No. 19-64

In The
Supreme Court of the United States

HEIDI C. LILLEY, KIA SINCLAIR and
GINGER M. PIERRO,

Petitioners,

v.

THE STATE OF NEW HAMPSHIRE,

Respondent.

**On Petition For A Writ Of Certiorari
To The Supreme Court Of New Hampshire**

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

GORDON J. MACDONALD
Attorney General of the
State of New Hampshire

DANIEL E. WILL
Solicitor General

LAURA E.B. LOMBARDI
Senior Assistant Attorney General

Counsel of Record
NEW HAMPSHIRE DEPARTMENT OF JUSTICE
33 Capitol Street
Concord, NH 03301
(603) 271-3650
laura.lombardi@doj.nh.gov

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

COUNTER-STATEMENT OF THE CASE

A. The Facts

The City of Laconia, New Hampshire, is located in central New Hampshire and is among the southernmost locations on Lake Winnipesaukee, a major tourist and outdoor recreation attraction in New Hampshire. A beach on the lake in Laconia, called Weirs Beach, also serves as a major hub for motorcycle enthusiasts during the annual "Bike Week" events in New Hampshire. In 1998, Laconia adopted an ordinance making it unlawful to knowingly or intentionally appear "nude" in a public place. *See Laconia, NH Ordinances Chapter 180* (1998) (quoted at Pet.App. at 3a)[1]. The ordinance defines "nudity" as "[t]he showing of the human male or female genitals, pubic area or buttocks with less than a fully opaque covering, *or the showing of the female breast with less than a fully opaque covering of any part of the nipple*." *Id.* (quoted at Pet.App. at 13a) (emphasis added). The ordinance contains a "purpose and findings" section which provides:

> This article is adopted by the City of Laconia for the purpose of upholding and supporting public health, public safety, morals and public order. *The conduct prohibited hereunder is deemed to be contrary to the societal interest in order and morality*. In addition, the prohibited conduct has been widely found and is

---

[1] Citation to the Petition for a Writ of Certiorari will be abbreviated "Pet. at ___".

Citation to the appendix to the Petition for a Writ of Certiorari will be abbreviated "Pet.App. at ___".

> deemed to have harmful secondary effects in places and communities where it takes place, including crimes of various types and reduction of property values, not only in the immediate vicinity, but on a community-wide basis.

Id. (emphasis added).

Laconia's ordinance remained in place, unchallenged until 2016, when the three petitioners went topless at Weirs Beach. Each was arrested and charged with violating the ordinance.

B. Procedural background

Pretrial, the petitioners moved to dismiss the charges, arguing that the ordinance violated their rights under the First and Fourteenth Amendments to the United States Constitution and their state constitution analogs. The Fourth Circuit – District Division – Laconia (the trial court) denied the motions, found the ordinance constitutional, found the petitioners guilty and fined each of them $100, suspended for one year. Pet.App. at 64a-69a.

The New Hampshire Supreme Court affirmed the lower court. Pet.App. at 1a. Recognizing that, for equal protection purposes, gender is a suspect class triggering strict scrutiny under the New Hampshire Constitution, Pet.App. at 7a-8a, the court nonetheless determined that because it merely recognized differences in male and female nudity, the Laconia ordinance did not classify on the basis of gender, Pet.App. at 11a-12a. The court thus concluded that "rational

basis is the appropriate standard of review for the ordinance." Pet.App. at 13a. Applying that standard, the court had "little trouble" upholding the ordinance, finding that it explicitly evinced a "societal interest in order and morality" which was a legitimate government interest. Pet.App. at 13a.

In a footnote, the court concluded also that the ordinance would survive even the intermediate scrutiny imposed by federal equal protection analysis. Pet.App. at 14a n.3. Citing opinions from the First, Second, Fourth, Seventh, Eighth, and Eleventh Circuits, the court observed that "[f]ederal courts applying federal equal protection analysis have near-uniformly upheld ordinances similar to Laconia's even when subjecting them to intermediate scrutiny." *Id.* (citing *Tagami v. City of Chicago*, 875 F.3d 375, 379-80 (7th Cir. 2017); *Ways v. City of Lincoln*, 331 F.3d 596, 599-600 (8th Cir. 2003); *Buzzetti v. City of New York*, 140 F.3d 134, 144 (2d Cir. 1998); *United States v. Biocic*, 928 F.2d 112, 115-16 (4th Cir. 1991); *J & B Soc. Club No. 1 v. City of Mobile*, 966 F.Supp. 1131, 1139-40 (S.D. Ala. 1996); *Craft v. Hodel*, 683 F.Supp. 289, 299-301 (D. Mass. 1988)).

