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Court of Appeals File No. 53450-9-II

(Direct review denied under Supreme Court No. 95901-3)

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

Hired Hands LLC; Kenneth Smith,

Appellants/Plaintiffs

v.

Washington State Department of Labor
and Industries

Respondent/Defendant

PETITION FOR REVIEW

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1. IDENTITY OF PETITIONER

Petitioner Ken Smith is managing member of petitioner Hired Hands LLC (collectively "Hired Hands"), a two-member electrical contractor company.

2. COURT OF APPEALS DECISION

A copy of the unpublished Court of Appeals decision is included at Appendix C. Division II affirmed the trial court's holdings.

3. ISSUES PRESENTED FOR REVIEW

a. Whether requiring electricians to wear their electrical license is a violation of the First Amendment as compelled speech.

b. Whether requiring electricians to wear their electrical license is a violation of the Fourteenth Amendment as an infringement of the fundamental right of bodily integrity, which includes privacy.

c. Whether the operative language in WAC 296-46B-940(3) is void for unconstitutional vagueness.

4. STATEMENT OF THE CASE

Ken Smith is a master electrician, electrical administrator, and owner of Hired Hands LLC (hereinafter collectively referred to as "Hired Hands"). In 2013, the Department of Labor and Industries (the "Department") promulgated WAC 296-46B-940(3), which requires that electricians "wear" their electrical license on the chest area while they "work in the electrical construction trade." Appx. A. The statutory authority was RCW 19.28.271(1). Appx. B.

This case concerns both the enabling law and resultant regulation (collectively, the "worn license requirement"). The license is color-coded

to rank and expresses the wearer's name, city, state, zip code, license number, level of certification, the state seal, and "Department of Labor & Industries." CP 124-25.

Hired Hands challenged the worn license requirement in Thurston County Superior Court on Free Speech and Bodily Autonomy grounds. Additionally, Hired Hands argued the regulation was void for vagueness. The trial court upheld the law and regulation and the appeals court affirmed.

5. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

a. Review is warranted under RAP 13.4(b)(1) because the opinion conflicts with a decision of the United States Supreme Court.

Under RAP 13.4(b)(1), review is warranted "[i]f the decision of the Court of Appeals is in conflict with a decision of the Supreme Court." The appeals court rejected four-square binding precedent, instead opting to expand the 'informed consent' doctrine, creating a new rule that any licensed worker may be compelled to wear their license.

In Nat'l Inst. of Family & Life Advocates v. Becerra ("NIFLA"), the Supreme Court struck down an "unlicensed notice" that the state had required be posted at fake pre-natal care clinics run by anti-choice religious activists. 138 S. Ct. 2361, 2376 (2018). The unlicensed notice would have served to ensure pregnant women were not tricked by these fundamentalists posing as medical professionals. id. at 2368 ("Unlicensed clinics must notify women that California has not licensed the clinics to provide medical services.").

Like the worn electrical license, the posted "unlicensed notice" contained no objectively ideological content and was required at a private location. Rather than follow NIFLA, the appeals court seized upon the doctrine that NIFLA rejected – the "'informed consent… requirement that a doctor give certain specific information about any medical procedure'… [that] regulated speech only 'as part of the practice of medicine, subject to reasonable licensing and regulation by the State.'" id. at 2373 (quoting Cruzan v. Director, Mo. Dept. of Health, 497 U.S. 261, 269 (1990); citing Schloendorff v. Society of N.Y. Hospital, 211 N.Y. 125, 129–130 (1914) (Cardozo, J.) (explaining that "a surgeon who performs an operation without his patient's consent commits an assault")). While this medical doctrine has also been expanded to mental health professionals, it has remained narrowly applicable to compelled speech describing a particular procedure -never has it been applied to compel wearing of a credential. Nor has it ever applied to a tradesperson.

The appeals court ignored obvious factual analogues in NIFLA. Washington requires a worn license notice. California sought to require a posted unlicensed notice. NIFLA, 138 S. Ct. at 2377. The only difference is that the former is more egregious for being affixed to the wearer's chest. Although a posted unlicensed notice "unduly burdens protected speech…[via] a government-scripted, speaker-based disclosure requirement…" the appeals court decided the worn electrical license is more like a surgeon explaining surgery to a patient. id. To sustain its rejection

of binding precedent, the appeals court engaged in reasoning that cannot be reconciled with any applicable doctrine.

