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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

ERIC ALAN ISAACSON
Counsel of Record
LAW OFFICE OF
ERIC ALAN ISAACSON
6580 Avenida Mirola
La Jolla, California 92037
(858) 263-9581
ericalanisaacson@icloud.com

DAN HYNES
LIBERTY LEGAL SERVICES PLLC
212 Coolidge Avenue
Manchester, New Hampshire 03101
(603) 583-4444

Counsel for Petitioners

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REPLY BRIEF IN SUPPORT OF CERTIORARI

INTRODUCTION

New Hampshire's Brief in Opposition ("Opp.") makes three major points, none a sound reason for declining to resolve a clear conflict between the Tenth Circuit's decision in *Free the Nipple—Fort Collins v City of Fort Collins*, 916 F.3d 792 (10th Cir. 2019), and the decision below.

First, New Hampshire contends that the conflict between the Tenth Circuit's *Fort Collins* decision, on the one hand, and the New Hampshire Supreme Court's decision below plus several other circuits and state high courts, on the other, is sheerly "illusory." Opp.4. New Hampshire suggests *Fort Collins* be ignored because it involved review of a preliminary-injunction order that later "became moot" when the defendant city agreed on remand to entry of a *permanent* injunction. Opp.4. Yet this Court's many decisions on review of preliminary-injunction orders have never lost precedential effect because parties sensibly honored them on remand. The Tenth Circuit exercised appellate jurisdiction under 28 U.S.C. §1292(a) to squarely hold that an ordinance punishing women alone for being topless in public "creates a gender classification on its face." *Fort Collins,* 916 F.3d at 800. It directly held that "this gender disparity violates the Equal Protection Clause," and "deprives [women] of a constitutional right." *Id.* at 806. *Fort Collins* is a federal appellate precedent, with which the New Hampshire Supreme Court's decision in this case clearly conflicts.

New Hampshire suggests this clear precedential conflict might be deemed inconsequential because the

Tenth Circuit stakes out a minority position. Actually, its considered rejection of extensive precedent shows the conflict is both real and firmly entrenched:

> We recognize that ours is the minority viewpoint. Most other courts, including a recent (split) Seventh Circuit panel, have rejected equal-protection challenges to female-only toplessness bans. ... None of these decisions binds us, though; nor does their sheer volume sway our analysis.
>
> As we interpret the arc of the [Supreme] Court's equal-protection jurisprudence, ours is the constitutionally sound result. At least since [*United States v.*] *Virginia*, [518 U.S. 515 (1996),] that arc bends toward requiring more—not less—judicial scrutiny when asserted physical differences are raised to justify gender-based discrimination, while casting doubt on public morality as a constitutional reason for gender-based classifications.

Fort Collins, 916 F.3d at 805 (citations and parentheticals omitted); *see United States v. Virginia,* 518 U.S. 515, 532-33 (1996); *Sessions v. Morales-Santana,* 137 S.Ct. 1678, 1690 (2017).

Finally, New Hampshire says certiorari should be denied because the decision below is correct, and the Tenth Circuit's wrong. Whichever is correct, however, a conflict both real and consequential should be resolved. Resulting legal uncertainty is producing chaos in the Tenth Circuit, where some municipalities are honoring *Fort Collins,* while Oklahoma's Attorney General and Utah prosecutors have vowed to ignore it. In the meantime, women across the country are being harassed, demeaned, humiliated, and even

jailed merely for being topless and female. This Court's review is needed to set things straight, and to ensure that women across America enjoy the equal protection of the law mandated by the Fourteenth Amendment and by this Court's precedents.

