summarized in *Hurley* at page 569 wherein the court stated that “symbolism is a primitive but effective way of communicating ideas”, and

cited examples such as saluting the American flag, or wearing a swastika on a uniform. These examples and others like them are constitutionally protected because the observer readily understands the symbolism of the American flag or a swastika. A person may salute one or wear another and thereby convey an understandable message to the observer either because the symbol is recognizable, i.e., American flag and swastika, or because it becomes understandable by the context in which it is displayed, i.e. armbands to protest a war, or red flag supporting the Communist Party.

The Top Hatter's logo with top hat, skull and wings, displayed on the vests worn by Petitioners is clearly not communicative of any message discernible to the observer. People who view the Top Hatter logo will, in response to inquiry, provide their own reactions to the logo, but such reactions will be as varied and numerous as the number of observers with no two reactions likely the same. The Top Hatter logo like the Rorschach inkblot test invokes a reaction in the observer but everyone sees something different. The blots of ink are meaningless. There is no understandable message and therefore no speech.

D. The "Expressive Merchandise" Test Does Not Apply

Petitioners cite *Mastrovincenzo v. City of New York* 435 F.3d 78, 93 (C.A.2 (N.Y.), 2006 in support of their assertion that items of clothing

bearing “text, logos and designs” are constitutionally protected expression. In *Mastrovincenzo*, unlike the case at bar, the issue was whether the commercial sale of articles of clothing bearing designs, came under the category of paintings, photographs, prints and sculptures which communicate some idea or concept to those who view them, and thus are entitled to full First Amendment protection. Even in this context the court required a determination of whether the “art” was sufficiently expressive.

The *Mastrovincenzo* court observed at page 82, “We hold, principally, that (1) the sale of clothing painted with graffiti is not necessarily expressive and therefore is not automatically entitled to First Amendment protection;...” The court went on to say at page 93:

“As the District Court accurately summarized, the *Bery* Court was “unwilling to provide *blanket* protection for all jewelry, pottery and metalwork *because such items do not always communicate an idea or concept to the viewer.*” *Mastrovincenzo*, 313 F.Supp.2d at 289 (emphasis added). Instead, as the District Court observed, “[f]or these and other items, as distinct from paintings, photographs, prints and sculptures, courts must conduct *case-by-case evaluations* to determine whether the work at issue is sufficiently expressive.” *Id.* (emphasis added). Accordingly, in the nature of things, some such items ultimately may be characterized as “expressive” while others may be deemed “mere commercial goods”-that is, goods whose characteristics suggest that their vendors are not engaged in protected speech. *See id.* at 285 (distinguishing between “expressive merchandise” and “[m]ere commercial goods”).

The Petitioners are neither artists nor sellers of artistic merchandise. The “expressive merchandise” analysis does not apply.

E. Petitioners Failed To Meet Their Burden Of Proving Expressive Conduct

The party asserting that its conduct is expressive bears the burden of demonstrating that the First Amendment applies, *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 n. 5, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984), and that party must advance more than a mere “plausible contention” that its conduct is expressive. Based on the record, Petitioners clearly failed to meet this burden.

Petitioners’ own testimony failed to establish that the Top Hatters advocated any political, religious, or other viewpoints, but, in fact, conceded they did not. [Opinion Pg. 4778]. Petitioners’ own testimony failed to establish that the Top Hatter logo communicated any message. Instead their emblem means different things to different people, to wit: “underneath our skins all of us are alike” (Villegas), death and freedom (Derosiers), and “whatever you want to interpret it as” (Poelker) [Opinion Pg. 4778].

If the Petitioners themselves could not articulate a common message conveyed by the Top Hatters’ logo, then no message was intended and no First Amendment rights invoked. Despite the urgings of counsel for Petitioners to attribute a communicative character to the Top Hatter logo,

this Court should consider the record as presented and refrain from finding expressive conduct which the parties themselves concede is lacking.

III. CONCLUSION

The wearing of clothing bearing the Top Hatter's logo to a festival, was not "sufficiently imbued with elements of communication" to warrant First Amendment scrutiny. En banc review is unwarranted.

Dated: July 9, 2007

STROMBOTNE LAW FIRM

By: 

Mark L. Strombotne, Esq.
Attorneys for Appellee City of Gilroy

CERTIFICATE OF SERVICE

I, Mark Strombotne, the undersigned, hereby certify and declare under penalty of perjury under the laws of the State of California that the following statements are true and correct:

1. I am over the age of 18 years and I am not a party to the within cause.
2. I am an employee at the Strombotne Law Firm, and my business address is 6501 Crown Blvd. #106 F7 San Jose, CA 95120.
3. I am familiar with the practice of the Strombotne Law Firm for collection and processing of correspondence for mailing by U.S. Mail. All mailed documents are placed in an envelope, addressed, sealed, proper postage affixed and deposited in a U.S. post box for delivery to the addressee.
4. On the date set forth below, I caused to be served a true copy of the **APPELLEE CITY OF GILROY'S ANSWER TO APPELLANTS' PETITION FOR REHEARING EN BANC** by mailing it to counsel as follows:

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Served and executed **July 9, 2007** at San Jose, California.


MARK STROMBOTNE

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Ninth Circuit Rule 35-4 or 40-1, the Answer To Appellant's Petition For Rehearing En Banc is proportionately spaced, has a typeface of 14 points and contains 1946 words.

Dated: July 9, 2007

STROMBOTNE LAW FIRM

By: 

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To: Panel and all active judges and any interested senior judges

**Re: Response to petition for panel rehearing and/or
petition for rehearing en banc**

05-15725

Villegas v. City of Gilroy

Opinion dated 4/30/07

Panel Judges: Honorable Ronald M. GOULD, Circuit Judge

 Honorable Johnnie B. RAWLINSON, Circuit Judge

 Honorable Alfred V. Covello, Senior Judge

I. INTRODUCTION

Rehearings *en banc* are “the exception, not the rule” and are granted only in “extraordinary circumstances.” *United States v. American-Foreign S.S. Corp.*, 363 U.S. 685, 689 (1960); see also *United States v. Weitzenhoff*, 35 F.3d 1275, 1293 (9th Cir. 1993). Rehearing *en banc* is only warranted when (a) a panel decision creates an intra- or inter-circuit split, or (b) the panel decision makes an “egregious error” on an issue of exceptional importance. Fed. R. App. P. 35(a); Circuit Rule 35-1; *Newdow v. United States Congress*, 328 F.3d 466, 470 (9th Cir. 2003); *Weitzenhoff*, 35 F.3d at 1293. Here, none of the criteria for rehearing *en banc* are satisfied.