First, the court seems to approve diminution of First Amendment rights as a function of the magnitude of bodies of "extensive licensing and regulation." Hired Hands, LLC v. Washington State Dep't of Labor & Indus., No. 53450-9-II, 2020 WL 5797899, at *2 (Wash. Ct. App. Sept. 29, 2020). This frightening proposition has never been the law. Even the case that ended Lochnerism and introduced rational basis review of industrial regulations disclaimed such a notion in the most famous footnote in all of American jurisprudence.

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments…[requiring] more exacting judicial scrutiny…. [and] more searching judicial inquiry.

United States v. Carolene Prod. Co., 304 U.S. 144, 153 n. 4 (1938).

Second, the appeals court adopted the Department's whopper of an intellectual contortion whereby electricians "performing electrical work…are…expressing that they…" are licensed and, therefore, the worn license requirement "merely verifies that the electrician is compliant with the law…." id. This legal fiction was lifted directly from the Department's briefing and can be found in no analogous precedent. Br. Resp't at 11-12.

This reasoning could arguably support application of the commercial speech exception to strict scrutiny, in which the state can constitutionally compel some extra information along with already extant

advertising. See e.g NIFLA, 138 S. Ct. at 2372 (2018) ("require professionals to disclose factual, noncontroversial information in their 'commercial speech.'"); Reply Br. at 1-3. Yet the worn license requirement has nothing to do with commercial speech and the appeals court stated it was applying informed consent surgery doctrine, not the commercial speech exception.

The proposition that, by working, Hired Hands is "expressing that they are licensed" also harkens to the Secondary Effects Doctrine as applied to nude dancers, especially given the appeals court's characterization of the overarching regulatory framework and citation to a Fifth Circuit "strip club" case. Hired Hands, WL 5797899 at *2, *4 (citing N.W. Enters. Inc. v. City of Houston, 352 F.3d 162, 197 (5th Cir. 2003). Clearly electricians have nothing to do with strippers or the law that follows their expressive conduct.

The appeals court further justified its rejection of the binding NIFLA case by amplifying the Supreme Court's concern with font size in the advertisement portion of the California law at issue there. Hired Hands, at *3 ("large font and in up to thirteen different languages"). However, the NIFLA Court focused mainly on the fact that the state was compelling

> a government-scripted, speaker-based disclosure requirement that…requires…facilities to post California's precise notice, no matter what the facilities say on site or in their advertisements. And it covers a curiously narrow subset of speakers. …Thus, a facility that advertises and provides pregnancy tests is covered by the unlicensed notice, but a facility across the street that advertises and provides nonprescription contraceptives is excluded—even though the latter is no less likely to make women think it is licensed. This Court's precedents are deeply skeptical of laws that "distinguis[h] among different speakers, allowing speech by some but not others."

NIFLA, 138 S. Ct. 2361, 2377–78 (2018) (quoting Citizens United v. Federal Election Comm'n, 558 U.S. 310, 340 (2010)); see also Opening Br. Appellants at 13-26 (analogizing the foregoing paragraph to the worn license requirement).

Only as dicta, predicated on the hypothetical that "California had presented" an acceptable justification, did the Court mention the portion of the law that could drown out a hypothetical "billboard for an unlicensed facility that says 'Choose Life….'" id. at 2378. Though such reasoning would seem to indicate adherence to the commercial speech portion of NIFLA, the appeals court then arbitrarily declared that the worn license requirement is distinguishable as "incidental" and not "speech as speech" regulation. Hired Hands, at *3.

This notion has been rejected by recent NIFLA progeny. See Appellants' Statement of Additional Authority, filed Sept. 2, 2020. In IMDb.com Inc. v. Becerra, the state prohibited publication of actors' age in online profiles created by IMDbPro, which "functions more or less as Hollywood's version of LinkedIn." 962 F.3d 1111, 1116 (9th Cir. 2020). The purpose was to prevent age discrimination in hiring. id.