ARGUMENT

I. The Circuit and High-Court Split is Real

New Hampshire insists precedential conflict is "illusory" because the Tenth Circuit reviewed a preliminary injunction when it applied this Court's Equal Protection Clause principles in *Fort Collins* to hold a local ordinance unconstitutional, Opp.4, and because the preliminary injunction later became "moot" when the defendant city accepted entry of a permanent injunction on remand.[1]

Yet appellate courts' decisions reviewing preliminary injunctions clearly have precedential force on points of law they decide, even if the parties honor those holdings on remand. New Hampshire cannot dispute that 28 U.S.C. §1292(a) conferred appellate jurisdiction in *Fort Collins*, which the Tenth Circuit exercised by holding quite directly that an ordinance punishing women alone for being topless in public is unconstitutional. That is the Tenth Circuit's

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[1] Opp. 4, 7. On remand, the *Fort Collins* district court ruled: "On stipulation of the parties ... the preliminary injunction ... is made permanent. ... The City of Fort Collins is permanently enjoined from enforcing section 17-142(b) of the Fort Collins Municipal Code or Ordinance No. 134 to the extent that they prohibit women, but not men, from knowingly exposing their breasts in public." *Free the Nipple—Fort Collins v. City of Fort Collins,* No. 16-cv-01308-RBJ, minute order (D.Colo. July 24, 2019).

last word on the subject, since the litigation now is over, and subsequent panels are "'bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court." *United States v. Garcia,* 936 F.3d 1128, 1139 (10th Cir. 2019) (citation omitted). Though circulated to the full court before publication, the opinion apparently drew no call for en banc hearing.[2] *Fort Collins'* holding accordingly binds subsequent Tenth Circuit panels, and all federal district courts in Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming.

New Hampshire's suggestion that constitutional holdings lack precedential force if rendered on review of preliminary injunctions overlooks the fact that many of this Court's own leading decisions often are rendered on review of orders granting or denying preliminary injunctions.[3] Those precedents' holdings cannot be ignored because issued on review of preliminary injunctions. Neither have they lost

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[2] *See* Tenth Circuit Rule 35.1(A) ("before any published panel opinion issues, it is generally circulated to the full court and every judge on the court is given an opportunity to comment").

[3] *See, e.g., Agency for Internat'l Dev. v. Alliance for an Open Society Internat'l,* 570 U.S. 205, 208, 221 (2013) (holding statute denying funds to any organization "'that does not have a policy explicitly opposing prostitution and sex trafficking'" is one that "violates the First Amendment and cannot be sustained"); *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.,* 547 U.S. 47, 68-70 (2006) (holding that statute withdrawing federal funding from academic institutions discriminating against military recruiters does not violate First Amendment); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418, 428 (2006) (interpreting and applying the Religious Freedom Restoration Act); *Saenz v. Roe,* 526 U.S. 489, 497-98 (1999) (holding state statute violated right to travel protected by the Privileges and Immunities Clause).

precedential force when the parties, on remand, accommodated their conduct to this Court's holdings.

II. The Circuit and High-Court Split is Entrenched

New Hampshire suggests that clear precedential conflict is inconsequential because *Fort Collins* runs against the weight of other circuits' authority. That the Tenth Circuit embraced a conclusion it knew was contrary to other circuits' decisions actually shows that the conflict is entrenched.

The New Hampshire Supreme Court's decision acknowledges its own conflict with federal appellate precedent. It notes federal circuit courts have "explicitly held that laws which prohibit women but not men from exposing their breasts are gender-based and trigger intermediate scrutiny," Pet.App. 9a, only to hold the contrary—that such laws do not classify on the basis of gender. Pet.App. 11a-12a. The Seventh Circuit's decision in *Tagami,* for example, considered a similar ordinance and held: "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.'" *Tagami v. City of Chicago,* 875 F.3d 375, 380 (7th Cir. 2017)(citation omitted); *accord Fort Collins,* 916 F.3d at 800 (a similar "ordinance creates a gender classification on its face").

New Hampshire suggests the conflict matters not if most courts nonetheless hold that this clear discrimination on the basis of gender survives intermediate scrutiny. Yet the Tenth Circuit deliberately rejects those holdings: "None of these decisions binds us, though; nor does their sheer volume sway our analysis." *Fort Collins,* 916 F.3d at