REASONS FOR DENYING THE PETITION

The petition asks this Court to grant certiorari and to rule, ultimately, that the United States Constitution requires every beach in the nation to allow topless sunbathing. But the petitioners offer no basis on

which to require such a drastic overhaul of rules that reflect accepted social norms. The jurisprudential conflict the petitioners identify is illusory and the Equal Protection Clause does not require this Court to wade into areas better left for the policy making of local legislative bodies.

No "clear and well entrenched conflict" plagues the federal appellate circuits and state high courts on whether public nudity ordinances that treat the male and female breasts differently violate equal protection. Nearly every state high court and federal appeals court has upheld similar ordinances against equal protection challenges, while just one federal appeals court has held to the contrary. That lone decision reviewed a preliminary injunction, not a decision on the merits, under an abuse of discretion standard of review. And the decision never advanced beyond the preliminary injunction stage. Instead, it became moot when the municipality repealed the ordinance without further appeal. The petitioners' claim of a "clear and well entrenched conflict" does not withstand close examination.

Nor does any conflict exist even within the decisions that find such ordinances consistent with equal protection. While it is true that the courts that have upheld ordinances similar to Laconia's have done so on varying equal protection reasoning, that varying reasoning has led those courts to the same outcome: that ordinances similar to Laconia's do not violate equal protection. Those courts – which do not support the

petitioners' position – are not in conflict. All of them find the ordinance constitutional.

Finally, the reason the weight of authority over the years has upheld ordinances similar to Laconia's is simple: the legal analysis those courts employ better comports with Fourteenth Amendment decisional law concerning public nudity.

I. There is no meaningful circuit and state high court conflict for this Court to resolve.

Public nudity ordinances that prohibit exposure of the female but not male breast have been subject to a variety of challenges over the past 30 or more years, and have almost uniformly failed. *See* Pet.App. at 8a-10a (New Hampshire Supreme Court collecting cases). Before this Court, the petitioners challenge the Laconia ordinance only on federal equal protection grounds. At least 17 federal appellate or state high courts have held that such ordinances do not violate federal equal protection. *See* Pet.App. 8a-10a. The New Hampshire Supreme Court reviewed this decisional law, noting that "[c]ourts in other jurisdictions have generally upheld laws that prohibit women, but not men, from exposing their breasts against equal protection challenges." Pet.App. at 8a-10a. The court observed that the cases employ varying reasoning but arrive at the same conclusion: that ordinances similar to Laconia's do not violate equal protection. *Id.*

Within the past two to three years, a small cluster of decisions, including New Hampshire's, have issued.

These comprise the focal point of the petitioners' claim of a conflict among federal appeals and state high courts. In addition to New Hampshire, the Seventh and Eighth Circuits have recently held that public nudity ordinances prohibiting the display of the female nipple but not the male nipple withstand Fourteenth Amendment scrutiny. *Free The Nipple – Springfield Residents Promoting Equality v. City of Springfield, Missouri*, 923 F.3d 508 (8th Cir. 2019); *Tagami v. City of Chicago*, 875 F.3d 375 (7th Cir. 2017). The Tenth Circuit has affirmed a preliminary injunction enjoining a public nudity ordinance in a 2-1 decision that was never directly appealed on its merits. *Free The Nipple – Fort Collins v. City of Fort Collins, Colorado*, 916 F.3d 792 (10th Cir. 2019). On the back of *Fort Collins*, petitioners contend that "federal circuits and state high courts are in clear and well-entrenched conflict." Pet. at 11. But the *Fort Collins* decision does not create a genuine conflict.

Fort Collins concerned an ordinance similar to Laconia's, that proscribed public nudity which definitionally included the female breast below the areola, but not the male breast. 916 F.3d at 794. The plaintiffs sought a preliminary injunction, which the district court granted. On appeal, the majority of a divided Tenth Circuit panel observed that "[t]his appeal presents *a narrow* question: did the district court reversibly err in issuing the preliminary injunction." *Id.* at 795 (emphasis added). The panel majority articulated the deferential abuse of discretion standard that governs reviews of preliminary injunctions, *id.* at 796, as well as the familiar burden of proof a moving party

must meet to establish entitlement to a preliminary injunction, *id*. at 797.

Among other elements, a party seeking a preliminary injunction must establish only a likelihood of success on the merits. *Id.* While the panel majority reviewed the district court's legal conclusions *de novo*, those conclusions nevertheless arrived at the Tenth Circuit in a preliminary fashion prior to the full litigation and conclusion of the proceedings in the district court, and prior to any final decision on the merits. Reflecting that procedural posture, the panel majority concluded only that "each preliminary injunction factor favors the plaintiffs," and, therefore, that "the district court didn't abuse its discretion in issuing the injunction." *Id.* at 807. After remand, the case became moot when Fort Collins repealed its ordinance. As a result, the Tenth Circuit never had the opportunity to consider the issue after the development of a full record including a trial or dispositive motion and final decision on the merits.

