APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 16-1441

SONUKU TAGAMI,

Plaintiff-Appellant

v.

CITY OF CHICAGO,

Defendant-Appellee

Argued November 1, 2016 – Decided November 8, 2017

Before EASTERBROOK, ROVNER, AND SYKES, *Circuit Judges*.

SYKES, *Circuit Judge*. Sonoku Tagami celebrated "GoTopless Day 2014" by walking around the streets of Chicago naked from the waist up, though wearing "opaque" body paint on her bare breasts. She was cited for violating a Chicago ordinance prohibiting public nudity. She responded with this lawsuit alleging that the ordinance is unconstitutional. She contends that banning women from exposing their breasts in public violates the First Amendment's guarantee of freedom of speech and amounts to an impermissible sex-based classification in violation of the Fourteenth Amendment's Equal Protection Clause. The district court dismissed the suit and we affirm.

I. Background

Tagami supports GoTopless, Inc., a nonprofit organization that advocates for a woman's right to bare her breasts in public. On August 24, 2014, she participated in the group's annual "GoTopless Day" by walking about the City of Chicago unclothed from the waist up. Before doing so, she applied "opaque" body paint to her bare breasts. That did not suffice to avoid the predicta-

ble citation for public indecency. A police officer ticketed her for violating the city's public-nudity ordinance, which states that

> [a]ny person who shall appear, bathe, sunbathe, walk or be in any public park, playground, beach or the waters adjacent thereto, or any school facility and the area adjacent thereto, or any municipal building and the areas adjacent thereto, or any public way within the City of Chicago in such a manner that the genitals, vulva, pubis, pubic hair, buttocks, perineum, anus, anal region, or pubic hair region of any person, *or any portion of the breast at or below the upper edge of the areola thereof of any female person, is exposed to public view or is not covered by an opaque covering*, shall be fined not less than $100.00 nor more than $500.00 for each offense.

CHICAGO, ILL., CODE § 8-8-080 (emphasis added).

Tagami contested the citation before a hearing officer but was found guilty of violating the public-nudity ordinance and ordered to pay a $100 fine plus $50 in administrative costs. Tagami then sued the City alleging that the ordinance is facially unconstitutional. As relevant here, she claims that the ordinance violates the First Amendment's guarantee of freedom of speech and discriminates on the basis of sex in violation of the Fourteenth Amendment's Equal Protection Clause.

The City moved to dismiss the original complaint for failure to state a claim. *See* FED. R. CIV. P. 12(b)(6). The district judge dismissed the equal-protection claim but allowed the First Amendment claim to proceed. Tagami then amended her complaint, reasserting both claims. The City again moved to dismiss, and the judge again dismissed the equal protection claim. As for the

repleaded First Amendment claim, the judge treated the City's motion as a request for reconsideration and reversed her previous ruling, dismissing that claim as well. Final judgment for the City followed and Tagami appealed.

II. Discussion

We review the judge's dismissal order de novo, accepting Tagami's factual allegations as true and drawing reasonable inferences in her favor. *United Cent. Bank v. Davenport Estate LLC*, 815 F.3d 315, 318 (7th Cir. 2016).

Taking the First Amendment claim first, we begin with an obvious point: Chicago's public-nudity ordinance regulates conduct, not speech. Some forms of expressive conduct get First Amendment protection, but this principle extends only to conduct that is "*inherently* expressive." *Rumsfeld v. Forum for Acad. & Inst'al Rights, Inc.*, 547 U.S. 47, 66 (2006) (emphasis added). To fall within the scope of this doctrine, the conduct in question must comprehensively communicate its own message without additional speech. *Id.* Put slightly differently, the conduct *itself* must convey a message that can be readily "understood by those who view[] it." *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence v. Washington*, 418 U.S. 405, 411 (1974)). This limiting principle is necessary lest "an apparently limitless variety of conduct be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

"Being in a state of nudity is not an inherently expressive condition." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000) (internal quotation marks omitted). Tagami nevertheless contends that her public nudity, viewed in context, warrants First Amendment protec-

tion as expressive conduct. She alleged in her amended complaint that she bared her breasts in public places around Chicago as part of GoTopless Day, an event intended to "protest … laws that prevent[] women from appearing bare-chested in public," which the group and its supporters consider archaic. Whatever her subjective intent, Tagami's public nudity did not *itself* communicate a message of political protest. Indeed, her amended complaint drives this point home by alleging that she appeared topless in public "while expressing [her] views that women, like men, should not be prohibited from appearing bare-chested in public." The presence of additional explanatory speech "is strong evidence that the conduct … is not so inherently expressive that it warrants [First Amendment] protection." *Rumsfeld*, 547 U.S. at 66.