The Panel decision does not create an intra- or inter- circuit split warranting *en banc* review because the Panel’s decision follows precedent in the Ninth Circuit and nationally by applying the test articulated in *Spence v. Washington*, 418 U.S. 405 (1974) and *Texas v. Johnson*, 491 U.S. 397 (1989). By applying this test, the Panel committed no error, let alone an “egregious” one, in deciding this case. For these reasons, Plaintiffs/Appellants’ Petition for Rehearing *En Banc* should be denied.

II. STATEMENT OF FACTS

On July 30, 2000, in celebration of a birthday, appellants paid an admission fee and entered the Gilroy Garlic Festival, a yearly event organized and facilitated by the Gilroy Garlic Festival Association (“GGFA”), a private entity. *Villegas v. Gilroy Garlic Festival Association*, 484 F.3d 1136, 1138 (9th Cir. 2007.) Shortly after entering the festival, a member of security noticed that appellants were wearing biker club vests in violation of the festival dress code. *Id.* These vests were adorned with a patch depicting a skull with wings and a top hat, in addition to the words “Hollister” and “Top Hatters.” *Id.*

The security officer, along with the chair of security, escorted appellants to the entrance of the festival and asked them to either remove their vests or leave the area. *Id.* When appellants refused to remove their vests, the GGFA refunded their admission fees and appellants left the area. *Id.*

Subsequently, appellants filed this lawsuit claiming that the GGFA violated their *First Amendment* rights of free expression and free association. *Id.* at 1139. On April 30, 2007, the Ninth Circuit affirmed the district court’s decision granting summary judgment for the defendants/appellees. *Id.* at 1142. The Panel determined that the act of wearing a vest adorned with a common insignia did not constitute expressive conduct protected by the *First Amendment*. *Id.* at 1140-41.

Appellants contest this determination and have filed a request for rehearing *en banc*.

III. ARGUMENT

A. The Panel's Decision is Consistent With Supreme Court Precedent

Appellants essentially argue that the Ninth Circuit Panel, as well as the district court, erred in applying the longstanding test used to determine expressive conduct, as formulated first in *Spence v. Washington*, 418 U.S. at 410-11, and later confirmed in *Texas v. Johnson*, 491 U.S. at 404. Under the *Spence-Johnson* test, in order to determine whether a particular act should be afforded *First Amendment* protection, the court must ask whether “an intent to convey a particularized message was present, and whether the likelihood was great that the message would be understood by those who viewed it.” *Johnson*, 491 U.S. at 404, citing *Spence*, 418 U.S. at 410-11. Applying this test, the district court determined and the Panel confirmed that the acts of appellants, wearing their vests into the Garlic Festival, did not constitute expressive conduct protected under the *First Amendment*. *Villegas*, 484 F.3d at 1140-41. Because the *Spence-Johnson* test continues to be the test used to determine the existence of expressive conduct in arguably all circuits, including the Ninth Circuit, appellants’ request for rehearing *en banc* should be denied.

Appellants claim that the Supreme Court modified, if not eliminated, the requirements set forth in *Spence* and *Johnson* when it decided *Hurley v. South Boston Allied War Veterans Council*, 515 U.S. 557 (1995). However, nothing could be further from the truth. Petitioners dissect the *Hurley* opinion, quoting language out of context without offering any meaningful discussion. A closer look at *Hurley* reveals its inapplicability to the case at hand, as well as the reasonableness of the Panel's decision to omit *Hurley* from its opinion.

Unlike *Spence* or *Johnson* or *Villegas*, *Hurley* involves compelled speech. The only issue before the *Hurley* court was "whether Massachusetts may require private citizens who organize a parade to include among the marchers a group imparting a message the organizers do not wish to convey." *Id.* at 559. The Court specifically emphasized that respondents, i.e. the group wanting to express its message by participating in the parade, did not present the Court with their own *First Amendment* claim. *Id.* at 566.

With this limitation in mind, *Hurley* should be read in context and understood as a case concerning only compelled speech. Indeed, the language vigorously adopted by appellants was used by the court to emphasize the fact that a parade constitutes expressive conduct and a parade organizer does not waive his or her *First Amendment* right to free expression simply by allowing others to

advance a variety of views. *Id.* at 569-70. “It boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government’s power to control.” *Id.* at 575.

To this end, the Supreme Court was considering the organizer’s right to control the breadth of the parade’s message, based on the organizer’s own freedom of expression, by excluding those messages with which the organizers did not agree. In context, *Hurley* actually supports the GGFA’s decision to require appellants to remove their vest based on GGFA’s own *First Amendment* rights. Because the Panel made its decision on other grounds, i.e. that appellants were not engaged in expressive conduct, an analysis of *Hurley* was unnecessary.

Unlike the single issue presented in *Hurley*, the Supreme Court in *Rumsfeld v. FAIR* addressed claims regarding both compelled speech and expressive conduct. *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* 126 S.Ct. 1297, 1309 (2006). In consideration of the compelled speech issue, the Supreme Court turned to *Hurley* in its discussion. *Id.* at 1309. “The compelled-speech violation in each of our prior cases [] resulted from the fact that the complaining speaker’s own message was affected by the *speech it was forced to accommodate*. The expressive nature of a parade was central to our holding in *Hurley*.” *Id.* at 1309, citing *Hurley*, 515 U.S. at 568, (emphasis added).

In the Court's analysis of the issue of expressive conduct, the Court did not include any further citation to *Hurley* and instead turned to the earlier cases of *United States v. O'Brien*, 391 U.S. 367 (1968) and *Texas v. Johnson* that have historically shaped our *First Amendment* jurisprudence regarding expressive conduct. *Id.* at 1310. Deciding that the actions of FAIR (the law schools) did not constitute expressive conduct, the Supreme Court emphasized that in prior cases, "we have extended First Amendment protection only to conduct that is inherently expressive." *Id.*, quoting *O'Brien*, 391 U.S. at 376. "Unlike flag burning, the conduct regulated by the Solomon Amendment is not inherently expressive." *Id.*, referring to *Johnson*. The U.S. Supreme Court's decision in *Rumsfeld* leaves no doubt as to the continued vitality of the expressive conduct test announced in *Johnson*. As the Ninth Circuit followed unambiguous U.S. Supreme Court precedent, the request for rehearing *en banc* must be denied.

B. The Panel's Decision is Consistent With the Decisions of Other Circuits

In support of their argument that the *Spence-Johnson* test is no longer the current law, appellants discuss three isolated cases appearing in other circuits since *Hurley*, including *Mastrovincenzo v. City of New York*, 435 F.3d 78 (2nd Cir. 2006), *Tenafly Eruv Association, Inc. v. Borough of Tenafly*, 309 F.3d 144 (3rd Cir. 2002), and *Holloman v. Harland*, 370 F.3d 1252 (11th Cir. 2004). As

explained below, these cases are internally inconsistent or an apparent anomaly and not followed within their own circuits. However, appellants are left to rely on these cases, because all other circuits that have addressed the issue of expressive conduct since *Hurley* have consistently applied the *Spence-Johnson* test.¹

1. The Second Circuit's *Mastrovincenzo* Decision Does Not Alter the *Spence-Johnson* Test

Appellants cite *Mastrovincenzo* to bolster their argument that the *Spence-Johnson* test is no longer the test to determine the existence of expressive conduct. However, the footnote cited by appellants in support of this proposition states that a “message must nonetheless be ‘particularized’ and likely to be understood.”