Fort Collins' procedural posture defeats petitioners' claim of an entrenched conflict. *Fort Collins* arose not in review of a final decision on the merits, but in review of a preliminary injunction for an abuse of discretion. Even the panel majority defined the question presented as "narrow" and ultimately held only that the district court did not abuse its discretion in issuing the preliminary injunction. *Id.* at 795 & 807. All told, the *Fort Collins* decision appears more an aberration created in a preliminary posture than evidence of a true conflict among the federal circuits and state high

courts. It does not create a conflict worthy of this Court's review.

Petitioners fare no better claiming conflict among courts that have upheld equal protection challenges to similar public nudity ordinances, but on varying reasoning. Pet. at 14-18. The fact that courts employ different reasoning cannot obscure that their decisions arrive at the same end: the ordinances do not violate equal protection. Courts that agree that equal protection claims such as the petitioners' lack merit are not in true conflict.

In the end, petitioners' claimed conflict amounts to this: in the face of unified rejections of petitioners' claim, a divided federal panel has held that a district court did not abuse its discretion in granting a preliminary injunction. That does not suffice. This Court ought to allow the law on this issue to continue to develop and see whether a true conflict arises.

II. The New Hampshire Supreme Court correctly held that Laconia's female-only toplessness ban withstands heightened scrutiny.

The New Hampshire Supreme Court's conclusion that the Laconia ordinance does not violate federal equal protection dictates is correct. The court's conclusion that the ordinance does not classify on the basis of gender is consistent with several courts that have concluded that such ordinances do not classify on the basis of gender. And the court's alternative conclusion, that the ordinance, even if it does classify on the basis

of gender, satisfies intermediate scrutiny, is consistent with the holdings of the overwhelming majority of federal appellate and state high court decisions analyzing these ordinances. Each upholds the female nudity ban in question, relying on this Court's equal protection jurisprudence.

The New Hampshire Supreme Court's determination that the Laconia ordinance does not classify on the basis of gender rests on solid footing. The court correctly observed that the ordinance simply reflects common understandings of nudity, and that men and women are not interchangeable within those understandings. Pet.App. at 12a (citing *Eckl v. Davis*, 51 Cal.App.3d 831, 847-48 (Cal. App. Ct. 1975), focusing on physical distinctions between the male and female bodies and the fact that "nudity in the case of women is commonly understood to include the uncovering of the breasts" to conclude that the California ordinance at issue treats all similarly situated people alike).

Embedded in this analysis is the notion that equal protection does not require the law to treat all people as if they are exactly the same. Instead, equal protection protects individuals from differential treatment "when there is no relevant difference between them." *Fort Collins*, 916 F.3d at 807 (*Hartz*, J. dissenting); *see also Tagami*, 875 F.3d at 377. With respect to gender, this Court's jurisprudence invalidates laws predicated on stereotypes that treat every member of a gender as having a particular characteristic that some or even most, but not all, members of the gender have. *Fort Collins*, 916 F.3d at 809. Public nudity ordinances such

as Laconia's do not advance such stereotypes. They "do not discriminate against women on the basis of any overbroad generalization about their perceived talents, capacities or preferences." *Id.* (citation and quotation omitted). They are based instead on "inherent biological, morphological differences" between the genders. *Id.* These indisputable precepts amply support the New Hampshire Supreme Court's conclusion that Laconia's ordinance does not classify on the basis of gender.

The court's alternative determination that, if the ordinance does classify on the basis of gender then it survives intermediate scrutiny, rests on equally sound footing. As mentioned, nearly every court to have considered the issue has held that ordinances similar to Laconia's survive intermediate scrutiny and do not violate equal protection. Among the recent federal appellate decisions, *Tagami* is illustrative. There, the appellant was convicted of violating a Chicago ordinance which prohibited public exposure of one's "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*." *Tagami*, 875 F.3d at 377 (emphasis added). Relying on this Court's jurisprudence, the *Tagami* majority held that "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.'" *Id.* at 380 (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)). It

noted that "[t]his intermediate level of judicial scrutiny recognizes that sex 'has never been rejected as an impermissible classification in all instances.'" *Id.* (quoting *Rostker v. Goldberg*, 453 U.S. 57, 69 n.7 (1981)). Returning to *Virginia*, *Tagami* reminded: "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." *Id.* (quoting *Virginia*, 518 U.S. at 533) (quotation marks omitted in original).