Nor does the amended complaint offer any facts from which it might reasonably be inferred that onlookers would have readily understood that this public display of nudity was actually a political protest against the City's public indecency ordinance. On this point the allegations here are not remotely analogous to the circumstances at issue in *Johnson*, the flag-burning case. There the Court held that "[t]he expressive, overtly political nature of th[e] conduct was both intentional and overwhelmingly apparent." *Johnson*, 491 U.S. at 406. It is not "overwhelmingly apparent" that a woman's act of baring her breasts in public expresses a political message.

Even if we assume for the sake of argument that Tagami's nudity was communicative enough to warrant some degree of First Amendment protection, the district judge was right to dismiss this claim. "[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important gov-

ernmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *O'Brien*, 391 U.S. at 376. Under the *O'Brien* test, a law survives First Amendment scrutiny if

> (1) the regulation is within the constitutional power of the government; (2) the regulation furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4) the restriction on alleged First Amendment freedoms is no greater than essential to further the government's interest.

Foxxxy Ladyz Adult World, Inc. v. Village of Dix, 779 F.3d 706, 712 (7th Cir. 2015) (describing *O'Brien*'s intermediate standard of scrutiny).

Tagami limits her argument to the second step of the *O'Brien* framework, challenging only the City's justification for banning public nudity. To defend the ordinance against this facial challenge, the City invokes its general interest in preserving health, safety, and traditional moral norms. More particularly, the City argues that the ordinance protects unwilling members of the public—especially children—from unwanted exposure to nudity.

Tagami insists that the City must produce *evidence* to support its justification for this law, so dismissal at the pleadings stage was improper. More specifically, she argues that the City has the burden to show, with evidence, that the ordinance is justified as a means to prevent the harmful secondary effects of public displays of nudity.

Not so—at least not in this context.[1] The Supreme Court has upheld a similar public-nudity ban under the *O'Brien* test based on history and tradition, without requiring an evidentiary showing. *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 568–69 (1991). Here's the key part of the Court's reasoning:

> [T]he statute's purpose of protecting societal order and morality is clear from its text and history. Public indecency statutes of this sort are of ancient origin and presently exist in at least 47 States. Public indecency, including nudity, was a criminal offense at common law … Public nudity was considered an act *malum in se*. Public indecency statutes … reflect moral disapproval of people appearing in the nude among strangers in public places.
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> …
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> This and other public indecency statutes were designed to protect morals and public order. The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and we have upheld such a basis for legislation.

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[1] Local governments sometimes point to the harmful effects of exotic-dancing clubs to defend enforcement of public-nudity laws in that context. *See, e.g.*, *Foxxxy Ladyz Adult World, Inc. v. Village of Dix*, 779 F.3d 706 (7th Cir. 2015); *Annex Books, Inc. v. City of Indianapolis*, 581 F.3d 460 (7th Cir. 2009). That justification, we've held, requires some evidentiary support. *See Foxxxy Ladyz*, 779 F.3d at 716. Chicago does not need a secondary-effects justification to defend this ordinance. As we explain in the text, *Barnes* suffices to defeat this facial challenge. The "secondary effects" line of cases is inapposite here.

Id. (citation omitted). Put more succinctly, the interest at stake here "is societal disapproval of nudity in public places and among strangers," *id.* at 572, so the prohibition "is not a means to some greater end, but an end in itself," *id.*

Chicago's ordinance has a similar pedigree. It has existed in one form or another for decades. Like other laws of this type, its essential purposes—promoting traditional moral norms and public order—are both self-evident and important enough to survive scrutiny under the *O'Brien* test. *Id.* at 569.

Moving now to the equal-protection claim, the City advances a threshold argument that its public-nudity ordinance does not actually classify by sex, so the Equal Protection Clause is not implicated at all. As the City sees it, the ordinance treats men and women alike by equally prohibiting the public exposure of the male and female body parts that are conventionally considered to be intimate, erogenous, and private. The list of intimate body parts is longer for women than men, but that's wholly attributable to the basic physiological differences between the sexes.

This strikes us as a justification for this classification rather than an argument that no sex-based classification is at work here at all. On its face, the ordinance plainly *does* impose different rules for women and men. It prohibits public exposure of "the breast at or below the upper edge of the areola thereof *of any female person*." CHICAGO, ILL., CODE § 8-8-080 (emphasis added).

Still, a law that classifies on the basis of sex is compatible with the Equal Protection Clause if the classification serves important governmental objectives and the "discriminatory means employed are substantially related to the achievement of those objectives." *United States v. Virginia*, 518 U.S. 515, 533 (1996) (quotation

marks omitted). This intermediate level of judicial scrutiny recognizes that sex "has never been rejected as an impermissible classification in all instances." *Rostker v. Goldberg*, 453 U.S. 57, 69 n.7 (1981) (quotation marks omitted). "Physical differences between men and women … are enduring: [T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both." *Virginia*, 518 U.S. at 533 (alterations in original) (quotation marks omitted).

The intermediate-scrutiny test for sex-based legal classifications is not meaningfully different than the *O'Brien* test for laws that burden expressive conduct. As we've just explained, Chicago's public-nudity ordinance easily survives review under *O'Brien*. Because the tests are materially identical, it follows that the City's ordinance withstands equal-protection challenge.