¹ See, *Gun Owners' Action League, Inc. v. Swift*, 284 F.3d 198 (1st Cir. 2002); *Church of the American Knights of the Klu Klux Klan v. Kerik*, 356 F.3d 197 (2nd Cir. 2004); *Zalewska v. County of Sullivan, New York*, 316 F.3d 314 (2nd Cir. 2003); *Montanye v. Wissahickon School District*, 2007 U.S. App. LEXIS 4005 (3rd Cir. 2007); *McClure v. Ashcroft*, 335 F.3d 404 (5th Cir. 2003); *Littlefield v. Forney Ind. School District*, 268 F.3d 275 (5th Cir. 2001); *Brandt v. Bd of Educ. of Chicago*, 480 F.3d 460 (7th Cir. 2007); *Klein v. Perry*, 216 F.3d 571, 575 (7th Cir. 2000); *Stephenson v. Davenport Comm. School District*, 110 F.3d 1303, 1307 (8th Cir. 1997); *Nunez v. Davis*, 169 F.3d 1222, 1226 (9th Cir. 1999); *Thomas v. City of Beaverton*, 379 F.3d 802 (9th Cir. 2004); *Garcia v. Jaramillo*, 2006 US Dist LEXIS 95389, 31-32 (10th Cir. 2006); *Winsness v. Campbell*, 2006 US Dist. LEXIS 33260 (10th Cir. 2006); *Local 491 v. Gwinnett Co.*, 2007 U.S. Dist. LEXIS 33260 (N.D. Ga. May 4, 2007.)

Mastrovincenzo, 435 F.3d at 91, fn 9.

Appellants mischaracterize the issue in *Mastrovincenzo* as whether decorated articles of clothing are sufficiently expressive to receive *First Amendment* protection. However, the Second Circuit was not analyzing these items as “articles of clothing.” Instead, the court was determining whether these articles could be considered artwork created on nontraditional canvases as the *Mastrovincenzo* plaintiffs contended. *Id.* at 86.

More analogous is the Second Circuit case of *Zalewska v. County of Sullivan, NY* in which the plaintiff challenged a dress code that prohibited her from wearing skirts, an act she asserted was “an expression of her deeply held cultural values.” *Zalewska v. County of Sullivan, NY*, 316 F.3d 314, 319 (2nd Cir. 2003). The court recognized that

clothing and personal appearance are important forms of self-expression. For many, clothing communicates an array of ideas and information about the wearer. It can indicate cultural background and values, religious or moral disposition, From the nun’s habit to the judge’s robes, clothing may often tell something about the person so garbed.

Yet, the fact that something is in some way communicative does not automatically afford it constitutional protection. For purposes of the First Amendment, the Supreme Court has repeatedly rejected the view that ‘an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.’

Id. at 319, quoting *United States v. O'Brian*, 391 U.S. 367, 376 (1968). To warrant *First Amendment* protection, conduct must be “sufficiently imbued with the elements of communication.” *Id.* quoting *Johnson*, 491 U.S. at 404.

Furthermore, “the reviewing court must find, at the very least, an intent to convey a ‘particularized message’ along with a great likelihood that the message will be understood by those viewing it.” *Id.* citing *Johnson*, 491 U.S. at 404 and *Spence*, 418 U.S. at 410-11. As with *Zalewska*, onlookers at the Garlic Festival would “glean no particularized message from appellant’s wearing” of the motorcycle club vests. *Id.* at 320.

2. The Third Circuit No Longer Follows the Rule Enunciated in *Tenaflly*

Next, appellants heavily rely on *Tenaflly* to support their contention that the *Spence-Johnson* test is no longer good law. In *Tenaflly*, the Third Circuit considered whether the act of creating an eruv was entitled to protection under the *First Amendment*. *Tenaflly*, 309 F.3d at 151-52. As appellants strongly assert, the Third Circuit described *Hurley* as having modified the *Spence* test by “eliminat[ing] the ‘particularized message’ aspect of the *Spence-Johnson* test.” *Id.* at 160. Despite the court’s language and appellants’ optimistic contention that *Spence-Johnson* is dead and that the Panel erred in applying it, the *Tenaflly* court,

basically went forward to apply the *Spence-Johnson* factors. *Id.* at 161-62. The court considered 1) whether plaintiffs “meant to demonstrate a belief or assert anything” and 2) whether observers “‘likely understand’ the eruv ‘to be telling them anything.’” *Id.* at 162. Finding no evidence in the record to support either finding, much less both, the court determined that the plaintiffs had not engaged in protected speech. *Id.* at 160. Indeed the court, in emphasizing the burden of the plaintiff stated, “If the putative speaker’s burden were ‘limited to ‘the advancement of a plausible contention’ that [his or her] conduct is expressive’ . . . the result ‘would be to create a rule that all conduct is presumptively expressive.’” *Id.* at 161, quoting *Clark v. Community for Creative Non-Violence*, 468 US 288, 293, n.5 (1984).

Though *Tenaflly* (and appellants) asserts that the expressive conduct test has changed, the language and assertion of *Tenaflly* has not been followed by either the district courts within the Third Circuit or the Third Circuit itself in subsequent cases. It appears that the language of *Tenaflly* is a mere anomaly that has been abandoned. As recently as February 2007, the Third Circuit once again considered whether certain acts constituted expressive conduct. See *Montanye v. Wissahickon School District*, 2007 U.S. App. LEXIS 4005 (3rd Cir. 2007). To make this determination, the Third Circuit returned to the *Spence-Johnson* test,

“[T]o determine whether a particular action or pattern of conduct constitutes speech protected under the First Amendment, we must ask whether ‘an attempt to convey a particularized message was present, and whether the likelihood was great that the message would be understood by those who viewed it.’” *Id* at 8, quoting *Johnson*, 491 U.S. at 404.

3. The Eleventh Circuit Has Not Followed The Interpretation of Hurley Set Forth in Holloman

Finally, appellants cite to *Holloman*, a case in which the Eleventh Circuit contends that *Hurley* modified the *Spence-Johnson* test. *Holloman*, 370 F.3d at 1270 (“Thus, in determining whether conduct is expressive, we ask whether the reasonable person would interpret it as some sort of message, not whether an observer would necessarily infer a specific message.”) Despite the fact that this case was decided in 2004, it has not been cited for this proposition. Indeed, in May 2007, a district court within the Eleventh Circuit, identified the *Spence-Johnson* test as the proper test to be applied to determine expressive conduct. *Local 491 v. Gwinett Co.*, 2007 US Dist. LEXIS 33260, *19 (ND. Ga. May 4, 2007.)