The Seventh Circuit found that the City's ordinance easily withstood equal-protection challenge. *Id*. (applying for equal-protection purposes the same test employed for laws that burden expressive conduct). With regard to the government's objectives, *Tagami* concluded that Chicago's ordinance held a "similar pedigree" to that of the public-nudity ban found constitutional in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991):

> [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.
>
> . . . .

> 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.

Tagami, 875 F.3d at 379 (quoting *Barnes*, 501 U.S. at 568-69 (upholding ordinance against First Amendment challenge)). "Put more succinctly, the interest at stake here is societal disapproval of nudity in public places and among strangers, so the prohibition is not a means to some greater end, but an end in itself." *Id.* (quoting *Barnes*, 501 U.S. at 572) (internal quotation marks omitted).

The same is true here: Laconia's ordinance, which makes explicit its objective of "upholding and supporting . . . morals," is a clear reflection of "societal disapproval of nudity in public places and among strangers." *Barnes*, 501 U.S. at 568-69. Petitioners argue that such a prohibition, with such objectives, is grounded in "archaic, overbroad, and obsolescent notions about gender." Pet. at 26. But that is simply incorrect. The current policy of New Hampshire, consistent with many other states, is that the female breast is an erogenous body part which warrants concealment in public.

For the purpose of protection from exploitation, other statutes in the criminal code place the female breast on equal footing with the penis, vagina, anus, and buttocks. For example, enacted in 2016, New Hampshire's revenge pornography statute criminalizes the

dissemination of "private sexual images" which show another person's exposed "intimate parts." N.H. Rev. Stat. Ann. § 644:9-a, II(a)(2). The term "intimate parts" is defined by the New Hampshire Legislature as "the fully unclothed, partially unclothed, or transparently clothed genitals, pubic area, or anus, or, *if the person is female, a partially or fully exposed nipple*, including exposure through transparent clothing." N.H. Rev. Stat. Ann. § 644:9-a, I(c) (emphasis added). In addition, § 644:9 makes it a crime to install or use a device "for the purpose of observing, photographing, recording, amplifying, broadcasting, or in any way transmitting images or sounds of the private body parts of a person including the genitalia, buttocks, *or female breasts*. . . ." N.H. Rev Stat. Ann. § 644:9, I(a). The Legislature left that language undisturbed when it amended the statute in 2012, not so long ago as to be considered a bygone era.

These statutes establish that New Hampshire *today* considers the female breast an erogenous body part. Government decency- and morality-based mandates that other erogenous body parts, like the male and female genitals, be cloaked in public are widely accepted; Laconia's proscription on baring the female breast serves those same objectives.[2] Contrary to

[2] It is of no consequence to the equal protection argument that New Hampshire enacted a statute which provides that "[b]reast-feeding a child does not constitute an act of indecent exposure and to restrict or limit the right of a mother to breast-feed her child is discriminatory." RSA 132:10-d. The statute does not demonstrate that the female breast is not considered an erogenous body part. Instead, the statute exempts public exposure of

Petitioners' suggestion, (at 25-26), this Court's equal protection jurisprudence requires no more stringent or empirical a justification for such laws. The Laconia ordinance does not "serve[] to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 131 (1994) (emphasis added). It does not rely "on overbroad generalizations about the different talents, capacities, or preferences of males and females." *Virginia*, 518 U.S. at 533. In sum, it does not involve the type of invidious discrimination which denies one gender important privileges or devalues one gender's human potential. The ordinance merely "reflect[s] moral disapproval of people appearing in the nude among strangers in public places." *Tagami*, 875 F.3d at 379 (quoting *Barnes*, 501 U.S. at 568-69) (quotation marks omitted). Courts employing this same reasoning – that these ordinances are substantially related to the important governmental purposes of preventing the adverse effects of public nudity and protecting order and morality – have formed a bulwark against equal protection challenges to public nudity ordinances that treat the female breast differently than the male breast. *Tagami*, 875 F.3d at 379; *Springfield*, 923 F.3d at 512 (relying on *Ways v. City of Lincoln*, 331 F.3d 596, 600 (8th Cir. 2003); *see* Pet.App. at 8a-10a (collecting cases). Because such laws survive intermediate scrutiny and are thus compatible with the Equal

---

the breast from proscription when that exposure is for the functional purpose of feeding.

Protection Clause, the opinion of the New Hampshire Supreme Court is correct.

CONCLUSION

The petition should be denied.

Respectfully submitted,

GORDON J. MACDONALD
Attorney General of the
State of New Hampshire

DANIEL E. WILL
Solicitor General

LAURA E.B. LOMBARDI
Senior Assistant Attorney General

Counsel of Record
NH DEPARTMENT OF JUSTICE
33 Capitol Street
Concord, NH 03301
(603) 271-3650