"[A] law's practical effects are not merely 'incidental' when it imposes restrictions 'based on the content of speech and the identity of the speaker.'" id. (quoting Sorrell v. IMS Health, 564 U.S. 552, 567 (2011)). The IMBd.com court rejected the notion that the law was "of general applicability [and therefore] 'does not offend the First

Amendment…[by]…incidental effect…' on speech." id. at 1120 (quoting Reed v. Town of Gilbert, 576 U.S. 155 (2015)). The worn license requirement dictates the content of compelled speech identifying the wearer.

Free Speech analysis begins by "categorizing the type of speech at issue." Riley v. National Federation of the Blind of North Carolina, 487 U.S. 781, 787 (1988). The IMDb.com court did what the appeals court should have done -it applied the analytical framework appropriate to content based speech restrictions. 962 F.3d at 1119-1128. State restrictions on content are presumptively invalid. id. at 1120. Compelled speech is always content based because the state creates the content and forces the speaker to communicate it. Thus "[t]he right to speak and the right to refrain from speaking are complementary components of" Free Speech. Wooley v. Maynard, 430 U.S. 705, 714 (1977).

To knock a court off the presumption of invalidity, the proponent of the speech-compelling law must demonstrate it fits an exception, of which there are necessarily few. As a threshold analysis, the IMDb.com court searched the precedent for exceptions, then addressed and eliminated each possible "reduced protection" category. 962 F.3d at 1121-25. It then applied strict scrutiny.

Commercial speech is one exception that the Department proffered to support the worn license. Clearly a worn license requirement is not related to commercial speech, which is "'defined as speech that does *no*

more than propose a commercial transaction' (emphasis added); … [and] 'expression related *solely* to the economic interests of the speaker and its audience' (emphasis added)." Nike, Inc. v. Kasky, 539 U.S. 654, 678 (2003) (quoting United States v. United Foods, Inc., 533 U.S. 405, 409 (2001) (citations omitted)).[1]

By the time Hired Hands is performing electrical work, the commercial transaction has already been proposed and accepted. The appeals court should have rejected but did "not address [the Department's]…argument that the [worn license requirement]…requires factual, uncontroversial disclosure [along with] commercial speech." Hired Hands, WL 5797899 n. 2. The appeals court did not address any other possible exceptions to the presumption of invalidity, instead creating its own.

"We conclude that the [worn license] requirement is constitutional because it is a reasonable regulation of professional conduct that only incidentally impacts speech." id. at *3. This 'rule' can only apply (if ever) after a threshold determination that one of the foregoing exceptions to the presumption of invalidity has been activated by the type of restriction and underlying infringed or compelled speech. "Professional conduct" is not an exception.[2]

[1] Emphasis on "no more than" and "solely" was added by the Nike, Inc. Court.
[2] See also NIFLA, at 2371-72 (disapproving the 9th Cir. exception for "professional speech").

b. Review is warranted under RAP 13.4(b)(3) and (4) because the opinion involves significant questions of law under the United States Constitution, which issues are of substantial public importance.

This Republic has recently been subjected to unprecedented authoritarian and divisive stress, shaking public confidence in the rule of law. The mistakes of history are being, not only repeated, but renewed as viable policies. The courts are the last bastion and must not rubber stamp even the most banal of constitutional infringements. The time for vigilance is now.

This is a case of first impression grounded on the sacred and fundamental civil rights of bodily autonomy and free speech. This Court has accepted direct review under RAP 4.2(a)(4) of such issues as whether a police chief's personnel report is exempted from the Public Records Act,[3] timeliness of a Condominium Act challenge,[4] propriety of B&O tax calculations,[5] and tribal authority over "non-Indian" motorists on tribal land.[6] None of these cases touched fundamental civil rights. If review is not granted, then Hired Hands must petition the United States Supreme Court under 28 U.S.C. § 1257.

There are thousands of electricians in our state. There are over six million licenses -of many kinds- issued by the various agencies of our state. The central issue, whether the state may force us to wear licenses, is of

[3] Amren v. City of Kalama, 131 Wash. 2d 25, 28 (1997)
[4] Bilanko v. Barclay Court Owners Ass'n, 185 Wash. 2d 443, 445 (2016)
[5] Ford Motor Co. v. City of Seattle, 160 Wash. 2d 32, 37 (2007)
[6] State v. Schmuck, 121 Wash. 2d 373, 379 (1993)

ubiquitous importance. Under the new rule created by the court of appeals, all licensed workers can be forced to wear their licenses -lawyers and judges included. A dystopian and paternalistic image likely to ignite further social upheaval and hostility.