AFFIRMED.

ROVNER, *Circuit Judge*, dissenting. As in many First Amendment cases, the speech at issue here is that which offends many, makes many others uncomfortable, and may seem trivial and unimportant to most. The First Amendment protects not just the speech which a majority of people find persuasive and worthwhile, but to the contrary, its protections are most essential when the speech is that with which most take offense. See, e.g., *Rankin v. McPherson*, 483 U.S. 378, 387 (1987). This is the caveat that must be emphasized beyond all else in this case.

A court may not dismiss a case on the pleadings unless it appears "beyond a reasonable doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Manning v. Miller*, 355 F.3d 1028, 1031 (7th Cir. 2004). We must always be mindful that when we dismiss a case on the pleadings,

we deprive the parties of their day in court to marshal evidence to make the most persuasive argument for their rights. And when presented with a free speech claim, we must take care not to allow our own personal assessment of the worth of the speech to dictate whether the claim should be dismissed. In dismissing this case on the pleadings, the majority has declared that there is no set of facts under which Sonoko Tagami's participation in an annual "Go Topless Day" protest—an event sponsored by a 501(c)(3) group advocating for gender equality in indecency ordinances—could be viewed as expressive conduct. *Forrest v. Universal Sav. Bank, F.A.*, 507 F.3d 540, 542 (7th Cir. 2007). This, the majority says, is because Tagami's nudity is conduct rather than expressive speech. To support this contention, the majority relies on the fact that Tagami accompanied the baring of her breasts with additional explanatory speech—that is, she and her group explained their conduct, passed out fliers and otherwise voiced the purpose of their protest. According to the majority, the fact that Tagami appeared topless while also expressing her views about nudity "is strong evidence that the conduct … is not so inherently expressive that it warrants [First Amendment] protection." Majority at 4, citing *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006). Conduct is sufficiently expressive when the intent of it is to convey a particularized message and the likelihood is great that those who view the conduct will understand the message. *Texas v. Johnson*, 491 U.S. 397, 404 (1989). In *Rumsfeld*, the Court held that the act of barring military recruiters from using campus facilities to conduct law school interviews in protest of the military's anti-gay policies was not inherently expressive because the casual observer would not understand what message the ban was conveying without an accompanying explanation *Id.*

And it is true in that fact scenario that the casual observer could not possibly know why the recruiters had been barred, or even that they had been barred, absent some explanation.

The majority nakedly [?] declares that "Tagami's public nudity did not *itself* communicate a message of political protest," but rather required accompanying explanation. But the fact that Tagami included some explanation with her conduct does not necessitate a finding that her message would not have been understood otherwise. Accompanying explanations do not turn expressive conduct into non-expressive conduct. Otherwise wearing a black armband would constitute expressive conduct, but wearing an armband and shouting "No more war!" would not. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). Nor can one evaluate the expressive content of public nudity divorced from the context in which it occurs. It is akin to taking a picture of a recent women's march protest and enlarging it again and again to isolate a single marcher wearing a pink hat and concluding from the picture of a single hat-wearing marcher alone that the conduct is not expressive because the wearing of a hat "d[oes] not *itself* communicate a message of political protest." See Majority at 4.

There could not be a clearer example of conduct as speech than the one here. Tagami was not sunbathing topless to even her tan lines, swinging topless on a light post to earn money, streaking across a football field to appear on television, or even nursing a baby (conduct that is exempted from the reach of the ordinance). Her conduct had but one purpose—to engage in a political protest challenging the City's ordinance on indecent exposure. Tagami engaged in the paradigm of First Amendment speech—a public protest on public land in

which the participants sought to change a law that, on its face, treats women differently than men. It is difficult to imagine conduct more directly linked to the message than that in which Tagami engaged. The ordinance prohibits bare (female) breasts; Tagami bared her breasts in protest. (To be more precise, Tagami apparently intended to comply with, but push the limits of the ordinance by painting her breasts with opaque paint.) The baring of breasts uniquely conveyed the intensity of the expression of protest and also the degree of commitment of the protestor. We are a society that expresses itself with displays on our bodies ranging from messaged t-shirts and hats, provocative clothing, tattoos, arm bands, and lapel pins. Perhaps this is why so many of our seminal free expression cases involve protected expressive conduct of clothing or the absence of it. See, e.g. *Tinker*, 393 U.S. 503 (arm bands to protest the war); *Cohen v. California*, 403 U.S. 15, 16 (1971) (a jacket bearing the words "F#*k the Draft"); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566, (1991) (nude dancing is expressive conduct); *Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. # 204*, 523 F.3d 668, 676 (7th Cir. 2008) (student protesting gay rights day with shirt bearing the slogan "Be Happy, Not Gay"). See also, *Brandt v. Bd. of Educ. of City of Chicago*, 480 F.3d 460, 465 (7th Cir. 2007) ("For that matter, parading in public wearing no clothing at all can, depending on the circumstances, convey a political message."). Public nudity may not always be "*inherently* expressive," *See City of Erie*, 529 U.S. at 299, (and I can think of many situations in which it would not be), but to declare, as a matter of law, that it can *never* be expressive is the quintessence of throwing out the free-expression baby with the non-expressive-conduct bath water.