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C. The Panel's Decision is Consistent With Other 9th Circuit Decisions

1. The *Vlasak* Court Applied the *Spence-Johnson* Test

In *Vlasak v. Superior Court of California*, plaintiff Vlasak was arrested while participating in a demonstration near the entrance to a circus by displaying photographs, videotapes and signs addressing “the cruelty that goes on behind the big top.” *Vlasak v. Superior Court of California*, 329 F.3d 683, 686 (9th Cir. 2003). In addition to these items, Vlasak was carrying a bull hook as an example of a device used to train elephants. *Id.* The Los Angeles Municipal Code limited the types of equipment one may carry or possess during a demonstration, and the bull hook exceeded the size limit allowed under the code. *Id.* As a result of this violation, Vlasak was arrested and subsequently challenged the constitutionality of the Los Angeles Municipal Code. *Id.*

Unlike the analysis of the *Sammartano* court (discussed below), the *Vlasak* court considered the actions of the appellant and applied the *Spence-Johnson* test to determine whether it constituted protected expressive conduct. *Id.* at 690. “The First Amendment extends to Vlasak’s possession of the bull hook during the demonstration because she had ‘an intent to convey a particularized message’ and ‘the likelihood was great that the message would be understood by those who viewed it.’” *Id.*, quoting *Johnson*, 491 U.S. at 403. Considering the context of her

acts, i.e. that she held the bull hook in one hand and photos of a bull hook being used on elephants in the other hand, the court was satisfied that onlookers would understand the purpose of the instrument and the message Vlasak was conveying through her conduct. *Id.* at 690-91.

Using *Vlasak* as its comparison, the Panel held that

there is little likelihood that any message would be understood by those viewing the plaintiffs' vests and, further, the context in which the plaintiffs' alleged expression took place does not add any additional meaning to their symbol. . . . In this case, the plaintiffs' act of wearing their vests adorned with a common insignia simply does not amount to the sort of expressive conduct protected by the First Amendment right to freedom of speech.

Villegas, 484 F.3d at 1140-41.

2. The *Sammartano* Court Did Not Consider or Apply Any Test of Expressive Conduct

Despite appellants' contention that the Panel "completely dismissed" the Ninth Circuit *Sammartano* decision, in fact, the Panel considered the applicability of *Sammartano* at length and pointed out its distinguishing factors. *Id.* at 1140; see also *Sammartano v. First Judicial District Court*, 303 F.3d 959 (9th Cir. 2002). As the Panel noted, "the court did not address the issue of whether the plaintiffs' conduct was sufficiently expressive to warrant *First Amendment* protection."

Villegas, 484 F.3d at 1140. The Ninth Circuit did not apply the *Spence-Johnson*

test or any other test the appellants may contend is proper to determine the existence of expressive conduct. Instead, the *Sammartano* court applied the standard for injunctive relief and considered whether the courtroom dress code was reasonable in light of the evidence before the court and whether it was viewpoint neutral. *Id.* at 965-67. The issues before the *Sammartano* court were different, and these differences make *Sammartano* inapplicable.

D. Appellants Choice of Clothing Does Not Constitute Pure Speech

Appellants also cite *Holloman*, 370 F.3d 1252 (discussed above), in support of their newly articulated argument that appellants' act of wearing their vests constituted pure speech rather than expressive conduct. Plaintiff Holloman was a highschool student who was punished for raising his fist during the recitation of the Pledge of Allegiance. *Holloman*, 370 F.3d at 1260. The *Holloman* court, in *dicta*, questioned whether this act by Holloman was "akin to pure speech" similar to that of the plaintiff in *Tinker v. Des Moines Independent Community School*, 393 U.S. 503 (1969). *Id.* at 1270.

Appellants go on to grandly compare their wearing of their biker vests at the Garlic Festival with *Tinker's* wearing of a black armband to protest the Vietnam War. In fact, the Supreme Court, in *Tinker*, was very careful to distinguish between *Tinker's* activity with the ordinary decision of what to wear. "The

statement in *Tinker*— that regulation of ‘length of skirts or type of clothing,... hair style, or deportment’ is different from that sort of regulation that ‘involves direct, primary *First Amendment* rights akin to ‘pure speech.’” *Zalewska*, 316 F.3d at 320, quoting *Tinker*, 393 U.S. at 507-08. This distinction “suggests that a person’s choice of dress or appearance in an ordinary context ‘does not possess the communicative elements necessary to be considered speech-like conduct entitled to *First Amendment* protection.’” *Id* at 320, quoting *Tinker*, 393 U.S. at 507-08. Because appellants act of wearing their motorcycle vests cannot be reasonably compared to the act of *Tinker*, or even *Holloman*, appellants’ newly articulated argument that they were engaged in “pure speech” lacks merit and in no way warrants a rehearing *en banc*.

E. Case Law Regarding Solicitations for Donations and/or Fund Raising Sales Is Inapplicable to This Case and Appellants’ Request for Rehearing *En Banc*

For the first time in their Petition for Rehearing *En Banc*, appellants make the nebulous argument that because one of the stated purposes of the Tophatters is to raise money for charity, if they were, in fact, *selling* their vests rather than merely wearing them, their conduct would be protected speech pursuant to the Ninth Circuit’s “protected merchandise standard.” This argument is specious.

As appellants point out in support of this argument, on numerous occasions,

“the Supreme Court has held that fund-raising for charitable organizations is fully protected speech.” *Board of Trustees of the State University v. Fox*, 492 US 469 (1989.) However, these cases have largely arisen in response to the enforcement of municipal codes that either set forth requirements that the solicitor of donations disclose certain information or prohibit the solicitation of donations in some way. Addressing these issues, the Supreme Court has held that the actual solicitation of charitable contributions is protected speech. See generally *Schaumburg v. Citizens for a Better Environment*, 444 US 620 (1980), *Riley v. Nat’l Fed’n of the Blind*, 487 US 781 (1988); *Secretary of State of Maryland v. Joseph H. Munson Co.* 467 US 947 (1984). “. . .[S]olicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease.” *Schaumburg*, 444 U.S. at 632. Because the appellants were not involved in the solicitation of charitable donations when they were asked to remove their vests or leave the festival and, instead, were merely celebrating a birthday, these cases and appellants’ argument are entirely inapplicable to the issues that were before the court and do not support their Petition for Rehearing *En Banc*.

In furtherance of their argument, appellants also emphasize that the Ninth

Circuit “has stated that ‘[t]he sale of merchandise which carries or constitutes a political, religious, philosophical or ideological message falls under the protection of the First Amendment.’” *American Civil Liberties Union of Nevada v. City of Las Vegas*, 333 F.3d 1092, 1107 (9th Cir. 2003) (citing *Gaudiya Vaishnava Society v. City and County of San Francisco*, 952 F.2d 1059, 2063 (9th Cir. 1990)).