> The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.
>
> Marbury v. Madison, 5 U.S. 137, 176 (1803).

6. CONCLUSION

Hired Hands respectfully requests this Court accept review and reverse the appeals court as to all three legal issues, and award attorney fees and costs as appropriate.

Respectfully submitted this 20th day of October, 2020.

s/Jackson Millikan

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By my signature above, I Jackson Millikan do hereby swear under penalty of Washington State perjury laws that on the date indicated I served these documents via the appellate e-file portal and email upon the Attorney General's Office through counsel.

APPENDIX A

WAC 296-46B-940

Electrician/certificate of competency required.

General.

(1) The department will deny application, renewal, reinstatement, or issuance of a certificate or permit if an individual owes money as a result of an outstanding final judgment(s) under chapter 19.28 RCW.

(2) The scope of work for electricians is described in WAC 296-46B-920.

Electrician - Certificate of competency required.

(3) To work in the electrical construction trade, an individual must possess, wear, and visibly display on the front of the upper body, a current valid:

(a) Master journey level electrician certificate of competency issued by the department;

(b) Journey level electrician certificate of competency issued by the department;

(c) Master specialty electrician certificate of competency issued by the department;

(d) Specialty electrician certificate of competency issued by the department; or

(e) Electrical training certificate, learning the trade in the proper ratio, per RCW 19.28.161, under the supervision of a certified master journey level electrician, journey level electrician, master specialty electrician working in their specialty, or specialty electrician working in their specialty.

The certificate may be worn inside the outer layer of clothing when outer protective clothing (e.g., rain gear when outside in the rain, arc flash, welding gear, etc.) is required. The certificate must be worn inside the protective clothing so that when the protective clothing is removed, the certificate is visible. A cold weather jacket or similar apparel is not protective clothing.

The certificate may be worn inside the outer layer of clothing when working in an attic or crawl space or when operating equipment (e.g., drill motor, conduit threading machine, etc.) where wearing the certificate may pose an unsafe condition for the individual.

The certificate must be immediately available for examination at all times.

APPENDIX B

RCW 19.28.271

Violations of RCW 19.28.161 through 19.28.271—Schedule of penalties—Appeal.

(1) It is unlawful for any person, firm, partnership, corporation, or other entity to employ an individual for purposes of RCW 19.28.161 through 19.28.271 who has not been issued a certificate of competency, a temporary permit, or a training certificate. It is unlawful for any individual to engage in the electrical construction trade or to maintain or install any electrical equipment or conductors without having in his or her possession a certificate of competency, a temporary permit, or a training certificate under RCW 19.28.161 through 19.28.271, and photo identification. The department may establish by rule a requirement that the individual also wear and visibly display his or her certificate or permit.

APPENDIX C

(Hired Hands, LLC v. Washington State Dep't of Labor & Indus., No. 53450-9-II, 2020 WL 5797899 (Wash. Ct. App. Sept. 29, 2020)

Filed
Washington State
Court of Appeals
Division Two

September 29, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

HIRED HANDS, LLC, and KENNETH SMITH, Appellants, v. WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES, Respondent.	No. 53450-9-II UNPUBLISHED OPINION

MELNICK, J. — Hired Hands, LLC and Kenneth Smith (hereafter Hired Hands) appeal the superior court's order that upheld the constitutionality of WAC 296-46B-940. This regulation requires electricians to wear a wallet-sized badge showing they are certified to perform electrical work. Hired Hands challenges the regulation on three constitutional grounds. First, it argues that the badge requirement violates its First Amendment right against compelled speech. Hired Hands next argues it violates the fundamental right to choose physical appearance. Lastly, it argues that the regulation is void for vagueness.

We affirm.

FACTS

Hired Hands sought a declaratory judgment in the Thurston County Superior Court seeking to have WAC 296-46B-940 declared unconstitutional on its face. This regulation requires electricians to wear a wallet-sized badge while working.