805. *Fort Collins* thus stands as settled Tenth Circuit law, expressly rejecting contrary decisions both of the New Hampshire Supreme Court in this case, *see id.* at 805 n.8 (rejecting *Lilley*), and also of the several other circuits that have sustained similar ordinances against equal-protection challenges: "We recognize that ours is the minority viewpoint. Most other courts, including a recent (split) Seventh Circuit panel, have rejected equal-protection challenges to female-only toplessness bans." *Id.* at 805 (citing, e.g., *Tagami,* 875 F.3d at 380); *see also id.* at 804 (also expressly rejecting *United States v. Biocic,* 928 F.2d 112, 115-16 (4th Cir. 1991), and *Ways v. City of Lincoln,* 331 F.3d 596, 600 (8th Cir. 2003). If that were not enough, the Eighth Circuit has adhered to the majority viewpoint, citing (and rejecting) *Fort Collins* as a contrary "*but see*." *Free the Nipple—Springfield Residents Promoting Equality v. City of Springfield,* 923 F.3d 508, 510 (8th Cir. 2019).

This is a well-developed and fully entrenched conflict.

III. The Conflict is Consequential and Should be Resolved

The precedential conflict is producing chaos within the Tenth Circuit, while women across the country face harassment and prosecution for conduct wholly lawful for men. It should be resolved without delay.

The good news is that many municipalities are honoring the Tenth Circuit's *Fort Collins* decision. The City of Manhattan, Kansas, reportedly removed

"female breast" from its definition of public nudity.[4] The City of Loveland, Colorado, not only "suspended enforcement of its provision against women exposing their breasts 'in or near any public place or in any place open to public view.'"[5] It has dropped charges against a topless frisbee player, agreeing to pay her $50,000.[6] *The Coloradoan* reports "Loveland's insurance carrier, the Colorado Intergovernmental Risk Sharing Agency, advised the city to settle."[7]

Other state actors in the Tenth Circuit are thumbing their noses. Oklahoma's Attorney General has declared that "the 10th Circuit's ruling is not binding on state courts," and "does not change local

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[4] Michael Stavola, *"Female Breast" is No longer Part of Manhattan Nudity Ban after Final Vote Tuesday,* The Wichita Eagle, Nov. 6, 2019, https://www.kansas.com/news/state/article237040349.html

[5] Kieran Nicholson, *Woman Cited for Being Topless in Loveland Wins $50,000 Settlement, Indecent Exposure Case Dropped,* The Denver Post, Nov. 7, 2019, https://www.denverpost.com/2019/11/07/loveland-woman-cited-topless-settlement-indecent-exposure-case-dropped/ .

[6] The stakes were high: "Krokos, who wants to be a history teacher, realized that a conviction of indecent exposure ... might have required her to register as a sex offender." Carina Julig, *Topless Frisbee Tosser Receives $50,000 Settlement after Indecent-Exposure Citation,* The Mercury News, November 8, 2019, https://www.mercurynews.com/2019/11/08/topless-frisbee-tosser-receives-50000-settlement-from-city-of-loveland/

[7] Jacy Marmaduke, *Loveland Avoids Its Own Topless Ban Lawsuit with $50,000 Settlement,* Coloradoan, Nov. 8, 2019 https://www.coloradoan.com/story/news/2019/11/08/loveland-colorado-reaches-topless-ban-settlement/2532232001/

and state laws in Oklahoma."[8] His official release elaborates:

> The 10th Circuit's ruling conflicts with a May ruling by the 8th U.S. Circuit Court of Appeals, which upheld an ordinance in Springfield, MO that bans women from exposing their breasts in public. Also, a 2017 ruling in the 7th U.S. Circuit Court of Appeals, which upheld a topless ban on women in Chicago. ...
>
> Similar rulings upholding the constitutionality of public nudity laws have been issued by 2nd, 4th and 5th Circuits, as well as courts in New Hampshire, Tennessee, Massachusetts, Alabama, Arizona, Texas, Florida, New Mexico, Mississippi, Rhode Island, New Jersey and Minnesota. [9]

The result: "The city of Tulsa initially said ... that it would adhere to a 10th U.S. Circuit Court of Appeals ruling clearing the way for women to be topless in public. Then Mayor G.T. Bynum received word that the state Attorney General's Office had a different opinion of the ruling, and like that, the city changed its position."[10] Oklahoma City followed suit, following the Attorney General's statement.[11]