Setting aside the fact that appellants were not selling anything for a charitable purpose, the key to this “protected merchandise standard” is the fact that it must be message bearing. The Ninth Circuit has consistently emphasized this requirement. See *American Civil Liberties Union*, 333 F.3d at 1108, (“The district court clearly acted correctly in granting summary judgment for Plaintiffs and issuing a permanent injunction against enforcement of this ordinance with respect to **message-bearing merchandise**”) (Emphasis added); *Gaudiya v. City and County of San Francisco*, 952 F.2d 1059 (9th Cir. 1991) (Enjoining city from enforcing code section against plaintiffs or other non-profits, “with respect to the sale of merchandise constituting or making a statement carrying a religious, political, philosophical or ideological **message relevant to the purpose** of the organization.”) (Emphasis added.) See also, *Perry v. Los Angeles Police Department*, 121 F.3d 1365 (9th Cir. 1997) (The items included “music, buttons, and bumper stickers **bearing political, religious, and ideological messages.**”

These are expressive items, and they do not lose their constitutional protection simply because they are sold rather than given away.”) (Emphasis added.) Appellants were not selling (or wearing) any product that bore any political, religious or ideological message relevant to the purpose of their organization, and therefore, their argument applying the “protected merchandise standard” is inapplicable to the issues that were decided by the Panel on April 30, 2007.

IV. CONCLUSION

For all of the foregoing reasons, Plaintiffs/Appellants’ Petition For Rehearing *En Banc* should be denied.

Dated: July 9, 2007

CLAPP, MORONEY, BELLAGAMBA
AND VUCINICH

By: Valerie S. Higgins
Gregory C. Simonian
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Attorneys for Defendants-Appellees

**Certificate of Compliance With
Typeface and Length Limitations**

Pursuant to Fed. R. App. P.29(d) and Ninth Circuit Rule 32-1, the attached brief is proportionally spaced, has a typeface of 14 points and contains 3,958 words, exclusive of Table of Contents, Table of Authorities, and Certificates of Service and of Compliance.

Dated: July 9, 2007

CLAPP, MORONEY, BELLAGAMBA
AND VUCINICH

By: Valerie S. Higgins
Gregory C. Simonian
Valerie S. Higgins
Attorneys for Defendants-Appellees

Villegas, et al. v. City of Gilroy, et al.
Court of Appeal Case No. 05-15725
U.S. District Court, N.D. Cal. Case No. C01-2070 JW

PROOF OF SERVICE BY FEDERAL EXPRESS

I, the undersigned, hereby declare that I am over the age of eighteen years and not a party to the within action. My business address is 1111 Bayhill Drive, San Bruno, CA 94066.

On the date indicated below, I served the following documents:

GILROY GARLIC FESTIVAL ASSOCIATION, INC.'S
RESPONSE TO PETITION FOR REHEARING *EN BANC*

by placing a true copy thereof (to which was attached a copy of this document) in a sealed envelope, and transmitting said documents via Federal Express, guaranteed overnight delivery, to person(s) address as follows:

Honorable James Ware
United States District Court
Northern District of California
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and was executed in San Bruno, California on July 9, 2007.


Leticia C. Julian



Cathy A. Catterson
Clerk of Court

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United States Court of Appeals for the Ninth Circuit
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(415) 355-8000

To: Panel and all active judges and any interested senior judges

**Re: Response to petition for panel rehearing and/or
petition for rehearing en banc**

05-15725

Villegas v. City of Gilroy

Opinion dated 4/30/07

Panel Judges: Honorable Ronald M. GOULD, Circuit Judge

 Honorable Johnnie B. RAWLINSON, Circuit Judge

 Honorable Alfred V. Covello, Senior Judge

I. INTRODUCTION

Rehearings *en banc* are “the exception, not the rule” and are granted only in “extraordinary circumstances.” *United States v. American-Foreign S.S. Corp.*, 363 U.S. 685, 689 (1960); see also *United States v. Weitzenhoff*, 35 F.3d 1275, 1293 (9th Cir. 1993). Rehearing *en banc* is only warranted when (a) a panel decision creates an intra- or inter-circuit split, or (b) the panel decision makes an “egregious error” on an issue of exceptional importance. Fed. R. App. P. 35(a); Circuit Rule 35-1; *Newdow v. United States Congress*, 328 F.3d 466, 470 (9th Cir. 2003); *Weitzenhoff*, 35 F.3d at 1293. Here, none of the criteria for rehearing *en banc* are satisfied.

The Panel decision does not create an intra- or inter- circuit split warranting *en banc* review because the Panel’s decision follows precedent in the Ninth Circuit and nationally by applying the test articulated in *Spence v. Washington*, 418 U.S. 405 (1974) and *Texas v. Johnson*, 491 U.S. 397 (1989). By applying this test, the Panel committed no error, let alone an “egregious” one, in deciding this case. For these reasons, Plaintiffs/Appellants’ Petition for Rehearing *En Banc* should be denied.

II. STATEMENT OF FACTS

On July 30, 2000, in celebration of a birthday, appellants paid an admission fee and entered the Gilroy Garlic Festival, a yearly event organized and facilitated by the Gilroy Garlic Festival Association (“GGFA”), a private entity. *Villegas v. Gilroy Garlic Festival Association*, 484 F.3d 1136, 1138 (9th Cir. 2007.) Shortly after entering the festival, a member of security noticed that appellants were wearing biker club vests in violation of the festival dress code. *Id.* These vests were adorned with a patch depicting a skull with wings and a top hat, in addition to the words “Hollister” and “Top Hatters.” *Id.*

The security officer, along with the chair of security, escorted appellants to the entrance of the festival and asked them to either remove their vests or leave the area. *Id.* When appellants refused to remove their vests, the GGFA refunded their admission fees and appellants left the area. *Id.*

Subsequently, appellants filed this lawsuit claiming that the GGFA violated their *First Amendment* rights of free expression and free association. *Id.* at 1139. On April 30, 2007, the Ninth Circuit affirmed the district court’s decision granting summary judgment for the defendants/appellees. *Id.* at 1142. The Panel determined that the act of wearing a vest adorned with a common insignia did not constitute expressive conduct protected by the *First Amendment*. *Id.* at 1140-41.

Appellants contest this determination and have filed a request for rehearing *en banc*.