Electricians in Washington are regulated in a several ways. Ch. 19.28 RCW. Individual electricians must acquire licenses and certificates of competency. RCW 19.28.041; RCW 19.28.161. The certificates have four levels: master journey level, journey level, master specialty, and specialty electrician. RCW 19.28.161(1). The various levels are based on experience with different types of work, and each level has specific hands-on requirements. RCW 19.28.191.

In 2009, the legislature conducted fact finding to understand the issue of contractors using unlicensed electricians to perform electrical work. SUBSTITUTE H.B. 1055, 61ST Leg., Reg. Sess. (Wash. 2009). Testimony revealed that some contractors did in fact utilize unlicensed electricians to perform electrical work. SUBSTITUTE H.B. 1055. Additionally, individual unlicensed electricians have deceived consumers and contractors by using certificates from people with the same name. SUBSTITUTE H.B. 1055.

The legislature determined these anticompetitive practices contributed to consumer deception and could lead to unsafe electrical installations. SUBSTITUTE H.B. 1055 §1. Pursuant to those findings, the legislature amended RCW 19.28.271 to give the Department of Labor and Industries (L&I) the power to require electricians to wear a visible certification badge. SUBSTITUTE H.B. 1055 §1; RCW 19.28.271(1).

In 2012, L&I adopted WAC 296-46B-940 which required electricians to wear a wallet-sized badge while working. The badge must contain the electrician's city and state of residence, and the person's level of electrical certification. The badge must be worn on the outside of clothing, except "when working in an attic or crawl space or when operating equipment . . . where

wearing the certificate may pose an unsafe condition for the individual." WAC 296-46B-940(3)(e). Additionally, as appropriate, the badge may be worn under protective clothing "e.g., rain gear when outside in the rain, arc flash, welding gear, etc." WAC 296-46B-940(3)(e). Cold weather jackets "or similar" clothing are excluded from the protective gear definition. WAC 296-46B-940(3)(e).

In 2017, Hired Hands filed a declaratory judgment action challenging the constitutionality of WAC 296-46B-940. Hired Hands also filed an opening brief. First, Hired Hands argued strict scrutiny should apply because the regulation compelled protected speech in violation of the First Amendment to the Constitution. Second, Hired Hands argued strict scrutiny should apply because the regulation violated the fundamental right to choose personal appearance by forcing electricians to wear the badge. Lastly, Hired Hands argued the "etc." and "similar" language in WAC 296-46B-940(3)(e) rendered the statute unconstitutionally vague. L&I argued that a rational basis test should be used for the first two arguments and that the court should uphold the regulation. In addition, it argued that the regulation was not vague.

At a hearing, the court asked Hired Hands whether the central issue requiring strict scrutiny was Hired Hands' bodily integrity argument, rather than its First Amendment challenge. Report of Proceedings (RP) at 12. Hired Hands conceded that strict scrutiny was appropriate only because the badge must be worn, not because of the specific content of the badge. Hired Hands also stated that the badge would be constitutional if it were affixed to an electrician's toolbox or car, but that it was a "huge step" to require the badge be worn on the electrician's person. RP at 12.

The court utilized a rational basis test to evaluate the badge requirement and it upheld the regulation. Hired Hands appeals.

ANALYSIS

I. STANDARD OF REVIEW

Hired Hands challenges the constitutionality of a Washington administrative rule. Constitutional challenges are issues of law. *Lenander v. Dep't of Ret. Sys.*, 186 Wn.2d 393, 403, 377 P.3d 199 (2016). We review such challenges de novo. *Lenander*, 186 Wn.2d at 403. In reviewing a rule, we shall declare it invalid if it is unconstitutional, if it exceeds the statutory authority of the agency, if its adoption violated rule-making procedures, or if it is arbitrary and capricious. *Hillis v. Dept. of Ecology*, 131 Wn.2d 373, 382, 932 P.2d 139 (1997).

II. FIRST AMENDMENT ISSUES

The parties disagree on what test we should utilize to decide the first two issues raised by Hired Hands. Hired Hands argues we should use strict scrutiny because the badge requirement compels electricians to convey a content based, ideological message of the state.[1] L&I argues that a rational basis test applies because the badge requirement is a reasonable regulation of professional conduct that only incidentally impacts speech. We agree with L&I.