Although Tagami's conduct clearly was expressive, the City might still have a legitimate reason for prohib-

iting it. The majority concludes that the purpose of "promoting traditional moral norms and public order—are both self-evident and important enough to survive scrutiny under the *O'Brien* test." Majority at 7. It is true that in our society female breasts have been sexualized as objects of desire while the breasts of men have not. There is no biological basis for this distinction. The primary functional difference between the female breast and the male breast is not a sexual one, but rather, just the opposite—the fact that the former has the potential to provide milk to sustain a baby, while the latter does not. The City's claim therefore boils down to a desire to perpetuate a stereotype that female breasts are primarily the objects of desire, and male breasts are not. As a district court reasoned in a similar case, we should not "accept the notion … that we should continue a stereotypical distinction 'rightly or wrongly,' or that something passes constitutional muster because it has historically been a part of 'our culture.'" *Free the Nipple-Fort Collins v. City of Fort Collins, Colorado*, 237 F. Supp. 3d 1126, 1133 (D. Colo. 2017). Had we done so we would not now have women lawyers, women jurors, women estate administrators or women military cadets. *Id.* I cannot say for certain what the ultimate outcome in this case would be after a full airing of the evidence, but to declare that Tagami's conduct cannot be a protected expression of free speech under any circumstances is premature.

Whether Tagami's conduct was sufficiently expressive and whether the City will be able to demonstrate a sufficient justification under *O'Brien* for banning the showing of the female breast below the upper edge of the areola are not matters that can be resolved on a motion to dismiss. And it is that aspect and only that aspect—the prematurity of this decision—from which I dissent.

Nor should Tagami's equal protection claim have been dismissed at the pleading stage. As my colleagues rightly acknowledge, Chicago's ordinance proscribing "indecent exposure or dress" on its face treats men and women differently, making it an offense only for women to bare their breasts in public. That differential treatment must be grounded in an "exceedingly persuasive justification." *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1690 (2017) (quoting *United States v. Virginia*, 518 U.S. 515, 524 (1996)). Of course male and female anatomies are different. But, as we noted, the principal respect in which the female breast is different is the role it plays in feeding infants, and yet that is the one purpose for which Chicago *permits* the female breast to be exposed in public. Apart from breastfeeding, it is societal perception rather than form and function that categorically distinguishes the female breast from the male: in our culture, a woman's breast has long been viewed as uniquely sexual and titillating. *See Free the Nipple-Fort Collins*, 237 F. Supp. 3d at 1132–33. Any invocation of tradition and moral values in support of a law that facially discriminates among classes of people calls for a healthy dose of skepticism on our part, as historical norms are as likely to reflect longstanding biases as they are reasonable distinctions. *See Morales-Santana*, 137 S. Ct. at 1692–93 (noting that the Court views with suspicion laws that rely on stereotypes concerning men's and women's respective social roles); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015) (noting essential role Equal Protection Clause plays in identifying inequalities previously "unnoticed and unchallenged"); *Lawrence v. Texas*, 539 U.S. 558, 571 (2003) ("Our obligation is to define the liberty of all, not to mandate our own moral code.") (quoting *Planned Parenthood of SE Penn. v. Casey*, 505 U.S. 833, 850 (1992)); *People v. Santorelli*, 600 N.E.2d 232, 236 (N.Y. 1992) (Titone, J.,

concurring) ("where 'public sensibilities' constitute the justification for a gender-based classification, the fundamental question is whether the particular 'sensibility' to be protected is, in fact, a reflection of archaic prejudice or a manifestation of a legitimate government objective"). Whether out of reverence or fear of female breasts, Chicago's ordinance calls attention to and sexualizes the female form, *see Free the Nipple-Fort Collins*, 237 F. Supp. 3d at 1133, and imposes a burden of public modesty on women alone, with ramifications that likely extend beyond the public way. Women, like men, take their bodies with them everywhere, and when the law imposes a different code of dress on women, when it requires them to cover up in a way that men need not, it is quite possible that women will be treated differently—in the workplace, in the public square, on the subway—precisely because they are required to dress differently. *Cf. Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (workplace evaluations based on stereotypes of how women should dress, appear, and comport themselves can constitute sex discrimination violating Title VII of the Civil Rights Act of 1964)); *Carroll v. Talman Fed. Sav. & Loan Ass'n of Chicago*, 604 F.2d 1028, 1032–33 (7th Cir. 1979) (workplace dress code requiring women but not men to wear uniforms described as demeaning to women). In any case, it strikes me as open to question whether there exists a broad consensus in support of the notion that a woman appearing bare-chested in public constitutes indecent exposure: only three states (Indiana, Tennessee, and Utah) have statutes clearly treating the exposure of the female breast as indecency, and section 213.5 of the Model Penal Code is limited to public exposure of the genitals (male or female).