III. ARGUMENT

A. The Panel's Decision is Consistent With Supreme Court Precedent

Appellants essentially argue that the Ninth Circuit Panel, as well as the district court, erred in applying the longstanding test used to determine expressive conduct, as formulated first in *Spence v. Washington*, 418 U.S. at 410-11, and later confirmed in *Texas v. Johnson*, 491 U.S. at 404. Under the *Spence-Johnson* test, in order to determine whether a particular act should be afforded *First Amendment* protection, the court must ask whether “an intent to convey a particularized message was present, and whether the likelihood was great that the message would be understood by those who viewed it.” *Johnson*, 491 U.S. at 404, citing *Spence*, 418 U.S. at 410-11. Applying this test, the district court determined and the Panel confirmed that the acts of appellants, wearing their vests into the Garlic Festival, did not constitute expressive conduct protected under the *First Amendment*. *Villegas*, 484 F.3d at 1140-41. Because the *Spence-Johnson* test continues to be the test used to determine the existence of expressive conduct in arguably all circuits, including the Ninth Circuit, appellants’ request for rehearing *en banc* should be denied.

Appellants claim that the Supreme Court modified, if not eliminated, the requirements set forth in *Spence* and *Johnson* when it decided *Hurley v. South Boston Allied War Veterans Council*, 515 U.S. 557 (1995). However, nothing could be further from the truth. Petitioners dissect the *Hurley* opinion, quoting language out of context without offering any meaningful discussion. A closer look at *Hurley* reveals its inapplicability to the case at hand, as well as the reasonableness of the Panel's decision to omit *Hurley* from its opinion.

Unlike *Spence* or *Johnson* or *Villegas*, *Hurley* involves compelled speech. The only issue before the *Hurley* court was "whether Massachusetts may require private citizens who organize a parade to include among the marchers a group imparting a message the organizers do not wish to convey." *Id.* at 559. The Court specifically emphasized that respondents, i.e. the group wanting to express its message by participating in the parade, did not present the Court with their own *First Amendment* claim. *Id.* at 566.

With this limitation in mind, *Hurley* should be read in context and understood as a case concerning only compelled speech. Indeed, the language vigorously adopted by appellants was used by the court to emphasize the fact that a parade constitutes expressive conduct and a parade organizer does not waive his or her *First Amendment* right to free expression simply by allowing others to

advance a variety of views. *Id.* at 569-70. “It boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government’s power to control.” *Id.* at 575.

To this end, the Supreme Court was considering the organizer’s right to control the breadth of the parade’s message, based on the organizer’s own freedom of expression, by excluding those messages with which the organizers did not agree. In context, *Hurley* actually supports the GGFA’s decision to require appellants to remove their vest based on GGFA’s own *First Amendment* rights. Because the Panel made its decision on other grounds, i.e. that appellants were not engaged in expressive conduct, an analysis of *Hurley* was unnecessary.

Unlike the single issue presented in *Hurley*, the Supreme Court in *Rumsfeld v. FAIR* addressed claims regarding both compelled speech and expressive conduct. *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* 126 S.Ct. 1297, 1309 (2006). In consideration of the compelled speech issue, the Supreme Court turned to *Hurley* in its discussion. *Id.* at 1309. “The compelled-speech violation in each of our prior cases [] resulted from the fact that the complaining speaker’s own message was affected by the *speech it was forced to accommodate*. The expressive nature of a parade was central to our holding in *Hurley*.” *Id.* at 1309, citing *Hurley*, 515 U.S. at 568, (emphasis added).

In the Court's analysis of the issue of expressive conduct, the Court did not include any further citation to *Hurley* and instead turned to the earlier cases of *United States v. O'Brien*, 391 U.S. 367 (1968) and *Texas v. Johnson* that have historically shaped our *First Amendment* jurisprudence regarding expressive conduct. *Id.* at 1310. Deciding that the actions of FAIR (the law schools) did not constitute expressive conduct, the Supreme Court emphasized that in prior cases, "we have extended First Amendment protection only to conduct that is inherently expressive." *Id.*, quoting *O'Brien*, 391 U.S. at 376. "Unlike flag burning, the conduct regulated by the Solomon Amendment is not inherently expressive." *Id.*, referring to *Johnson*. The U.S. Supreme Court's decision in *Rumsfeld* leaves no doubt as to the continued vitality of the expressive conduct test announced in *Johnson*. As the Ninth Circuit followed unambiguous U.S. Supreme Court precedent, the request for rehearing *en banc* must be denied.

B. The Panel's Decision is Consistent With the Decisions of Other Circuits

In support of their argument that the *Spence-Johnson* test is no longer the current law, appellants discuss three isolated cases appearing in other circuits since *Hurley*, including *Mastrovincenzo v. City of New York*, 435 F.3d 78 (2nd Cir. 2006), *Tenafly Eruv Association, Inc. v. Borough of Tenafly*, 309 F.3d 144 (3rd Cir. 2002), and *Holloman v. Harland*, 370 F.3d 1252 (11th Cir. 2004). As

explained below, these cases are internally inconsistent or an apparent anomaly and not followed within their own circuits. However, appellants are left to rely on these cases, because all other circuits that have addressed the issue of expressive conduct since *Hurley* have consistently applied the *Spence-Johnson* test.¹

1. The Second Circuit's *Mastrovincenzo* Decision Does Not Alter the *Spence-Johnson* Test

Appellants cite *Mastrovincenzo* to bolster their argument that the *Spence-Johnson* test is no longer the test to determine the existence of expressive conduct. However, the footnote cited by appellants in support of this proposition states that a “message must nonetheless be ‘particularized’ and likely to be understood.”

¹ See, *Gun Owners' Action League, Inc. v. Swift*, 284 F.3d 198 (1st Cir. 2002); *Church of the American Knights of the Klu Klux Klan v. Kerik*, 356 F.3d 197 (2nd Cir. 2004); *Zalewska v. County of Sullivan, New York*, 316 F.3d 314 (2nd Cir. 2003); *Montanye v. Wissahickon School District*, 2007 U.S. App. LEXIS 4005 (3rd Cir. 2007); *McClure v. Ashcroft*, 335 F.3d 404 (5th Cir. 2003); *Littlefield v. Forney Ind. School District*, 268 F.3d 275 (5th Cir. 2001); *Brandt v. Bd of Educ. of Chicago*, 480 F.3d 460 (7th Cir. 2007); *Klein v. Perry*, 216 F.3d 571, 575 (7th Cir. 2000); *Stephenson v. Davenport Comm. School District*, 110 F.3d 1303, 1307 (8th Cir. 1997); *Nunez v. Davis*, 169 F.3d 1222, 1226 (9th Cir. 1999); *Thomas v. City of Beaverton*, 379 F.3d 802 (9th Cir. 2004); *Garcia v. Jaramillo*, 2006 US Dist LEXIS 95389, 31-32 (10th Cir. 2006); *Winsness v. Campbell*, 2006 US Dist. LEXIS 33260 (10th Cir. 2006); *Local 491 v. Gwinnett Co.*, 2007 U.S. Dist. LEXIS 33260 (N.D. Ga. May 4, 2007.)