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[8] *Attorney General Hunter Issues Statement on 10th Circuit Ruling on Fort Collins Case*, Sept. 30, 2019, https://bit.ly/2oL7c9p ; http://www.oag.ok.gov/attorney-general-hunter-issues-statement-on-10th-circuit-ruling-on-fort-collins-case

[9] *Id.*

[10] Kevin Canfield, *Tulsa Police Will Resume Enforcing Ban on Women Going Topless in Public,* Tulsa World, Sept. 30, 2019, https://www.tulsaworld.com/news/tulsa-police-will-resume-

A Utah woman, moreover, is being prosecuted for "lewdness involving a child" because her stepchildren saw her topless *in her own home*.[12] Prosecutors say that the Tenth Circuit's *Fort Collins* "ruling does not override Utah's state ordinance."[13] The New Hampshire Supreme Court's decision *in this case* is encouraging them:

> Topless bans have been upheld elsewhere. The New Hampshire Supreme Court in February affirmed the conviction of three members of the Free the Nipple campaign who were arrested for going topless on a beach in 2016. [14]

As the precedential conflict at the heart of this case creates chaos in the Tenth Circuit, women across the country are being harassed, demeaned and humiliated for the crime of being topless and female. In August 2019 a topless sunbather in Connecticut

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enforcing-ban-on-women-going-topless/article_9c8ba1e3-bea4-5171-9196-95027146860b.html

[11] Melissa Scavelli, *Go Topless in Oklahoma City, Get Arrested Police Say,* Tulsa 8abc, Sept. 30, 2019, https://ktul.com/news/local/go-topless-in-oklahoma-city-get-arrested-police-say

[12] Laurel Wamsley, *Utah Woman Charged with Lewdness After Being Topless In Her Own Home,* National Public Radio, Nov. 21, 2019, https://www.npr.org/2019/11/21/781703956/utah-woman-charged-with-lewdness-after-being-topless-in-her-own-home

[13] Abigail Weinberg, *A Utah Woman Is Facing Criminal Charges For Going Topless in Her Own Home,* Mother Jones, Sept. 30, 2019, https://www.motherjones.com/crime-justice/2019/09/utah-lewdness-law-prosecution-woman-topless/

[14] Lindsay Whitehurst, *Woman Fights Charges After Stepkids See Her Topless at Home,* AP, Nov. 21, 2019, https://apnews.com/2b962a7218d949ee84963d91f370edec

reportedly "was charged with violations of Risk of Injury to a Minor and Breach of the Peace."[15] More commonly, harassment under color of state law induces women to cover themselves.[16] A Duluth, Minnesota sunbather bullied by police into donning a top said she "was kind of traumatized by the whole ordeal." [17]

Enough. Women should not have to put up with this. The Court should grant certiorari to resolve a conflict that is producing chaos in the Tenth Circuit, while women across the country face harassment, humiliation, and prosecution *because they are women*.

IV. The Decision Below is Wrong and Does Injustice to Women

New Hampshire urges certiorari should be denied because *Fort Collins* is wrong and the decision below correct. Were that so, it would not obviate the need for this Court's review to resolve a clear precedential conflict.

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[15] *Woman Arrested for Sunbathing Topless in Front of Child,* https://www.fox5ny.com/news/woman-arrested-for-sunbathing-topless-in-front-of-child (Aug. 20, 2019).

[16] *See, e.g.,* Jennifer Brooks, *Topless Duluth Swimmer Has Police Called on Her, Touching Off 45-Minute Debate Over Indecent Exposure,* StarTribune, July 10, 2019, http://www.startribune.com/topless-duluth-swimmer-has-police-called-on-her-touching-off-45-minute-debate-over-indecent-exposure/512503652/

[17] Tom Olsen, *Cops Called When Woman Goes Topless at Duluth Beach. But Was She Breaking the Law?*, Twin Cities Pioneer Press, July 10, 2019, https://www.twincities.com/2019/07/10/cops-called-when-woman-goes-topless-at-duluth-beach-but-was-she-breaking-the-law/