Do I relish the prospect of seeing bare-chested women in public? As a private citizen, I surely do not. (I

would give the same answer with respect to bare-chested men.) But I speak here *strictly* as a judge, with the responsibility to accord Tagami her constitutional rights.

The question before us is not whether Tagami should prevail but whether she *might* prevail after a full development of the record. Tagami has presented us with potentially viable First Amendment and sex discrimination claims Like any other litigant with a viable case, she should be permitted to develop the record in support of her claims, and the city in turn should be required to present evidence to justify its actions.

I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 14-cv-9074

SONOKO TAGAMI,

Plaintiff,

v.

CITY OF CHICAGO, *ET AL.*,

Defendants.

Filed: July 10, 2015

MEMORANDUM OPINION AND ORDER

Plaintiff Sonoko Tagami filed her complaint against defendants City of Chicago (the "City"), City of Chicago Department of Administrative Hearings ("DAH"), and Chicago Police Officer Ramona Stovall on November 12, 2014. Defendants now move to dismiss her complaint [10]. For the reasons that follow, defendants' motion is granted in part and denied in part.

Background

Tagami alleges that on August 24, 2014, she participated in "GoTopless Day" organized by "GoTopless," a non-profit organization that advocates for the right of women to appear bare-chested in public. GoTopless Day occurs at sites around the world and Tagami participated in the event from 2010 to 2013. On August 24, Tagami was wearing opaque body paint and "protesting the existence of laws that prevented women from appearing bare-chested in public" when Stovall ordered her to end her protest or be subject to arrest. (Dkt. 1, ¶ 11). Tagami stopped protesting. Stovall cited Tagami with violating Municipal Code of Chicago § 8-8-080 (the

"Ordinance"), which prohibits indecent exposure. The Ordinance provides:

> Any person who shall appear, bathe, sunbathe, walk or be in any public park, playground, beach or the waters adjacent thereto, or any school facility and the area adjacent thereto, or any municipal building and the areas adjacent thereto, or any public way within the City of Chicago in such a manner that the genitals, vulva, pubis, pubic hair, buttocks, perineum, anus, anal region, or pubic hair region of any person, or any portion of the breast at or below the upper edge of the areola thereof of any female person, is exposed to public view or is not covered by an opaque covering, shall be fined not less than $100.00 nor more than $500.00 for each offense.

Municipal Code of Chicago § 8-8-080.

According to Tagami, Stovall also "seized" Tagami's GoTopless Day protest flyer as "evidence" of Tagami's violation of the Ordinance. (Dkt 1, ¶¶ 16.) Stovall took possession of a flyer that contained information about GoTopless Day. Although Tagami alleges that Stovall "could not have reasonably believed that the [flyer] was evidence of indecent exposure[,]" no details are provided about whether the GoTopless Day participants handed out fliers to promote their cause. On October 10, 2014, an administrative law judge of DAH found Tagami liable for violating the Ordinance and ordered her to pay a $100 penalty and $50 in administrative costs.

Tagami brought this complaint pursuant to 42 U.S.C. § 1983 alleging that, as applied to her "expressive activ-

ity," the Ordinance is impermissibly vague[1] and unconstitutionally infringes on her First Amendment and Fourteenth Amendment rights. (Dkt.1, ¶ 14.) She also asserts that the Ordinance does not prohibit bare-chested males from appearing in public, and therefore treats men and women as "an arbitrary classification prohibited by the Equal Protection Clause of the Fourteenth Amendment[.]" (*Id.* at ¶ 15.) Tagami further claims that Stovall violated her rights secured by the First, Fourth, and Fourteenth Amendments when Stovall seized her flyer. (Dkt. 1, ¶ 16.) Finally, she contends that DAH's finding that Tagami is liable for violating the Ordinance is "arbitrary, unreasonable, against the manifest weight of the evidence, and was entered pursuant to an unconstitutional application to plaintiff of an unconstitutional ordinance." She asks the Court to reverse the administrative decision. Defendants move to dismiss Tagami's complaint for failure to state a claim upon which relief can be granted.

Legal Standard

When reviewing a motion to dismiss for failure to state a claim upon which relief can be granted, pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court accepts as true all well-pleaded facts alleged in the complaint and construes all reasonable inferences in favor of the nonmoving party. *Hallinan v. Fraternal Order of Police of Chi. Lodge No. 7*, 570 F.3d 811, 820 (7th Cir. 2009). The complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). In other words, the complaint "must contain sufficient factual

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[1] Tagami clarifies in her response that she is not stating a claim that the Ordinance is unconstitutionally vague. (Dkt. 16, FN 7.) Accordingly, vagueness is not at issue.

matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). This does not require "'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.*

Discussion

1. First Amendment Freedom of Expression Claim

Defendants argue that Tagami's First Amendment claim fails because her actions are not protected expression and that, even if Tagami's expression is deemed to be protected activity, the Ordinance nevertheless passes the test set forth in *United States v. O'Brien*, 391 U.S. 367 (1968) ("*O'Brien* test").