Mastrovincenzo, 435 F.3d at 91, fn 9.

Appellants mischaracterize the issue in *Mastrovincenzo* as whether decorated articles of clothing are sufficiently expressive to receive *First Amendment* protection. However, the Second Circuit was not analyzing these items as “articles of clothing.” Instead, the court was determining whether these articles could be considered artwork created on nontraditional canvases as the *Mastrovincenzo* plaintiffs contended. *Id.* at 86.

More analogous is the Second Circuit case of *Zalewska v. County of Sullivan, NY* in which the plaintiff challenged a dress code that prohibited her from wearing skirts, an act she asserted was “an expression of her deeply held cultural values.” *Zalewska v. County of Sullivan, NY*, 316 F.3d 314, 319 (2nd Cir. 2003). The court recognized that

clothing and personal appearance are important forms of self-expression. For many, clothing communicates an array of ideas and information about the wearer. It can indicate cultural background and values, religious or moral disposition, From the nun’s habit to the judge’s robes, clothing may often tell something about the person so garbed.

Yet, the fact that something is in some way communicative does not automatically afford it constitutional protection. For purposes of the First Amendment, the Supreme Court has repeatedly rejected the view that ‘an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.’

Id. at 319, quoting *United States v. O'Brian*, 391 U.S. 367, 376 (1968). To warrant *First Amendment* protection, conduct must be “sufficiently imbued with the elements of communication.” *Id.* quoting *Johnson*, 491 U.S. at 404.

Furthermore, “the reviewing court must find, at the very least, an intent to convey a ‘particularized message’ along with a great likelihood that the message will be understood by those viewing it.” *Id.* citing *Johnson*, 491 U.S. at 404 and *Spence*, 418 U.S. at 410-11. As with *Zalewska*, onlookers at the Garlic Festival would “glean no particularized message from appellant’s wearing” of the motorcycle club vests. *Id.* at 320.

2. The Third Circuit No Longer Follows the Rule Enunciated in *Tenaflly*

Next, appellants heavily rely on *Tenaflly* to support their contention that the *Spence-Johnson* test is no longer good law. In *Tenaflly*, the Third Circuit considered whether the act of creating an eruv was entitled to protection under the *First Amendment*. *Tenaflly*, 309 F.3d at 151-52. As appellants strongly assert, the Third Circuit described *Hurley* as having modified the *Spence* test by “eliminat[ing] the ‘particularized message’ aspect of the *Spence-Johnson* test.” *Id.* at 160. Despite the court’s language and appellants’ optimistic contention that *Spence-Johnson* is dead and that the Panel erred in applying it, the *Tenaflly* court,

basically went forward to apply the *Spence-Johnson* factors. *Id.* at 161-62. The court considered 1) whether plaintiffs “meant to demonstrate a belief or assert anything” and 2) whether observers “‘likely understand’ the eruv ‘to be telling them anything.’” *Id.* at 162. Finding no evidence in the record to support either finding, much less both, the court determined that the plaintiffs had not engaged in protected speech. *Id.* at 160. Indeed the court, in emphasizing the burden of the plaintiff stated, “If the putative speaker’s burden were ‘limited to ‘the advancement of a plausible contention’ that [his or her] conduct is expressive’ . . . the result ‘would be to create a rule that all conduct is presumptively expressive.’” *Id.* at 161, quoting *Clark v. Community for Creative Non-Violence*, 468 US 288, 293, n.5 (1984).

Though *Tenaflly* (and appellants) asserts that the expressive conduct test has changed, the language and assertion of *Tenaflly* has not been followed by either the district courts within the Third Circuit or the Third Circuit itself in subsequent cases. It appears that the language of *Tenaflly* is a mere anomaly that has been abandoned. As recently as February 2007, the Third Circuit once again considered whether certain acts constituted expressive conduct. See *Montanye v. Wissahickon School District*, 2007 U.S. App. LEXIS 4005 (3rd Cir. 2007). To make this determination, the Third Circuit returned to the *Spence-Johnson* test,

“[T]o determine whether a particular action or pattern of conduct constitutes speech protected under the First Amendment, we must ask whether ‘an attempt to convey a particularized message was present, and whether the likelihood was great that the message would be understood by those who viewed it.’” *Id* at 8, quoting *Johnson*, 491 U.S. at 404.

3. The Eleventh Circuit Has Not Followed The Interpretation of Hurley Set Forth in Holloman

Finally, appellants cite to *Holloman*, a case in which the Eleventh Circuit contends that *Hurley* modified the *Spence-Johnson* test. *Holloman*, 370 F.3d at 1270 (“Thus, in determining whether conduct is expressive, we ask whether the reasonable person would interpret it as some sort of message, not whether an observer would necessarily infer a specific message.”) Despite the fact that this case was decided in 2004, it has not been cited for this proposition. Indeed, in May 2007, a district court within the Eleventh Circuit, identified the *Spence-Johnson* test as the proper test to be applied to determine expressive conduct. *Local 491 v. Gwinett Co.*, 2007 US Dist. LEXIS 33260, *19 (ND. Ga. May 4, 2007.)

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C. The Panel's Decision is Consistent With Other 9th Circuit Decisions

1. The *Vlasak* Court Applied the *Spence-Johnson* Test

In *Vlasak v. Superior Court of California*, plaintiff Vlasak was arrested while participating in a demonstration near the entrance to a circus by displaying photographs, videotapes and signs addressing “the cruelty that goes on behind the big top.” *Vlasak v. Superior Court of California*, 329 F.3d 683, 686 (9th Cir. 2003). In addition to these items, Vlasak was carrying a bull hook as an example of a device used to train elephants. *Id.* The Los Angeles Municipal Code limited the types of equipment one may carry or possess during a demonstration, and the bull hook exceeded the size limit allowed under the code. *Id.* As a result of this violation, Vlasak was arrested and subsequently challenged the constitutionality of the Los Angeles Municipal Code. *Id.*

Unlike the analysis of the *Sammartano* court (discussed below), the *Vlasak* court considered the actions of the appellant and applied the *Spence-Johnson* test to determine whether it constituted protected expressive conduct. *Id.* at 690. “The First Amendment extends to Vlasak’s possession of the bull hook during the demonstration because she had ‘an intent to convey a particularized message’ and ‘the likelihood was great that the message would be understood by those who viewed it.’” *Id.*, quoting *Johnson*, 491 U.S. at 403. Considering the context of her

acts, i.e. that she held the bull hook in one hand and photos of a bull hook being used on elephants in the other hand, the court was satisfied that onlookers would understand the purpose of the instrument and the message Vlasak was conveying through her conduct. *Id.* at 690-91.

Using *Vlasak* as its comparison, the Panel held that

there is little likelihood that any message would be understood by those viewing the plaintiffs' vests and, further, the context in which the plaintiffs' alleged expression took place does not add any additional meaning to their symbol. . . . In this case, the plaintiffs' act of wearing their vests adorned with a common insignia simply does not amount to the sort of expressive conduct protected by the First Amendment right to freedom of speech.