Strict scrutiny requires the government to prove a challenged restriction furthers a compelling state interest and is narrowly tailored to achieve that interest. *Reed v. Town of Gilbert*, 576 U.S. 155, 171, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015). Strict Scrutiny is the highest standard available, and few statutes survive under this level of analysis. *Reed*, 576 U.S. at 180.

On the other hand, the rational basis test is a deferential standard that presumes a statute is valid. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985). Under rational basis, a statute is constitutional if it rationally relates to any legitimate state interest. *Cleburne Living Ctr.*, 473 U.S. at 440.

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[1] This argument seems to contradict the position Hired Hands asserted in the trial court.

We must first decide whether the badge requirement is a regulation of professional conduct or one of compelled speech. The outcome of that analysis determines what test we use.

We conclude that the badge requirement regulates professional conduct and only incidentally involves speech. This requirement is a component of a larger scheme that regulates electricians. Ch. 19.28 RCW; Ch. 296-46B WAC. The electrical profession in Washington is subject to extensive licensing and regulation. Ch. 19.28 RCW; Ch. 296-46B WAC. The badge requirement is a component of those licensing regulations. RCW 19.28.191; WAC 296-46B-940. The badge identifies the person as an electrician and it shows the electrician's certification level, which directly corresponds to the type of electrical work the electrician may perform. RCW 19.28.191. The badge discloses information that contractors or consumers need to determine whether an electrician is certified and whether an electrician can do the assigned work.

The badge requirement is not compelled speech. Hired Hands seems to argue that the badge requirement forces electrical workers to express a message they would not otherwise make. However, this argument fails because all electricians must obtain a certificate of competency issued by L&I. RCW 19.28.161(1). By performing electrical work, electricians are merely expressing that they have met L&I's certification requirements. The regulation at issue merely verifies that the electrician is compliant with the law, or, as the case may be, that the worker is not compliant with the law. The regulation's effects on speech are incidental.

This conclusion is in accord with *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992). In *Casey*, the state required physicians to provide factual disclosures about abortion to women seeking the procedure. 505 U.S. at 884. Because the practice of medicine is subject to licensing and regulation, and the disclosures directly related to the procedures practiced by the complaining physicians, the Court

held the disclosure was constitutional as a reasonable regulation of professional conduct that only incidentally impacts speech. *Casey*, 505 U.S. at 884. The state's interest was to ensure women seeking an abortion provided informed consent, and the required disclosure was reasonably related to that interest. *Casey*, 505 U.S. at 883-84.

Hired Hands' reliance on *National Institute of Family and Life Advocates v. Becerra*, ___ U.S. ___, 138 S. Ct. 2361 201 L. Ed. 2d 835 (2018), is misplaced and it does not affect *Casey*'s applicability. In *Becerra*, the Court invalidated a California law that required anti-abortion clinics and unlicensed covered facilities" to provide a government drafted notice onsite about other available options for "family planning services, . . . prenatal care, and abortion for eligible women." 138 S. Ct. at 2369. It also required that unlicensed clinics provide onsite and in all advertising materials a government drafted notice stating they were unlicensed. *Becerra*, 138 S. Ct. at 2370. The state required the notices be in large font and in up to thirteen different languages. *Becerra*, 138 S. Ct. at 2378. The Court held that the California law did not regulate professional conduct but that it did regulate "speech as speech." *Becerra*, 138 S. Ct. at 2374.

Here, WAC 296-46B-940 regulates professional conduct and not "speech as speech." For this reason, we utilize a rational basis test. We reject Hired Hands argument that we utilize strict scrutiny.

The rational basis test is used when states regulate professional conduct, even if the regulation incidentally impacts speech. *Casey*, 505 U.S. at 884. A statute or regulation is reasonable if it rationally relates to any legitimate state interest. *Cleburne Living Ctr.*, 473 U.S. at 440.

We have previously established that the badge requirement is a regulation of professional conduct directly related to an electrician's profession. The remaining step is to apply *Casey*'s rational basis test to determine if the regulation rationally relates to a legitimate state interest. We determine that it does.