The First Amendment protects the expression of ideas through both written and spoken words and through symbolic speech, which is "nonverbal activity … sufficiently imbued with elements of communication." *Spence v. Washington*, 418 U.S. 405, 409 (1974). Conduct constitutes "symbolic speech" when (1) the conduct demonstrates "[a]n intent to convey a particularized message[,] and (2) there is a great likelihood that "the message would be understood by those who viewed [the conduct]." *Id.* Since "[b]eing 'in a state of nudity' is not an inherently expressive condition" (*City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000)), the Court must first determine whether Tagami engaged in expressive conduct when she appeared in public wearing opaque body paint covering her otherwise bare chest during a GoTopless Day event.

When analyzing the likelihood that those who view the alleged symbolic speech will understand the message, courts consider the circumstances surrounding the conduct at issue. *See e.g., Spence*, 418 U.S. at 411 (explaining that the timing of conduct, during or around

"issues of great public moment," may transform "otherwise bizarre behavior" into conduct that most citizens would understand). Here, Tagami alleges that she and other women around the world annually protest the legal prohibition of women appearing in public bare-chested by actually appearing bare-chested in public, though wearing opaque body paint. She alleges that participants' intent is to convey the message that women, like men, should be allowed to appear bare-chested in public and the act of appearing so protests this prohibition. Based on these allegations, the Court finds that Tagami sufficiently alleges that, within the context of a GoTopless event, she engaged in expressive conduct protected by the First Amendment.

The Court next addresses whether Tagami sufficiently pleaded that the Ordinance violates her First Amendment right to freedom of expression. Public nudity laws such as the one at issue have consistently been deemed content-neutral statutes that regulate conduct and not expression. *See e.g.*, *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000) (plurality opinion), *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991) (plurality opinion), *Foxxxy Ladyz Adult World, Inc. v. Vill. of Dix*, 779 F.3d 706, 711 (7th Cir. 2015). Such regulations are evaluated under the test set forth in *United States v. O'Brien*, 391 U.S. 367 (1968); *see also Foxxxy Ladyz*, 779 F.3d at 711. "Under the *O'Brien* test, a regulation of public nudity will be upheld if (1) the regulation is within the constitutional power of the government; (2) the regulation furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4) the restriction on alleged First Amendment freedoms is no greater than essential to further the government's interest." *Foxxxy Ladyz*, 779 F.3d at 712; *citing O'Brien*, 391 U.S. at 377.

The parties only dispute the second prong: whether the Ordinance furthers an important or substantial governmental interest. The Ordinance contains no statement of its justification and defendants fail to present any evidence of the City's justification for passing the Ordinance. Authority cited by defendants involved ordinances with an expressly included statement of governmental interest, unlike the Ordinance at issue here. *See Hightower v. City and County of San Francisco*, No. C-12-5841 EMC, 2014 WL 7336677, *9, 2014 U.S. Dist. LEXIS 177340, *24-25 (N.D.Cal. Dec. 24, 2014) (finding that the defendants identified multiple substantial interests relating to the health, safety, and morals of the public, supported by findings of the Board of Supervisors related to "public safety hazards" and invasion of privacy); and *Bush v. City of San Diego*, NO. 10CV1188-LAB (RBB), 2010 WL 2465034, *3, 2010 U.S. Dist. LEXIS 57922, *8 (S.D.Cal. June 11, 2010) (the text of the anti-nudity ordinance identified two substantial government interests: " preventing offense to those unwillingly exposed to nudity *and* promoting the public health, morals, and general welfare").

As the Seventh Circuit held in *Foxxxy Ladyz*, the City must provide some evidentiary support for its contention that "the Ordinance furthers the City's substantial interest in health and safety and in protecting unwilling audiences from exposure to nudity." (Dkt. 12, at pg. 7.) The City must "produce some specific, tangible evidence establishing a link between the regulated activity and harmful secondary effects." *Foxxxy Ladyz*, 779 F.3d at 715; *see also Annex Books, Inc. v. City of Indianapolis, Ind.*, 581 F.3d 460, 465 (7th Cir. 2009). Defendants argue, however, that the holding in *Foxxxy Ladyz* only applies in the context of adult entertainment venues. *See Foxxxy Ladyz*, 779 F.3d at 714. While *Foxxxy Ladyz* addressed adult entertainment venues,

this does not change the fact that the City has not put forth any evidence to show that its "predominant purpose … was to combat the harmful secondary effects of public nudity." *Schultz v. City of Cumberland*, 228 F.3d 831, 842 (7th Cir. 2000); *see also Foxxxy Ladyz*, 779 F.3d at 715 ("In the wake of *Alameda Books*, our court has been consistent in requiring that a regulating body produce some specific, tangible evidence establishing a link between the regulated activity and harmful secondary effects."). Accordingly, this Court finds Tagami sufficiently alleges a First Amendment claim in order to proceed.