Villegas, 484 F.3d at 1140-41.

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test or any other test the appellants may contend is proper to determine the existence of expressive conduct. Instead, the *Sammartano* court applied the standard for injunctive relief and considered whether the courtroom dress code was reasonable in light of the evidence before the court and whether it was viewpoint neutral. *Id.* at 965-67. The issues before the *Sammartano* court were different, and these differences make *Sammartano* inapplicable.

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Appellants also cite *Holloman*, 370 F.3d 1252 (discussed above), in support of their newly articulated argument that appellants' act of wearing their vests constituted pure speech rather than expressive conduct. Plaintiff Holloman was a highschool student who was punished for raising his fist during the recitation of the Pledge of Allegiance. *Holloman*, 370 F.3d at 1260. The Holloman court, in *dicta*, questioned whether this act by Holloman was "akin to pure speech" similar to that of the plaintiff in *Tinker v. Des Moines Independent Community School*, 393 U.S. 503 (1969). *Id.* at 1270.

Appellants go on to grandly compare their wearing of their biker vests at the Garlic Festival with Tinker's wearing of a black armband to protest the Vietnam War. In fact, the Supreme Court, in *Tinker*, was very careful to distinguish between Tinker's activity with the ordinary decision of what to wear. "The

statement in *Tinker*— that regulation of ‘length of skirts or type of clothing,... hair style, or deportment’ is different from that sort of regulation that ‘involves direct, primary *First Amendment* rights akin to ‘pure speech.’” *Zalewska*, 316 F.3d at 320, quoting *Tinker*, 393 U.S. at 507-08. This distinction “suggests that a person’s choice of dress or appearance in an ordinary context ‘does not possess the communicative elements necessary to be considered speech-like conduct entitled to *First Amendment* protection.’” *Id* at 320, quoting *Tinker*, 393 U.S. at 507-08. Because appellants act of wearing their motorcycle vests cannot be reasonably compared to the act of *Tinker*, or even *Holloman*, appellants’ newly articulated argument that they were engaged in “pure speech” lacks merit and in no way warrants a rehearing *en banc*.

E. Case Law Regarding Solicitations for Donations and/or Fund Raising Sales Is Inapplicable to This Case and Appellants’ Request for Rehearing *En Banc*

For the first time in their Petition for Rehearing *En Banc*, appellants make the nebulous argument that because one of the stated purposes of the Tophatters is to raise money for charity, if they were, in fact, *selling* their vests rather than merely wearing them, their conduct would be protected speech pursuant to the Ninth Circuit’s “protected merchandise standard.” This argument is specious.

As appellants point out in support of this argument, on numerous occasions,

“the Supreme Court has held that fund-raising for charitable organizations is fully protected speech.” *Board of Trustees of the State University v. Fox*, 492 US 469 (1989.) However, these cases have largely arisen in response to the enforcement of municipal codes that either set forth requirements that the solicitor of donations disclose certain information or prohibit the solicitation of donations in some way. Addressing these issues, the Supreme Court has held that the actual solicitation of charitable contributions is protected speech. See generally *Schaumburg v. Citizens for a Better Environment*, 444 US 620 (1980), *Riley v. Nat’l Fed’n of the Blind*, 487 US 781 (1988); *Secretary of State of Maryland v. Joseph H. Munson Co.* 467 US 947 (1984). “. . .[S]olicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease.” *Schaumburg*, 444 U.S. at 632. Because the appellants were not involved in the solicitation of charitable donations when they were asked to remove their vests or leave the festival and, instead, were merely celebrating a birthday, these cases and appellants’ argument are entirely inapplicable to the issues that were before the court and do not support their Petition for Rehearing *En Banc*.

In furtherance of their argument, appellants also emphasize that the Ninth

Circuit “has stated that ‘[t]he sale of merchandise which carries or constitutes a political, religious, philosophical or ideological message falls under the protection of the First Amendment.’” *American Civil Liberties Union of Nevada v. City of Las Vegas*, 333 F.3d 1092, 1107 (9th Cir. 2003) (citing *Gaudiya Vaishnava Society v. City and County of San Francisco*, 952 F.2d 1059, 2063 (9th Cir. 1990)).

Setting aside the fact that appellants were not selling anything for a charitable purpose, the key to this “protected merchandise standard” is the fact that it must be message bearing. The Ninth Circuit has consistently emphasized this requirement. See *American Civil Liberties Union*, 333 F.3d at 1108, (“The district court clearly acted correctly in granting summary judgment for Plaintiffs and issuing a permanent injunction against enforcement of this ordinance with respect to **message-bearing merchandise**”) (Emphasis added); *Gaudiya v. City and County of San Francisco*, 952 F.2d 1059 (9th Cir. 1991) (Enjoining city from enforcing code section against plaintiffs or other non-profits, “with respect to the sale of merchandise constituting or making a statement carrying a religious, political, philosophical or ideological **message relevant to the purpose** of the organization.”) (Emphasis added.) See also, *Perry v. Los Angeles Police Department*, 121 F.3d 1365 (9th Cir. 1997) (The items included “music, buttons, and bumper stickers **bearing political, religious, and ideological messages.**

These are expressive items, and they do not lose their constitutional protection simply because they are sold rather than given away.”) (Emphasis added.) Appellants were not selling (or wearing) any product that bore any political, religious or ideological message relevant to the purpose of their organization, and therefore, their argument applying the “protected merchandise standard” is inapplicable to the issues that were decided by the Panel on April 30, 2007.

IV. CONCLUSION

For all of the foregoing reasons, Plaintiffs/Appellants’ Petition For Rehearing *En Banc* should be denied.

Dated: July 9, 2007

CLAPP, MORONEY, BELLAGAMBA
AND VUCINICH

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Dated: July 9, 2007

CLAPP, MORONEY, BELLAGAMBA
AND VUCINICH

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Villegas, et al. v. City of Gilroy, et al.
Court of Appeal Case No. 05-15725
U.S. District Court, N.D. Cal. Case No. C01-2070 JW

PROOF OF SERVICE BY FEDERAL EXPRESS

I, the undersigned, hereby declare that I am over the age of eighteen years and not a party to the within action. My business address is 1111 Bayhill Drive, San Bruno, CA 94066.

On the date indicated below, I served the following documents:

GILROY GARLIC FESTIVAL ASSOCIATION, INC.'S
RESPONSE TO PETITION FOR REHEARING *EN BANC*

by placing a true copy thereof (to which was attached a copy of this document) in a sealed envelope, and transmitting said documents via Federal Express, guaranteed overnight delivery, to person(s) address as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and was executed in San Bruno, California on July 9, 2007.


Leticia C. Julian