That *Fort Collins* expresses a minority viewpoint does not make it wrong. This Court frequently adopts minority viewpoints when resolving precedential conflicts.[18] It overrules longstanding majority (and even consensus) views among the circuits when it believes them mistaken.[19]

New Hampshire invokes *Tagami*'s resort to reliance on a three-justice plurality opinion in *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560 (1991), which sustained Indiana's regulation of commercialized nude dancing against a First Amendment free-speech challenge—but which contains no holding at all on gender discrimination. Joined by Justices O'Connor and Kennedy, Chief Justice Rehnquist explained that "the customary 'barroom' type of nude dancing may

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[18] *See, e.g., Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,* 501 U.S. 350, 354 & n.1 (1991) (adopting minority view of just two circuits); *Jackson Transit Authority v. Local Div. 1285, Amalgamated Transit Union, AFL-CIO,* 457 U.S. 15, 19 n.5, 29 (1982) (noting that while several circuits "have decided that §13(c) authorizes federal suits for violations of §13(c) agreements," "[o]ne Court of Appeals has reached the opposite conclusion," as this Court then did); *McCarthy v. United States,* 394 U.S. 459, 468-69 (1969) (noting conflict between the Ninth Circuit and the "[o]ther courts of appeal, [which] have consistently rejected [the Ninth Circuit's] holding," and then concluding that "the Ninth Circuit has adopted the better rule").

[19] *See, e.g., Pereira v. Sessions,* 138 S.Ct. 2105, 2128 (2018) (Alito, J, dissenting: "what the Court finds so obvious somehow managed to elude every Court of Appeals to consider the question save one"); *Moncrieffe v. Holder,* 569 U.S. 184, 197 (2013)(rejecting decisions of "every Court of appeals to have considered the question"); *Central Bank v. First Interstate Bank,* 511 U.S. 164, 192 (1994) (Stevens, J., dissenting: "all 11 Courts of Appeals to have considered the question have recognized a private cause of action against aiders and abettors under §10(b)").

involve only the barest minimum of protected expression," but that the statute in question did not target expression because Indiana's Supreme Court had "traced the offense to the Bible story of Adam and Eve." *Id.* at 565, 568 (Rehnquist, Ch. J., joined by O'Connor & Kennedy, JJ.) (citing *Ardery v. State,* 56 Ind. 328, 329-30 (1877)). Given a biblical rationale that "predates barroom nude dancing," Indiana's public-indecency law could not have targeted any free expression involved in commercialized erotic dancing. *Id.* But neither the plurality, nor the Court, considered whether the Indiana statute violated women's rights under the Equal Protection Clause.

Without doubt, the *Barnes* plurality's Genesis story ends with Adam and Eve cast out of the Garden clothed, a curse placed upon the woman that "your desire shall be for your husband, and he shall rule over you." Genesis 3:16 (NRSV); *cf.* 1 Timothy 2:9-14 (NRSV) (directing women to dress modestly and to subordinate themselves to men "[f]or Adam was formed first, then Eve; and Adam was not deceived, but the woman was deceived and became a transgressor"). But even if the scriptural story showed an Indiana law did not target expression, it cannot justify demeaning gender classifications. Not in this day and age.

Neither can New Hampshire's laws targeting revenge porn and spycams be used to justify *punishing women* when others seek to sexualize their bodies. Laws against revenge porn and spy cams do not target women for prosecution on account of their gender. Those laws concern involuntary exposure and invasion of privacy; they do not support sex discrimination in laws regulating women's public behavior. They protect women's autonomy, rather than violating it—as Laconia's Ordinance does.

The Tenth Circuit's *Fort Collins* decision honors this Court's Equal Protection precedents. The decision below does not. This Court should grant certiorari to resolve the precedential conflict.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

LAW OFFICE OF
ERIC ALAN ISAACSON
ERIC ALAN ISAACSON
Counsel of Record
6580 Avenida Mirola
La Jolla, CA 92037-6231
(858) 263-9581
ericalanisaacson@icloud.com

LIBERTY LEGAL SERVICES
PLLC
DAN HYNES
212 Coolidge Avenue
Manchester, NH 03101
(603) 583-4444

Counsel for Petitioners

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