The badge requirement rationally relates to the state's interest of preventing consumer deception and unsafe electrical work. It also relates to the L&I's mandate to "adopt reasonable rules in furtherance of safety to life and property." RCW 19.28.031(1). L&I adopted the regulation after the legislature conducted fact finding, which found that contractors utilize unlicensed electricians and individual unlicensed electricians used certificates from people with the same name. SUBSTITUTE H.B. 1055. The legislature determined these practices led to consumer deception and could contribute to unsafe electrical work. SUBSTITUTE H.B. 1055 § 1. Protecting the public is a legitimate state interest. The regulation helps prevent consumer deception and unsafe electrical work by helping contractors and consumers easily identify who is certified to conduct electrical work. The badge requirement is reasonable because it rationally relates to a legitimate state interest.

We conclude the badge requirement is constitutional because it is a reasonable regulation of professional conduct that only incidentally impacts speech.[2]

[2] Because of our conclusion, we do not address L&I's alternative argument that the regulation does not violate the First Amendment because it requires factual, uncontroversial disclosure of commercial speech.

III. Physical Appearance

Hired Hands argues we should evaluate the badge requirement under strict scrutiny because it violates the fundamental right to choose physical appearance because the badge must be worn.[3] We disagree.

A right is fundamental when it is "objectively, 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720-21, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997) (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1997), and *Palko v. Connecticut*, 302 U.S. 319, 325-36, 58 S. Ct. 149, 82 L. Ed. 288 (1937)). Fundamental rights that the Supreme Court has recognized involve deeply intimate personal choices including marriage, procreation, and abortion. *Glucksberg*, 521 U.S. at 726; *Kelley v. Johnson*, 425 U.S. 238, 244, 96 S. Ct. 1440, 47 L. Ed. 2d 708 (1976). No court has held that personal appearance is a fundamental right and Hired Hands has cited none.

Those cases that have examined personal appearance have applied a rational basis test. *Kelley*, 425 U.S. at 244. In *Kelley*, a police officer challenged a requirement that male officers keep their hair at a certain length. 425 U.S. at 239. In one sentence, the Court assumed some liberty interest existed in personal appearance, but it still applied a rational basis test. *Kelley* 425 U.S. at 244, 248. The Court emphasized that police, as government employees, are accorded fewer liberty protections than private citizens. *Kelley* 425 U.S. at 245. The Court upheld the constitutionality of the hair requirement because the state had a reasonable interest in requiring a uniform for police that included hair length. *Kelley* 425 U.S. at 247-48.

[3] Hired Hands uses the term "bodily integrity" but it really means physical appearance.

Other cases that have examined personal appearance challenges have also applied rational basis review, even when faced with race-based discrimination challenges. *See e.g. Hodge v. Lynd*, 88 F. Supp. 2d 1234, 1241-42 (D.N.M. 2000) (reviewing a number of state personal appearance cases, all of which applied rational basis); *Equal Emp't Opportunity Comm'n v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018, 1032 (11th Cir. 2016) (reviewing decisions holding hair styles are not a protected interest in workplace discrimination cases); *N.W. Enters. Inc. v. City of Houston*, 352 F.3d 162, 197 (5th Cir. 2003) (rejecting strict scrutiny and upholding a requirement that strip club staff wear visible identification badges), *abrogated on other grounds by Reagan Nat'l Advert. of Austin, Inc. v. City of Austin*, 352 F.3d 162 (2003). Personal appearance is subject to reasonable regulation and is evaluated under a rational basis standard. *Hodge*, 88 F. Supp. 2d at 1241-42.

Hired Hands argues that we should create a new fundamental right based on one sentence in *Kelley* and other inapplicable cases based on sexual battery. However, Hired Hands cites to no case that holds personal appearance alone is a fundamental right subject to strict scrutiny. All of the authority in personal appearance cases have applied rational basis, and we agree with this authority.

As analyzed above, the Washington badge requirement rationally relates to a legitimate state interest. It does not violate Hired Hands' right to personal appearance.

IV. VOID FOR VAGUENESS CHALLENGE

Hired Hands argues the badge requirement is unconstitutional because the regulation is vague and does not provide fair notice of when the badge may be worn under clothing. We disagree.