2. Fourteenth Amendment Equal Protection Claim

Defendants argue that Tagami fails to allege an equal protection violation where the Ordinance does not impose an invidious classification that constrains women's economic opportunity or that perpetuates social inferiority. The Court finds that Tagami's equal protection claim fails because, while the Ordinance permits men but not women to appear bare-chested in public, Tagami fails to allege how this distinction places "artificial constraints" on a woman's opportunity, or how the Ordiance is used to "create or perpetuate the legal, social, and economic inferiority of women." *U.S. v. Virginia*, 518 U.S. 515, 533-34 (1996); *see also Michael M. v. Superior Ct. of Sonoma Cnty.*, 450 U.S. 464, 469 (1981) (plurality opinion). Thus, defendants' motion to dismiss this claim is granted without prejudice.

3. Seizure of the Flyer

According to Tagami, Stovall seized the flyer as evidence of Tagami's wrongdoing. Tagami argues that because Stovall did not have a warrant to seize the flyer and could not have reasonably believed the flyer was evidence of Tagami's indecent exposure, Stovall infringed Tagami's First, Fourth, and Fourteenth

Amendment rights. Her complaint, however, fails to allege any facts that support her contentions of multiple constitutional amendment violations. She also provides no reasoning or legal basis in her response to defendants' motion to dismiss that support her claims against Stovall. The Court finds that she failed to state a claim upon which relief can be granted as to her First, Fourth, and Fourteenth Amendment claims and grants defendants' motion as to this claim without prejudice.

Conclusion

Based on the foregoing, the Court grants in part and denies in part defendants' motion to dismiss. Tagami has 14 days to file an amended complaint consistent with this opinion.

IT IS SO ORDERED.

Dated: July 10, 2015

/s/ Sharon Johnson Coleman.
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 14-cv-9074

SONOKO TAGAMI,

Plaintiff,

v.

CITY OF CHICAGO, *ET AL.*,

Defendants.

Filed: February 1, 2016

MEMORANDUM OPINION AND ORDER

On July 10, 2015, this Court granted in part and denied in part a motion to dismiss filed by defendants, City of Chicago and the City of Chicago Department of Administrative Hearings (collectively "the City"). Plaintiff Sonoko Tagami filed a three Count Amended Complaint, which the City now moves to dismiss [27]. For the reasons stated herein, this Court grants the motion.

Background

Tagami alleges that on August 24, 2014, she participated in "GoTopless Day" organized by "GoTopless," a non-profit organization that advocates for the right of women to appear bare- chested in public. During the event, Tagami alleges that she attempted to comply with Municipal Code of Chicago § 8-8-080 (the "Ordinance"), which prohibits certain forms of public nudity, by applying opaque body paint. (Dkt. 26 at ¶ 24). She was ordered to end her protest or be subject to arrest. (*Id.* at ¶ 25). Tagami complied with Chicago Police Officer Romona Stovall's request. Officer Stovall issued a notice of ordinance violation, charging plaintiff with

committing the municipal offense of Indecent Exposure or Dress. (*Id* at ¶ 27). The Ordinance provides: The Ordinance provides:

> Any person who shall appear, bathe, sunbathe, walk or be in any public park, playground, beach or the waters adjacent thereto, or any school facility and the area adjacent thereto, or any municipal building and the areas adjacent thereto, or any public way within the City of Chicago in such a manner that the genitals, vulva, pubis, pubic hair, buttocks, perineum, anus, anal region, or pubic hair region of any person, or any portion of the breast at or below the upper edge of the areola thereof of any female person, is exposed to public view or is not covered by an opaque covering, shall be fined not less than $100.00 nor more than $500.00 for each offense.

Municipal Code of Chicago § 8-8-080.

On October 10, 2014, an administrative law judge ("ALJ") of the City's Department of Administrative Hearings found Tagami liable for violating the Ordinance. (*Id.* at ¶ 28, 30). She was ordered to pay a $100 penalty and $50 in administrative costs. (*Id.* at ¶ 30).

Tagami filed the instant lawsuit alleging that the Ordinance violates her First Amendment right to Freedom of Expression, that the Ordinance violates Equal Protection by creating a sex-based classification, that Officer Stovall violated her constitutional rights by seizing her flyer, and that the administrative decision was arbitrary and against the manifest weight of the evidence. The City moved to dismiss the original Complaint for failure to state a claim. This Court granted the motion with respect to the Equal Protection claim and the Fourth Amendment claim, and denied the mo-

tion with respect to the First Amendment Freedom of Expression claim. The Court's Opinion Memorandum and Order was silent on the administrative review claim. (Dkt. 24). Tagami's Amended Complaint, reasserts her Freedom of Expression claim, Equal Protection claim, and administrative review claim. (Dkt. 26).