A statute is vague if a person of ordinary intelligence would need to guess what a statute prohibits. *Johnson v. United States*, 576 U.S. 591, 612, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015); *City of Spokane v. Douglass*, 115 Wn.2d 171, 179, 795 P.2d 693 (1990). The standard requires more than "mere uncertainty." *Douglass*, 115 Wn.2d at 179.

To determine whether a regulation is vague, courts employ rules of statutory construction. The rules of statutory construction apply to agency created rules and regulations. *Odyssey Healthcare Operating B, LP v. Dep't of Health*, 145 Wn. App. 131, 141, 185 P.3d 652 (2008). The primary goal of statutory construction is to determine and give effect to the legislature's intent. *SEIU Healthcare 775 NW* (SEIU) v. *Dep't of Soc. & Health Servs.*, 193 Wn. App. 377, 398, 377 P.3d 214 (2016). To decipher legislative intent, courts examine the plain language of the statute, the context of the statute in which the provision is found, and related statutes. *SEIU*, 193 Wn. App. at 398. "When the statute at issue or a related statute includes an applicable statement of purpose, we interpret statutory language in a manner consistent with that stated purpose." *SEIU*, 193 Wn. App. at 398.

"To discern the plain meaning of undefined statutory language, we give words their usual and ordinary meaning and interpret them in the context of the statute in which they appear." *SEIU*, 193 Wn. App. at 399. Generally, "statutory exceptions are construed narrowly in order to give effect to the legislative intent underlying the general provisions." *Foster v. Dep't of Ecology*, 184 Wn.2d 465, 473, 362 P.3d 959 (2015).

Here, the regulation at issue expressly identifies the situations when the badge may be covered: "when working in an attic or crawl space or when operating equipment . . . where wearing the certificate may pose an unsafe condition for the individual." WAC 296-46B-940(3). Additionally, the regulation identifies when the badge may be worn beneath clothing: "rain gear

when outside in the rain, arc flash, welding gear, *etc*.," when such gear is required. WAC 296-46B-940(3)(e) (emphasis added). Cold weather jackets "or *similar*" clothing are excluded from the protective gear definition. WAC 296-46B-940(3)(e) (emphasis added).

Hired Hands argues the words "etc." and "similar" in the protective gear section mean other garments may qualify and that failing to list these other garments makes the regulation unconstitutionally vague. However, the context of the surrounding words in the regulation provide guidance on the meaning of "etc." and "similar."

The "etc." does mean that the badge may be worn under other, unlisted protective clothing. The "etc." is at the end of a string of expressly identified articles of protective gear. WAC 296-46B-940(3)(e). In this context, a person of ordinary intelligence would conclude the badge may only be worn under clothing designed to protect against specific harms (rain, high temperature, flame, etc.). "Similar" is used in the regulation in a section excluding cold weather jackets from the list of protective gear in WAC 296-46B-940(3). WAC 296-46B-940(3)(e). In this context, "similar" is intended to encompass other cold weather gear such as hats, gloves, wind breakers. The "similar" means that other clothing worn to protect against the cold do not qualify as protective gear. Outside of these situations, the badge may be covered only when working in an attic or crawl space. WAC 296-46B-940(3)(e). Evaluating the "etc." and "similar" within the context of the regulation shows WAC 296-46B-940 is not vague and provides fair notice of when the badge may be covered.

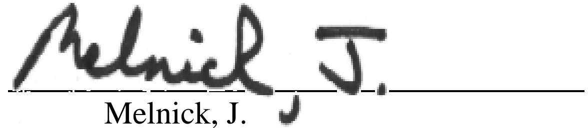
For these reasons, we conclude the badge regulation provides fair notice of when the badge may be worn under clothing. It is not vague.

ATTORNEY FEES

Hired Hands has requested costs and attorney's fees as a prevailing party pursuant to RCW 4.84.010 and RCW 4.84.350. Because Hired Hands is not a prevailing party, it is not entitled to costs or fees.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.



Melnick, J.

We concur:

Worswick, P.J.

Cruser, J.

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Transmittal Information

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Appellate Court Case Number:	53450-9
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Superior Court Case Number:	16-2-01850-2

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