Legal Standard

To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim has facial plausibility when the complaint's factual content allows the Court to draw a reasonable inference that the defendants are liable for the misconduct alleged. *Id.* The Court draws all reasonable inferences in favor of the nonmoving party. *Pisciotta v. Old Nat. Bancorp,* 499 F.3d 629, 633 (7th Cir. 2007)..

Discussion

The City moves to dismiss the constitutional claims in the Amended Complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) and asks this Court to decline jurisdiction over the state law claim for administrative review. The City elected to move to dismiss the Amended Complaint rather than file a motion to reconsider the partial denial of its motion to dismiss the Original Complaint. Nevertheless, the Court will treat the motion with respect to the First Amendment Freedom of Expression claim as one for reconsideration.

Under Federal Rule of Civil Procedure 54(b), a district court has inherent authority to reconsider its own orders entered prior to final judgment. *See Saunders v. City of Chi.,* No. 12-CV-09158, 2015 U.S. Dist. LEXIS

154989, 2015 WL 7251938, at *2-3 (N.D. Ill. Nov. 17, 2015). "Motions for reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence." *Conditioned Ocular Enhancement, Inc. v. Bonaventura*, 458 F. Supp. 2d 704, 707 (N.D. Ill. 2006) (citing *Caisse Nationale de Credit Agricole v. CBI Indus., Inc.*, 90 F.3d 1264, 1269 (7th Cir. 1996)). Here, as part of their motion to dismiss, the City asserts that this Court failed to sufficiently analyze the second prong of Spence v. Washington, which requires facts showing that "in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it." 418 U.S. 405, 410-11 (1974). The City also argues that the Court erred by applying the secondary effects doctrine as set forth in *Foxxxy Ladyz Adult World, Inc. v. Vill. of Dix*, 779 F.3d 706, 711 (7th Cir. 2015). Upon review of this Court's prior ruling as well as the relevant cases, this Court finds that it bent over backwards to adhere to the low standard of notice pleading when considering whether Tagami's purported message would be understood. However, as the United States Supreme Court has held public nudity is not inherently expressive. *See City of Erie v. Paps A.M.*, 529 U.S. 277, 299 (2000). This Court was remiss when it considered the verbally communicated message in its consideration of the circumstances. *See Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 66 (U.S. 2006) (holding that if the expressive component of an action is not created by the conduct itself but by the speech that accompanies it, then it is unlikely expressive conduct protected by the First Amendment).

Upon further reflection, the cases that this Court relied on in its prior ruling, including *Foxxxy Ladyz* and, *Schultz v. City of Cumberland*, 228 F.3d 831, 842 (7th Cir. 2000), are distinguishable from the case at hand be-

cause those cases specifically addressed nude dancing in private venues where the governmental concern was the "secondary effects" that could result from such venues. That is not the situation here. Accordingly, this Court finds that Tagami's claim under the First Amendment fails as a matter of law.

Next, the Court considers whether the Amended Complaint adequately states an equal protection claim under the Fourteenth Amendment. As this Court previously found, Tagami's equal protection claim fails because the Complaint did not contain sufficient allegations showing how the Ordinance places "artificial constraints" on women or how it is used to "create or perpetuate the legal, social, and economic inferiority of women." *United States v. Virginia*, 518 U.S. 515, 533-34 (1996). The Amended Complaint does not cure this defect. The Amended Complaint contains only conclusory allegations such as: "creates an artificial constraint that embodies and perpetuates an assumption of inferiority: that the sight of a female's breast is offensive in a way that the sight of a male's breast is not." (Dkt. 26 at ¶ 39). However, Tagami does not support these allegations with factual support to survive dismissal under *Iqbal* and *Twombly*. *See Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 570.

Having dismissed Tagami's constitutional claims in which this Court has original jurisdiction, this Court declines to exercise jurisdiction over Tagami's state law claim for administrative review of the ALJ's decision to impose a fine for Tagami's violation of the Ordinance. *See* 28 U.S.C. § 1367(c).

Conclusion

Based on the foregoing discussion, this Court grants the City's Motion to Dismiss [27]. Civil case terminated.

IT IS SO ORDERED.

Dated: February 1, 2016

/s/ Sharon Johnson Coleman.
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 16-1441

SONUKU TAGAMI,

Plaintiff-Appellant

v.

CITY OF CHICAGO,

Defendant-Appellee

December 11, 2017

Before EASTERBROOK, ROVNER, AND SYKES, *Circuit Judges*.

On consideration of the petition for rehearing and for rehearing en banc, no judge in active service has requested a vote on the petition for rehearing en banc, and all of the judges on the original panel have voted to deny rehearing. It is therefore ordered that the petition for rehearing and for rehearing en banc is **DENIED**.